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## ARTICLE

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### INTERNATIONAL TRIBUNALS: A RATIONAL CHOICE ANALYSIS

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ANDREW T. GUZMAN<sup>†</sup>

*In well-functioning domestic legal systems, courts provide a mechanism through which commitments and obligations are enforced. A party that fails to honor its obligations can be brought before a court and sanctioned through seizure of person or property. The international arena also has courts or, to expand the category somewhat, tribunals. These institutions, however, lack the enforcement powers of domestic courts. How, then, do they work, and how might they work better or worse? The first objective of this Article is to establish that the role of the tribunal is to promote compliance with some underlying substantive legal rule. This simple yet often-overlooked point provides a metric by which to measure the effectiveness of tribunals. But a tribunal does not operate in isolation. The use of a tribunal is one way to resolve a dispute, but reliance on diplomacy and other traditional tools of international relations is another. Furthermore, even if a case is filed with a tribunal, there may be settlement prior to a ruling and, even if there is a ruling, the losing party may refuse to comply. Understanding international tribunals, therefore, requires consideration of the entire range of possible outcomes to a dispute, including those that do not involve formal litigation. The second goal of this Article is to*

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<sup>†</sup> Professor of Law, University of California, Berkeley, School of Law. I am grateful to Jeff Dunoff, Jeffrey Frieden, Oona Hathaway, Henry Hansman, Maximo Langer, Tim Meyer, Erin Murphy, Jide Nzelibe, Kal Raustiala, Beth Simmons, Joel Trachtman, John Yoo, participants at the American Law and Economics Association Annual Meeting 2008, the International Law/International Relations Workshop at Harvard University, the Latin American Law and Economics Association 2008, the UCLA Globalization of Law Colloquium Series, Stanford Faculty Seminar, Northwestern International Law Workshop, and the Comparative Law and Economics Forum, for comments on earlier versions of this Article. Leah Granger and Robert Cunningham provided excellent research assistance.

*develop a rational-choice model of dispute resolution and tribunals that takes this reality into account. The third goal is to explore, based on the above model, various features of international tribunals and identify those that increase effectiveness and those that reduce it. Finally, the Article applies the analysis to help us understand two prominent tribunals: the World Trade Organization's Appellate Body and the United Nations Human Rights Committee.*

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## INTRODUCTION

International dispute resolution and international tribunals are all the rage.<sup>1</sup> On the one hand, many international lawyers celebrate them as a powerful tool in the effort to bring order to our anarchic world.<sup>2</sup> On the other hand, critics view these tribunals—perhaps inconsistently—as both a threat and a waste of resources.<sup>3</sup>

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<sup>1</sup> See, e.g., Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001) (characterizing the proliferation of international tribunals as a viable, effective means of international dispute resolution); David Davenport, *The Proliferation of International Courts and Tribunals: What Does It Mean?*, BRIEFLY . . . PERSP. ON LEGIS., REG., & LITIG., May 2005, at 1 (arguing that the growth of international tribunals is the “most significant international development of our day” and predicting their increasing future importance); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 910 (2005) (explaining that “[w]ithin the past decade the world has witnessed an explosion of international adjudication”); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 680 (1999) (introducing a series of papers that examine whether the expansion of international tribunals and courts is “fragmenting or system-building”); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999) (summarizing competing views on whether the growth of international tribunals has negative effects and whether there is, or should be, a uniform international legal system to demonstrate the lack of consensus on the issues); Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 MELB. J. INT'L L. 453, 454 (2002) (book review) (noting that “[t]he establishment of new fora for third party dispute settlement is undoubtedly one of the more striking international legal developments in recent years”); *Serbia Promises to Cooperate with Tribunal*, N.Y. TIMES, Mar. 30, 2006, at A11 (noting Serbia’s cooperation with the international war crimes tribunal in The Hague); Mark Turner & Roula Khalaf, *UN Closer to Beirut Tribunal Resolution*, FIN. TIMES (USA), Apr. 5, 2007, at 4; Washington Post, *International Court Rebuffed*, CHI. TRIB., June 29, 2006, § 1, at 6 (reporting on a U.S. Supreme Court decision that interprets the Vienna Convention differently than the International Court of Justice (ICJ)).

<sup>2</sup> See Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 51, 51 (2003) (arguing that “[o]ne of the main hopes of proponents of international courts is that international courts will in some way encourage greater respect for international law”); Jose E. Alvarez, *The Move from Institutions?*, Address at the 2006 Friedman Conference (Mar. 23, 2006), available at [http://www.columbia.edu/cu/law/csil/home%20page\\_files/Alvarez%20Friedmann%20Address.pdf](http://www.columbia.edu/cu/law/csil/home%20page_files/Alvarez%20Friedmann%20Address.pdf) (describing how “[w]e continue to presume that we need to establish more formal [intergovernmental organizations] to make ever more international law, whether through judges, more multilateral treaties, or other forms of regulation”).

<sup>3</sup> See, e.g., ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 10 (2003) (maintaining that “[j]udges of international courts . . . are continuing to undermine democratic institutions and to enact the agenda of the liberal Left”); JEREMY RABKIN, *WHY SOVEREIGNTY MATTERS* 46-47 (1998) (arguing that high expectations

This debate is both lively and important. It has proceeded, however, with a very thin theory of what international tribunals do and why they work (or fail to work). We lack a well-developed and tractable analysis of what international tribunals can or should achieve, how they can or should affect state behavior, or even what it means for a tribunal to be effective. Until such questions are sorted out it is unlikely that any form of consensus can emerge on the role of international courts and tribunals.

These institutions are important to the international legal system. To begin with, they are a useful tool for the peaceful settlement of disputes. Secondly, their decisions clarify international law in important ways and, although usually not formally binding on states not party to a dispute, they establish a form of de facto international common law. Furthermore, tribunals are politically salient because disputes are often played out in a (relatively) public context. The presence of a tribunal can raise the stakes for the political leaders of the states involved. Finally, an understanding of tribunals is critical to a more general understanding of international law, both as it currently exists and as it will develop in the future.

This Article presents an analysis of what it means for tribunals to be effective and how they impact states. It considers how these institutions fit within the larger set of state interactions and describes the situations in which international tribunals can play a role. It explicitly accounts for both the absence of formal enforcement schemes and the potential for states to disregard the work of these bodies.

Methodologically, the Article uses a rational-choice approach, meaning that states are assumed to be rational, self-interested, and able to identify and pursue their interests.<sup>4</sup> State interests are a func-

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for international law may promote cynicism and backlash); John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SEC., Winter, 1994–1995, at 7 (maintaining that “institutions have minimal influence on state behavior, and thus hold little promise for promoting stability in the post–Cold War world”); Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2022 (2004) (“If the United States means to remain self-governing, then international treaties—just as Washington said—always will be problematic, because they threaten to make our law answerable to international governance, rather than self-government”).

<sup>4</sup> I, like others, have defended the use of this approach in past writing and will not repeat those arguments here. See generally ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY (2008) [hereinafter GUZMAN, HOW INTERNATIONAL LAW WORKS] (explaining how international law can affect state behavior by looking at various sources of international law within a single framework); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005) [hereinafter Guzman, *Design*] (analyzing why states may prefer to draft international agree-

tion of the preferences of states, which are assumed to be given, or exogenous, and fixed. The analysis is institutionalist in approach, and so differs in its underlying assumptions both from the traditional realist approach advanced by, for example, Mearsheimer,<sup>5</sup> and from the liberal theory approach adopted by, for example, Helfer and Slaughter.<sup>6</sup> Realists build a hostility to cooperation among states into their models of international interaction by assuming that states care mostly, and perhaps only, about relative gains and losses.<sup>7</sup> As a result, even when cooperation makes all parties better off, it will likely be frustrated because some of the parties will gain less than others and will therefore refuse to participate. The institutionalist approach taken in this Article assumes instead that states are interested in absolute gains. It is well-established that international cooperation is possible under these assumptions.<sup>8</sup> Liberal theory seeks to “deconstruct” the states and focus on substate actors. There is no doubt that domestic politics influences state behavior, so there is a strong argument to be made for taking it into account. The difficulty is that we lack good models of domestic politics that can be applied to the general question of how tribunals affect international behavior.<sup>9</sup>

Though the vast majority of international legal commitments come without mandatory dispute-resolution provisions, a number of international bodies have jurisdiction to adjudicate disputes among states or between states and private parties.<sup>10</sup> The best known of these are the International Court of Justice (ICJ),<sup>11</sup> the World Trade Or-

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ments in a way that makes them less credible and easier to violate); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002) [hereinafter Guzman, *Compliance-Based Theory*] (arguing that states consider reputational consequences when deciding whether to comply with international law because they are rational and self-interested).

<sup>5</sup> Mearsheimer, *supra* note 3.

<sup>6</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

<sup>7</sup> See Jeffrey W. Legro & Andrew Moravcsik, *Is Anybody Still a Realist?*, INT'L SEC., Fall 1999, at 5 (proposing a reformulation of realism that focuses on conflict and material power).

<sup>8</sup> See ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Guzman, *Compliance-Based Theory*, *supra* note 4.

<sup>9</sup> See *supra* note 4.

<sup>10</sup> As discussed *infra* Part IIA, the precise list of international tribunals varies based on how one defines the category.

<sup>11</sup> The ICJ is the principle judicial organ of the United Nations. It is available to virtually every country in the world for the resolution of disputes, but no state can be forced to appear before the court without having previously consented to the court's jurisdiction. That consent can take one of three forms, all provided for in the Statute

ganization (WTO) and its mandatory dispute-resolution system,<sup>12</sup> the European Court of Human Rights,<sup>13</sup> the International Tribunal for the Law of the Sea (ITLOS),<sup>14</sup> and arbitration bodies such as the International Centre for Settlement of Investment Disputes (ICSID).<sup>15</sup>

The structure of these and other dispute-resolution systems varies considerably. For instance, decisions of the ICJ are binding only on the parties litigating the case.<sup>16</sup> In contrast, all members of the ICSID are required to recognize and enforce all arbitral awards.<sup>17</sup> The WTO system establishes a right to appeal a decision, whereas most other

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of the International Court of Justice, 59 Stat. 1031 (1945) [hereinafter I.C.J. Statute]. Under Article 36.2, a state can recognize the jurisdiction of the ICJ over matters of international law. *Id.* at 1042; Article 37 states that jurisdiction can be provided through treaty or the parties may refer a case to the ICJ through special agreement, as provided under Article 36.1. *Id.* at 1042-43. The decisions of the Court are binding upon the parties and the Court may refer matters to the United Nations Security Council.

<sup>12</sup> The WTO Dispute Settlement Mechanism was established at the same time as the WTO itself in 1995, upon completion of the Uruguay Round of Multilateral Trade Negotiations of the General Agreement on Trade and Tariffs (GATT). Membership in the WTO—currently held by 149 states—requires submission, without reservation, to the jurisdiction of the dispute settlement bodies. The WTO Dispute Settlement Mechanism has two tiers. At the first level are dispute-settlement panels composed on an ad hoc basis in consultation with the disputing parties. Parties can appeal panel rulings to the Appellate Body, which consists of a seven-member permanent body, with individual appeals heard by three of the seven members. The decisions of the panel and the Appellate Body are binding upon the parties unless there is a consensus among WTO members—including the disputing parties—to refuse to adopt the decision. If a losing defendant is unable or unwilling to bring its trade practice into compliance with the ruling, the Dispute Settlement Body can authorize the “suspension of concessions,” that is, impose trade sanctions.

<sup>13</sup> The European Court of Human Rights was established in 1959 as one of three institutions charged with enforcing the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in 1950.

<sup>14</sup> ITLOS is the adjudicatory branch of the United Nations Convention on the Law of the Sea. The Convention provides four alternative means for the settlement of disputes: ITLOS, the ICJ, and two types of arbitral tribunals, with arbitration serving as the default procedure if the parties have not chosen one of the alternatives. ITLOS is composed of twenty-one permanent judges, each serving nine-year terms, nominated and elected by the 150 member states. The rulings of the Tribunal or the arbitration panel are final and binding upon the parties to the dispute, though there is no enforcement or monitoring mechanism. The default arbitration option provides for panels of five arbitrators chosen by the parties and the issuance of a binding decision.

<sup>15</sup> For a longer list, see Brown, *supra* note 1, at 455-57 and THE PROJECT ON INT’L COURTS AND TRIBUNALS, THE INTERNATIONAL JUDICIARY IN CONTEXT: A SYNOPSIS CHART (2004), available at [http://www.pict-pecti.org/publications/synoptic\\_chart/Synop\\_C4.pdf](http://www.pict-pecti.org/publications/synoptic_chart/Synop_C4.pdf).

<sup>16</sup> I.C.J. Statute, *supra* note 11, art. 59, 59 Stat. at 1046.

<sup>17</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 54, Aug. 27, 1965, 17 U.S.T. 1270, 515 U.N.T.S. 159.

dispute settlement systems do not.<sup>18</sup> The ITLOS tribunal, the ICJ, and the WTO Appellate Body have permanent judges, while WTO panels and arbitral approaches typically feature the ad hoc appointment of judges or arbitrators.

The diversity of approaches to dispute resolution provides a challenge. Highly contextualized analysis can generate a more accurate portrait of a single institution but makes it difficult to extract lessons applicable across a range of dispute settlement strategies. A more abstract approach, on the other hand, promises more general lessons but may omit important features of tribunals that are critical to how they function. This Article seeks to shed light on the general working of tribunals rather than on a single institution, and so it adopts a fairly general theoretical approach. This strategy is not hostile to a more particularized approach. Rather, the two methods complement one another; undoubtedly both are required to advance our understanding of international tribunals. Indeed, Part V of this Article looks more closely at two specific tribunals both to contextualize the analysis and to illustrate how we might apply lessons of the Article in particular cases.

Even at a general level, however, tribunals vary sufficiently enough that the theoretical tools used herein cannot address their full range of diversity. Where the assumptions required for the analysis are inappropriate, the relevant tribunals must be put to one side. This is the case for three categories of tribunals.

First, this Article does not consider international tribunals before which the defendants are individuals. These include, for example, the International Criminal Court and the International Criminal Tribunals for the former Yugoslavia and Rwanda. These tribunals have access to coercive enforcement power over defendants, which makes their operation fundamentally different from the tribunals studied here.

Second, the European Court of Justice (ECJ) is put to one side for purposes of this analysis. Because of the peculiar structure of the European Union (EU), interactions among EU member states in some ways resemble the interactions among the fifty United States more than they resemble cooperation among sovereign states. Fur-

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<sup>18</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994), at art. 17 [hereinafter DSU].

thermore, the level of integration achieved within the European Union is unprecedented, and the costs of systematically failing to behave cooperatively within that framework are very high. Conceivably, the theory developed here could be applied to the ECJ because the basic theoretical structure is relevant. I prefer to exclude this tribunal from the discussion because the magnitudes of the payoffs are quite different from those of other tribunals, and assumptions that may be appropriate for other tribunals may not apply to the ECJ.

Finally, the analysis deals primarily with tribunals that feature compulsory jurisdiction—those in which a defendant cannot simply reject the jurisdiction of the tribunal at the time of the dispute. Most of the Article assumes that there has been some prior consent to jurisdiction that binds the defendant from the moment the complaint is filed. This assumption is relaxed, however, later in the Article.<sup>19</sup>

## I. WHAT DO TRIBUNALS DO?

### A. *Courts Without Coercion*

To understand international tribunals, it is helpful to start with the most fundamental question: what are they supposed to achieve? Much of the existing debate on international courts overlooks this important question and implicitly assumes that the role of these tribunals is essentially the same as that of domestic courts. This confusion is understandable given that in many ways these institutions have the look and feel of domestic courts. They often call themselves courts, have adjudicators or arbitrators who are referred to as judges, feature an adversarial system, rely on legal arguments, publish reasoned opinions that resemble domestic court rulings, and are charged with issuing legally binding rulings intended to resolve disputes.<sup>20</sup>

Nevertheless, the institutional context in which international tribunals operate is sufficiently different from that of domestic courts to make the role of the international tribunal fundamentally different from that of the domestic courts. The critical difference between domestic and international courts is that the former are backed by a system of coercive enforcement. In the context of a domestic dispute, the failure of a losing party to comply with the ruling of a court, or to

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<sup>19</sup> See *infra* Part IV.F.2.

<sup>20</sup> See, e.g., MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981) (comparing various legal traditions and formulating a generally applicable theory of comparative law).

satisfy the winning party in some other way, leads to sanctions—most typically a seizure of property or person. This threat of coercive enforcement is foundational to the functioning of domestic systems.<sup>21</sup>

In contrast, when a state loses before an international tribunal, no formal legal structure exists to enforce the ruling. The assets of the noncompliant state will not be seized, nobody will be arrested, and the state will not even lose its ability to file complaints. If international tribunals are effective, it must be for some reason other than the system of coercive enforcement that accompanies a domestic court's decision.<sup>22</sup>

To get an idea of how and why international tribunals might matter to states, it is helpful to consider the most basic description of exactly what they do. The mechanism through which state behavior is affected by a tribunal must, after all, begin with some action by that tribunal. Reduced to its simplest components, a tribunal hears evidence and arguments from the parties and issues a ruling regarding the relevant facts and law. At that point its job is done; it generally does not supervise or enforce compliance with its decisions.<sup>23</sup> In other words, the tribunal simply announces the relevant legal rules and, in the context of those rules, its interpretation of events. Its sole contribution to the dispute is information concerning what happened, what law governs, and how the law applies to the facts. Whatever impact international tribunals have, then, must be the result of the ruling itself and the information in that ruling.

