

# Why States Create International Tribunals: A Response to Professors Posner and Yoo

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# Why States Create International Tribunals: A Response to Professors Posner and Yoo

Laurence R. Helfer & Anne-Marie Slaughter

*A recent article in this journal by Professors Eric Posner and John Yoo, *Judicial Independence in International Tribunals*, argues that the only effective international tribunals are “dependent” tribunals, by which the authors mean ad hoc tribunals staffed by judges closely controlled by governments through the power of reappointment or threats of retaliation. By contrast, independent tribunals, meaning tribunals that resemble domestic courts, pose a danger to international cooperation. According to Posner and Yoo, independent judicial decision makers are suspect because they are more likely to allow moral ideals, ideological imperatives, or the interests of third parties to influence their judgments.*

*In this Response, we identify many shortcomings in the theory, methodology, and empirics in *Judicial Independence in International Tribunals*. We do so to challenge the authors’ core conjecture: that formally dependent international tribunals are correlated with effective judicial outcomes. We then offer our own counter-theory, a theory of “constrained independence” in which states establish independent international tribunals to enhance the credibility of their commitments in specific multilateral settings and then use more fine-grained structural, political, and discursive mechanisms to limit the potential for judicial overreaching.*

## INTRODUCTION

Professors Eric Posner and John Yoo’s recent article in this journal, *Judicial Independence in International Tribunals*, argues that the only effective international tribunals are “dependent” tribunals, by which they mean ad hoc tribunals staffed by judges closely controlled by governments through the power of reappointment or threats of retaliation.<sup>1</sup> According to Posner and Yoo, such tribunals “render judgments that reflect the interests of the states at the time that they submit the dispute to the tribunal.”<sup>2</sup> By

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1. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 1, 8, 27 (2005).

2. *Id.* at 6.

contrast, independent tribunals—meaning tribunals staffed by judges appointed on terms similar to those serving in domestic courts—“pose a danger to international cooperation” because they are “more likely to allow moral ideals, ideological imperatives, or the interests of other states to influence their judgments.”<sup>3</sup> Stated more pointedly, Posner and Yoo assert that independence actually “prevents international tribunals from being effective.”<sup>4</sup>

Can dependent judges really contribute more to the global rule of law or to international cooperation than their independent brethren? We doubt it, and Posner and Yoo have not shown it. In this Response, we advance three broad sets of objections to their analysis and then offer our own counter-theory of “constrained independence.” Our theory asserts that states (1) establish formally independent international tribunals to enhance the credibility of their commitments, and (2) then rely on a range of structural, political, and discursive mechanisms to ensure that independent judges are nevertheless operating within a set of legal and political constraints.

Our objections to Posner and Yoo’s claims are easily summarized. First, their entire argument is aimed at knocking down a straw man: the claim that judicial independence is the key determinant of the success of an international tribunal and the rule of law more generally.<sup>5</sup> For all their efforts to refute this claim, however, the authors never succeed in attributing it to any source other than “conventional wisdom” or “international legal academics.”<sup>6</sup> In fact, as we demonstrate below, existing analyses of tribunal effectiveness list independence as but one of a host of factors, factors that Posner and Yoo ignore and that often constrain the independence that the authors are so eager to challenge.

Second, after constructing a simplistic dichotomy between “independence” and “dependence” as the key variable that explains the relative effectiveness of international tribunals, Posner and Yoo proceed to an empirical analysis that suffers from serious selection bias and omitted variable bias. They begin by describing only a portion of the true empirical landscape. Although they acknowledge that the number of tribunals has increased dramatically in recent years, they fail to note that the vast majority of these tribunals are highly independent. The authors also ignore the steady increase in states’ willingness to recognize the jurisdiction of these independent tribunals and to litigate cases before them. Further, the tribunals that they select for analysis are heavily weighted in favor of interstate

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3. *Id.* at 7, 27.

4. *Id.* at 7.

5. *Id.* at 7.

6. *Id.* at 6-7.

tribunals and against supranational tribunals and quasi-judicial review bodies.

These omissions skew the analysis that follows. Supranational tribunals are those that allow direct access by private parties, a factor that earlier scholarship has shown is as or more important than independence in contributing to effectiveness. Supranational tribunals are also more likely than interstate tribunals to be embedded in the domestic politics of the states subject to their jurisdiction, a second explanatory variable in the effectiveness equation that Posner and Yoo fail to address. Even quasi-judicial review bodies that issue only recommendations rather than legally binding judgments can be effective where they possess supranational jurisdiction. In sum, Posner and Yoo ignore the extensive and growing body of literature that explores how effectiveness is linked to a tribunal's ability to provide information to, and hence empower, domestic political actors.<sup>7</sup> In so doing, they vastly overestimate the importance of dependence on a tribunal's effectiveness.

Third, even working with an incomplete data set and omitting key variables, Posner and Yoo's empirical results are inconsistent with their theory. For example, in their table that documents the "relationship between independence and effectiveness," the three tribunals that scored the highest on *both* effectiveness and independence were the European Court of Justice (ECJ), the European Court of Human Rights (ECHR), and the World Trade Organization (WTO) Appellate Body.<sup>8</sup> Although Posner and Yoo provide extensive explanations as to why the WTO results are not what they appear to be, and why the ECJ and ECHR should be distinguished from other international tribunals, their arguments, as we will show, are unpersuasive.<sup>9</sup>

More strikingly, a thorough empirical survey reveals that states are doing precisely what Posner and Yoo argue they have no rational interest in doing: setting up more independent tribunals and quasi-judicial review bodies and using them more frequently. But why? Why would states ever agree to bind themselves to tribunals that they cannot control and that can hand down decisions that appear contrary to their national interests?

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7. For recent scholarship by international legal scholars and political scientists that documents the different ways in which international organizations and tribunals gather, review, and disseminate information, see *LEGALIZATION AND WORLD POLITICS* (Judith L. Goldstein et al. eds., 2001); KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* (2001); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 *INT'L ORG.* 761, 762 (2001).

8. Posner & Yoo, *supra* note 1, at 54.

9. See *infra* Part II.B.1 (refuting the authors' efforts to distinguish these three tribunals).

Posner and Yoo's answer is simple: they wouldn't. Hence, dependent tribunals are more effective and should be more popular. As we demonstrate below, however, the facts do not fit this theory.<sup>10</sup>

Moreover, even within the rational choice framework that Posner and Yoo adopt, their conception of the costs and benefits states face when designing tribunals is thin and abstract. The authors do not take account of how these tribunals actually function nor how they interface with domestic political actors. As a result, Posner and Yoo overstate the costs and understate the benefits.

The *benefits* that states derive from independent tribunals far exceed the provision of information to the disputing parties.<sup>11</sup> Independent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts. They do so by raising the probability that violations of those commitments will be detected and accurately labeled as noncompliance. Such violations create short-term material and reputational costs for the state in default. But detection of these violations also encourages future compliance, maximizing the long-term value of the agreement to all parties to the multilateral regime, including the defecting state.<sup>12</sup>

Conversely, the *costs* of independent tribunals are far less than they may at first appear. Just as in the domestic setting, judicial independence does not mean that judges face no constraints on their behavior. Judges in the United States, for example, are appointed for life at a fixed salary. But they are influenced by the views of their brethren and of the bar, by the desire to preserve their political legitimacy as nonmajoritarian institutions, by strong institutionalized professional norms, and by their hope of personal career advancement or achievement of a particular judicial legacy. As we demonstrate below, "independent" international judges face an even greater host of structural, political, and discursive constraints, many of which can be manipulated by states themselves. The result is an international legal system in which independent tribunals are unlikely to overstep

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10. See *infra* Part II.A.

11. Posner and Yoo's principal positive claim about the role of international tribunals merely rehashes arguments about the information functions of these institutions developed by some of the same scholars they purport to refute. Specifically, they claim that international tribunals "can benefit states that seek to cooperate with each other by providing relatively neutral information about the facts and law relevant to a particular dispute." Posner & Yoo, *supra* note 1, at 14. This argument strikes us as a straightforward application of the information-based theory of international institutions that Robert Keohane and others advanced two decades ago. See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

12. See *infra* Part III (discussing the credibility-enhancing benefits that states derive from delegating authority to an independent tribunal in three multilateral settings: deep international agreements, treaties regulating public goods and commons problems, and treaties that create rights or benefits for private parties).

their bounds and are far more likely to advance states' long-term interests.<sup>13</sup>

This more nuanced assessment of international adjudication reveals that states face a choice not between dependent and independent tribunals, as Posner and Yoo would have it, but between complete dependence and constrained independence. States can establish a tribunal that is tightly tethered to their immediate interests. Or they can create a tribunal that is free to decide a case according to the rules agreed to in advance, and thereby strengthen their commitment to the enforcement of those rules against all states. Just how much freedom judges enjoy is a function both of the more fine-grained choices that states make regarding tribunal design and of peer pressure and professional norms emanating from an increasingly global community of courts, tribunals, and quasi-judicial review bodies. These various elements provide the constraints in the theory of constrained independence that we develop in the final Part of this Response.<sup>14</sup>

We proceed as follows. Part I briefly reviews the claims about independence presented in our earlier writings on supranational adjudication and identifies some of its recent extensions by other scholars. Part II focuses on empirics and methodology. It more accurately describes the empirical landscape of international adjudication, identifies Posner and Yoo's errors in defining and measuring independent and dependent variables, and explains their selection and omitted variable biases. Part III challenges the conjecture at the heart of *Judicial Independence in International Tribunals*—that rational states prefer to submit disputes to dependent tribunals. Part IV sets forth our theory of constrained independence, in which states create tribunals that are formally independent and then use a range of more fine-grained mechanisms to limit the potential for overreaching by independent judicial decision makers. We also explain how the participation of tribunals in a global community of law generates discursive constraints that judges internalize and that further limit the potential for judicial excesses.