This observation—that tribunals serve to provide information—guides the analysis that follows. The goal here is to develop a theory

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<sup>21</sup> Even within the domestic sphere, this potential for sanctions does not always exist. For example, should the President disregard an order from the courts of the United States, there may be no coercive mechanisms available to enforce the ruling. Nevertheless, domestic court rulings generally are enforceable.

<sup>22</sup> This is, of course, just one manifestation of the general problem of a lack of enforcement in international law. For years, international lawyers have been forced to defend the relevance of international law against the charge that in the absence of enforcement there is no "law" and the relevant rules cannot affect state behavior. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that international law is based on rational state actors pursuing their own self interests); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993) (describing the rise of an internationalist agenda as theoretical approaches to the study of international law).

<sup>23</sup> Some tribunals, such as the WTO dispute settlement mechanism, give winning parties the opportunity to argue that a losing defendant has failed to comply. Even in these situations, however, the tribunal can only issue another ruling that the defendant has failed to comply—assuming it concludes that the complainant's assertion is correct.

capable of explaining how information can influence state behavior and encourage compliance with international law.

### B. *The Influence of Information*

There are two kinds of information dissemination that might allow a tribunal to influence states. First, dissemination may assist the parties in reaching a common understanding regarding relevant facts or law, and thereby assist in reaching a mutually agreeable settlement. It may achieve this through a conventional adversarial process, through something more akin to mediation, or through something in between. Once the parties have a shared understanding of events, they may be able to reach a settlement that was previously unavailable. This is a process of overcoming informational asymmetries rather than one of assigning blame. It is a potential role for bodies that are authorized to receive complaints and facilitate communication between the parties but are not authorized to issue rulings. The Convention Against Torture (CAT),<sup>24</sup> for example, establishes the Committee Against Torture which serves as a sort of mediator between disputing states.<sup>25</sup> Disputing parties are to negotiate with one another for a period of six months, after which either one may refer the matter to the Committee.<sup>26</sup> The Committee holds closed meetings when examining communications,<sup>27</sup> makes available its “good offices to the States Parties,” sets up an ad hoc conciliation commission when appropriate,<sup>28</sup> and delivers a report. The report, however, is not a “ruling”; it is instead simply a description of the dispute.<sup>29</sup> Even in the absence of a formal ruling, however, the process may generate information and thereby facilitate settlement.

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<sup>24</sup> G.A. Res. 39/46, art. 17, U.N. Doc. A/RES/39/46 (Dec. 10, 1984), available at <http://www.hrweb.org/legal/cat.html> [hereinafter CAT].

<sup>25</sup> This assumes that both parties have recognized the competence of the Committee Against Torture for this purpose. *Id.* art. 21.

<sup>26</sup> *Id.* art. 21.1(b).

<sup>27</sup> *Id.* art. 21.1(d).

<sup>28</sup> *Id.* art. 21.1(e).

<sup>29</sup> See *id.* art. 21.1(h)(ii) (“[T]he Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report.”). The report is to follow the description in the text if the parties have failed to reach a mutually satisfactory solution. If the parties are able to reach such a solution, the report provides even less information, limiting itself to “a brief statement of the facts and of the solution reached.” *Id.* art. 21.1(h)(i).

In addition, of course, the tribunal announces whether one party has violated the law. This allows the parties and other states to form a more accurate assessment of the challenged behavior, generates reputational consequences for a violation, and makes retaliation or reciprocal noncompliance more likely and more acceptable to the rest of the international community.<sup>30</sup>

This is the function, for example, of dispute resolution at the WTO. To be sure, the actions of WTO panels and the WTO's Appellate Body often promote settlement, but they also rule on the question of whether the defendant has violated WTO law. If a state does not bring itself into compliance—or satisfy the complainant in some other way—the complainant can obtain authorization to respond with trade measures of its own. Wrongdoers, then, face both reputational and retaliatory consequences when they lose a case.

The two functions mentioned above are, of course, not mutually exclusive. Providing accurate information about the facts and the law can serve both to promote settlement and to increase the cost of violation. In some instances, however, one function will dominate the other. If a tribunal's ruling is confidential, for example, this will tend to serve the interests of settlement rather than sanction. The same will be true if the parties have a significant degree of control over the adjudicators. In this latter case the tribunal is not disinterested and so is less likely to arrive at reliable conclusions regarding the facts or the law. In the course of the proceedings, however, the parties may overcome critical informational asymmetries.

These different functions lead to different observed outcomes. When courts serve primarily to promote settlement, for example, we expect the parties to abide by that settlement. Rational parties will only settle a dispute if they reach an agreement and the promise to abide by the settlement is credible. It is to be expected, then, that the rate of "compliance" with the settlement will be high. This simply reflects the fact that both parties prefer the settlement to the alternative of a continued dispute. Put another way, a settlement is similar to other forms of agreement in international law—e.g., treaties—and so we should expect similar rates of compliance.

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<sup>30</sup> See GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 4, at 33-48 (arguing that states are rational actors and that the reputational consequences of their actions factor into their analysis of their own behaviors); *see also* Helfer & Slaughter, *supra* note 1, at 931-36 (arguing that tribunals act as trustees that enhance the credibility of promises governments make).

When courts serve to apportion wrongdoing, on the other hand, the final decision does not require the consent of the parties. Given that there is no coercive enforcement scheme in the background, one would expect a lower level of compliance than in the settlement context. The losing party retains the option of ignoring the judgment and living with whatever consequences come with that choice. This is, for example, what the European Communities (EC)<sup>31</sup> has done in the *EC—Hormones* case at the WTO.<sup>32</sup> Rather than abide by the decision of the WTO's Appellate Body, the EC has continued its illegal activity and lives with the WTO-approved sanctions imposed by the United States and Canada.<sup>33</sup>

### C. *Why Is a Tribunal Necessary?*

If the role of a tribunal is simply to provide information, one might wonder why states cannot achieve the same result by themselves. Why can't they simply enter into negotiations with one another, exchange information, and arrive at the same decision? One answer is that states often do exactly this. Many disputes are resolved without recourse to formal dispute-resolution procedures, even when that option is available. Indeed, the ability of states to replicate the tribunal's function may help to explain why only a small fraction of international legal obligations is subject to formal dispute resolution.<sup>34</sup>

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<sup>31</sup> The European Union is referred to as the European Communities in WTO matters.

<sup>32</sup> Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (*adopted* Feb. 13, 1998).

<sup>33</sup> The case continues to generate activity at the WTO. Most recently the WTO's Appellate Body heard arguments by the EC to the effect that the sanctions put in place by Canada and the United States were impermissible. At the time of writing, the Appellate Body had not yet ruled on this issue. See Panel Report, *Canada—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS321/R (Mar. 31, 2008); Panel Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/R (Mar. 31, 2008).

<sup>34</sup> From a negotiating-theory perspective, it should not come as a surprise that states would want to design a mechanism to make their commitments more credible and more enforceable. Indeed, from this perspective, one might wonder why states do not use dispute-resolution clauses in all of their agreements. I have addressed this issue in past writing, arguing that the sanctions in international law—specifically, reputation, retaliation, and reciprocity—impose costs on the parties (i.e., they are negative sum) rather than simply transferring value from one party to the other (i.e., zero sum). States must, therefore, balance the cost these negative-sum sanctions impose in the event of a violation against the benefits that will accrue through compliance with the enforcement mechanism. See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002), for further elaboration.

When tribunals are used, one of their functions is to sort and evaluate information more effectively than states are able to do themselves. Once states are in a dispute, they have opposing interests and thus have an incentive to provide misleading or inaccurate information and to interpret the available information in a light favorable to their own position. Without a third party to rule on points of disagreement, the parties to the dispute may have difficulty reaching an unbiased account of events. In other words, a tribunal may reduce the transaction costs associated with negotiation conducted between the states themselves.

A tribunal can also help observing states, which are not party to the negotiations and have less information to begin with, understand the situation. Providing these states with information at a low cost is useful because it allows them to adjust their beliefs about the willingness of the parties to comply with legal obligations. This enhances the impact of international law by increasing the reputational consequences of a violation, making reciprocal noncompliance by third parties a possibility and retaliation by third parties more likely.

#### D. *Strategic Tribunals*

Before turning to the development of a model of dispute resolution, it is worth taking a moment to discuss the goals of the tribunals themselves. For simplicity, it is assumed initially that tribunals do not have an agenda other than attempting to provide a ruling on the legal question before them. This assumption allows us to develop the basic model of tribunal behavior, but it is clearly an inaccurate assumption for many—and perhaps all—tribunals.

First, a tribunal may acquire an agenda of its own, distinct from any legitimate authority delegated to it by states, and it may use its authority to pursue that agenda. The United Nations Human Rights Committee (HRC) exemplifies this sort of behavior.<sup>35</sup>

The specter of a runaway tribunal is, of course, a concern for states when they consider the creation of such an entity. Though some safeguards can be put in place when tribunals are formed—giving states power over judges, retaining control of the institution's budget, etc.—there remains a risk that a tribunal will run amok and behave differently than states intended. Such misbehavior by a tribunal can be represented in one of two ways. First, a tribunal may be bi-

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<sup>35</sup> See *infra* Part V.B.

ased, meaning that it may develop interests that correspond to the interests of a subset of the participating states. The way in which this development will affect perceptions of the tribunal and the impact of its decisions is discussed in Part IV.C. Another possibility is that the tribunal will develop some other set of priorities and goals, distinct from those of any state party. These priorities and goals might involve an enlargement of the tribunal's power and jurisdiction, the advancement of a particular view of the law, or some other objective. From the perspective of states, a tribunal that develops its own objectives suffers a reduction in quality in the sense that it does not adequately fulfill the objectives of the states. The impact of this loss of quality is analyzed in Part IV.B.

A second way in which tribunals may act strategically is by tailoring their judgments to the political realities of the situation before them. A tribunal might, for example, avoid issuing a ruling that it expects will be ignored by the parties. The strategy of the tribunal in this situation is to avoid too severe a deviation from the preferences of states. In particular the court may seek a resolution capable of generating acceptance and compliance by both sides. Because tribunals appeal to states by accommodating the latter's ex post preferences, this form of strategic conduct is tantamount to an increase in the tribunal's dependence on the states. That is, as the tribunal tries to satisfy the parties, it must adjust its rulings to avoid a negative reaction. This is the same behavior one would expect from a more dependent tribunal, thus the discussion of dependence in Part IV.C applies to this form of strategic behavior.

## II. TRIBUNALS AND EFFECTIVENESS

### A. *What Is a Tribunal?*

One could limit the definition of "international tribunals" to bodies that have explicitly been granted authority by the parties to rule on the legality of disputed conduct. This definition would produce a set of tribunals that most closely resembles national courts in the sense that they have clear jurisdictional authority and are authorized to resolve the legal questions in a case.<sup>36</sup> It would include, for example, contentious cases before the ICJ and the WTO's judicial organs.

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<sup>36</sup> See Helfer & Slaughter, *supra* note 6, at 285 n.35 (adopting a similar definition).

And yet institutions sometimes address disputes in contexts that fall outside the scope of this definition but nevertheless fulfill some adjudicatory or quasi-adjudicatory functions. The ICJ, for example, issues advisory opinions which are different in character from a classic conventional adjudication. When it does so, it is not acting in a manner consistent with the above definition of a tribunal, but it is nonetheless engaged in an activity that falls within the scope of this Article. When the ICJ issued an advisory opinion in the *Israeli Wall* case, for example, the opinion had an effect similar to that of a standard contentious case.<sup>37</sup>

For the purposes of this Article, then, a broader definition is appropriate. Thus, a tribunal is defined here as a disinterested institution to which the parties have delegated some authority and that produces a statement about the facts of a case and opines on how those facts relate to relevant legal rules.<sup>38</sup>

This definition also captures instances in which a tribunal discusses the merits of a case while declining jurisdiction over the dispute, as sometimes happens. The paradoxical result in such cases is that the tribunal labels one party as the wrongdoer but imposes no formal guilt, sanction, or legal obligation. Arguably the tribunal lacks the formal authority to rule on the legality of the conduct and so might not be considered a tribunal at all under a narrow definition of that term. A ruling of this sort, however, does fall within the definition used in this Article. In the 2003 *Loewen* case, for example, a North American Free Trade Agreement (NAFTA) tribunal issued a

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<sup>37</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9). Other advisory opinions that resemble contentious cases, in the sense that they impose costs on one or more states that resemble the model developed in this Article, include: Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. 73 (Dec. 20); Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

<sup>38</sup> This approach is broadly consistent with that used by the Project on International Courts and Tribunals (PICT). PICT was established in 1997 as a joint endeavor of the Center on International Cooperation (CIC), New York University, and the Foundation for International Environmental Law and Development (FIELD). Since 2002, PICT has been a joint undertaking of CIC and the Centre for International Courts and Tribunals, University College London. PICT describes itself as the “only internationally based effort to address, with a comprehensive and holistic approach, all existing international courts and tribunals.” See About PICT, <http://www.pict-pecti.org/about/about.html> (last visited Oct. 12, 2008).

scathing ruling criticizing the injustice suffered by a Canadian corporation at the hands of Mississippi courts.<sup>39</sup> In the same decision, however, the tribunal rejected the legal claims because in failing to appeal to the United States Supreme Court, Loewen did not exhaust his domestic remedies.<sup>40</sup> Thus, the tribunal generated reputational consequences detrimental to U.S. interests while nevertheless invoking a procedural defense to avoid, among other things, the imposition of damages.

Our broader definition also includes bodies that, though not formally constructed as tribunals, nevertheless opine on the merits of disputes or behaviors in a way that resembles how a tribunal operates and that is described by the model developed in this Article. Probably the best known example of such an institution is the HRC which was established by the International Covenant on Civil and Political Rights (ICCPR).<sup>41</sup> The HRC's task is to "study the reports submitted by the States Parties to the [ICCPR]" and "transmit its reports, and such general comments as it may consider appropriate, to the States Parties."<sup>42</sup> If states have opted, under Article 41 of the ICCPR, to recognize the competence of the HRC to consider communications to the effect that the state is not fulfilling its obligations, then the HRC also performs a mediation role.<sup>43</sup> If the parties are unable to resolve their dispute, the HRC is to issue a report, but that report must be limited to "a brief statement of the facts," and the HRC is to attach to its report the "record of the oral submissions."<sup>44</sup>

Under these provisions, the HRC has at most a very circumscribed role in evaluating the merits of the claims made by states. Nevertheless, it has taken on a more active role in commenting on submitted disputes and legal questions. Whatever the legitimacy of this approach, it falls within the scope of actions that this Article seeks to understand.

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<sup>39</sup> Loewen Group v. United States, ICSID Case No. ARB(AF)/98/3 Award, ¶ 54, (2003), available at <http://www.state.gov/documents/organization/22094.pdf> (concluding that "the conduct of the [U.S.] trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law").

<sup>40</sup> *Id.* at ¶ 167.

<sup>41</sup> International Covenant on Civil and Political Rights art. 28, *opened for signature* Dec. 16, 1996 [hereinafter ICCPR]; see also DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 151-52 (1991) (noting that the HRC is limited in its binding effect as crafted by the ICCPR).

<sup>42</sup> ICCPR, *supra* note 41, art. 40.4.

<sup>43</sup> *Id.* art. 41.

<sup>44</sup> *Id.* art. 41.1(h)(ii).

### B. *What Is an Effective Tribunal?*

It has already been emphasized that the primary role of an international tribunal is informational. It follows that the value of a tribunal depends on the extent to which the tribunal is perceived to provide an unbiased ruling. This much is agreed upon by all commentators.<sup>45</sup>

Beyond a desire for tribunals to be unbiased, however, there is little agreement on the features that improve tribunal performance. To make any sort of judgment, however, we first must understand the difference between a “good” and a “bad” tribunal. The current debate focuses on whether or not a tribunal is “effective,” but this term has not been defined satisfactorily. In particular, measures of effectiveness are not connected to the reasons that states set up tribunals in the first place.

Some commentators have looked to a tribunal’s ability to generate compliance with its own rulings as a measure of effectiveness.<sup>46</sup> This approach, however, does not consider the role of tribunals in the larger legal system. In particular, a high rate of compliance with tribunal rulings does not necessarily imply that the tribunal is encouraging compliance with the underlying legal obligation. A tribunal could get a high rate of compliance, for example, by ruling in favor of the defendant in every case, or perhaps in favor of the more powerful party, regardless of the underlying merits, but this obviously would serve no useful purpose. Slightly more realistically, a tribunal could ignore the relevant legal questions and simply seek to mimic the result that the parties would achieve through politics. This would lead to a high rate of compliance but would not support the relevant legal rule. Furthermore, even when a state fails to comply with a tribunal’s ruling, the tribunal may be effective at promoting compliance if it imposes sufficient costs on the state to discourage future violations of the underlying legal rule.