## I

### INDEPENDENT TRIBUNALS, SUPRANATIONAL JURISDICTION, AND DOMESTIC POLITICS: A PRIMER

Nearly eight years ago, in *Toward a Theory of Effective Supranational Adjudication*, we wrote that supranational adjudication in Europe was a

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13. See *infra* Part IV (describing the theory of constrained independence and applying it with practical examples).

14. *Id.*

remarkable and surprising success.<sup>15</sup> To a world growing ever more interdependent, the prospect that any group of nations could create genuinely effective supranational tribunals held enormous promise for promoting interstate cooperation. With national borders increasingly permeable to people, goods, and information, governments faced a growing and diverse array of regulatory problems that required multilateral solutions. Effectuating those solutions, however, required states to comply with their international commitments.

This question of compliance has plagued generations of international lawyers and political theorists who understand the constraints of an international legal system that lacks the coercive enforcement authority of domestic law. In this relatively anarchic environment, the creation of adjudicatory and dispute settlement mechanisms often bears little relationship to their efficacy. Yet the nations of Europe have somehow managed to establish not one but two supranational courts—the ECJ and the ECHR—with active dockets, extensive and well-reasoned case law, and, most importantly, judgments with which governments have habitually complied. If the factors that contributed to the success of the ECJ and ECHR could be isolated and replicated in other parts of the globe, they could significantly enhance the compliance opportunities for international law in general and for international adjudication in particular.

As a first step toward uncovering the secrets of this success, we distilled from four decades of commentary and analysis by judges, lawyers, and political scientists a checklist of thirteen factors that contributed to effective supranational adjudication in Europe.<sup>16</sup> One factor on our checklist was the independence of the court or tribunal. We viewed independence formally, by reviewing judicial selection and tenure rules, and functionally, by considering the willingness of judges to decide cases based on generally applicable legal principles rather than political expediency. Based on these criteria, we concluded that the judges of the ECJ and the ECHR are relatively independent. As a matter of formal institutional structure, they are jurists of high moral character who serve in their individual capacities for a renewable term of years, during which they are protected from removal

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15. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 276 (1997).

16. See *Id.* at 298-337. These included four factors within the control of the member states that created the tribunal (composition of the tribunal, its caseload and functional capacity, whether it possesses independent fact-finding capacity, and the formal authority of the instrument that the tribunal interprets); six factors within the control of the judges themselves (awareness of audience, neutrality and demonstrated autonomy from political interests, incrementalism, quality of legal reasoning, judicial cross-fertilization and dialogue, and form of opinions); and three factors beyond the control of either states or judges (nature of violations, autonomous domestic institutions committed to the rule of law and responsive to citizen interests, and the relative cultural and political homogeneity of states subject to a supranational tribunal).



except for cause.<sup>17</sup> As a matter of practical judicial decision making, the judges of the ECJ and ECHR do not pander to the powerful states that appear before them, but regularly decide high-profile and contentious cases in accordance with the rule of law, frequently employing prudential doctrines to control their dockets and advance their jurisprudence incrementally.<sup>18</sup>

*Toward a Theory of Effective Supranational Adjudication* began with a study of Europe. But we applied our analysis to other international tribunals<sup>19</sup> and consciously avoided urging lawmakers around the world to imitate Europe. Quite to the contrary, we expressly acknowledged that certain attributes of the European experience—most notably the liberal democratic regime-types of European governments and the strong tradition of domestic courts committed to the rule of law—were the product of larger historical, political, and cultural forces that could not be immediately replicated (if at all) in other states or regions.<sup>20</sup>

Our analysis also sought to explain how the two European tribunals were able to enhance their effectiveness over time while faced with competing interests of the very national governments that retained plenary power to limit their authority. We emphasized the supranational jurisdiction of the two tribunals as a key ingredient of their success. Such jurisdiction allows individuals and other private actors to petition the tribunals directly. Tribunals with these wider access rules can penetrate the surface of the state and thereby influence, and be influenced by, domestic politics.

The successful evolution of supranational tribunals was not, we took pains to stress, limited to tribunals that operated exclusively in liberal democracies. Rather, it depended upon two factors. First, the judges' participation in an emerging "global community of law," which we defined as "a community of interests and ideals shielded by legal language and practice" in which participants "understand themselves to be linked through their participation in, comprehension of, and responsibility for legal discourse."<sup>21</sup> Second, evolutionary success also depended on the judges' skill

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17. See, e.g., CONSOLIDATED VERSIONS OF THE TREATY ON EUROPEAN UNION AND OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, DEC. 24, 2002, art. 223, O.J. (C 325) 123 (2002) [hereinafter TREATY OF ROME]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 39(3), 40(1), 213 U.N.T.S. 221, 244 [hereinafter EUROPEAN CONVENTION]; see also Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 LAW & PRAC. INT'L CTS. & TRIBUNALS 27, 34 (2003) ("No tribunal provides for lifetime tenure, but all contain protections against removal except for cause.").

18. Helfer & Slaughter, *supra* note 15, at 313 & n.161.

19. See *id.* at 337-66 (applying checklist to the United Nations Human Rights Committee, a quasi-judicial tribunal with a global jurisdictional reach).

20. As one of us has emphasized, domestic regime-type, in general, and liberal democracy, in particular, are important factors for explaining compliance with international commitments. See Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 ASIL PROC. 240, 241 (2000).

21. Helfer & Slaughter, *supra* note 15, at 370.

in identifying domestic constituencies who could press national governments to comply with the tribunals' rulings.<sup>22</sup>

The symbiotic relationship between supranational tribunals and domestic politics that underpinned our analysis in *Toward a Theory of Effective Supranational Adjudication* also informed a later article by Keohane, Moravcsik, and Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*.<sup>23</sup> In this article, the authors used three variables to measure the effectiveness of international tribunals: independence, access, and embeddedness.<sup>24</sup>

Of particular relevance here is the care with which *Legalized Dispute Resolution* defined and measured independence and specified its relationship to domestic politics. The article constructed an independence continuum with "pure control by states" at one end, where disputes are resolved "by the agents of the interested parties themselves."<sup>25</sup> At the other end of this continuum are judges who are free from "at least three categories of institutional constraint: selection and tenure, legal discretion, and control over material and human resources."<sup>26</sup> Selection and tenure are the most important determinants of tribunal independence because they help to protect judges from governmental retaliation for unfavorable judgments.<sup>27</sup> However, the level of legal discretion that judges may exercise when interpreting a treaty, and the degree of control that governments exert over a tribunal's material and human resources, also play a role in determining overall tribunal independence.<sup>28</sup>

It is unnecessary to repeat further the details of Keohane et al.'s argument. But it is worth noting that independence is only one facet of their three-part typology. The authors thus attributed the comparative effectiveness of international tribunals not only to variations in their degrees of independence, but also to differences in the domestic political context in which they are embedded and the ability of private parties to access them directly.<sup>29</sup>

In recent years, much has been added to the literature linking international judicial institutions and domestic politics. Scholars and policy

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22. *Id.* at 308-12.

23. Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457 (2000).

24. The Keohane article defined these three variables as follows. Independence is "the extent to which formal legal arrangements ensure that adjudication can be rendered impartially with respect to concrete state interests." Access is the "ease with which parties other than states can influence the tribunal's agenda." Embeddedness is "the extent to which dispute resolution decisions can be implemented without governments having to take actions to do so." *Id.* at 458.

25. *Id.* at 460.

26. *Id.*

27. *Id.*

28. *See id.* at 461-62.

29. *Id.* at 461 tbl. 1.

analysts have studied existing and newly created tribunals using detailed empirical information on international and supranational adjudication.<sup>30</sup> A few commentators have used some or all of our thirteen-point checklist as a basis to evaluate other supranational tribunals and quasi-judicial review bodies.<sup>31</sup> Others have explored linkages between subnational and supranational actors to explain the differential effectiveness of international institutions generally.<sup>32</sup> The approach taken by Posner and Yoo, in treating states as unitary actors, ignores this burgeoning literature and assumes away any relationship between international tribunals and domestic politics. Their analysis thus overlooks a crucial aspect of the compliance equation, as we explain in greater detail below. First, however, we turn to their empirical analysis.

## II

### METHODOLOGICAL AND EMPIRICAL ERRORS IN *JUDICIAL INDEPENDENCE IN INTERNATIONAL TRIBUNALS*

To their credit, Posner and Yoo test their claims against a wealth of empirical data regarding the organizational structures and actual operations of international courts and tribunals. But the data the authors use as evidence to support their theory are flawed. To begin with, they fail to accurately describe the empirical landscape, omitting dozens of independent tribunals and quasi-judicial review bodies from their analysis and diminishing the universe of potential observations relevant to testing their theory.

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30. The Project on International Courts and Tribunals (PICT), at <http://www.pict-pecti.org/> (last visited Jan. 26, 2005)—which provides a wealth of information on the structures, functions, and case law of international courts, tribunals, and quasi-judicial review bodies—is the most significant contribution to this empirical scholarship.

31. See, e.g., Robert B. Adieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004) (applying factors from our checklist to investor-state dispute settlement panels under Chapter 11 of NAFTA); John Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1 (2001) (applying our checklist to the citizens complaint procedure of NAFTA's environmental side agreement); John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109 (1998) (applying our checklist to the International Tribunal for the Law of the Sea); Ernst Ulrich Petersmann, *Dispute Settlement in International Economic Law—Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 J. INT'L ECON. L. 189 (1999) (applying our checklist to the Appellate Body and dispute settlement panels of the WTO).

32. A representative but by no means comprehensive list of this literature includes SUSAN K. SELL, *PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS* 100-09 (2003); GREGORY C. SHAFFER, *DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION* 1-18 (2003); Karen Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT'L ORG. 489, 508 (2000); Judith Goldstein, *International Institutions and Domestic Politics: GATT, WTO, and the Liberalization of International Trade*, in *THE WTO AS AN INTERNATIONAL ORGANIZATION* 133, 149-51 (Anne O. Krueger ed., 1998); Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT'L ORG. 603 (2000); Laurence R. Helfer, *Adjudicating Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 398 (1998); Kal Raustiala, *Information in International Agreements* 19-26 (Aug. 2004) (working paper on file with authors).

Second, and more significantly, they commit selection bias by analyzing a subset of tribunals in a nonrandom manner. Finally, they engage in omitted variable bias by failing to control for judicial design features and political and discursive constraints that affect the correlation between their explanatory variable (tribunal (in)dependence) and their dependent variable (tribunal effectiveness).<sup>33</sup> These methodological errors undermine their analysis and, ultimately, their conclusions.

### A. *The True Empirical Landscape*

Within the past decade, the world has witnessed an explosion of international adjudication.<sup>34</sup> This explosion can be documented in at least three distinct ways. First, states are creating new international courts and tribunals which exhibit many formal attributes of independence. Second, states are recognizing the jurisdiction of both new and existing independent tribunals in increasing numbers. Third, several highly independent tribunals are actively used, a fact demonstrated by their swelling dockets and the large number of decisions they issue.<sup>35</sup> These three trends reveal a strikingly different empirical landscape than the one portrayed in *Judicial Independence in International Tribunals*.

These trends undermine the authors' hypothesis. If independent tribunals were ineffective in the ways that Posner and Yoo assert, we would expect to observe a decline in their number, in their caseloads, and in states' willingness to submit themselves to the tribunals' jurisdiction. Yet, as we demonstrate below, the revealed preferences of states in all three areas is strikingly to the contrary. This evidence presents an insoluble problem for the theory of dependence that Posner and Yoo offer. Either states are acting highly irrationally—an explanation inconsistent with the rational choice framework the authors employ—or independent tribunals are serving states' interests in ways that their model fails to capture.<sup>36</sup>

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33. For a discussion of each of these types of methodological errors, see GARY KING ET AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 24, 128-29, 168-75 (1994).

34. See, e.g., Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 MELB. J. INT'L L. 453, 454 (2002) ("The establishment of new fora for third party dispute settlement is undoubtedly one of the more striking international legal developments in recent years.").

35. Some evidence suggests that there is in fact a contrary trend in adjudication before dependent tribunals. See Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DE COURS 101, 119 (1998) (noting that there were 350 ad hoc international arbitrations between 1795 and 1922, with 74 of those between 1891 and 1900, and 165 between 1900 and 1930, but only about 50 arbitrations between 1930 and 1990).

36. As Cesare Romano has pointedly posed the question, "Why create an expensive standing court or tribunal to settle future disputes when it is possible to submit the issue to an *ad hoc* arbitral body?" Cesare P.R. Romano, *International Justice and Developing Countries: A Quantitative Analysis*, 1 L. & PRAC. INT'L CTS. & TRIBUNALS 367, 374 (2002).

### I. *The Proliferation of Independent Courts and Tribunals*

Posner and Yoo analyze eleven adjudicatory mechanisms as the basis for their analysis.<sup>37</sup> Yet their study fails to address no fewer than fifteen additional international courts and tribunals.<sup>38</sup> Each of these tribunals may be characterized as independent using the five-point scale that Posner and Yoo construct.<sup>39</sup> And thirteen of the fifteen possess three attributes—compulsory jurisdiction, permanence, and tenured judges—that the authors feature prominently in their article and that we agree are the most salient indicia of formal independence.<sup>40</sup> The following table evaluates these courts using Posner and Yoo’s five-point scale.

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37. See Posner & Yoo, *supra* note 1, at 52.

38. All fifteen are regional tribunals, exercising jurisdiction over a contiguous or geopolitically linked group of states. It should hardly be surprising that the majority of international tribunals created in the last three decades have been regional in scope. Proximity may itself impose tighter binds than geographical remoteness. But it also functions as a rough proxy for “cultural and political homogeneity,” a glue that binds states together to achieve shared objectives. Helfer & Slaughter, *supra* note 15, at 335-36.

39. See Posner & Yoo, *supra* note 1, at 51, 52 tbl. 6 (constructing a scale with one point for each of five characteristics that distinguish an independent tribunal from a dependent tribunal: (1) compulsory jurisdiction; (2) no right to a judge being a national; (3) permanent body; (4) judges having fixed terms; and (5) right of third parties to intervene).

40. See Posner & Yoo, *supra* note 1, at 51; Keohane et al., *supra* note 23, at 460 n.9. The remaining two tribunals, the ICTY and ICTR, exercise compulsory jurisdiction and their judges serve for a term of years, but they have limited temporal mandates tailored to the time- and place-specific atrocities that fall within their purview. The tribunals’ mandates are, however, far longer than the case-specific competence granted to international arbitrators.

**TABLE 1**

Court or Tribunal (Date Established)	Subject Matter Jurisdiction	Compulsory Jurisdiction?	No Right to Nationals?	Permanent Body of Judges?	Term of Judges? (years)	Third Party Intervention?	Overall Inde- pendence Score
CJAU (2003)*	Trade	Yes	Yes	Yes	Yes (6)	Yes	5
CCJ (2002)*	General	Yes	Yes	Yes	Yes, until age 72	Yes	5
ACHPR (1998)*	Human Rights	Yes	Yes	Yes	Yes (6)	Yes	5
ICTR (1994)	Int'l Crimes	Yes	Yes	No	Yes (4)	No	3
COMESA (1993)	General	Yes	Yes	Yes	Yes (5)	Yes	5
OHADA (1993)	Corporate	Yes	Yes	Yes	Yes (7)	Yes	5
ECCIS (1993)	Trade & Economic	Yes	No**	Yes	Yes (10)	No	3
ICTY (1993)	Int'l Crimes	Yes	Yes	No	Yes (4)	No	3
EFTAC (1992)	General	Yes	No	Yes	Yes (6)	Yes	4

CACJ (1991)	General	Yes	Yes	Yes	Yes (10)	No	4
AMU (1991)	General	Yes	No Info	Yes	Yes (6)	No Info	3
CFI (1988)	General	Yes	Yes	Yes	Yes (6)	Yes	5
TJAC (1979)	General	Yes	No	Yes	Yes (6)	No	3
OAPEC (1978)	Trade	Yes	Yes	Yes	Yes (3)	Yes	5
BCJ (1965)	General	Yes	No	Yes	Yes, if still national court judge	Yes	4

\* These courts are not yet in operation.

\*\* *But see Gennady M. Danilenko, The Economic Court of the Commonwealth of Independent States*, 31 N.Y.U. J. Int'l L. & Pol. 893, 896 (1999) (stating that although "[t]he parties have no means to control the composition of the chambers" of the ECCIS, they do appoint two judges to the court's plenum, which hears appeals of chambers' decisions).

† All dates are taken from the PICT Research Matrix except where otherwise noted. PICT Research Matrix, at <http://www.pict-pecti.org/matrix/Matrix-main.html> (last visited Jan. 26, 2005).

CIAU – Court of Justice of the African Union

CCJ – Caribbean Court of Justice

ACHPR – African Court of Human and Peoples Rights

ICTR – International Criminal Tribunal for Rwanda

COMESA – Court of Justice for the Common Market of Eastern and Southern Africa

OHADA – Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa

ECCIS – Economic Court of the Commonwealth of Independent States

ICTY – International Criminal Tribunal for the Former Yugoslavia

EFTAC – European Free Trade Area Court

CACJ – Central American Court of Justice

AMU – Court of Justice for the Arab Maghreb Union

CFI – European Court of First Instance

TJAC – Court of Justice of the Andean Community

OAPEC – Judicial Tribunal for the Organization of Arab Petroleum Exporting Countries

BCJ – Benelux Court of Justice

Whether these newly created independent tribunals will also be effective tribunals is not clear. The proliferation of courts that share these formal characteristics strongly suggests, however, a growing global consensus that adjudicatory bodies outside the nation state should be independent.