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<sup>45</sup> See, e.g., GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 4; Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); Helfer & Slaughter, *supra* note 1; Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 17 (2005).

<sup>46</sup> See Helfer & Slaughter, *supra* note 6, at 283 (defining “effectiveness” as the ability of a tribunal “to compel a party of a dispute to defend against a plaintiff’s complaint and to comply with the resulting judgment”). Nevertheless, in later writing Helfer and Slaughter acknowledge the elusiveness of a workable definition. See Helfer & Slaughter, *supra* note 1, at 918 (“[O]ur adoption of this definition was more relative than absolute.”).

Others have relied on usage rates as a proxy for effectiveness.<sup>47</sup> Theories of litigation and settlement, however, teach us that usage rates reveal nothing about a tribunal's impact on states.<sup>48</sup> This is so because the parties to litigation have an incentive to settle their disputes prior to trial in order to save the costs of litigation, and they do so in the shadow of the tribunal. If they find themselves actually litigating a case, it is because something has frustrated the settlement, not because the court is effective. A failure to settle may be caused by informational asymmetries or by the fact that states—or their leaders—receive political payoffs from pursuing litigation.<sup>49</sup> In either case, the decision to “use” the tribunal is a strategic choice by the state and is unrelated to the tribunal's perceived effectiveness.<sup>50</sup>

This Article pursues a different approach, first considering the primary purpose of an international tribunal. The most compelling potential purpose for a tribunal is to support some underlying legal obligation. When states create dispute-resolution procedures they provide an enforcement mechanism for some set of international law rules. The dispute-resolution provisions of the WTO, for example, do not exist for their own sake. They are intended to increase compliance with rules contained in the WTO Agreements. This Article, therefore, defines effectiveness as the tribunal's ability to enhance compliance with the associated substantive obligation.<sup>51</sup>

Notice that a tribunal's ability to encourage compliance with underlying legal rules is not a simple binary measure. A tribunal that

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<sup>47</sup> See, e.g., Posner & Yoo, *supra* note 45, at 28 (asserting that “one could measure effectiveness [of tribunals] through usage”). Posner and Yoo use two additional measurements of effectiveness: compliance with the tribunal's ruling and the “overall success of the treaty regime that established the court.” *Id.* at 28-29.

<sup>48</sup> See, e.g., Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984) (proposing a model that identifies informational asymmetry as an important factor in determining the likelihood of settlement and concluding that proposed legal rules should be scrutinized for their potential effects); Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 495-98 (1996) (discussing the effect of private information on the likelihood of settlement). Posner and Yoo acknowledge that all three of their measures are “highly imperfect,” Posner & Yoo, *supra* note 45, at 29, but they proceed with their argument nonetheless.

<sup>49</sup> Because political payoffs need not be zero sum, it is possible that the payoff to the parties is higher from litigation than from settlement.

<sup>50</sup> A sufficiently ineffective tribunal will not be used at all, of course, if the cost of litigation exceeds the benefits of winning at the tribunal.

<sup>51</sup> Among other possible roles, a tribunal may operate to reduce the severity of conflict, to elaborate rules left unclear in the drafting of a treaty, or to provide political cover for domestic politicians.

provides some incentive to states but that fails to prevent all violations will be more effective than one that fails to provide any compliance incentive to the parties. Effectiveness, then, is inevitably a relative measure.

One more point regarding the above definition of effectiveness must be made clear. Though tribunals exist primarily to encourage compliance with underlying legal obligations, it is not the case that the parties to an international agreement always want to maximize compliance. If they did, they would always enter into agreements with robust dispute resolution, including some form of sanctioning mechanism. States sometimes prefer instead to stop short of the strongest possible enforcement scheme.<sup>52</sup> Greater effectiveness, then, is not necessarily a normatively desirable goal, and the discussions that follow are not meant to suggest that the international legal system does or should constantly strive for greater effectiveness.

### C. *What Is a “Binding” Ruling?*

Notice that effectiveness is not defined with reference to whether or not a tribunal’s decision is “binding” on the parties. Nonbinding rulings, despite their lack of legal force, can influence party behavior. Prior to the establishment of the WTO in 1995, for example, the decisions of General Agreement on Trade and Tariffs (GATT) dispute-resolution panels were not binding on the parties until they were adopted by the GATT Contracting Parties. Because that adoption required a consensus of all GATT parties—including the losing party in the dispute—it was possible for a panel to issue a nonbinding ruling.<sup>53</sup>

Including nonbinding rulings inevitably leads to a fundamental question about tribunals and international law: if there are both binding and nonbinding rulings, and if binding rulings lack coercive enforcement, what does “bindingness” mean?

Imagine two tribunals that are identical in every respect except that one is said to issue binding rulings while the other is understood to produce nonbinding rulings. The tribunals are otherwise equally

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<sup>52</sup> I have offered an explanation for why states behave in this way in prior writing. See Guzman, *Design*, *supra* note 4 (arguing that strong international sanctions often create a net loss for the parties involved).

<sup>53</sup> Nonbinding rulings come about in other contexts as well, including advisory opinions of the ICJ and decisions by bodies that lack the authority to issue binding rulings, such as the HRC.

capable, equally neutral, equally respected, and so on.<sup>54</sup> Now suppose that both tribunals find that a defendant has violated international law and call upon that defendant to take some action as a result. They may demand cessation of its violative behavior, compensation for the complainant, or some other action.

By assumption, the tribunals are identical in terms of the information they have and the quality of the judges, and so they reach the same judgment regarding the legality of the disputed conduct. Furthermore, the confidence that the parties or other states have in the accuracy of the ruling will be the same regardless of which tribunal issues the decision. It follows that when the tribunal reaches a conclusion about the legality of the challenged conduct—putting aside for the moment the proposed remedy—that conclusion will carry equal force whether or not it is binding. A finding of guilt, for example, will impose the same costs on the defendant whether or not the ruling is said to be binding.

We are talking here of the cost borne by the defendant simply because the tribunal has declared that party to be in violation. This cost may take the form of a reputational loss, reciprocal noncompliance by other states, or retaliation by others. In the model that follows, this cost will be labeled “*R*.” *R* is not affected by the bindingness of the ruling because the finding of a violation simply provides information. It does not, by itself, implicate the question of whether the ruling is binding.

When a ruling includes a statement about what the losing defendant must do, however, bindingness matters. That a ruling is binding implies that it imposes a legal obligation on the losing defendant—specifically, a legal obligation to comply with the tribunal’s order. This legal obligation operates much like any other obligation, and a failure to comply represents an additional violation with additional costs.<sup>55</sup>

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<sup>54</sup> One can imagine, for example, a pre-WTO GATT ruling. It is binding if it is adopted unanimously by the Contracting Parties but nonbinding if it is not adopted. Whether it is adopted or not, however, it is the product of precisely the same quasi-judicial process.

<sup>55</sup> Arguably, almost any binding ruling comes with a legal obligation because customary international law requires states to cease illegal activities and to provide some form of reparations to affected states. In practice it is clear that compensation is not always provided. See Draft Articles of State Responsibility arts. 34-37, in Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 49, U.N. Doc. A/56/10 (Apr. 3–Aug. 10, 2001), available at

One might ask why simply declaring the ruling to be binding increases the cost of ignoring it. An initial possibility is that a binding decision triggers domestic law enforcement in a way that nonbinding decisions do not. Robert Keohane, Andrew Moravcsik, and Anne-Marie Slaughter term this “embeddedness” or “the extent to which dispute-resolution decisions can be implemented without governments having to take actions to do so.”<sup>56</sup> A nonbinding ruling would not generate these domestic-law pressures to comply.

Failure to comply with the tribunal can also signal that a state is prepared to ignore its obligations under international law (reputation),<sup>57</sup> may lead to a refusal on the part of other states to comply with decisions of the tribunal when the noncompliant state is the complainant (reciprocity), and may provoke some punitive sanction (retaliation). Reputation, retaliation, and reciprocity—what I have called the “Three Rs of Compliance” in other writing—are mechanisms through which international law can affect state behavior, and they apply to the obligation to comply with the tribunal.<sup>58</sup>

Notice, however, that none of these reactions require that the decision be “binding.” A nonbinding ruling that includes a statement of what the losing defendant must do can have similar effects.<sup>59</sup> Nevertheless, one would expect that, all else equal, a binding ruling will have a greater impact than a nonbinding one. By agreeing to a system

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[http://untreaty.un.org/ilc/documentation/english/A\\_56\\_10.pdf](http://untreaty.un.org/ilc/documentation/english/A_56_10.pdf) (last visited Jan. 25, 2008).

<sup>56</sup> Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 458 (2000).

<sup>57</sup> This reputational effect can be costly because future agreement becomes more difficult. A refusal to honor a decision might, for example, make it difficult for a state to commit credibly to dispute resolution in future agreements. This robs the state of one of the mechanisms available to make its future commitments more credible and, therefore, makes it more difficult to extract value in exchange for its future promises.

<sup>58</sup> GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 4, at 9.

<sup>59</sup> This point is consistent with the observed fact that nonbinding rulings often lead to compliance. The Inter-American Commission on Human Rights, for example, is a body that reviews petitions, interprets states' human rights obligations, and issues nonbinding recommendations. According to the Commission's 2006 Annual Report, full compliance with their recommendations is relatively rare—only 1 out of 66 cases—but partial compliance was achieved in a large majority of cases—48 out of 66 cases, or 73%. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 49-54 (2006), available at <http://www.cidh.org/annualrep/2006eng/chapter.iii.eng.pdf>. Furthermore, because the cases considered include ones in which it is uncertain whether compliance has taken place or is forthcoming, these figures understate the level of compliance. Thus, well over half of the nonbinding recommendations lead to compliance. *Id.* at 23-31.

that includes binding dispute resolution, states make a greater commitment, which means they pledge a larger amount of reputational capital. A subsequent failure to comply will, therefore, impose a larger reputational cost than would be true if less reputation were pledged (i.e., if the ruling was considered nonbinding).

*Hypothesis: Where a tribunal's task is limited to opining on the legality of a particular action, but not ordering any specific measures to cure the violation, it makes no difference whether the ruling is binding or nonbinding.*

*Hypothesis: Where the tribunal's task includes determining what the violating party must do to remedy the violation, a binding judgment will be more effective than a nonbinding one.*

These hypotheses offer an explanation for why the HRC has worked to give its "views" the look and feel of binding rulings. If they succeed in making their views binding in a de facto sense, they will have increased the cost of ignoring these views. This same reasoning also explains why the HRC has urged states to amend the ICCPR's Optional Protocol to make its views binding.<sup>60</sup>

### III. A THEORY OF DISPUTE RESOLUTION

If international courts are able to alter the incentives of states so as to encourage compliance, we would like to identify and model the mechanism by which they do so. In particular, there must be some process through which the existence of a tribunal imposes costs on violating states. A desire to avoid these costs provides the incentive to comply with international law.<sup>61</sup> The analysis that follows examines how a typical dispute would be handled by the parties, when formal dispute-resolution procedures will be used, and what the potential outcomes may be.

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<sup>60</sup> Helfer & Slaughter, *supra* note 6, at 351-52.

<sup>61</sup> International law also includes some rules that, at least arguably, require states to provide compensation to a state that has been wronged. Even if one accepts that such a rule of law exists, there remains the question of why it should affect state behavior. In trying to understand why a state might comply with an international obligation it makes no sense to turn to a rule of international law that says a failure to comply generates an obligation to make reparations. If there is nothing other than the international law obligation to encourage compliance with the initial obligation, then the rule requiring reparations is similarly impotent.

As previously mentioned, this Article focuses on mandatory dispute-resolution procedures. The term “mandatory” refers to a process that gives the would-be complaining party, *C*, the option of pursuing a dispute through a legalized process. If *C* opts for this process the defendant, *D*, cannot prevent the case from moving forward. A mandatory process does not, however, prevent *C* from pursuing other strategies for resolving the dispute. In particular the alternative of pursuing the dispute through regular political means remains available.<sup>62</sup>

To model this interaction, assume that *C* has a dispute with *D*.<sup>63</sup> If there is no mandatory dispute-resolution system in place, *C* must pursue the dispute through conventional diplomatic means, which I call “politics.” If, on the other hand, an international tribunal is available, *C* can choose to pursue a remedy through that system, which I call “litigation.”<sup>64</sup>

The term “politics” is used in a nonstandard way here, and so clarification is in order. The key difference between politics and litigation is that politics describes a situation in which threatening litigation serves no purpose because the parties realize that the threat is either not relevant or not credible. This may be because it is clear that *C* can do at least as well through politics as through litigation, making the threat of litigation irrelevant, or because litigating would be too costly for the complainant, making the threat of litigation not credible. Politics is the complainant’s only option if there are no dispute-resolution procedures available, and it is an alternative to litigating if such procedures are in place.

Litigation involves taking or threatening, perhaps implicitly, to take a case to an international tribunal. The decision to litigate (i.e., to use or threaten to use the dispute-resolution system) clearly does not cut off all negotiation, and once *C* has chosen litigation the parties may settle the case. Here, the term “settle” or “settlement” refers to negotiated outcomes prior to a tribunal ruling that occur in the

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<sup>62</sup> This Article considers the possibility that a formal dispute-resolution system may attempt to make itself the exclusive vehicle for the resolution of disputes. See *infra* Part IV.F.3.

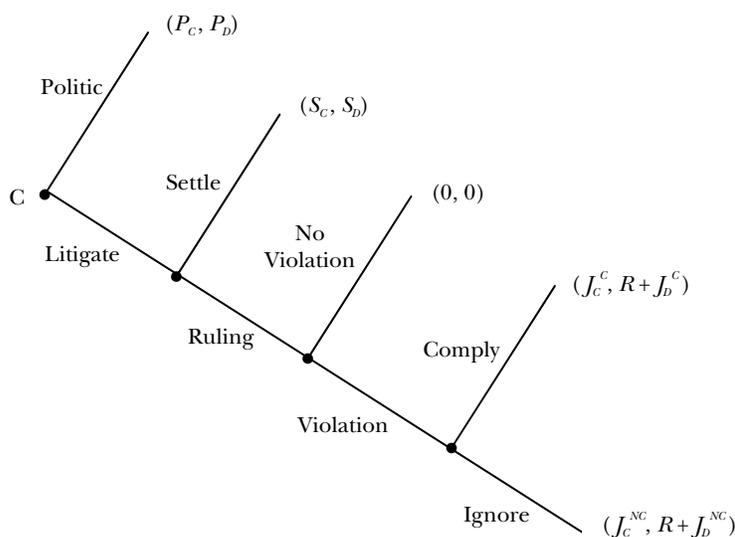
<sup>63</sup> It is assumed that the parties have full information.

<sup>64</sup> The term “litigation” refers to the use or threatened use of a tribunal. It does not require that the tribunal reach a ruling or even that the complainant file a case at the tribunal. Thus, for example, settlement of a dispute in the face of a threat to file a complaint qualifies as litigation for our purposes.

shadow of dispute-resolution procedures.<sup>65</sup> If the parties fail to settle the case they must proceed to a ruling by the tribunal. The tribunal may find that the defendant violated the underlying rule of international law, or it may find that the defendant acted within the law. If the defendant is judged to have acted legally, both parties receive a payoff of zero.<sup>66</sup> If the defendant acted illegally the defendant chooses either to comply with the ruling or to ignore it. Each of these options yields payoffs which are described in more detail below.

Figure 1 provides a representation of the dispute. The payoffs to the parties are listed in the parentheses with the complainant's payoff listed first, followed by the defendant's. The meaning of the variables listed in Figure 1 and a discussion of how the dispute proceeds are discussed in Sections III.A and III.B. The game is examined through "backward induction," the standard mechanism used to solve games of this sort. This simply means that the analysis begins at the final stage and works backwards to the first decision point.

**Figure 1: Dispute-Resolution Payoffs**



<sup>65</sup> The terms here are used for convenience only. I mean to suggest neither that politics is absent when a threat of litigation exists nor that "law" is absent when there is no dispute resolution.

<sup>66</sup> Assigning a payoff of zero to this outcome is simply a way of establishing a baseline against which to measure other outcomes. All the analysis that follows remains valid even if a ruling for the defendant leaves the parties in a different position than they would have been had the case never been filed.

### A. *Politics*

In the absence of international adjudication, or if *C* chooses to use politics rather than litigation, *C* pursues its dispute with *D* by threatening some form of retaliation (e.g., trade sanctions, withdrawal of aid, etc.) threatening to resist cooperation in the future, threatening to announce the violation to the world, or threatening to impose a cost on *D* in some other way (or actually imposing such a cost). *D* can respond with stonewalling, counter-threats, capitulation, or some combination of these. This is simply the familiar back-and-forth of international relations, the precise form of which is not critical for our purposes. One way or another, the dispute is resolved—though not necessarily quickly and not necessarily amicably—through this political process, and each state receives a payoff that reflects the gain or loss it experienced as a result of the dispute. The payoffs may be affected by any number of factors, including the legal rule at issue, the relative power of the parties, other interactions they may have with one another, and so on. The key point here is that the payoffs are unaffected by the presence of an international tribunal. The payoffs from politics will be labeled  $P_c$  and  $P_d$  for the complainant and defendant, respectively.<sup>67</sup>

### B. *Litigation*

If an international tribunal is available, the complainant can choose to pursue litigation rather than politics. For convenience, it is assumed that litigation costs are zero.<sup>68</sup>

If *C* files a complaint with the tribunal and the case proceeds to judgment, the tribunal announces whether *D* has violated a rule of international law. The tribunal may also state what a losing defendant

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<sup>67</sup> The payoff for the defendant is defined in such a way that  $P_d > 0$  when politics imposes a cost on the defendant.