## 2. *Increasing Recognition of Tribunals' Jurisdiction by States*

Posner and Yoo also fail to notice the marked increase in state recognition of the jurisdiction of both new and existing independent courts and tribunals. Such recognition takes two principal forms. First, states are increasingly ratifying treaties that require dispute resolution in international courts. Rising ratification rates are especially pronounced in the case of the WTO Agreement,<sup>41</sup> the ICC statute,<sup>42</sup> and regional tribunals.<sup>43</sup> Second, states are recognizing the jurisdiction of independent courts and tribunals even where the decision to do so is optional. This latter trend is especially pronounced for human rights tribunals,<sup>44</sup> and to a lesser degree, for tribunals whose competence covers trade and economic law<sup>45</sup> — areas in which

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41. The WTO exemplifies the first trend. The WTO began its life on January 1, 1995 with seventy-six members, all of which were automatically subject to the jurisdiction of the WTO's dispute settlement system, including its highly independent appellate body. Press Release 3, Members of the WTO General Council, WTO News (Jan. 31, 1995), at [http://www.wto.org/english/news\\_e/pres95\\_e/3\\_11.htm](http://www.wto.org/english/news_e/pres95_e/3_11.htm). The number of WTO members quickly surpassed 100, and, as of July 2004, membership had risen to 147, with twenty-six additional states seeking accession. See, e.g., Press Release 28, Members of the WTO General Council, WTO News (Oct. 25, 1995), at [http://www.wto.org/english/news\\_e/pres95\\_e/pr028\\_e.htm](http://www.wto.org/english/news_e/pres95_e/pr028_e.htm).

42. See Leila Nadya Sadat, *The International Criminal Court Treaty Enters Into Force*, ASIL INSIGHTS, at <http://www.asil.org/insights/insigh86.htm> (Apr. 2002). As of July 2004, ninety-four states were parties to the Rome Statute, and an additional forty-five had signed the treaty. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/part1/chapterXVIII/treaty10.asp>.

43. The ECJ and ECFI have seen their jurisdictional reach expand as more states have joined the Treaty of Rome and the numerous amendments it has spawned. From a six-state trading block, the European Community (now the EU) has now expanded to twenty-five members. Further enlargements are likely in the next few years. See David Fairlamb, *They're Changing the Face of Europe; Judges on the European Court of Justice Have Become Major Players in the Drive for Economic Integration*, BUSINESS WEEK, Nov. 3, 2003, at 26 (stating that the expansion of EU membership to 25 nations "may make the ECJ more relevant than ever"); Peter Ford, *Two Worlds Meet in the Expanded EU*, CHRISTIAN SCIENCE MONITOR (Apr. 30, 2004) (discussing future expansions of the EU), available at <http://www.csmonitor.com/2004/0430/p01s04-woeu.html>.

44. The ECHR has perhaps the strongest record in this regard. At the time of the European Convention's founding in 1953, recognition of the court's jurisdiction was optional. That changed with the adoption of Protocol 11, which made jurisdiction compulsory and granted individuals direct access to the court in all cases. The Protocol, opened for signature in May 1994, could enter into force only if ratified by all forty European Convention member states. Universal ratification was quickly achieved, however, and the new court began operating in November 1998. Since then, five more states have ratified Protocol 11. See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, at <http://www.conventions.coe.int/Treaty/QueVoulezVous.asp?NT=155&CM=8&DF=2/7/05&CL=ENG> (last visited Jan. 26, 2005).

45. Since 1992, for example, eight of the twelve members of the Commonwealth of Independent States have ratified the agreement establishing ICCIS. Rilka Dragneva, Legal Institutions for Economic



international jurists possess broad authority to review laws and practices lying at the core of national sovereignty.

Admittedly, not all tribunals can boast of such expansions. The compulsory jurisdiction of the ICJ and ITLOS, for example, has not been widely accepted.<sup>46</sup> As elaborated in Part I above, domestic politics—and in particular the political pressures generated by tribunals to which private parties have direct or indirect access—may explain some of these discrepancies. Regardless, a clear trend is evident toward greater state recognition of independent tribunals, an empirical observation that undermines a central premise of *Judicial Independence in International Tribunals*.

### 3. *Rising Caseloads of International Courts and Tribunals*

Independent international tribunals have also witnessed a corresponding increase in their caseloads. The rise in judicial activity has been most striking for the ECHR and ECJ,<sup>47</sup> but is true as well for tribunals as diverse

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Integration in the Commonwealth of Independent States, Paper Presented at the 11th Annual Comparative Law and Economics Forum, Zurich (June 25-26, 2004) (unpublished manuscript at 50, on file with authors). And in just over a year since African governments agreed in 2003 to create a new Court of Justice of the African Union, thirty-one states have signed and three have ratified a Protocol that specifies the court's powers and responsibilities. List of Countries which have Signed, Ratified/Acceded to the Protocol on the Amendments to the Constitutive Act of the African Union, at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/List/Protocol%20on%20the%20Amendments%20to%20the%20Constitutive%20Act.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/Protocol%20on%20the%20Amendments%20to%20the%20Constitutive%20Act.pdf) (last visited Jan. 26, 2005).

46. Nearly 150 states have ratified the United Nations Convention on the Law of the Sea (UNLCOS), which entered into force more than a decade ago. Yet only twenty-four of those nations have recognized the jurisdiction of ITLOS to adjudicate maritime-related disputes. See Oceans and Law of the Sea: Settlement of Disputes Mechanism, at [http://www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm) (last updated Dec. 9, 2004); Oceans and Law of the Sea: United Nations Convention on the Law of the Sea—Ratifications, at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_agreements.htm](http://www.un.org/Depts/los/convention_agreements/convention_agreements.htm) (last updated Jan. 5, 2005). The ICJ's record is even weaker. Only one-third of United Nations members have filed declarations recognizing the court's compulsory jurisdiction, and many of these are riddled with reservations limiting the types of cases the court can hear. See John R. Cook, *The International Court of Justice and Human Rights*, 1 Nw. U. J. INT'L HUM. RTS. 2, ¶ 19, at 6. (2004). Sixty-four out of 191 UN members have filed declarations under Article 36(2) of the court's statute. See International Court of Justice, *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm> (last visited Jan. 26, 2005).

47. Of the 2090 infringement cases referred by the European Commission to the ECJ between its founding in 1952 and 2002, 1366 or approximately 65% were referred to the court between 1990 and 2002. A similar trend is apparent for the 4834 cases referred to the ECJ by national courts, of which 2945 or approximately 61% were referred during that thirteen-year period. Caseload figures for the ECHR are even more striking. Of the 259,891 cases registered and 3442 judgments issued by the ECHR since 1959, 210,769 cases (approximately 81%) and 3304 judgments (approximately 96%) were registered and issued, respectively between 1990 and 2002. Karen J. Alter, *Delegation to International Courts: Why, How, and Problems in Doing So* (May 3-4, 2002) (paper prepared for the Conference on Delegation to International Organizations, Park City, UT, May 3-4, 2002, on file with authors). As Alter explains, the remarkable increase in the ECHR's activity may be due in part to two key events: (1) the ratification of the European Convention by East European nations since 1990, and (2) the restructuring of the ECHR as a full-time court to which individuals have direct access in 1998. *Id.* at 4 n.3.

as the IACHR<sup>48</sup> and the ICJ.<sup>49</sup> Aggregating the output of all independent tribunals reveals a similar trend. According to a recent study by Karen Alter based on cases decided through 2002, “more than 80% of the total international judicial activity (14,946 out of 18,277 cases heard by international tribunals) occurred in the last 13 years alone.”<sup>50</sup> These figures are particularly striking given that the dockets of international tribunals often take years or even decades to reach anything close to full capacity.

One reason, perhaps, that Posner and Yoo fail to discuss this trend is that they calculate the average annual caseload per tribunal per state based on the mean number of states parties to each tribunal over its lifetime. Although we agree that it is appropriate to control for a tribunal’s membership when comparing caseloads, the unit of analysis that Posner and Yoo employ effectively masks the recent increase in supranational and international adjudication. It also obscures the influence of other explanatory variables—such as shifts in the geopolitical landscape or changes in institutional form—that are essential to understanding why a tribunal’s docket expanded at a particular point in its history.<sup>51</sup>

A more basic criticism of their approach is the authors’ relative lack of caution in drawing inferences about effectiveness based upon a comparison of tribunal usage rates.<sup>52</sup> At best, these statistics provide one metric for

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48. Since its inception in 1979, the IACHR has issued 97 judgments, 17 advisory opinions, and 148 orders for provisional measures. It issued 88 judgments, 7 advisory opinions, and all of its provisional measures orders between 1990 and 2002, inclusive. Alter, *supra* note 47, at 5.

49. Since its inception in 1947, the ICJ docketed 131 proceedings. Of those, 49, or nearly 40%, were filed since 1990. Douglass Cassel, *Is There a New World Court?*, 1 NW. U.J. INT’L HUM. RTS., ¶ 18. (2004), <http://www.law.northwestern.edu/journals/JIHR/v1/1/>.

50. Alter, *supra* note 47, at 4.

51. For example, observers often attribute the rapid rise in the ECHR’s caseload after 1990 to the ratification of the European Convention by Eastern European nations. See The European Court of Human Rights: Historical Background, Organisation and Procedure para. 6, at <http://www.echr.coe.int/Eng/EDocs/HistoricalBackground.htm> (Sept. 2003) [hereinafter ECHR ORGANISATION AND PROCEDURE] (stating that the backlog of unresolved cases and the delays in reviewing them were “aggravated by the accession of new Contracting States from 1990”). A recent empirical analysis of compliance with the ECHR’s rulings casts doubt upon this conventional wisdom. Although the number of judgments issued by the court rose rapidly between 1990 and 1992, it fell just as rapidly in 1993 and 1994. The number of member states, by contrast, increased steadily throughout this period. Christopher J.W. Zorn & Steven R. Van Winkle, Explaining Compliance with the European Court of Human Rights 30, fig.1 (April 27, 2000) (unpublished manuscript, on file with authors) (plotting number of member states and ECHR judgments between 1960 and 1994). Moreover, the ECHR’s crowded docket continued to expand even after membership rates had stabilized. Between 1998 and 2001, a period during which the Convention’s members increased only slightly (from forty to forty-two states), see Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Status as of July 11, 2004 at [ChercheSig.asp?NT=005&CM=8&DF=11/07/04&CL=ENG](http://www.coe.int/T/E/H/Convention.asp?NT=005&CM=8&DF=11/07/04&CL=ENG) (last visited Jan. 26, 2005), the number of cases filed with the court increased 130%, a rate the Council of Europe described as “unprecedented.” ECHR ORGANISATION AND PROCEDURE, *supra* note 53, at para. 7.

52. In *Toward a Theory of Effective Supranational Adjudication*, we considered usage rates as only one among many factors to assess the efficacy of supranational tribunals such as the ECJ and

evaluating the effectiveness of international adjudication, revealing that the use and output of independent tribunals has increased markedly over the past fifteen years. But when analyzed in isolation, usage rates can obscure more than they illuminate. Such obfuscation is especially likely where definitional problems and measurement errors skew the data being analyzed.

### B. *Definition Problems and Measurement Errors*

In addition to misrepresenting the empirical landscape of international adjudication, Posner and Yoo also fail to provide useful or reliable measures of the dependent and independent variables. They identify their dependent variable—that is, the thing to be explained—as “effective” tribunals, an admittedly difficult attribute to define and measure. They then measure effectiveness, in part, by borrowing other scholars’ measures of compliance, which is a quite distinct concept. We have adopted this approach ourselves. However, subsequent scholarship has revealed that the conflation of these two measurement units creates difficulties that should at least be acknowledged, as should the extreme variability in measuring compliance itself.

There is a separate problem with the authors’ independent variable: the dependence or independence of a particular tribunal. Posner and Yoo articulate five formal attributes to measure relative dependence or independence.<sup>53</sup> Based on these criteria, the ECJ and the ECHR score four out of a possible five points for maximal independence; the WTO Appellate Body scores a perfect five. All three tribunals also score as highly effective. Posner and Yoo nonetheless exclude these courts from their sample, arguing that each tribunal is *sui generis* or distinctive in ways that cannot be replicated elsewhere. We explain below why their attempt to distinguish these three independent and effective tribunals is unpersuasive.

#### 1. *Conflating Effectiveness and Compliance*

The effectiveness of international tribunals is an elusive concept.<sup>54</sup> We have previously defined effectiveness “in terms of [a tribunal’s] ability to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to

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ECHR, as compared to international courts such as the ICJ, which only entertain interstate disputes. See Helfer & Slaughter, *supra* note 15, at 285-86, 301-02.

53. Posner & Yoo, *supra* note 1, at 51.

54. Helfer & Slaughter, *supra* note 15, at 282 (“The effectiveness of a particular court or of courts in general quickly becomes intertwined with larger jurisprudential questions such as the nature of law and the sources of compliance. Defining effectiveness also inevitably requires asking the question ‘effective for what purpose?’—an inquiry that will in turn depend on a prior conception of the functions of specific courts within specific legal systems.”).

use their power on its behalf.”<sup>55</sup> Our adoption of this definition was more relative than absolute, for we sought only to make the case that the ECJ and the ECHR were more effective than other international tribunals and to develop hypotheses as to why this might be the case.

*Judicial Independence in International Tribunals*, by contrast, offers an absolute measure of effectiveness based on an amalgam of compliance, usage rates, and the success of the underlying treaty regime.<sup>56</sup> Yet this begs the larger question of what effectiveness actually *means* in this context. Given that the authors define the function of international tribunals as providing states with neutral information about the facts and the law in a particular dispute, is an effective tribunal one that performs this function well? Or does effectiveness mean maximizing the larger goals of a particular treaty regime? Or, if courts are agents of states, as Posner and Yoo would have them, is a court most effective when it ascertains and then follows state interests in a given dispute?

Measuring compliance is similarly problematic. Whether or not a specific state has complied with a given judgment in a particular case often requires, in the first instance, a legal interpretation of the decision. This problem may not arise in cases awarding monetary damages; but consider boundary dispute cases, where a boundary is purportedly moved in often uninhabited areas or at sea, or trade cases in which a nation is ordered not to subsidize domestic producers. Second, even assuming agreement on what a decision requires, judgments often vary widely as to whether a state has in fact complied.<sup>57</sup>

Even if the problems of measuring compliance can be overcome, a more fundamental problem of relying on compliance as an indicator of effectiveness is that it fails to consider the nature of the commitments that states have asked the tribunal to police. To illustrate this point, imagine that states create a tribunal to interpret a treaty that requires them to do little more than what their respective domestic laws already require.<sup>58</sup> Such a tribunal would likely remain mostly inactive. But those disputes that states

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55. *Id.* at 290.

56. Posner & Yoo, *supra* note 1, at 27-29.

57. To take only one example, consider the data the authors cite regarding compliance with ICJ rulings. They list the ICJ as having a compliance rate of only 40% in cases over which it has compulsory jurisdiction. Yet in a recent article reviewing compliance with final judgments in all of the fourteen contentious-jurisdiction cases filed since 1987, Colter Paulson finds full compliance in nine cases and partial compliance in five cases (which he characterized as “most or nearly compliant” behavior). See Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AMER. J. INT’L L. 434, 436, 459 (2004) (concluding there is “no link between submission by special agreement and compliance, as three of the five states that signed a special agreement complied only in part with the judgment”).

58. Many international environmental agreements have this characteristic. See Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT’L L. 387, 392 (2000) (“If an international commitment matches current practice in a given state . . . implementation is unnecessary and compliance is automatic.”).

did refer to it—perhaps because of inadequate information about the behavior of other treaty parties or a shift in government policy—would result in decisions with very high compliance rates. Yet we could not say that such a tribunal was effective merely as a result of the high or even perfect rate of compliance with its judgments.

States are, of course, unlikely to create an international tribunal in such situations. Quite to the contrary, they will establish a tribunal when the commitments they undertake require them to deviate substantially from the status quo ante.<sup>59</sup> Precisely because such commitments are onerous, we would expect them to generate a large number of disputes whose resulting decisions will be met with something less than full compliance. Yet a tribunal charged with resolving such disputes can hardly be branded as ineffective for this reason. Indeed, a tribunal whose decisions receive a moderate or even low rate of compliance in these situations may be highly effective in changing state behavior.<sup>60</sup> By measuring their dependent variable in principal part by reference to compliance rates, Posner and Yoo miss this key conceptual point and elide a crucial component for determining tribunal effectiveness.

## 2. *Distinguishing the ECJ, ECHR, and WTO*

Posner and Yoo acknowledge that the ECJ, ECHR, and WTO Appellate Body score high marks for both independence and effectiveness.<sup>61</sup> This data on its face refutes their strong thesis that the correlation between independence and effectiveness is negative. However, to prove their weak thesis—that independence and effectiveness have not been shown to be positively correlated—they argue that the environment in which the three courts exist is unique, and their success may not be duplicated in other circumstances.

But consider how they go about this. The ECJ and ECHR are not valid exemplars for other tribunals because they each belong to a “political community.” “Europe has such a community,” the authors assert, “the rest of the world does not.”<sup>62</sup> But what exactly defines such a community? At first blush, it might seem to be limited to legal systems, such as the European Union, that explicitly contemplate economic, political, and legal integration among sovereign states. Yet the designation of states subject to the ECHR’s jurisdiction as a political community belies such a limitation.

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59. And, as we argue below, states are likely to create independent tribunals in such situations to enhance the credibility of their commitment to change their behavior from the status quo ante. *See infra* Part III.

60. *Cf.* Raustiala, *supra* note 58, at 394 (“[R]ules can be effective even if compliance with them is low. If a legal standard is quite demanding, even widespread failure to meet it may still correlate with observable, desired changes in behavior.”).

61. Posner & Yoo, *supra* note 1, at 54.

62. *Id.* at 55.

Perhaps political communities, then, are restricted to liberal democracies, since the member states of the Council of Europe must, at least nominally, be democratic.<sup>63</sup> But if regime-type is the touchstone, the authors' concept of political community is capacious indeed. It includes a treaty regime with forty-five member states, including not only Western Europe but also countries, such as Russia, Turkey, and Azerbaijan, with highly diverse legal, political, and economic traditions and, in some cases, weak democratic traditions and still evolving commitments to the domestic rule of law.<sup>64</sup>

Whatever the precise contours of a political community, the authors are clear that independent tribunals cannot exist without it.<sup>65</sup> Yet, how to explain the success of the WTO, which has jurisdiction over 147 countries (three-quarters of the world's nations), and four billion of their inhabitants (two-thirds of its total population)?<sup>66</sup> Put simply, they cannot. Instead, Posner and Yoo avoid the issue altogether and instead address the success of the WTO only as compared to its predecessor, the GATT. This approach is suspect. The WTO is, by the authors' own assessment, a highly effective and independent tribunal.<sup>67</sup> Whether it is less effective than its predecessor—a point we dispute—does not detract from that conclusion.