<sup>68</sup> Though this assumption is made to simplify the presentation, it may also be a good approximation of reality. The funds necessary to support litigation will typically be taken from the state's general treasury, and so their use is unlikely to be politically controversial. Furthermore, for many disputes states can staff all or much of the litigation team with individuals already on the government payroll. Though use of these "in-house" lawyers and negotiators implies some opportunity cost—they are taken away from other tasks—it is likely to be less expensive than hiring private counsel to pursue the case. Notice also that for most states the dollar cost of litigation, even if it reaches several million dollars, will represent a negligible fraction of government spending. Finally, even if there are costs associated with litigation, they are relevant only to the extent that they are greater than the costs of politics.

must do to cure the violation. This might be an order to bring itself into compliance with its international obligations, an order to provide some form of compensation, or some other sanction.

The ruling itself is, of course, simply words on a page and comes with no coercive enforcement. Because it is an authoritative and public judgment, however, the ruling provides information both to the parties and to other states. If  $D$  is judged to have violated international law, it may suffer reputational sanctions.<sup>69</sup> The winning party or, conceivably, third parties, may also respond by suspending compliance with the relevant agreement or retaliating against the losing party. These actions in response to the ruling impose a cost labeled  $R$ ,  $R > 0$ .<sup>70</sup> In response to the ruling,  $D$  can either comply or ignore the tribunal. The defendant's cost of complying is labeled  $J_D^C$  and the resulting gain to the complainant is  $J_C^C$ .<sup>71</sup>

There remains the question of why  $D$  would comply with the judgment of the tribunal. There are certainly cases in which a state refuses to comply with the rulings of tribunals. In 2004, for example, the ICJ ruled in the *Avena* case<sup>72</sup> that the failure of the United States to inform defendants of their rights under the Vienna Convention on Consular Relations<sup>73</sup> required a remedy that "guarantees that full weight be given to the violation of the rights set forth in the Vienna Convention."<sup>74</sup> Despite the fact that the defendants had failed to raise the denial of their Vienna Convention rights early in their domestic court proceedings, the ICJ ruled that American procedural-default rules could not be applied and that American courts were obliged to provide a substantive review of the Vienna Convention claims to determine if actual prejudice had resulted.<sup>75</sup>

The United States responded to this ICJ decision in the form of a United States Supreme Court ruling—*Sanchez-Llamas v. Oregon*.<sup>76</sup> In that case, the Supreme Court concluded that under United States law,

<sup>69</sup> See Guzman, *Compliance-Based Theory*, *supra* note 4, at 1861-65 (discussing the impact of a violation of international law on a state's reputation).

<sup>70</sup> Because  $C$  already knows that  $D$  has violated the law, it is assumed that  $C$  enjoys no gain from the ruling itself. This assumption—that  $C$  enjoys no gain from the ruling itself—simplifies the presentation but is not required for any of the results.

<sup>71</sup> Superscripts refer to whether or not there has been compliance, and subscripts identify the party as the defendant or complainant.

<sup>72</sup> *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

<sup>73</sup> Vienna Convention on Consular Relations, Mar. 19, 1967, 596 U.N.T.S. 261.

<sup>74</sup> *Avena*, 2004 I.C.J. at ¶ 139.

<sup>75</sup> *Id.* at ¶ 121.

<sup>76</sup> 548 U.S. 331 (2006).

“claims under Article 36 of the Vienna Convention may be subjected to the same procedural default rules that apply generally to other federal-law claims.”<sup>77</sup> With this ruling, the Supreme Court made clear that the United States was going to ignore the *Avena* ruling as it applies to procedural default.

Though additional examples of states ignoring the rulings of international tribunals could be cited, it is also clear that in many other cases the losing party chooses to comply.<sup>78</sup> The ICJ, for example, has successfully resolved a number of border disputes.<sup>79</sup> One of these involved a dispute between Botswana and Namibia over the Kasikil/Sedudu Island in the Chobe River. The parties agreed to submit the dispute to the ICJ in 1999. The court awarded the island to Botswana but gave both countries rights in the channel on either side of the island.<sup>80</sup> The Namibian government publicly accepted the ruling, and the two states established a technical commission to officially demarcate the entire length of the Chobe. This work was successfully completed in 2003.

Similarly, compliance levels at the WTO—where, it should be added, there is at least the potential for trade sanctions if a state fails to comply—appear to be fairly high.<sup>81</sup> More generally, casual observation suggests that states often comply with the rulings of international tribunals.<sup>82</sup>

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<sup>77</sup> *Id.* at 360.

<sup>78</sup> For a more thorough discussion of compliance with the ICJ, see Jonathan I. Charney, *Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 288 (Lori Fisler Damrosch ed., 1987), which analyzes ICJ cases prior to 1987. See also Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434 (2004) (discussing compliance from 1987 to 2004).

<sup>79</sup> See Paulson, *supra* note 78, at 458 tbl.1 (finding that, of eight border disputes within the period of study, the compliance level was “high” in five of them and “medium” in the remaining three).

<sup>80</sup> *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1108 (Dec. 13).

<sup>81</sup> See GUZMAN, *HOW INTERNATIONAL LAW WORKS*, *supra* note 4, at 22 (noting that legal scholars have observed a “high rate of compliance”); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. S179, S196-98 (2002) (arguing that reputation plays a critical role in enforcing WTO rules).

<sup>82</sup> See, for example, Frans Viljoen & Lirette Louw, *State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004*, 101 AM. J. INT'L L. 1, 5-7 (2007), which concluded that of forty-four cases handled by the African Commission on Human and Peoples' Rights, six (14%) led to full compliance, fourteen (32%) led to partial compliance, and thirteen cases (30%) led to noncompliance.

A rational state will only comply with a ruling if doing so offers a higher payoff than the alternative of refusing to comply. How could costly compliance lead to a higher payoff than simply ignoring the ruling? The answer is that ignoring the ruling imposes its own costs. Just as there are reputational and other costs associated with violating international law, there are reputational and other costs associated with refusing to honor the rulings of a dispute-resolution system to which a state has committed. The intransigent state is seen as one that is unwilling to work within the relevant institution, and, in response, other states will be reluctant to enter into cooperative agreements with the renegade state.<sup>83</sup> The state may also be perceived as one that cannot be relied upon to keep its legal promises—in this case the promise to abide by the tribunal's rulings. Should the noncompliant state find itself as a winning complainant in a future case, the losing party may refuse to comply on reciprocity grounds. Finally, the winning complainant may retaliate against the noncompliant state. These costs associated with a refusal to comply with a ruling are labeled  $J_D^{NC}$  and represent a sanction over and above the cost of losing the case. As an illustration, consider the *EC—Hormones* case at the WTO.<sup>84</sup> Losing this case imposed some cost on Europe. That Europe has refused to comply with the rulings of the WTO's Appellate Body has imposed additional costs.<sup>85</sup>

It is now possible to make some observations about when a losing defendant will comply with the ruling of a tribunal. A losing defendant must bear the cost,  $R$ , whether or not it complies with the ruling. The decision to comply imposes an additional cost of  $J_D^C$ , while a refusal to comply imposes an additional cost of  $J_D^{NC}$ .<sup>86</sup>

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The remaining eleven cases either featured compliance as a result of regime change—and, therefore, not as a result of the tribunal's decision—or were unclear cases. Of the cases for which compliance could be measured and attributed to success or failure by the tribunal, 18% yielded full compliance, 42% partial compliance, and 39% noncompliance.

<sup>83</sup> For a detailed discussion of how a state's reputation for compliance with international law is related to its behavior, see GUZMAN, HOW INTERNATIONAL LAW WORKS, *supra* note 4, at 71-117.

<sup>84</sup> See *supra* text accompanying notes 32-34.

<sup>85</sup> Those additional costs include trade measures put in place by the United States and Canada. In this and other cases there may also be reputational damage or other costs.

<sup>86</sup> One could collapse the cost of losing the case and the cost of complying or ignoring the tribunal into a single variable that would measure the cost to the losing party of complying or ignoring the tribunal. Leaving these variables disaggregated,

$D$  will comply with the tribunal only if the cost of noncompliance exceeds the cost of compliance:  $J_D^{NC} > J_D^C$ . If  $D$  loses the case and prefers to comply with the ruling, the complainant receives the benefit of  $D$ 's compliance while the defendant bears the costs of losing the case and the cost of compliance.<sup>87</sup> Formally this can be represented as:

$$\left. \begin{array}{l} C \text{ receives: } J_C^C \\ D \text{ loses: } R + J_D^C \end{array} \right\} \text{ If } J_D^{NC} \geq J_D^C$$

If  $D$  loses but chooses not to comply the payoffs can be represented as:

$$\left. \begin{array}{l} C \text{ receives: } J_C^{NC} \\ D \text{ loses: } R + J_D^{NC} \end{array} \right\} \text{ If } J_D^{NC} < J_D^C$$

$J_C^{NC}$  represents the payoff to the complainant following the defendant's failure to comply with the ruling.  $J_C^{NC}$  could be as small as zero if the complainant has no alternative avenues through which to seek relief. Alternatively it may be larger—perhaps even larger than what the complainant could get through politics,  $P_C$ , because the victory before the tribunal may give the complainant greater leverage over the defendant.

### C. Settlement

If the complainant elects to pursue litigation, the parties may resolve their dispute through negotiation prior to the tribunal's ruling. Here, the term "settlement" refers to negotiated outcomes reached in the shadow of a tribunal.

A settlement requires the consent of both parties and so must be preferred by both parties over the alternative of a judgment. The parties are in full control of the terms of the settlement and so virtually any arrangement is possible as long as both states agree. The question, then, is whether there is some feasible agreement that makes both parties better off than if they wait for a ruling. Settlements can take the form of cash payments, cessation of particular conduct, con-

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however, proves convenient for some of the discussion that follows. Nothing in the analysis turns on whether these costs are lumped together or included separately.

<sup>87</sup> Recall that if  $D$  wins the case, both parties receive a payoff of zero.

cessions in unrelated areas, and so on. When states settle a dispute, the cost to one side may not be the same as the gain to the other. This is so both because international settlements typically do not consist of (exclusively) cash payments from one side to the other, and because the relevant payoffs are the political payoffs to political leaders. We therefore allow the payoffs between the parties to be asymmetric, and label them  $S_d$  and  $S_c$  for the defendant and complainant, respectively.

To evaluate the parties' decision making with respect to settlement we must once again distinguish between situations in which the defendant would ignore a ruling, should one be issued, and situations where the defendant would comply with such a ruling. Consider first the situation where the defendant would ignore the tribunal's ruling—that is, if  $J_d^{NC} < J_d^C$ . In that case the defendant prefers a settlement,  $S_d$ , if the cost of settlement is less than the reputational costs of losing before the tribunal and ignoring its judgment. So  $D$  prefers settlement if and only if  $S_d < R + J_d^{NC}$ . The complainant stands to receive  $J_c^{NC}$  if the case goes to judgment—because the defendant will ignore the ruling—and so will prefer any settlement that results in  $S_c > J_c^{NC}$ .

So if  $J_d^{NC} < J_d^C$ , the parties reach a settlement if there exists some settlement for which  $S_d \leq R + J_d^{NC}$  and  $S_c \geq J_c^{NC}$ . To simplify:

$$S_d - R - J_d^{NC} \leq 0 \text{ and } S_c - J_c^{NC} \geq 0 \quad [1].$$

Now consider the situation if the defendant would comply with the tribunal's ruling, should one be issued—that is,  $J_d^{NC} > J_d^C$ . The defendant will accept a settlement if its costs are less than the reputational and other costs of the ruling itself plus the cost of compliance— $R + J_d^C$ . In other words,  $D$  prefers settlement if and only if  $S_d < R + J_d^C$ .

The complainant will only agree to a settlement that yields a payoff greater than  $J_c^C$ , that which it stands to gain from the defendant's compliance with the judgment. So the complainant will agree to a settlement if and only if  $S_c > J_c^C$ .

Summarizing these results, if  $J_d^{NC} > J_d^C$ , the parties will reach a settlement if there exists some settlement for which  $S_d \leq R + J_d^C$  and  $S_c \geq J_c^C$ .

To simplify:

$$S_d - R - J_d^C \leq 0 \text{ and } S_c - J_c^C \geq 0 \quad [2].$$

Table I summarizes the conditions under which there will be settlement.

**Table 1: Summary of Settlement Conditions**

	$J_b^{NC} < J_b^C$ ( <i>D</i> would ignore ruling)	$J_b^{NC} > J_b^C$ ( <i>D</i> would comply with ruling)
<i>C</i> agrees to settle if:	$S_c - J_c^{NC} \geq 0.$	$S_c - J_c^C \geq 0.$
<i>D</i> agrees to settle if:	$S_d - R - J_d^{NC} \leq 0$	$S_d - R - J_d^C \leq 0$

Notice that for some values of the relevant variables, the parties will proceed to a judgment rather than settle. In contrast to standard models of domestic litigation, the parties may fail to settle even if they know all relevant payoffs and the probability of victory for each party. Two features of the model explain the failure to settle. First, the payoffs are political, so a given outcome may yield different payoffs if it is the result of a tribunal ruling rather than a settlement. Thus a party may prefer a ruling even if a settlement is possible on the same terms. Second, the payoffs are asymmetric—the gains or losses to one party may be larger or smaller than the gains or losses to the other. When combined with political payoffs it is possible for the parties to be better off with a ruling than with a settlement.<sup>88</sup>

#### D. *Politics and Litigation*

The last step in evaluating the choices of the parties is to address the complainant's choice between politics and litigation. As already discussed,<sup>89</sup> the difference between these two alternatives is that the former is unaffected by the presence of a tribunal.

<sup>88</sup> See Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251, 252 (2006) (asserting that a ruling by a trade court "actually increases the President's power over lawmaking at home").

<sup>89</sup> See *supra* Part III.A-B.

To analyze the decision between politics and litigation we once again consider whether or not  $D$  would comply with a tribunal's ruling. Because the parties know the payoffs and probability of victory for each party, they are able to anticipate the settlement negotiations and so can predict the settlement terms,  $S_C$  and  $S_D$ .<sup>90</sup> Suppose first that  $D$  would comply with a tribunal's ruling ( $J_D^{NC} > J_D^C$ ). Knowing this,  $C$  chooses between the larger of (i) the payoff from politics ( $P_C$ ) and (ii) the payoff from settlement (if a settlement is possible) or judgment (if no settlement is possible).

In formal notation,  $C$  receives  $\text{Max}\{P_C, S_C\}$  if there exists a settlement arrangement  $\{S_C, S_D\}$  such that:

$$S_C - J_C^C \geq 0 \text{ and } S_D - R - J_D^C \leq 0 \quad [3]$$

or  $\text{Max}\{P_C, J_C\}$  if there is no such settlement arrangement.<sup>91</sup>

If [3] is satisfied,  $D$  gets either  $P_D$  or  $S_D$ , depending on whether  $C$  settles or politics. If not,  $D$  gets  $P_D$  or  $R + J_D^C$ .

Now suppose the defendant will not comply with a ruling should one be issued. The complainant can politic and earn  $P_C$ , or it can seek to negotiate a settlement backed by the threat of litigation. Formally,  $C$  receives  $\text{Max}\{P_C, S_C\}$  if there exists a settlement arrangement  $\{S_C, S_D\}$  such that:

$$S_C - J_C^{NC} \geq 0 \text{ and } S_D - R - J_D^{NC} \leq 0 \quad [4]$$

or  $\text{Max}\{P_C, J_C\}$  if there is no such settlement arrangement.<sup>92</sup>

If [4] is satisfied the defendant gets either  $P_D$  or  $S_D$  depending on whether  $C$  settles or politics. If not,  $D$  gets  $P_D$  or  $R + J_D^{NC}$ .

These theoretical results allow us to consider how alternative forms of international tribunals will behave. More specifically, we can ask what will happen if, for example, one of the above variables is changed as a result of a change in the tribunal structure. That is the task of the next section.

<sup>90</sup> When the tribunal speaks, of course, it provides additional information about the facts and the law.

<sup>91</sup> Stated another way,  $C$  receives  $\text{Max}\{P_C, J_C\}$  if, for all available settlement possibilities, either  $S_C - J_C^C < 0$  or  $S_D - R - J_D^C > 0$ .

<sup>92</sup> Stated another way,  $C$  receives  $\text{Max}\{P_C, S_C\}$  if, for all available settlement possibilities, either  $S_C - J_C^{NC} < 0$  or  $S_D - R - J_D^{NC} > 0$ .