Moreover, Posner and Yoo's measures of the relative effectiveness of the GATT and the WTO are questionable. They begin with usage, noting that a straight measure of number of cases per year yields results strongly in favor of the WTO (9.2 cases per year for GATT versus 34.7 for the WTO). But the authors then "limit [their] comparison to, say, 1989 to 1994," yielding a much better figure for the GATT—21.2 disputes a year.<sup>68</sup> But why this limitation? The GATT was created in 1949. It was thus in operation for forty-six years, out of which Posner and Yoo choose to test only the last five. The authors select this five-year window ostensibly to control for increased membership and trade flows. Yet even with most of these controls in place, they find that one plausible measure of usage is both higher and statistically significant under the WTO.<sup>69</sup> More tellingly,

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63. See Statute of the Council of Europe, May 5, 1949, pmbl., arts. 1, 3, 87 U.N.T.S. 103.

64. Another hallmark of a political community is the existence of "external agents" to correct tribunal errors and prevent judicial overreaching. Posner & Yoo, *supra* note 1, at 56. As we explain below, however, states have myriad ways to do precisely that. See *infra* Part IV.

65. Posner & Yoo, *supra* note 1, at 13-14 ("Independent judges are tolerated in domestic settings because citizens who become judges share most of the values and expectations of the political community. When they do not, they can be removed; deprived of funds; or regulated through changes in jurisdiction, the modification of the laws they enforce, or appointment of new judges . . . . There is no such political community at the international level acting to keep judges in line.")

66. See World Trade Organization, Seattle: What's at Stake? Growth, Jobs, Development and Better International Relations: How Trade and the Multilateral Trading System Help, at [http://www.wto.org/english/thewto\\_e/minist\\_e/min99\\_e/english/book\\_e/stak\\_e\\_3.htm](http://www.wto.org/english/thewto_e/minist_e/min99_e/english/book_e/stak_e_3.htm) (last visited Jan. 26, 2005).

67. Posner & Yoo, *supra* note 1, at 54.

68. *Id.* at 46.

69. *Id.* at 47 n.179.

they cannot discount the significant possibility that the higher usage rate for GATT during this five-year period resulted not from increased membership or trade flows, but rather from a key structural reform in 1989 that, for the first time in GATT's history, precluded states from blocking the establishment of a dispute settlement panel.<sup>70</sup>

Posner and Yoo then turn to compliance with GATT/WTO decisions. Their analysis here is equally problematic. They choose to compare WTO compliance rates only with GATT compliance rates between 1980 and 1994. For this fourteen-year period, WTO compliance rates are still markedly higher: full compliance "73% of the time" and full or partial compliance "88% of the time."<sup>71</sup> GATT compliance rates for this period are full compliance "54% of the time" and full or partial compliance "76% of the time."<sup>72</sup>

The difference between 73% for WTO and 54% for GATT seems noteworthy, particularly given a fourteen-year test span for GATT and only a five-year span for WTO (the article they cited was published in 2001). But the authors assert that "[t]he differences between the WTO statistics and the GATT statistics are not significant."<sup>73</sup> Given the centrality of this point to their argument as a whole, their support for this claim is thin at best.<sup>74</sup> We note further that the authors' conclusion is contrary to the views of other trade scholars on whose work they rely.<sup>75</sup>

Moreover, the study by Eric Reinhardt on which Posner and Yoo rely for these numbers actually finds, looking at all GATT cases from 1948 to 1994, full compliance occurs only 42% of the time, as compared to 73% of the time for the WTO during the first five years of its operation, and full or partial compliance occurs only 69% of the time, as compared to 88% of the time for the WTO.<sup>76</sup> Posner and Yoo cite these results in a footnote, but then add: "For reasons given earlier, the 1980 to 1994 data provide a better basis for comparison."<sup>77</sup> Yet the authors fail to explain why this particular

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70. *Id.* at 46 n.176.

71. The authors never explain the difference between full and partial compliance, nor how they coded specific cases. *Id.* at 48.

72. *Id.*

73. *Id.*

74. The only authority for this claim is a one-sentence description of a statistical test performed by Eric Reinhardt on a data set he created. *Id.* at 48 n.185. The analysis supporting this test appears nowhere in *Judicial Independence in International Tribunals*.

75. These scholars have documented the "increasing concerns regarding various aspects of the GATT dispute settlement system" during its final decade, including the "'dramatic increase in non-compliance' with dispute settlement rulings during the 1980s." ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT* 90 (1997) (quoting ROBERT HUDEC, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* 354 (1993)).

76. Eric Reinhardt, *Adjudication Without Enforcement in GATT Disputes*, 45 J. CONFLICT RESOL. 174, 177 (2001).

77. Posner & Yoo, *supra* note 1, at 48 n.185.

fourteen-year span provides a better basis for comparison with the WTO. As with the five-year window for usage rates described above, it is difficult to avoid the conclusion that the authors have selectively chosen time periods in a way that overstates the empirical support for their thesis.

In sum, the authors' attempts to distinguish the ECJ, ECHR, and WTO boil down to a plea to write off three independent and effective tribunals with demonstrated track records of success because each, in its own way, is *sui generis*. But the same argument could be made of each individual arbitral or claims tribunal. Each involves different states and a different kind of a dispute.<sup>78</sup> Ironically, having started by radically simplifying the dimensions along which they identify effective tribunals to the single measure of formal independence, Posner and Yoo conclude by embracing and highlighting the specific complexities of the tribunals they seek to distinguish.

### C. *Selection Bias: Underrepresentation of Quasi-judicial Review Bodies and Tribunals with Supranational Jurisdiction*

An appreciation of the true empirical landscape illuminates the "selection bias" in *Independence in International Tribunals*.<sup>79</sup> Although we do not criticize Posner and Yoo for failing to analyze each court or tribunal in detail, the sample that they selected for analysis is biased in at least two distinct ways. First, with the exception of the GATT, their study fails to consider the growing number of quasi-judicial bodies that states have established to review compliance with their international obligations. And second, their study is heavily weighted against courts, tribunals, and review bodies that have supranational jurisdiction to hear disputes in which at least one of the litigants is a private party.

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78. For example, Posner and Yoo point to the compliance record of the (dependent) Iranian-U.S. Claims Tribunal as evidence for their theory, stating that the Tribunal "has generally experienced full compliance with its decisions." Posner & Yoo, *supra* note 1, at 34. This is an important datum for their argument, as it allows them to classify the Tribunal as both dependent and effective. Yet they never address the rather obvious point that, unlike virtually all ad hoc arbitrations or formal adjudications, compliance is virtually assured because the funds necessary to satisfy the judgments reached are being held in escrow and are dedicated to this purpose by prior agreement of the two governments involved. Indeed, as they point out, the United States transferred a portion of Iran's assets that had been previously frozen in the United States to "a foreign bank and instructed the bank to release those assets as necessary to satisfy judgments issued by the Tribunal." *Id.* at 33-34. It thus seems highly unlikely that compliance in these cases is in any way related to the dependence or independence of the Tribunal's judges. Indeed, the striking fact is that the Tribunal apparently does not have a 100% compliance record. But Posner and Yoo provide no details to support their claim that the Tribunal "has generally experienced full compliance." *Id.*

79. Selection bias occurs when a researcher intentionally or inadvertently "select[s] observations on the basis of combinations of the independent and dependent variables that support the desired conclusion." KING ET AL., *supra* note 33, at 128.



### 1. Underrepresentation of Quasi-judicial Review Bodies

According to a comprehensive chart prepared by the Project on International Courts and Tribunals (PICT), there are nearly fifty quasi-judicial review bodies currently in existence, ranging across the gamut of international affairs from human rights to labor, from the environment to war claims, and from finance to international administrative law.<sup>80</sup>

These entities are not fully fledged supranational or international courts.<sup>81</sup> But each of them exercises “court like” functions, such as receiving petitions from complainants, reviewing submissions, finding facts, interpreting legal rules, and issuing nonbinding decisions or recommendations.<sup>82</sup> Quasi-judicial review bodies are thus an increasingly important tool for resolving international controversies among states and between states and private parties.<sup>83</sup>

Posner and Yoo implicitly recognize the importance of quasi-judicial tribunals by including GATT dispute settlement panels in their study. As with many other quasi-judicial bodies, these panels interpreted GATT members’ international law obligations, but their decisions were only non-binding recommendations. States could and often did block panel reports from becoming legally binding.<sup>84</sup> By including GATT panels in their article and by making them a lynchpin of their theoretical claims,<sup>85</sup> Posner and Yoo apparently recognize that any plausible theory of international adjudication must take such dispute settlement mechanisms into account. Nonetheless, they fail to seriously analyze the independence or effectiveness of any quasi-judicial body other than GATT.

This omission produces serious errors. To take only one example, consider the authors’ treatment of the Inter-American human rights system. They cite the relatively limited number of cases heard and judgments

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80. Cesare Romano, *The International Judiciary in Context: A Synoptic Chart*, [http://www.picti.org/publications/synoptic\\_chart/synoptic\\_chart2.pdf](http://www.picti.org/publications/synoptic_chart/synoptic_chart2.pdf) (1998) [hereinafter *Synoptic Chart*].

81. For an analysis of the distinction between international tribunals and quasi-judicial review bodies, see Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, N.Y.U. J. INT’L L. & POL. 709, 711-22 (1999) (analyzing various definitions of international courts and tribunals).

82. Helfer & Slaughter, *supra* note 15, at 344 (describing “court like” attributes of UNHRC).

83. Although we do not comprehensively evaluate the independence of these quasi-judicial bodies, we note in passing that many of them are highly to moderately independent under the Posner and Yoo five-point scale. All human rights review bodies, for example, are composed of a permanent body of members who are appointed for fixed terms and who hear cases without regard to the nationality of the parties that appear before them. See KIRSTEN A. YOUNG, *THE LAW AND PROCESS OF THE U.N. HUMAN RIGHTS COMMITTEE* 95-100 (Procedural Aspects of Int’l L. Series vol. 26, 2002).

84. Contrary to what Posner and Yoo suggest, GATT dispute settlement differs from international arbitration. In arbitration, the disputing states are legally obligated to comply with the arbitral ruling once they have agreed to submit their dispute to arbitration. In the GATT, by contrast, states could and often did block the adoption of panel decisions, preventing them from becoming binding in the first instance. JOHN JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO* 122-23 (2000).

85. Posner & Yoo, *supra* note 1, at 44-54.

issued by the Inter-American Court of Human Rights. Yet they fail to note that the Inter-American *Commission* on Human Rights—the quasi-judicial tribunal that reviews petitions, interprets the human rights obligations of OAS member states, issues recommendations to those states, and submits cases to the court for a legally binding ruling—has received and reviewed 6687 petitions since 1997, and that its caseload has been rising.<sup>86</sup> As these statistics demonstrate, it is the Commission, not the court, that does much of the heavy judicial lifting for the Inter-American human rights system.

Moreover, the track record of compliance with the Commission's *nonbinding* reports and recommendations is considerably higher than Posner and Yoo indicate. The Commission's 2003 Annual Report, cited by the authors, includes data on "the status of compliance with the recommendations made by the IACHR in the cases that have been decided and published in the last three years."<sup>87</sup> According to the report, "full compliance" has been achieved in five of sixty-two cases (8%) and "partial compliance" in twenty-nine cases (47%).<sup>88</sup> The Commission lists the remaining twenty-eight cases (45%) as "compliance pending," a category that includes both noncompliance and cases for which there is insufficient information to determine whether compliance has yet occurred.<sup>89</sup> Even assuming that compliance is never achieved in all pending cases, these interim full- and partial-compliance statistics by a highly independent quasi-judicial tribunal<sup>90</sup> are far less helpful to the authors than the "4% rate of full compliance" that they selectively and erroneously attribute to the Commission.<sup>91</sup>

## 2. *Underrepresentation of Tribunals with Supranational Jurisdiction*

An even more serious problem of selection bias emerges when we consider issues of access, that is, the types of litigants who may submit

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86. ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2003, OEA/SER.L/V/II.I18, DOC. 5 REV. 2 (Dec. 29, 2003), available at <http://www.cidh.oas.org/annualrep/2003eng/chap.3b.htm> [hereinafter Annual Report]; see also OFFICE OF THE SECRETARY GENERAL OF THE ORGANIZATION OF AMERICAN STATES FOR THE AD HOC WORKING GROUP ON HUMAN RIGHTS, FINANCING THE INTER-AMERICAN HUMAN RIGHTS SYSTEM, at <http://www.summit-americas.org/Human%20Rights/Costa%20Rica%20Conference/Human%20Rights%20Financing%20-Costa%20Rica-Nov-99.htm> (Apr. 28, 2000) ("There has been an even greater workload increase in the case system. The Commission is receiving more petitions, processing more cases, and producing more reports.").

87. ANNUAL REPORT, *supra* note 86, at para. 75.

88. *Id.* at para. 76.

89. *Id.* This data is limited to the three years ending in December 2003. As the Commission itself notes, compliance "is meant to be successive and not immediate." *Id.* at para. 75. This suggests that the total compliance rate with the Commission's nonbinding recommendations is likely to be higher than the data we reproduce above.

90. The Inter-American Commission meets four of the five indicia of independence on the Posner and Yoo independence scale. See MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 219, 221 (Sands et al. eds., 1999).

91. Posner & Yoo, *supra* note 1, at 43.

disputes to a tribunal. As we document below, Posner and Yoo select tribunals that are unrepresentative in their focus on interstate disputes, and they exclude the vast majority of supranational courts, tribunals, and quasi-judicial review bodies that hear cases brought by private parties. This skewed selection pattern all but ignores one of the most important design decisions states face when creating new international tribunals.

The data are revealing. Of the eleven judicial and arbitral mechanisms the authors analyze, all but three (the ECJ, ECHR, and ICC) review only interstate disputes.<sup>92</sup>

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92. All information is taken from the PICT Research Matrix, *supra* note 30, with the following exceptions. For IACHR, see Sands et al., *supra* note 90, at 221 (noting that only states and the Inter-American Commission on Human Rights may refer cases to the court); for ITLOS, see Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AMER. J. INT'L L. 277 (2001) (noting that only states may invoke ITLOS for purposes of dispute resolution relating to the United Nations Convention on the Law of the Sea; private parties may one day challenge decisions of the International Seabed Authority before ITLOS, but the Authority is not yet in existence and is unlikely to be established in the foreseeable future); for CJAU, see Protocol of the Court of Justice of the African Union, art. 18, Assembly/AU/Dec.25(II), 2nd Sess., Doc/EX/CL/59(III) (2003) (not yet in force) (stating that Parliament of the Union and Assembly of the Union may bring cases to the court, and that third parties, including non-state actors, may do so with the state's consent), available at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Protocol%20to%20the%20African%20Court%20of%20Justice%20-%20Maputo.pdf); for ACHPR, see Amnesty International, *African Union: Assembly Should Establish an Effective African Court on Human and Peoples' Rights* (July 6, 2004), <http://www.web.amnesty.org/library/Index/ENGIOR300182004>; and for ECCIS, see Dragneva, *supra* note 45, at 33 (stating that the Russian judge on the ECCIS favors extending standing to include "disputes between organizations of the Commonwealth, organs and member-states, between local (regional) governments, between commercial organizations being part of transnational associations, and others").

**TABLE 2(a)**

	<b>Courts and Tribunals Analyzed in <i>Judicial Independence in International Tribunals</i></b>	<b>Supra- national Jurisdiction?</b>
1.	Ad hoc Arbitration	No
2.	Permanent Court of Arbitration (PCA)	No
3.	Permanent Court of International Justice (PCIJ)	No
4.	International Court of Justice—Compulsory Jurisdiction (ICJ-comp)	No
5.	International Court of Justice—Other Jurisdiction (ICJ-other)	No
6.	General Agreement on Tariffs and Trade (GATT)	No
7.	European Court of Justice (ECJ)	Yes
8.	European Court of Human Rights (ECHR)	Yes
9.	Inter-American Court of Human Rights (IACHR)	No
10.	WTO Appellate Body (WTO AB)	No
11.	International Tribunal for the Law of the Sea (ITLOS)	No
12.	International Criminal Court (ICC)	Yes

**TABLE 2(b)**

	<b>Courts and Tribunals Not Analyzed in <i>Judicial Independence in International Tribunals</i></b>	<b>Supra- national Jurisdiction?</b>
1.	Court of Justice of the African Union (CJAU)	No
2.	Caribbean Court of Justice (CCJ)	Yes
3.	African Court of Human and Peoples Rights (ACHPR)	Yes
4.	International Criminal Tribunal for Rwanda (ICTR)	Yes
5.	Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)	Yes
6.	Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)	Yes
7.	Economic Court of the Commonwealth of Independent States (ECCIS)	No
8.	International Criminal Tribunal for the Former Yugoslavia (ICTY)	Yes
9.	European Free Trade Area Court (EFTAC)	Yes
10.	Central American Court of Justice (CACJ)	Yes
11.	Court of Justice for the Arab Mahgreb Union (AMU)	No
12.	European Court of First Instance (CFI)	Yes
13.	Court of Justice of the Andean Community (TJAC)	Yes
14.	Judicial Tribunal for the Organization of Arab Petroleum Exporting Countries (OAPEC)	Yes
15.	Benelux Court of Justice (BCJ)	Yes

This pattern of selection bias is itself troubling, suggesting that Posner and Yoo have given short shrift to an important design feature of international adjudication. As we explain in the next section, however, the pattern is even more problematic because it reveals the presence of omitted variable bias.

*D. Omitted Variable Bias: Judicial Access Rules and Political and Discursive Constraints*

Posner and Yoo acknowledge some of the methodological challenges facing scholars who seek to compare outcomes across different tribunals and treaty regimes.<sup>93</sup> Nonetheless, their own study ignores one of the principal canons of political science research, which requires researchers to “control[] for the possibly spurious effects of other variables when estimating the effect of one variable on another.”<sup>94</sup>

The list of omitted control variables is long. It includes the domestic regime type of states subject to each tribunal’s jurisdiction, power differentials among those states, the subject matter of disputes the tribunal may hear, and the remedial measures it awards.<sup>95</sup> Each of these omitted variables arguably influences the independence of an international tribunal; each also plausibly correlates with the tribunal’s effectiveness and, therefore, may lead to bias. For present purposes, however, we focus on two omitted variables that demonstrably bias the authors’ conclusions: (1) judicial access rules, and (2) political and discursive constraints that—whatever a tribunal’s formal powers—affect the tribunal’s perception of its authority in relation to the states that established it.

*1. Judicial Access Rules*

The rules regulating access to a tribunal are closely correlated with both the independent variable (independence) and the dependent variable (effectiveness). This omission presents a paradigmatic case of omitted variable bias.<sup>96</sup> Evidence of the correlation between access and independence can be found by comparing the independence scores in Table 1 with the supranational jurisdiction data in Table 2. That comparison reveals that highly independent tribunals are also likely to exercise supranational jurisdiction over cases filed by private parties.<sup>97</sup>

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93. Posner & Yoo, *supra* note 1, at 54.