## IV. EFFECTIVENESS AND THE DESIGN OF AN INTERNATIONAL TRIBUNAL

When states create an international tribunal they have almost complete freedom over its design. A glance at existing tribunals demonstrates that states have taken advantage of this flexibility and structured tribunals in different ways. The WTO dispute-resolution system, for example, is mandatory, provides for sanctions in the event of a failure to comply with a ruling, provides a standing body of highly independent judges (at the appellate level) and issues binding decisions.<sup>93</sup> The jurisdiction of the ICJ, on the other hand, is subject to the consent of the parties, which can be given ahead of time; the Court has no system for imposing sanctions on violators and no mechanism for appellate review.<sup>94</sup> The HRC is charged with accepting reports from states in a non-adversarial process and, if states consent, to consider interstate claims about violations of the ICCPR. In either case, the HRC issues reports that are not binding on the parties.<sup>95</sup>

Why might rational states select one set of features rather than another? Why have they selected different features in different tribunals? Part IV.A explains how the various design choices made in the creation of a tribunal impact the three key variables in the above model: (i) the cost of being judged to be in violation ( $R$ ); (ii) the costs of ignoring a tribunal's ruling ( $J_D^{NC}$ ); and (iii) the cost of compliance with a ruling ( $J_D^C$ ). Once this is done, alternative design choices are analyzed in terms of how they affect these three variables.

A. *Tribunal Design and Effectiveness*

Tribunal design can influence outcomes by affecting one or more of the three above-mentioned variables. Understanding the relationship between a particular design choice and the relevant variables is the key to understanding how effectiveness is impacted.

First, a particular design choice may affect the reputational or other costs of being found to have violated international law,  $R$ .<sup>96</sup> When this cost increases, so does the tribunal's effectiveness.

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<sup>93</sup> DSU, *supra* note 18.

<sup>94</sup> I.C.J. Statute, *supra* note 11, art. 36.

<sup>95</sup> See ICCPR, *supra* note 41, art. 40.

<sup>96</sup> Greater independence and quality raise this cost. Transparency in voting within the tribunal can also increase quality—among other effects—and, therefore, may increase this cost.

Second, changes to the tribunal may alter the costs borne by a losing defendant that chooses to ignore the tribunal,  $J_D^{NC}$ .<sup>97</sup> An increase in the cost of ignoring the tribunal raises the expected cost of violating the law and, in turn, leads to an increase in the tribunal's effectiveness. Such a cost may cause a state that would otherwise have ignored the tribunal to comply with the ruling, but this also increases the defendant's costs and so increases the tribunal's effectiveness.

Third, changes to a tribunal may affect the cost borne by a defendant that complies with a ruling,  $J_D^C$ .<sup>98</sup> Changes to this cost have a more nuanced impact on effectiveness. For states that will comply with the ruling, an increase in this cost clearly increases that effectiveness of the tribunal as it raises the expected cost of the underlying violation. For states that would ignore the tribunals with or without the change, an increase in the cost of complying with the ruling has no impact. This leaves a third group of states that would comply with the ruling but for the increase in the cost of doing so. That is, increasing the cost of complying with the tribunal causes these states to refuse to comply. This impacts effectiveness in two ways. First, it increases the cost of the underlying violation because the losing defendant bears higher costs than it would have absent the change. This tends to increase the effectiveness of the tribunal. But pushing states toward noncompliance with the tribunal has an additional effect because it alters the payoff to the complainant in the event of a judgment. Rather than receiving  $J_C^C$  (the complainant's payoff when the defendant complies with the tribunal) the complainant receives  $J_C^{NC}$  (the payoff if the defendant fails to comply with the tribunal). If  $J_C^{NC}$  is less than  $J_C^C$ , as is likely, the complainant's incentive to bring the case in the first place is reduced and its threat to do so is less credible. If this effect is strong enough (e.g., if  $J_C^{NC} = 0$ ), the complainant may prefer not to pursue litigation at all. Knowing this, the defendant will refuse to settle for anything greater than the payoff from politics,  $P_D$ , and the tribunal will lose effectiveness. If  $J_C^{NC}$  is similar in magnitude to  $J_C^C$ , on the other hand, increasing the cost of complying with the ruling will increase effectiveness.

Finally, there are design issues that the model does not capture—at least not as it is presented above. These choices can, however, be assessed using an extension of the above model, and section IV.F considers three such features: whether there is a mandatory consultation

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<sup>97</sup> Greater independence and quality also increase this cost.

<sup>98</sup> Imposition of remedies by a tribunal, for example, increases this cost.

period, whether jurisdiction is compulsory, and whether the tribunal attempts to constrain politics.

B. *How and Why Does Quality Matter?*

It almost goes without saying that is preferable to staff a tribunal with judges of higher rather than lower quality. Helfer and Slaughter suggest that the key dimension along which quality matters is that the members of a tribunal be “known and respected by national judges.”<sup>99</sup> They reach this conclusion because they believe that the key mechanism through which international tribunals are made effective is the domestic court system.<sup>100</sup> If domestic judges respect the international judges there will be greater deference to the decisions of international tribunals. Indeed, Helfer and Slaughter suggest that expertise in international law may be less important than expertise in domestic law because it is the latter that makes a judge well-known among national judges.<sup>101</sup>

Whether or not Helfer and Slaughter are correct, their claim makes clear that a simple reference to quality is not enough. Rather, we must have some understanding of what “quality” means—i.e., what features of a judge or tribunal increase the impact of a ruling?

Because a tribunal’s role is simply to provide information about the facts and the law, an increase in quality necessarily means an increase (or at least a perceived increase) in the quality of the information provided. So to the extent that a change in the tribunal makes that information more accurate and reliable, the change can be described as an increase in quality.

This analysis corresponds to standard notions of what it means to appoint a “better” judge. A better judge produces higher quality decisions—decisions that are more likely to reach accurate conclusions with respect to the facts and the law.<sup>102</sup> Because the information is

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<sup>99</sup> Helfer & Slaughter, *supra* note 6, at 300.

<sup>100</sup> *See id.* at 290 (“In sum, we measure the effectiveness of a supranational tribunal in terms of its ability to compel compliance with its judgments by convincing domestic government institutions . . . to use their power on its behalf.”).

<sup>101</sup> *See id.* at 300 (noting that “staffing an international tribunal solely with experts in international law” may lead to members being “less well-known to national judges than appointees of equal distinction who have made a career in *domestic* law”). One relevant question that could be raised is whether a judge known within the domestic law of one country is likely to be known among other states party to the litigation.

<sup>102</sup> In some instances, of course, there may be no single “accurate” interpretation of the law. The language in a treaty, for example, may be vague, and the parties may

more reliable, states will, for example, adjust their estimate of the losing defendant's reputation more readily. If it is likely that the court has made a mistake, on the other hand, the reputational consequence will be less severe.<sup>103</sup>

States react to the ruling of a tribunal based on their beliefs about the quality of that ruling, and so it is the perception of a judge's (and therefore a tribunal's) abilities that matters rather than the actual quality. There is, of course, a close relationship between perceived and actual quality in a rational-choice model such as the one used here. Over time we expect observers to adjust their perception of quality in reaction to the decisions they see, and we expect this movement to align perceptions about quality more closely with actual quality.

In the domestic court system, with its larger case volume, the ability of observers to update their beliefs about the quality of judges makes it less important to appoint individuals who are respected for their judicial abilities prior to appointment. In addition, the coercive enforcement system of the courts ensures that the decisions of judges will be rendered effective.<sup>104</sup>

International tribunals, however, have different characteristics and different needs. First, because most such tribunals hear relatively few cases, judges have a limited ability to acquire or alter a reputation.<sup>105</sup> A judge's reputation upon appointment, therefore, will continue to have a large effect on how her rulings are perceived for quite some time. This suggests that appointing respected jurists is more important, all else equal, for international courts than for domestic courts. In practice this may provide a reason to appoint judges to in-

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have entered into the agreement with divergent understandings of that language or without any particular understanding of it. In this case, higher quality decisions will be those that are more reasonable given the background legal landscape and that more accurately reflect what the parties would have agreed to if they had negotiated over the matter. This concept is similar to what Helfer and Slaughter call "quality of legal reasoning." *Id.* at 318.

<sup>103</sup> For example, if a tribunal's decision is thought to be no more accurate than a fully random assignment of responsibility (i.e., the tribunal has a fifty-percent chance of being right and a fifty-percent chance of being wrong with its ruling on the question of whether or not there has been a violation), then observing states do not gain any information from the ruling and will not update their beliefs about the allegedly violating state or alter their behavior with respect to retaliation and reciprocity.

<sup>104</sup> To be sure, the court system as a whole benefits if its judges are respected, and that respect presumably comes with a belief that they are of high quality.

<sup>105</sup> This ability is further hampered if the tribunal does not reveal the author of decisions and does not permit a judge to dissent from a decision. *See infra* Part IV.E.

ternational tribunals who are, on average, more senior and established than newly appointed domestic judges.

If a tribunal exceeds the authority that it is granted and embarks on policy-making adventures, the effect is similar to a loss of quality. Like a low-quality tribunal, a maverick tribunal is less likely to provide an accurate and unbiased judgment of facts and law. This does not necessarily completely strip such a tribunal of influence, but as the judges stray from interpretation of legal rules toward policy making or legislating from the bench, their rulings become less credible.

A focus on the quality of information makes it clear that more than just the quality of the judges matters. Giving a tribunal greater resources, permitting it to engage in independent fact finding,<sup>106</sup> structuring more effective procedural rules, improving the quality of lawyering, and supporting the judges' work with a capable secretariat all represent plausible ways to increase quality.

In our model, any action to increase the quality of the tribunal corresponds to an increase in the cost,  $R$ , borne by a losing defendant. If the tribunal also orders some remedy the cost of ignoring the ruling,  $J_d^{NC}$ , will increase with the tribunal's quality.

As shown in Part IV.A, increases in  $R$  and  $J_d^{NC}$  improve the effectiveness of the tribunal. It also makes it more likely that the parties will settle the dispute prior to a ruling because the defendant is more eager to reach a settlement.<sup>107</sup> Furthermore, the complainant will, on average, get more from settlement that increases the complainant's incentive to bring the case in the first place and, therefore, provides an additional increase in the expected cost of violation.<sup>108</sup>

*Hypothesis: Increases in the perceived quality of judges or the tribunal generate a greater incentive for compliance with the underlying substantive rules and lead to fewer violations of international law, making a tribunal more effective.*

*Hypothesis: Increases in perceived quality increase the likelihood of settlement, the cost of settlement to the defendant, and the gains from settlement enjoyed by the complainant.*

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<sup>106</sup> Helfer and Slaughter identify resources and independent fact finding as two stand-alone attributes of effectiveness within their thirteen-factor "checklist." Helfer & Slaughter, *supra* note 6, at 301-04.

<sup>107</sup> That is, it makes it more likely that the inequalities that correspond to settlement,  $S_d - R - J_d^C < 0$  or  $S_d - R - J_d^{NC} < 0$ , are satisfied.

<sup>108</sup> This is because higher quality increases the cost of losing for the defendant, making the defendant more eager to settle and, therefore, willing to pay more to do so.

*Hypothesis: Increases in perceived quality make it more likely that a losing defendant will comply with the ruling of a tribunal.*

C. *Should Tribunals be "Independent"?*

Debates about the effectiveness of international tribunals have focused to a certain extent on tribunal independence. Posner and Yoo, for example, argue that "independence *prevents* international tribunals from being effective"<sup>109</sup> while Helfer and Slaughter argue that independence contributes to effectiveness.<sup>110</sup> This debate has been stymied by the already discussed lack of clarity regarding the definition of effectiveness. Posner and Yoo focus on the question of whether tribunals carry out the will of states at the time of the dispute while Helfer and Slaughter focus on the ability of tribunals to generate compliance with their rulings.

Using the model from Part III and the definitions from Part II, this subsection explores the relationship between independence and effectiveness, uncovers how the implicit assumptions being made in the existing debate generate disagreement, and explains the conditions under which each side's conclusions are correct or incorrect.

One of course needs a definition of independence, and an appropriate one is provided by Professors Keohane, Moravcsik, and Slaughter, who define it as the "extent to which adjudicators for an international authority charged with dispute resolution are able to deliberate and reach legal judgments independently of national governments."<sup>111</sup> There is little serious disagreement about how to increase a tribunal's independence.<sup>112</sup> All commentators agree that rules governing selec-

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<sup>109</sup> Posner & Yoo, *supra* note 45, at 7.

<sup>110</sup> Helfer & Slaughter, *supra* note 6, at 312-14.

<sup>111</sup> Robert O. Keohane et al., *supra* note 56, at 457, 459-60 (2000).

<sup>112</sup> In an attempt to operationalize independence, Posner and Yoo identify five characteristics that they argue correspond to independence: (i) compulsory jurisdiction; (ii) no right to a judge being a national; (iii) permanent body; (iv) judges having fixed terms; and (v) the right of third parties to intervene. Posner & Yoo, *supra* note 45, at 51. One could quibble with this list, but for present purposes these factors offer a useful illustration of what might contribute to the independence of judges. Posner and Yoo construct a measure of independence by assigning a tribunal one point for each of the characteristics that the tribunal has. I leave to the side the important question of whether that measure is a good one for empirical purposes. One could obviously imagine any number of alternatives, including a different list of factors and different weighting of them.

tion and tenure,<sup>113</sup> financial and human resources, and perhaps even the trappings of the institution and the judicial role are relevant.<sup>114</sup>

The traditional view of international law scholars is that more independent tribunals have greater legitimacy and are more effective for this reason.<sup>115</sup> This claim, however, needs elaboration if it is to be viewed as a satisfactory account of international courts. It requires, for example, a definition of legitimacy and an explanation of why legitimacy increases effectiveness.

Because our model of international tribunals relies on their informational impact, differences between more and less independent tribunals must turn on their relative abilities to provide information. The connection between independence and information is clear: greater independence makes individual judges or arbitrators more neutral and their decisions less biased. Put another way, as tribunals become more dependent, it is more likely that a ruling is the product of political forces rather than a judgment about the relevant legal rules and their application to the facts.

At first glance, then, greater independence has the same effect as higher quality (discussed above in section IV.B). To the extent that a tribunal is perceived to be more independent, the costs of losing a case or of ignoring the ruling are increased and so is the effectiveness of the tribunal.

There is, however, at least one important way in which independence affects tribunals differently than does an increase in quality. Increases in quality will not generally affect the cost of compliance with a tribunal's ruling ( $J_D^C$ ) because the action that a losing defendant must take to comply with the ruling will be the same regardless of the quality of the tribunal (given that the defendant has lost).

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<sup>113</sup> *Id.* The more dependent judges are on national governments for either their current or future careers, the more closely judges (or their views) are associated with the government at the time of appointment, the more control governments have over their appointment, and the shorter their tenure, the less independent they are likely to be.

<sup>114</sup> *Id.* Judges and tribunals with more resources are better able to process cases quickly and effectively and are likely to render higher-quality decisions, all else equal. Such resources may also allow a tribunal to conduct independent fact finding, which gives it a greater ability to make decisions without reliance on the parties.

<sup>115</sup> See Benedict Kingsbury, *Neo-Madisonian Global Constitutionalism: Thomas M. Franck's Democratic Cosmopolitan Prospectus for Managing Diversity and World Order in the Twenty-First Century*, 35 N.Y.U. J. INT'L L. & POL. 291, 296 (2003) ("[T]he effectiveness and legitimacy constraints of [the tribunals'] operation . . . require a highly variegated theory as to the proper roles and future aspirations of differently situated tribunals.").

Changes to the independence of the tribunal, on the other hand, affect the cost of complying with a ruling. To the extent that a defendant has influence over the tribunal it will seek to avoid being found to have violated international law but, should it be found to have done so, it will also seek to reduce the cost of complying with the ruling. A complainant will, of course, have opposing incentives.

A rational complainant, however, will not want to make compliance with the ruling so expensive as to cause the defendant to ignore the ruling. That outcome would normally reduce the payoff to the complainant relative to one in which the defendant complies.

With a more dependant tribunal, then, the probability of non-compliance by the defendant is reduced. This is important because the complainant's incentive to file a complaint is reduced, all else equal, if the defendant refuses to comply.

Posner and Yoo make essentially this point when they argue that independence undermines effectiveness because "independent tribunals . . . can render decisions that conflict with the interests of state parties."<sup>116</sup> This claim cannot really mean that the ruling makes both states worse off since the states can always reach some alternative settlement if they wish. The authors must mean that the tribunal may issue a ruling that imposes costs on one state that exceed the benefits to the other and there must be something to prevent the states from negotiating a preferable outcome. This appears to be what Posner and Yoo have in mind:

[Tribunals] cannot issue judgments that run contrary to the interests of the parties to a dispute. If they do so, their rulings will be ignored and states will use them less often. And therein lies the problem. More independent tribunals are less likely to issue decisions that are satisfactory to all state parties to a dispute. So making a tribunal independent may actually undermine its effectiveness.<sup>117</sup>

The problem with this argument, as already discussed, is that simply ignoring a ruling imposes its own costs. It is true that an independent tribunal is more likely to demand actions that the defendant is unwilling to take. In that case the defendant refuses to comply and the parties get the corresponding payoffs. Contrary to what Posner and Yoo claim, however, this does not undermine effectiveness. A dependent tribunal generates compliance by reducing the cost of compliance to the point where it is less than the cost of noncompliance.

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<sup>116</sup> Posner & Yoo, *supra* note 45, at 7.

<sup>117</sup> *Id.* at 28.

This compliance reduces the sanctions imposed on the defendant for its violation of international law, and therefore, reduces the effectiveness of the tribunal. A dependent tribunal, therefore, may get a higher rate of compliance with its rulings, but only by reducing its effectiveness.

There remains only one way in which independence could reduce effectiveness. If an independent tribunal demands so much from the defendant that the defendant refuses compliance, the complainant's payoff is likely to be reduced. If this reduction in the complainant's payoff is large enough, it could reduce the incentive to bring the case in the first place and, therefore, reduce the defendant's expected cost of violating the relevant rule. This outcome, however, seems unlikely. It requires, first, a large difference between the complainant's payoffs when the defendant complies as opposed to when the defendant refuses to comply. More importantly, it assumes that the parties will be unable to negotiate around this situation. Once the tribunal rules, the defendant wants to reduce the costs it bears while the complainant wants to extract the largest possible gains for itself. One option for the parties is to agree on some partial compliance by the defendant. As long as this gives both parties a payoff greater than noncompliance, the case will be resolved. Furthermore, this result can be achieved with minimal transaction costs. The losing defendant can unilaterally determine the actions that it will take. As long as the complainant prefers that outcome to explicit noncompliance by the defendant, the complainant will acquiesce to the arrangement. In effect, the defendant makes a "take it or leave it" offer and can adjust the offer to ensure that the complainant accepts.

Because the parties can engage in this sort of settlement after the ruling, it is unlikely that an independent tribunal will undermine the complainant's incentive to bring the complaint in the first place.

Overall, then, an increase in independence has several effects. It increases the cost of ignoring a tribunal's ruling, it increases the reputational cost to the defendant of losing a case, and it increases the expected cost of complying with a ruling. In our model this corresponds to increases in  $R$ ,  $J_D^{NC}$ , and  $J_D^C$ . All of these changes increase the expected cost borne by a violating defendant and therefore increase the effectiveness of the tribunal.<sup>118</sup>

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<sup>118</sup> It follows that a rational defendant will be prepared to offer more generous settlement terms in order to avoid a ruling, expanding the set of possible settlements,

Notice that if the tribunal is more effective, we expect fewer violations, but where there is a violation, there is a greater chance that litigation will be pursued. And, if litigation is pursued, there is a greater chance of settlement. Without additional information about the relative size of these effects, it is simply not possible to generate any prediction about the impact of increased independence on the number of cases that result in litigation, the number of cases actually filed through a formal dispute settlement system,<sup>119</sup> or the share of filed cases that generate a ruling.

It is possible, however, to make a prediction about the impact of independence on the rate of compliance with tribunal rulings. As a tribunal becomes more dependent, its procedures become more like negotiation and less like adjudication. The parties to a case have more influence if the tribunal is dependent, meaning that they have a greater ability to prevent a ruling that they dislike. The most extreme form of dependence, of course, would be a situation where a ruling will only be issued if both parties support it. We can label such an institution a tribunal, but we more commonly refer to it as a negotiation.<sup>120</sup> If both parties have to consent to a decision, of course, it is likely to lead to a high level of compliance. The obvious point is that the more the interaction of the parties resembles negotiation, the higher the compliance rate one would expect, all else equal.

This discussion of independence explains a great deal of the debate between Posner and Yoo on the one hand and Helfer and Slaughter on the other. Posner and Yoo are concerned about tribunal rulings that are contrary to some measure of the interests of the parties at the time of the dispute, and they point to a low level of compliance with independent tribunals as evidence.<sup>121</sup> Theory predicts what they claim to observe in the data: independence reduces compliance with tribunal rulings.<sup>122</sup> But theory also makes it clear that this has nothing to do with effectiveness.

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leading to an increase in the number of settlements, and increasing the expected gains to the complainant from settlements.

<sup>119</sup> Because they can threaten to file a complaint with a dispute settlement body, states can pursue "litigation" without actually filing a case. The threat to file may itself encourage settlement because, for example, a filing may make a dispute public.

<sup>120</sup> Keohane et al., *supra* note 56, at 477-78, describe a similar continuum from pure control by states (highly dependent) to highly independent tribunals.

<sup>121</sup> See Posner & Yoo, *supra* note 45, at 53 tbl.7 (presenting the usage and compliance rates of various courts).

<sup>122</sup> Helfer and Slaughter dispute the empirical claim that increased independence reduces compliance with the tribunal. See Helfer & Slaughter, *supra* note 1, at 919-22

Helfer and Slaughter argue, among other things, that “agreeing to an independent tribunal signals the depth of a state’s commitment to a particular international regime in a way that makes it more likely that it will secure benefits of that regime.”<sup>123</sup> This claim is generally supported by the analysis developed above. By increasing the cost of ignoring a tribunal, independence generates a stronger incentive for states to comply with the underlying legal rule. In this sense independence makes the substantive commitment more credible.<sup>124</sup>

The above discussion leads to the following hypotheses, all of which rely on the assumption that independence does not increase the cost of compliance with the tribunal enough to undermine the credibility of the complainant’s threat to litigate.

*Hypothesis: More independent tribunals are more effective.*

*Hypothesis: Parties in litigation are more likely to settle their dispute prior to a ruling if the tribunal is more independent. The result of such settlements will be more favorable to the complainant.*

*Hypothesis: A more independent tribunal increases the likelihood that the complainant will resort to litigation (rather than politics) in response to a violation by the defendant.*

#### D. *Should Tribunals Be Authorized To Impose Remedies?*

The above discussion of independence also helps clarify the role of remedies imposed by a tribunal. I define “remedies” here to be some form of compensatory action that must be taken by the losing defendant, beyond simply terminating its own violative conduct, to

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(asserting that Posner and Yoo’s comparisons are overly general and statistically questionable). I take no position on this empirical question since, to me, it seems unrelated to effectiveness.

<sup>123</sup> *Id.* at 955.

<sup>124</sup> Part of this debate is definitional, and Posner and Yoo are not entirely clear about how they define effectiveness. At one point they suggest that the problem with independent tribunals is that “states will be reluctant to use international tribunals unless they have control over the judges.” Posner & Yoo, *supra* note 45, at 7. Posner and Yoo’s discussion, however, centers on rates of compliance with rulings, usage rates, and “the overall success of the treaty regime,” *id.* at 29, none of which speak to the willingness of states to accept the jurisdiction to begin with. The degree of compliance with rulings is, of course, consistent with the one used by Slaughter and Helfer. On this definition it seems likely that Yoo and Posner have the better argument for reasons stated in the text. The difficulty, of course, is that compliance with the rulings of tribunals tells us nothing about the impact of the tribunals on compliance with the relevant substantive rule of international law.

make amends for its breach of international legal obligations. Arbitration of an investor-state dispute involving a bilateral investment treaty, for example, might lead to a ruling requiring the state to pay monetary damages to the investor.<sup>125</sup>

Many tribunals do not go beyond ruling on the question of whether there has been a violation. An ongoing violation normally carries with it an obligation (explicit or implicit) for the losing defendant to cease its violative conduct. Where the violation is not ongoing, the ruling imposes no obligation at all on the losing defendant. At the WTO, for instance, a losing party is expected to bring itself into compliance, but no compensation is provided to the complainant.<sup>126</sup>

In a domestic context, the need for sanctions is well established. An efficient deterrent requires that the expected costs of violating the law be equal to the expected harm from that violation. A policy designed in this way discourages all socially harmful violations while allowing violations where societal gains outweigh societal losses. The same logic applies in the international arena. Ideally one would like a system of sanctions to deter all violations in which global costs exceed global benefits. As far as I know there is a consensus that existing enforcement tools fall far short of this ideal in virtually every area of international law. Even at the WTO—arguably the strongest form of state-to-state dispute resolution in operation—the sanctions in place are only prospective, meaning that a violating state that loses at the dispute-resolution phase and comes into compliance the moment before trade sanctions are to be imposed escapes without any obligation to compensate the complaining state and without any sanctions being imposed against it.<sup>127</sup>

One possible response to the weak system of sanctions is to give tribunals the authority to order the losing defendant to take some additional costly action. How would such a system impact the effectiveness of the tribunal?

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<sup>125</sup> For example, in 2002 an ICSID tribunal ordered Egypt to pay a private claimant a total of just less than four million dollars. *Middle East Cement Shipping & Handling Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶ 178 (Apr. 12, 2002), reprinted in 18 ICSID REV. 602, 645 (2003).

<sup>126</sup> If the losing party refuses to comply, the winning party may be authorized to impose trade sanctions in response, but this is intended to encourage compliance with the ruling. No penalty is imposed for the violation itself.

<sup>127</sup> See Monika Büttler & Heinz Hauser, *The WTO Dispute Settlement System: A First Assessment from an Economic Perspective*, 16 J.L. ECON. & ORG. 503, 527-28 (2000) (arguing that the WTO's system of delayed sanctions underdeters violations).

A remedy issued by an international tribunal increases the defendant's cost of complying with the ruling. This is represented by an increase in  $J_D^c$ . The same action also leads to an increase in the gain to the complainant,  $J_C^c$ , if the defendant complies. Assuming that the losing defendant complies with the ruling, then the expected cost of violating international law is increased, and therefore, the effectiveness of the tribunal is increased. Under these assumptions the complainant gains more from the case, so its incentive to bring the complaint in the first place is increased, and the defendant is more willing to settle so that the amount received by the complainant in settlement increases.

*Hypothesis: If the losing defendant would comply with the ruling of a tribunal, then the imposition of remedies increases the effectiveness of the tribunal, increases the likelihood that a complainant will pursue litigation in response to a violation, and, if there is a settlement, leads to a more favorable outcome for the complainant.*

Cases in which the defendant would refuse to comply with the tribunal with or without the imposition of remedies are not affected by the tribunal's imposition of remedies.

*Hypothesis: If the losing defendant would refuse to comply in the absence of a remedies order, the use of remedies will have no additional impact on it or its incentive to comply.*

Because the imposition of remedies increases the costs faced by a defendant that complies with the ruling, it is also more likely that a losing defendant will refuse to comply.<sup>128</sup>

*Hypothesis: All else equal, a defendant is more likely to refuse to comply with a tribunal's ruling if the ruling requires that it compensate the defendant in some way.*

In those cases where a defendant would comply in the absence of a remedy being ordered but would refuse to do so if a remedy were ordered, the presence of those remedies may change the complainant's position. If the defendant ignores the ruling the complainant receives a different payoff than if the defendant complies with the ruling. The discussion here is similar to the discussion of how a more

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<sup>128</sup> It is conceivable that the obligation to compensate the defendant would increase both the cost of compliance and the cost of noncompliance (the latter is assumed to remain constant in the text). The analysis in the text remains correct as long as this increase in costs is smaller than the increase in the cost of compliance, as seems very likely to be the case.

independent tribunal might increase the cost of compliance with the ruling. In both circumstances, if a defendant chooses not to comply with the ruling the complainant's payoff changes from  $J_c^c$  to  $J_c^{nc}$ . This could, at least in theory, reduce the complainant's incentive to pursue the case in the first place and, therefore, may reduce the effectiveness of the tribunal.

As discussed in section IV.C, however, this result seems unlikely. The defendant can offer partial compliance, and unless the complainant objects, the defendant will be perceived to be in compliance.<sup>129</sup> The complainant will only have an incentive to object if it can earn more by publicizing the defendant's failure to comply fully. Thus, a carefully chosen set of actions by the defendant will ensure that the complainant is satisfied. It follows that the complainant will do better than it would under the noncompliant outcome and will retain at least some incentive to pursue the case when the violation takes place.

Nevertheless, it remains possible that the parties will fail to negotiate an acceptable solution after the tribunal's ruling, in which case the presence of remedies may increase the defendant's likelihood of noncompliance and reduce the complainant's incentive to pursue litigation.

Because remedies only impact the cost of compliance with the tribunal and not the cost associated with simply being found to be in violation ( $R$ ) or the cost of refusing to comply with the tribunal ( $J_d^{nc}$ ), concerns about undermining the complainant's incentive to bring the case in the first place are more problematic with remedies than they are with increased independence. If remedies increase the likelihood of noncompliance and thus undermine the credibility of the complainant's threat to litigate, the inclusion of remedies may do more harm than good. If this is the case in many areas of international law, the absence of remedies in dispute resolution can be explained.

However, there is no reason to think that the cost of remedies will outweigh the benefits in all circumstances. We should expect to see remedies put in place where the remedies themselves are unlikely to cause the defendant to ignore the tribunal's order. This would be the case if the cost of noncompliance greatly outweighs the cost of com-

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<sup>129</sup> In many instances only the complainant will truly know whether the defendant has fully complied. Even if other states know, as long as the complainant is satisfied, the observing states will view the defendant as having (adequately) complied with the tribunal.

pliance (so an increase in the cost of compliance will not tip the losing defendant into noncompliance).

This balance of the cost of noncompliance outweighing the cost of compliance seems to best characterize investment arbitration. Under most bilateral investment treaties, a violating state faces the prospect of third-party dispute resolution and an order to pay monetary damages to a winning complainant. Though a state may be reluctant to pay, the key for a defendant is to preserve its reputation as a country that treats foreign investment well. Should it fail to comply with the ruling, it risks scaring away other potential investors. At least when the investment dispute is not too large, one would expect this cost of noncompliance to greatly exceed the cost of compliance, even if cash damages must be paid.

E. *Should the Votes of Judges Be Public and  
Should Dissent Be Allowed?*

The extent to which the decision-making process of tribunals is made transparent to observers varies from one tribunal to another. The ICJ, for example, reports both the number of votes in favor of and against a ruling and how each individual judge voted. In addition, judges who find themselves in the minority may issue dissenting opinions.<sup>130</sup> At the WTO, in contrast, a ruling is normally reported without any information about whether there was disagreement among the judges or about which judges supported the decision.

There are at least three different choices that a tribunal must make about the transparency of its decision process. First, will the number of judges voting for each outcome be revealed? Second, assuming the vote count is made public, will the individual votes of judges be revealed? Finally, are dissenting opinions permitted?

The impact of these choices can be discussed in terms of the analysis that has already taken place. Consider first the consequence of keeping judges' votes secret, meaning that not even the number of votes for a particular outcome will be revealed. Observers will only learn the decision of the tribunal as a whole and there will be no dissent. This form of secrecy has two main consequences. First, it increases the independence of the judges. If states cannot (or cannot

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<sup>130</sup> See, for example, the dissenting opinions of Vice-President Weeramantry and Judges Bedjaoui, Ranjeva, and Vereshchetin in *Fisheries Jurisdiction (Spain v. Can.)* 1998 I.C.J. 432, at 496, 516, 553, 570 (Dec. 4).

easily) identify how each judge voted, they cannot punish a judge for acting contrary to the state's interests. Judges are better able to make decisions on criteria other than the preferences of the state.

Fully secret voting will also tend to reduce the amount of information provided. Observers will not know if it was a close decision—in which case, for example, a violation may be viewed more leniently by other states. Secrecy is also likely to reduce the quality of the decision because potential dissenters cannot challenge the reasoning behind the ruling. When the majority on a tribunal must craft a ruling that effectively competes with a dissent, it is forced to think harder about its position, which leads to better reasoning and, at times, can even alter the decision.

So, as one moves to increasingly transparent judicial decisions, the independence of judges will be reduced and the quality of the decision will improve. Simply announcing the vote split without revealing specific votes of the judges would have a modest impact on both independence (states would not know exactly which judges behaved which way) and quality (without dissenting opinions, the pressure to improve the quality of reasoning is modest). It would also have a significant impact on the ability of states to determine whether or not the decision was close. Announcing the judges' individual votes would further reduce independence but would also increase quality, as judges would be more accountable for their votes. Finally, allowing dissenting (or, for that matter, concurring) opinions would have the greatest positive impact on the quality of the reasoning.

How one balances these different priorities cannot be determined without a better understanding of their relative tradeoffs. In other words, how much independence is lost when voting patterns are revealed? Does this impact effectiveness more or less than the simultaneous increase in information transmission and quality? These questions should be analyzed when a tribunal is formed.

*Hypothesis: Increased transparency with respect to the voting of judges has an ambiguous impact on effectiveness. It tends to increase effectiveness by increasing the quality of decision making and accuracy of the information provided by the decision, but it also reduces the tribunal's effectiveness by reducing the independence of judges.*

F. *Extending the Model*

## 1. Should There Be a Mandatory Consultation Period?

Some dispute-resolution procedures have a mandatory period of consultation or negotiation before the more formal stages of litigation can begin. The WTO's Dispute Settlement Understanding, for example, imposes a mandatory sixty-day consultation period before the complainant can request that a panel hear the case.<sup>131</sup>

The delay caused by this practice reduces the tribunal's effectiveness because it puts off the time at which the defendant must bear the cost of a violation. Reducing the costs imposed on the defendant (as well as the gains to the complainant) makes politics more appealing to the complainant. Put differently, delay reduces the appeal of litigation and, therefore, its effectiveness.

Presumably, the purpose of these "cooling-off" periods is to increase the likelihood of settlement. In the model of dispute resolution developed thus far, the parties are rational and there are no transaction costs or informational asymmetries that would allow a mandatory consultation period to improve the likelihood of settlement.

To consider mandatory consultations within the model, the zero-transaction-cost and full-rationality assumptions can be relaxed. Adding transaction costs to the model is straightforward. They can be thought of as some fixed cost,  $T$ ,  $T > 0$ , which must be borne by each party in order to achieve a negotiated settlement.<sup>132</sup> This cost makes it less likely that the parties will settle because the gains from settlement (i.e., the difference in total payoffs that the parties receive from settling rather than going to a judgment) now must be enough to cover these transaction costs (i.e., they must be at least  $2 \times T$ ).

If we also add an assumption that mandatory consultations reduce  $T$ , then those consultations make settlement more appealing for both parties.<sup>133</sup> Even with these assumptions, however, a mandatory consul-

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<sup>131</sup> DSU, *supra* note 18, art. 4, ¶ 7. The period can be shortened if both parties agree that consultations have failed. The key element is that the complainant cannot unilaterally avoid this period of negotiation. *Id.*

<sup>132</sup> These costs do not have to be the same for both parties. The complainant could face transaction costs of  $T_c$  and the defendant,  $T_d$ . This would have no effect on the analysis, and so the discussion in the text assumes that the complainant and defendant face the same transaction costs.

<sup>133</sup> In a model of rational states, mandating some form of negotiation cannot enhance the prospects for settlement, so a relaxation of the rationality assumption is required.

tation period reduces the effectiveness of the underlying legal rules and, therefore, of tribunals. This is so because any settlement takes place in the shadow of the potential ruling. Should the case go to a ruling, the delay associated with the mandatory consultation period reduces the expected cost to the defendant and, therefore, the incentive to settle. So even if the settlement takes place early, the defendant is willing to give up less to achieve it. Because an early settlement may generate value that the parties can share, mandatory consultations may leave the complainant better off, but they will not increase the cost to the defendant.<sup>134</sup>

*Hypothesis: Mandatory consultations reduce the effectiveness of the tribunal.*

## 2. Should Jurisdiction Be Mandatory?

Up to this point, this Article has developed a model of international tribunals with mandatory jurisdiction, and the results only apply to that category of tribunals.

Mandatory jurisdiction changes the game that the parties to a dispute are playing in a fundamental way. It gives the complainant the power to decide if a case will be pursued through litigation rather than politics, regardless of what the defendant would prefer. Consider how things are different if both parties must agree to the use of a tribunal. Parties must make such an agreement at the ICJ, for example, in the absence of compulsory jurisdiction.<sup>135</sup> The relevant game tree then looks like this:

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<sup>134</sup> One caveat should be added. If the complainant does better as a result of the mandatory consultation, it is more likely to pursue litigation rather than politics. If litigation imposes higher costs on the defendant than politics, then the presence of mandatory consultations will increase the cost of violating international law for some (but not all) defendants.

<sup>135</sup> See I.C.J. Statute, *supra* note 11, art. 36.2 (granting parties the ability to recognize the power of the ICJ as compulsory).

**Figure 2: Dispute-Resolution Payoffs with Voluntary Jurisdiction**

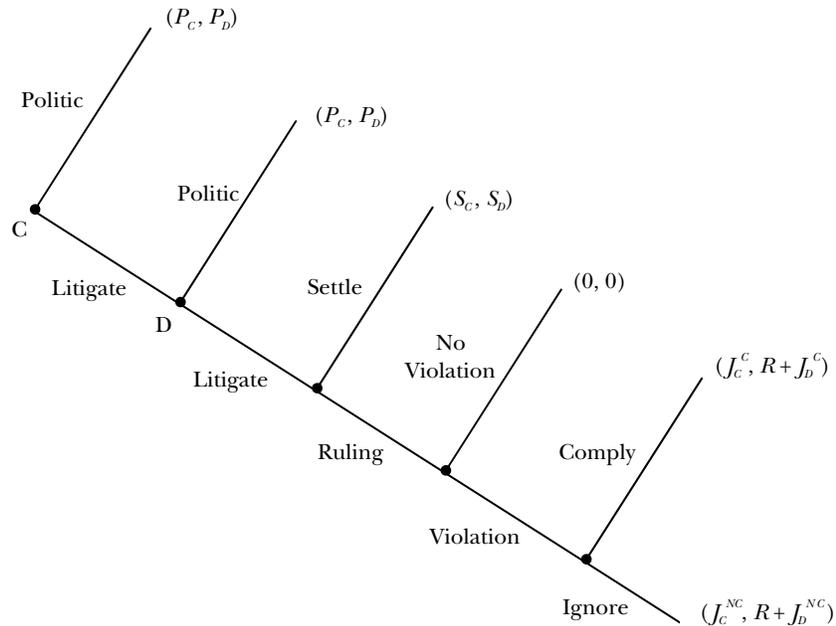


Figure 2 is identical to the game tree presented in Figure 1, except that an additional stage has been added early in the game. In that new stage, the defendant chooses whether to pursue politics or litigation. In this system, litigation will be used only if it offers both the complainant and the defendant a higher payoff than politics would. The defendant's payoffs are, of course, the sanction it must pay if it violates international law. Giving the defendant the power to prevent the use of the tribunal, then, allows that state to choose the smaller of the possible sanctions it will face. State choice of sanctions, in turn, reduces the costs of violating the law and, therefore, the incentive to comply, making the tribunal less effective in generating compliance with the underlying substantive rules.

There is one way that a tribunal without mandatory jurisdiction might nonetheless operate as effectively as one with mandatory jurisdiction. A defendant that is wrongly accused of violating international law may prefer a tribunal over the alternative of politics because the tribunal may be the best way to demonstrate publicly that those accusations are baseless.

If so, observing states may infer that states refusing to submit themselves to a tribunal are guilty of whatever violation the would-be complainant alleges. The tribunal, then, may serve as a signaling mechanism that distinguishes violators from nonviolators. This, in turn, generates costs for those states that refuse to use the tribunal—in effect increasing the cost of using politics,  $P_D$ . That increased cost makes litigation more appealing, and the tribunal may, in fact, serve as an effective device for determining guilt. Alternatively, a pooling equilibrium may emerge in which the parties always submit to the jurisdiction of the tribunal because a failure to do so will lead others to conclude that they are violators.

There is, however, no guarantee that either of these situations will arise. What may emerge instead is a pooling equilibrium in which cases never go to the tribunal because one of the parties always prefers politics. Or, alternatively, the parties may occasionally use the tribunal because the savings in the form of, say, lower transaction costs for settlement are large enough to make it worthwhile for both parties. In either of these situations, the absence of mandatory jurisdiction reduces the effectiveness of the tribunal.

Though it is not possible to rule out the signaling story as a theoretical matter, I suspect that it is a secondary effect and that the main impact of mandatory jurisdiction on the effectiveness of a tribunal is positive. With that in mind, I offer the following hypothesis:

*Hypothesis: Mandatory jurisdiction is likely to increase the effectiveness of a tribunal.*

### 3. Should Tribunals Constrain the Use of Politics?

Up to this point it has been assumed that the presence of an international tribunal does not affect the payoffs from politics,  $(P_C, P_D)$ . This subsection relaxes that assumption. Though dispute-resolution provisions can specify that they represent the only forum in which the parties are permitted to pursue their disagreement, there is no practical way to prevent states from simply choosing to use conventional political means to address the issue. The WTO rules regarding the settlement of disputes, for example, specify that members shall not “make a determination to the effect that a violation has occurred . . . except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding.”<sup>136</sup> Though this provi-

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<sup>136</sup> DSU, *supra* note 18, art. 23.2(a).

sion seeks to discourage states from pursuing alternative paths to resolve their disputes, there is no doubt that states often do exactly this.

That said, the WTO system does limit the ability of a potential complainant to take unilateral action. In the *United States—Section 301-310 Panel Report*,<sup>137</sup> a WTO panel considered an American statute authorizing retaliatory action against foreign trade practices that the United States considers unfair, including WTO violations. Europe claimed that this statute amounted to a violation of the above-quoted provision that identifies the WTO's Dispute Settlement Understanding as an exclusive mechanism. The United States prevailed in the case, but only because there was no instance of unilateral retaliation at hand. The WTO panel left no doubt that use of the statute to preempt a WTO decision would be a violation.<sup>138</sup> In this example, the dispute-resolution rules, at least arguably, cabined the ability of member states to resort to unilateralism.

If a tribunal is able to limit the political options of the complainant as the WTO did in the above example, resorting to politics is less appealing to states. This causes the complainant to opt for litigation more often, which, according to the model herein, reduces the complainant's payoff from politics,  $P_c$ .

How does this impact the role of international law? Reducing the payoff from politics gives the complainant fewer options and thus reduces its ability to react to perceived violations. This makes it less likely that the complainant will pursue the matter in any forum (i.e., it may conclude that doing nothing is the best response), or it may pursue litigation, even if it would have otherwise preferred politics.

Because it is the payoff to the defendant that generates an incentive to comply with international law, it is difficult to draw firm conclusions about how changes in the complainant's payoffs affect these incentives. It seems reasonable to assume, however, that giving the complainant more ways to address the issue increases the likelihood that violating international law imposes costs on the defendant. This suggests that reducing the appeal of politics for the complainant also

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<sup>137</sup> Panel Report, *United States—Section 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

<sup>138</sup> *See id.* at 7.61-7.63 (“[W]hen a Member adopts any legislation it has to be mindful that it does not violate its WTO obligations.”).

reduces the costs borne by the defendant (on average) and, therefore, the effectiveness of international law and the tribunal.<sup>139</sup>

*Hypothesis: Constraining the use of politics is likely to reduce the effectiveness of international law and the tribunal.*

Two caveats should be added. First, discouraging the use of politics may increase the fairness in the system. It is generally the case that more powerful countries are better able to use politics. It may be desirable on fairness grounds to ensure, as much as possible, that more powerful countries play by the same rules as their weaker partners. Second, if constraining politics encourages states to use dispute settlement, it may lead to a more accurate determination of law and facts. This will increase the importance of the underlying rule because a more accurate determination of a state's culpability increases the difference between the costs of violation and compliance, thereby increasing the incentive to comply.

## V. TWO TRIBUNALS

As the Introduction promised, the analysis in this Article has been done at an abstract level. This allows for a more general discussion and, therefore, yields insights that apply to a wide range of tribunals. The disadvantage of this approach is that it does not provide a contextualized discussion of any particular tribunal. This section offers a glimpse of what a more contextual analysis, informed by the lessons of this Article, might look like. For brevity's sake, the present section is limited to a short discussion of two tribunals.

Before considering the particulars of any individual tribunal, it is important to understand that this Article does not claim to be able to fully predict or account for the effectiveness of any specific tribunal. Many contextual factors explain why tribunals work well or poorly. To illustrate, the fact that the Appellate Body of the WTO addresses trade issues is of central importance to its effectiveness. Trade relations, unlike areas such as human rights, often (though not always) rely on reciprocity to encourage compliance with international law. It is thus sometimes easier to generate compliance with legal obligations in the

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<sup>139</sup> When a dispute is pursued through politics rather than litigation, the tribunal has no explicit role to play. It is nevertheless appropriate to say that the tribunal is more effective in the absence of an attempt to constrain the use of politics because it is the tribunal's rules that alter the incentives of the parties and encourage or discourage them from using politics.

trade area than in the human rights area, and no tinkering with tribunal design can change the basic strategic structure of these subject areas.

This Article attempts, instead, to shed light on how different design structures might impact effectiveness, holding other factors constant. Those other factors, such as the subject matter at issue, are often very important. The analysis herein is thus better suited to address the question of how one might want to design a particular tribunal rather than the question of which tribunals are most effective.

Noting that these matters of design impact effectiveness at the margin makes it more difficult to carry out empirical analysis of the claims. If we had large numbers of tribunals and a good proxy for effectiveness, it might be possible to examine their relative effectiveness through formal empirical tests. We do not have large enough numbers for this approach, however, and so alternative strategies must be used. Specifically, the most promising method for evaluating the claims made in this Article is qualitative rather than quantitative. Qualitative analysis enables investigation of the extent to which individual design features improve the effectiveness of a particular tribunal.

#### A. *The (Almost) Full Monty: The WTO Appellate Body*

Among international tribunals, the WTO's Appellate Body (AB) is arguably the most like domestic courts. It has compulsory jurisdiction over all WTO disputes; its judges are highly independent of state parties; it issues legally binding decisions; it is capable of authorizing sanctions in response to violations; and judicial decisions are subject to appeal before a standing Appellate Body. The WTO also attempts to prevent the use of extra-legal actions to resolve disputes, as discussed in subsection IV.F.3. To be sure, there are many ways in which the AB differs from domestic systems—most importantly the lack of true enforcement power, as authorized sanctions are imposed only by the complainant (rather than by some supranational authority or by all members collectively).

The AB is perceived to be quite effective, meaning that it promotes compliance with the underlying legal rules.<sup>140</sup> It is, of course, difficult to determine how much compliance with the substantive

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<sup>140</sup> See, e.g., Andrea Kupfer Schneider, *Not Quite a World Without Trials: Why International Dispute Resolution Is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119, 120 (describing the WTO system as a "stringent and effective dispute-resolution system").

rules can be attributed to the dispute-resolution system itself, rather than other features of the agreement. As mentioned above, the trading system has the advantage that reciprocity plays an important role in supporting the relevant obligations.

Turning to the design features discussed in the Article, we can consider how the AB matches up with our criteria for effectiveness. The signature features of the dispute-resolution process are its mandatory nature—the defendant cannot prevent the case from moving forward—and the potential for economic sanctions. Mandatory dispute resolution clearly increases effectiveness under the model developed in this Article, as it would under any reasonable model.

It is rare for international tribunals to impose sanctions on parties, which makes the WTO's mechanism unusual in this respect. It is also quite different from a standard contractual remedy under domestic law because it does not provide for compensatory sanctions of any kind. A state that loses before a tribunal is required to bring itself into compliance, but it faces no economic sanctions if it agrees to do so. If it refuses to come into compliance, however, the complainant can request the authorization to suspend concessions, which means imposing trade sanctions, limited to the amount of the ongoing injury.<sup>141</sup> The Article notes that the imposition of remedies has an ambiguous impact on effectiveness. The WTO has structured its remedies, however, in a way that ensures improved effectiveness. The defendant does not face sanctions when it loses before the tribunal; it faces them only if it refuses to comply with the ruling. This increases the cost of ignoring the tribunal without increasing the cost of complying with it, and has an unambiguously positive impact on effectiveness.

The failure to impose retrospective sanctions reduces the deterrence effect of the legal rules, because a state can violate its obligations, lose a case, and then eliminate the violation without suffering any explicit penalty. This system falls well short of a system of optimal damages designed to discourage inefficient breach.<sup>142</sup> This aspect of the dispute settlement system—a relatively low level of sanctions—

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<sup>141</sup> DSU, *supra* note 18, art. 22.4.

<sup>142</sup> See, e.g., Büttler & Hauser, *supra* note 127, at 538 (discussing how the lack of effective sanctions and the complainant's agenda-setting powers weaken the clout of the system); Carolyn B. Gleason & Pamela D. Walther, *The WTO Dispute Settlement Implementation Procedures: A System in Need of Reform*, 31 LAW & POLY INT'L BUS. 709, 712-13, 729 (2000) (exploring how interpretive issues concerning compliance deadlines, compliance review, and requests to suspend concessions have diminished the effectiveness of the WTO).

clearly undermines effectiveness because it reduces the cost of a violation. One possible reason to nevertheless structure the sanctions in this way is to increase the difference between the cost of complying with the tribunal and the cost of ignoring it. By increasing the cost of ignoring the tribunal, we increase the expected cost of the underlying violation and the likelihood that the defendant will comply with the ruling. Those increases, in turn, avoid the key problem of remedies—namely, that the presence of remedies will make more defendants ignore the ruling.<sup>143</sup> The particular way in which the WTO authorizes remedies unambiguously increases effectiveness relative to a system without remedies.

The AB also scores very high on two other factors discussed in this Article: independence and quality. The AB is a permanent body made up of seven judges, each of whom is appointed to a four-year term that can be renewed once. The judge's country is unable to remove her, affect her compensation, or otherwise punish her for unfavorable rulings. Allowing judges to sit on cases involving their home states does not appear to have caused any serious problems, claims of bias, or lack of independence.<sup>144</sup>

The decisions of the AB are adopted unless the Dispute Settlement Body, to which all member states belong (including the winning state in the case), rejects adoption by consensus. Thus, the decision is virtually certain to be adopted and, once adopted, there is no mechanism short of a new AB decision or a decision by member states to overturn it.<sup>145</sup>

It is more difficult to clearly measure the quality of AB judges, but it is perhaps instructive that discussions about the quality of judges at the WTO typically focus on the panelists that rule on disputes in the first instance rather than on the AB judges. In general, it is fair to say that the quality of AB judges is perceived to be very high, further increasing effectiveness.

The WTO's dispute-resolution process reduces effectiveness in at least two ways. First, the votes of judges on panels and on the AB generally are not disclosed and dissenting opinions are not used. Al-

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<sup>143</sup> One could achieve something closer to efficient remedies by further increasing the permissible sanctions when the defendant refuses to comply with the tribunal.

<sup>144</sup> See, e.g., Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R (Apr. 18, 2006) (featuring Merit Janow, a U.S. citizen, as one of the AB members hearing the case).

<sup>145</sup> Other features supporting independence include the ability of third parties to participate in the process and a secretariat able to provide assistance to the judges.

though neither the Dispute Settlement Understanding nor the Appellate Body Working Procedures prohibit dissenting opinions, they do discourage them. The Working Procedures, for example, state that “[t]he Appellate Body and its divisions shall make every effort to take their decisions by consensus.”<sup>146</sup> To date, there has been only one dissenting opinion and one concurring opinion produced in AB decisions.<sup>147</sup> Whatever the reasons for the absence of dissents, it seems likely that the failure to provide dissents undermines the tribunal’s effectiveness.<sup>148</sup> The theory developed in this Article points out that permitting dissents may reduce the independence of judges and the tribunal, but the independence of AB judges is sufficiently well-established to make this a minor concern. The beneficial effects—in the form of clearer and more carefully thought-out decisions—seem quite likely to outweigh the independence concerns.

The WTO provides a mandatory consultation period of sixty days. During this time, the complainant cannot request the establishment of a panel unless the defendant consents or fails to enter into consultations.<sup>149</sup> This policy negatively impacts effectiveness simply because it produces delay. If states are fully rational, there is nothing to be gained from this mandatory consultation period because the parties will negotiate for as long as they deem worthwhile. If one assumes some irrationality among the parties, however, this process may increase the likelihood of settlement. As long as the parties’ discount rates are not too high, a short period of mandatory consultations may, therefore, be beneficial.

Finally, the WTO seeks to constrain the use of politics by stating that members shall “not make a determination to the effect that a violation has occurred” except through the dispute-resolution system.<sup>150</sup> As already discussed, this limits one option available to a complainant and, in this sense, reduces the effectiveness of the tribunal. As also mentioned, however, reducing the role of politics may serve both

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<sup>146</sup> World Trade Organization, *Working Procedures for Appellate Review*, WT/AB/WP/5 at Rule 3.2 (2005).

<sup>147</sup> The dissent is in Appellate Body Report, *United States—Subsidies on Upland Cotton*, ¶ 631, WT/DS267/AB/R (Mar. 3, 2005). The concurrence is in Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 149, WT/DS135/AB/R (Mar. 12, 2001).

<sup>148</sup> See Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT’L ECON. L. 895, 903 (2006) (offering explanations for the lack of dissenting and concurring opinions).

<sup>149</sup> DSU, *supra* note 18, art. 3.

<sup>150</sup> *Id.* art. 23.2.

fairness and accuracy goals and so may be justified despite any impact on effectiveness.

Overall, then, the WTO appears to be structured in a way that is consistent with the design criteria that maximize effectiveness. The one area where there appears to be room to increase effectiveness is that of dissenting opinions. By encouraging more dissents, the AB would increase the quality and clarity of its decisions and would signal the views of the judges more clearly, all of which, in turn, would increase effectiveness.

B. *The Power Grab: The United Nations Human Rights Committee*

Although the HRC satisfies our definition of a tribunal (a disinterested institution to which the parties have delegated some authority, and that produces a statement about the facts of a case and opines on how those facts relate to relevant legal rules), it is different from the WTO's AB or the ICJ because it has sought to exert authority that is quite clearly beyond that contemplated in its founding document, the ICCPR. In this sense, the HRC might be described as a maverick tribunal. Whether attempts by the HRC to increase its influence are good or bad depends on one's perspective, though it is not necessary for the purposes of this Article to take a position on that normative question. What interests us here is that the tribunal has exceeded a reasonable interpretation of its founding charge in attempting to exert influence on states.

Interestingly, efforts by the HRC to increase its influence have been met with some success. Whatever criticisms one might level at the HRC, it is taken seriously by states and commentators and appears to have influence even in areas where it lacks formal authority to take action.<sup>151</sup>

If the committee lacks coercive enforcement and if states have not consented to its current set of actions, why do they listen at all? The answer is that the HRC has managed to position itself as a tribunal and retain independence from the parties to a dispute. As a result, it is able to provide useful information to the international community. This information, in turn, serves the same purpose as a judgment from any other tribunal.

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<sup>151</sup> See, e.g., David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 19 (2006) ("[L]ower [United States federal] courts have held that the decisions of the Human Rights Committee constitute persuasive authority for interpreting provisions of the ICCPR.").

The HRC, in other words, is an example of a tribunal with non-binding rulings that can nevertheless influence states. This is precisely what the theory developed earlier suggests—the rulings of a nonbinding tribunal can have the same effect as those of a binding tribunal, at least with respect to statements regarding the legality of a particular action. It is only when the tribunal demands some action (including the termination of illegal conduct) that a binding tribunal is more effective.<sup>152</sup>

The HRC was established under Article 28 of the ICCPR. HRC members are nominated by their home state and then elected by the parties to the ICCPR.<sup>153</sup> They serve four-year terms after which they can be renominated by their state and reelected by the parties to the Convention. HRC members are made more independent by the fact that they do not participate in the consideration of reports submitted by their home states or in the adoption of concluding observations relating to these reports.<sup>154</sup>

The formal role of the HRC, as laid out in the ICCPR, is quite modest. Under Article 40 the HRC is charged with studying reports from parties to the ICCPR on the measures those states have adopted that give effect to the rights recognized under the ICCPR.<sup>155</sup> It is to “transmit its reports, and such general comments as it may consider appropriate, to the States Parties.”<sup>156</sup> In addition, Article 41 and the First Optional Protocol give parties the option of recognizing the competence of the HRC to (i) “receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations”<sup>157</sup> and (ii) receive and consider communications from individuals subject to the party’s jurisdiction “who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.”<sup>158</sup>

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<sup>152</sup> See *supra* Part II.C (demonstrating that the impact of a tribunal’s decision on the legality of an action is unrelated to the bindingness of its ruling).

<sup>153</sup> ICCPR, *supra* note 41, art. 30.4.

<sup>154</sup> OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, CIVIL AND POLITICAL RIGHTS: THE HUMAN RIGHTS COMM. 8-9, *available at* <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

<sup>155</sup> ICCPR, *supra* note 41, art. 40.1.

<sup>156</sup> *Id.* art. 40.4.

<sup>157</sup> *Id.* art. 41.

<sup>158</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 1, U.N. Doc. A/6316 (Dec. 19, 1966) [hereinafter *Optional Protocol*].

With respect to interstate complaints, should the parties fail to resolve their disagreement, the HRC is authorized to submit a report, but it “shall confine its report to a brief statement of the facts.”<sup>159</sup> A mechanism to establish a more conventional form of tribunal to rule on the dispute exists (an “ad hoc Conciliation Commission”), but it requires the consent of the parties at the time of its establishment.

For disputes between individual complainants and states that have accepted the First Optional Protocol, the HRC has a more conventional judicial role. After receiving a communication from an individual complainant and a response from the relevant state, the HRC is to “forward its views to the State Party concerned and to the individual.”<sup>160</sup>

Simply reading the ICCPR does not provide an accurate sense of the influence that the HRC actually has on the interpretation of human rights obligations and of the claims the HRC makes about its own authority. For illustration, consider two of the more aggressive assertions of HRC authority, both of which are included in the HRC’s General Comment 24.<sup>161</sup>

One of these claims to authority states that the “[t]he [HRC’s] role under the Covenant, whether under Article 40 or under the Optional Protocols, necessarily entails interpreting the provisions of the Covenant and the development of a jurisprudence.”<sup>162</sup> This must be true if the HRC is acting as a tribunal and evaluating actions in light of relevant laws. It is not obvious, however, that Article 40 of the ICCPR gives the HRC that power. Under Article 40, the HRC is instructed to “transmit its reports, and such general comments as it may consider appropriate.”<sup>163</sup> Nothing in this language suggests that the HRC is entitled to offer authoritative interpretations of the treaty or to establish a jurisprudence.

The second claim made by the HRC is more substantive and relates to the treatment of reservations. To begin with, the HRC states that “[i]t necessarily falls to the Committee to determine whether a specific reservation is compatible with the object and purpose of the

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<sup>159</sup> ICCPR, *supra* note 41, art. 41.1(h)(ii). The HRC must also attach the written submissions and record of the oral submissions made by the disputing parties. *Id.*

<sup>160</sup> Optional Protocol, *supra* note 158, art. 5.4.

<sup>161</sup> U.N. Human Rights Comm., *Report of the Human Rights Comm.*, Vol. 1, Annex V, U.N. Doc. A/50/40 (Feb. 4, 1996), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/bbd592d8d48a76fec12563f000586adc/\\$FILE/N9602481.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/bbd592d8d48a76fec12563f000586adc/$FILE/N9602481.pdf).

<sup>162</sup> *Id.* at General Comment No. 24, art. 11.

<sup>163</sup> ICCPR, *supra* note 41, art. 40.4.

Covenant.”<sup>164</sup> Once again, nothing in the treaty indicates that the HRC has been given this task. A more plausible reading is that reservations to the ICCPR should be governed by the relevant rules in the Vienna Convention on the Law of Treaties (VCLT), as is the case for reservations to any other treaty.

Having laid claim to the authority to address reservations, the HRC then asserts that the VCLT is “inappropriate to address the problem of reservations to human rights treaties.”<sup>165</sup> Instead, the HRC prescribes alternative substantive rules to govern reservations. Unacceptable reservations, for example, are “severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation.”<sup>166</sup> This idea is contrary to the normal Vienna Convention rule under which neither such a reservation nor the treaty provisions to which it extends apply between the states.<sup>167</sup>

These claims by the HRC did not go unnoticed and were met with protests from some quarters. The United States, for example, responded that the ICCPR “does not impose on States Parties an obligation to give effect to the Committee’s interpretations or confer on the Committee the power to render definitive or binding interpretations of the Covenant.”<sup>168</sup> Nevertheless, the suggestions were not simply dismissed out of hand. Instead they have become a part of the ongoing human-rights debate.<sup>169</sup>

To the degree that the HRC is extending its authority when it declares, through its General Comments or statements of views under Article 41, that states have certain obligations, it is increasing the burden on states that wish to comply with these nonbinding statements. In our model, this corresponds to an increase in the cost of compliance,  $J_D^C$ , and can lead to an increase in the incentive to comply with

<sup>164</sup> Human Rights Comm., *supra* note 161, at General Comment No. 24,(52), ¶ 18.

<sup>165</sup> *Id.* at ¶ 17.

<sup>166</sup> *Id.* at ¶ 18.

<sup>167</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1195 U.N.T.S. 331.

<sup>168</sup> Observations of States Parties under Article 40, paragraph 5, of the Covenant on General Comment No. 24(52); *accord* Human Rights Comm., *supra* note 161, at Annex VI. France and Britain similarly responded to and disagreed with the HRC’s claims in General Comment 24. *Id.*

<sup>169</sup> See Elena A. Baylis, *General Comment 24: Confronting the Problem of Reservations to Human Rights Treaties*, 17 BERKELEY J. INT’L L. 277 (1999) (assessing the importance of General Comment 24 as it relates both to the ICCPR and previously established standards for reservations); Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, J. INT’L LEGAL STUD. Winter 1999, at 57, 67-69 (explaining the impact of ICCPR obligations on individual and state rights).

the relevant human-rights obligations. To work, however, the increased cost of compliance must not be so large as to cause states to simply ignore the tribunal.

The HRC has two tools at its disposal to try to avoid this result. First, it can attempt to increase the cost of refusing to comply with views of the HRC ( $J_b^{NG}$  in our model). It is clear that the HRC has pursued this strategy aggressively. In cases under the First Optional Protocol, for example, the HRC not only forwards its views regarding a complaint to the relevant state party, but also typically requests that the state provide it with “information about the measures taken to give effect to the Committee’s Views.”<sup>170</sup> The HRC also requires that state reports under Article 40 of the ICCPR indicate what steps state parties have taken to comply with the HRC’s views in such cases.<sup>171</sup>

In addition to self-reporting by states, the HRC has established a “Special Rapporteur for follow up” who is charged with “ascertaining the measures taken by States parties to give effect to the Committee’s views.”<sup>172</sup> The Rapporteur must report to the HRC regularly, and the HRC is to include information about these follow-up activities in its annual report.<sup>173</sup>

By requesting or demanding follow-up information (whether self-reported or gathered by the Rapporteur), the HRC is attempting to make a state’s refusal to comply with the HRC’s demands more transparent. Though these demands are not binding on the state, ignoring them can be costly, and greater transparency increases that cost.

A second way in which the HRC can discourage states from refusing to comply with its rulings is to moderate its demands. If the increase in the cost of compliance is kept modest, it is less likely that states will ignore the tribunal. In other words, the HRC has an incentive to not go too far. The HRC appears to be at least somewhat sensitive to this concern, as evidenced by the fact that even as it has sought to expand its authority, it has, for example, avoided openly criticizing

<sup>170</sup> See, e.g., Views of the HRC under art. 5, para. 4 of the Optional Protocol to the ICCPR, (Gridin, Ctr. for Assistance to the Int’l Prot. v. Russ. Fed’n) Communication No. 770/1970, U.N. Doc. CCPR/C/69/D/770/1997 (28 Jul.).

<sup>171</sup> See Thomas Buergenthal, *The U.N. Human Rights Committee*, 5 U.N.Y.B. 341, 353 (2001) (finding violations of the ICCPR and reminding the state party of its continuing obligations under the covenant).

<sup>172</sup> ICCPR, Human Rights Comm., *Rules of Procedure of the Human Rights Committee*, R. 95, U.N. Doc. CCPR/C/3/Rev.6 (Apr. 24, 2001).

<sup>173</sup> *Id.*

states for failures to comply with the ICCPR.<sup>174</sup> Sensitivity to the limits of its ability to generate compliance moderates the demands of the HRC, and this, in turn, reduces the risk that states will simply ignore its decisions.

The above discussion explains why the HRC has been able to expand its role and still provide an incentive for states to take it seriously. One might wonder why states tolerate this. After all, the states chose to set up the HRC with the limited authority specified in the ICCPR rather than with the authority that the HRC is currently exercising.

One possibility is that the attitude of states has changed, and they now support a more active HRC. Even if that is not the case, however, states may be unable to agree on a specific response to the activist HRC. Any change to the HRC would require the consent of all states, and so even if only a few states support the HRC's activities, it is enough to frustrate reform efforts. Other states could, and, in fact, many states have, simply refused to submit declarations under Article 41 or the First Optional Protocol.<sup>175</sup> To avoid the obligation to submit reports to the HRC would be more difficult and may require withdrawal from the ICCPR altogether. Needless to say, this would be a more extreme action that states would not take lightly.

#### CONCLUSION

There are precious few tools available to the international community to encourage compliance with international obligations. The international tribunal is one such tool, and one that seems to be gaining in popularity. If tribunals are to be used wisely, however, the way in which they affect state decisions must be understood more completely. This Article is a step toward that deeper understanding. Many open questions remain, and this is certainly not the last word on the subject. What the piece does offer, however, is a systematic and

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<sup>174</sup> See Helfer & Slaughter, *supra* note 6, at 340 (noting that the Committee tries not to engage in direct criticism when dealing with individual states' failure to comply with treaty obligations).

<sup>175</sup> Of the 160 parties to the ICCPR, 109 are also party to the First Optional Protocol, though many of those 109 have accepted the protocol subject to significant reservations—including two states (Guyana and Trinidad & Tobago) that initially signed the protocol and subsequently withdrew only to rejoin subject to reservations. See Office of the United Nations High Commissioner for Human Rights, *Optional Protocol to the ICCPR New York 16 December 1966*, <http://www2.ohchr.org/english/bodies/ratification/5.htm> (last visited Oct. 1, 2008) (displaying the dates on which participants became parties and signatories).

coherent theoretical approach to the subject. By focusing not only on how a dispute is handled once in the hands of the tribunal, but also on how states react both before and after a tribunal gets involved, this Article helps us to appreciate the relationship between the tribunal and the rest of the legal system.

The starting point of the analysis is an assumption about exactly what tribunals are intended to achieve. Specifically, they are intended to increase compliance with the relevant underlying substantive rules. With this objective in mind, this Article examines how various choices with respect to the design of a tribunal alter its effectiveness.

Beyond setting forth lessons for designing a more effective tribunal, I hope that this Article encourages those writing and working on tribunals to keep the theoretical structure developed herein in mind as they work. It is important not to lose sight of the peculiar features of international tribunals and to avoid the easy mistake of analogizing too quickly to domestic tribunals. International tribunals are simply tools to produce a particular kind of information. If we recognize this fact, appreciate the content of the information likely to be produced, and evaluate how states will respond to it, there is reason to hope that we can make international tribunals a more valuable part of the international legal system.