94. KING ET AL., *supra* note 33, at 168.

95. Not coincidentally, these variables are among those included in our checklist for effective supranational adjudication. Helfer & Slaughter, *supra* note 15, at 300-37.

96. KING ET AL., *supra* note 33, at 174 (instructing researchers to avoid omitted variable bias by controlling for potential explanatory variables “that are correlated with both the dependent variable and with the included explanatory variables”).

97. As stated in *Legalized Dispute Resolution: Interstate and Transnational*, international tribunals cluster into two ideal types—supranational and interstate—according to three distinct

The correlation between access and independence is equally plausible when examined from the perspective of judicial decision making. A tribunal that hears cases from private parties in addition to, or instead of, cases brought by states must contend with an additional audience for its rulings. It cannot simply apply political principles to reach results acceptable to one or more of the governments that created it. Such an approach would alienate the tribunal from an important constituency that provides it with repeated opportunities to justify its existence. Tribunals with supranational jurisdiction must therefore demonstrate more than token independence from states if they hope to attract cases from private actors.

The relationship between access and effectiveness is also easy to discern. When a tribunal possesses supranational jurisdiction, its doors are thrown open to individuals, firms, NGOs, or prosecutors who have the incentive and the means, albeit to different degrees, to file cases internationally. By contrast, where only states have access to the tribunal, the decision of whether to file a complaint is often highly politicized, as government officials weigh and filter the diverse preferences of domestic constituencies and pressures from other states.<sup>98</sup>

Strikingly, the adjudicatory mechanisms that Posner and Yoo rate as having low effectiveness are interstate dispute settlement bodies, whereas the only two supranational tribunals included in their study both rate as highly effective.<sup>99</sup> Clearly, more is at work here than formal attributes of tribunal independence can account for. If we are correct that access is positively correlated with both the explanatory and the dependent variables, the plausibility of the authors' conjecture linking dependence and effectiveness is significantly weakened.

## 2. *Political and Discursive Constraints*

The authors' decision to define independence exclusively by reference to a tribunal's formal attributes (permanence, compulsory jurisdiction, tenure of judges, and the like) presents a second problem of omitted variable bias. This definition of independence fails to consider the political and discursive environments in which international tribunals operate. This

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characteristics: independence, access, and embeddedness. These three characteristics are related such that "[s]ystems with higher values on one dimension have a greater probability of having higher values in the other dimensions." Keohane et al., *supra* note 23, at 468.

98. See Keohane et al., *supra* note 23, at 463 ("State officials are often cautious about instigating such [judicial] proceedings against another state, since they must weigh a wide range of cross-cutting concerns, including the diplomatic costs of negotiating an arrangement with the foreign government in question."); David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 779 (1994) (explaining that a tribunal's jurisdiction is limited to interstate disputes; "One state may be reluctant to initiate a third-party dispute settlement process against another state for fear of jeopardizing other strategic or economic bilateral relationships.").

99. See Posner & Yoo, *supra* note 1, at 54 tbl. 8.

omission skews the authors' independence ratings and obscures an accurate assessment of tribunal independence.

The source of the bias is easily identified. A tribunal that Posner and Yoo code as highly independent on the basis of its formal attributes may, in practice, be subject to political and discursive constraints that limit its potential for overreaching. Richard Steinberg's recent study of the WTO Appellate Body, a tribunal that scores a perfect five using the authors' formal independence metric, provides a telling example. As Steinberg reveals, this highly independent tribunal operates within a "strategic space" that is "bounded by three nested factors: WTO legal discourse, which could be constrained by constitutional rules, both of which are constrained by politics."<sup>100</sup> According to Steinberg, it is the political constraints that impose the most significant restrictions on expansive judicial lawmaking by the Appellate Body.<sup>101</sup>

Political and discursive constraints of the sort described above cabin the decision-making authority of independent tribunals. They mitigate formal independence using a suite of structural controls and informal signaling devices by which states convey to a tribunal when it is approaching the politically palatable limits of its authority. Where these control and signaling mechanisms are relatively weak, they help to map out a zone of "constrained independence" whose boundaries even highly autonomous judges are unlikely to transgress.<sup>102</sup> Where these mechanisms are sufficiently strong, however, they may cause formally independent tribunals to operate in a moderately or even highly dependent fashion.<sup>103</sup>

Shortly after the ICJ's founding, for example, observers asserted that certain judges on the court rule in politically biased ways in contentious jurisdiction cases.<sup>104</sup> A recent empirical study coauthored by Eric Posner bolsters this claim, revealing that ICJ judges (not surprisingly) favor the

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100. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AMER. J. INT'L L. 247, 249 (2004).

101. *Id.* These political constraints include informal agreements regarding the selection of Appellate Body members, threats to rewrite the rules of the WTO Dispute Settlement Understanding, delegitimizing and signaling through diplomatic statements, delegitimizing through noncompliance with WTO rulings, and threats of unilateral exit. *Id.* at 263-67.

102. See *infra* Part IV, in which we provide a more comprehensive discussion of our theory of "constrained independence."

103. The balance is obviously a delicate one. Just as nonexistent or weak control mechanisms can increase the risk of overreaching by independent tribunals, so also can robust controls reduce the credibility-enhancing benefits of judicial independence.

104. During the Cold War, for instance, Western governments generally assumed that judges appointed by the former Soviet Union and its satellites were not free to vote against the wishes of their governments. See Zigurds L. Zile, *A Soviet Contribution to International Adjudication: Professor Krylov's Jurisprudential Legacy*, 58 AMER. J. INT'L L. 359, 381 (1964) (questioning whether "a Soviet judge of the [ICJ] can be an 'independent' judge"). Judges from some developing countries with weak domestic judiciaries or strongly ideological governments were subject to similar suspicions. See Shelton, *supra* note 17, at 32 (discussing allegations of bias against ICJ judges).



country that appoints them and (perhaps more unexpectedly) favor countries whose wealth levels and political systems are close to those of the judge's home state.<sup>105</sup> If true, this evidence only confirms our claim of omitted variable bias. For it implicitly acknowledges that an accurate measure of independence must take into account not only the formal rules of judicial selection and tenure, but also how judges actually vote and reason in specific cases.

### III

#### WHY STATES DELEGATE AUTHORITY TO INDEPENDENT INTERNATIONAL TRIBUNALS

We have thus far shown that a true empirical picture differs radically from the one portrayed in *Judicial Independence in International Tribunals*, in that states are creating new independent tribunals, recognizing the jurisdiction of such tribunals, and litigating cases before such tribunals. More courts, wider jurisdiction, and more cases hardly describe the failure of independent tribunals that the authors' theory implies. In this Part we offer our own explanation for these empirical trends.

First we describe a long line of political science scholarship which explains why independent tribunals in fact serve the interests of governments. We then expand upon this settled theoretical framework and offer our own hypotheses. Our basic conjecture is that, as a first order of regime design, states choose independent tribunals over dependent ones when they face multilateral, as opposed to bilateral, cooperation problems. We identify three types of multilateral cooperation problems that independent tribunals are especially well suited to resolve, and then we explain why bilateral disputes permit effective dispute resolution through arbitration or dependent tribunals.

This theory, while subject to further refinement and empirical testing, provides a more accurate explanation of the existing legal landscape than does *Judicial Independence in International Tribunals*. The theory also resolves the apparent paradox of how independent tribunals can flourish in an international legal system in which enforcement authority resides predominantly in states themselves.

##### *A. Delegation Enhances the Credibility of International Commitments*

Many political scientists have argued that delegating dispute settlement authority to independent judicial decision makers can further government interests. Although such delegations may at first seem counterintuitive, they are explained by the functions that courts and

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105. Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Politically Biased?*, 34 J. LEGAL STUDIES (forthcoming June 2005).

tribunals perform. For Posner and Yoo, international tribunals play only a limited role: they provide information that reduces decision-making costs for states involved in a dispute.<sup>106</sup> In exercising this function, the tribunal members are agents and the disputing states are principals. The dilemma facing the principals is how to ensure that the agents remain faithful to the principals' instructions as set forth in a treaty, customary international law, or an arbitration agreement. In the parlance of principal-agent theory, this is "the problem of agency slack."<sup>107</sup>

Independent courts and tribunals do far more, however, than simply settle disputes between contesting parties. In the domestic realm, independent courts reduce policy ambiguities, stabilize policy outcomes, manage electoral uncertainty, and discipline other political actors.<sup>108</sup> In the international context, independent tribunals serve related functions.<sup>109</sup> In particular, they act as trustees that enhance the credibility of the promises that governments make to one another.<sup>110</sup> By interpreting those promises

106. See Posner & Yoo, *supra* note 1, at 14-22.

107. *Id.* at 23. See also Paul B. Stephan, *Courts, Tribunals, and Legal Unification—The Agency Problem*, 3 CHI. J. INT'L L. 333, 336 (2002) ("[I]nternational adjudicatory bodies entail substantial agency costs.").

108. See Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 J. INT'L CONST. L. 446, 451 (2003) (describing and evaluating these four rationales for why elected officials would "attach[] positive value to an independent court"); see also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 8-35 (1981) (discussing functions performed by independent courts in addition to settling disputes between two parties).

109. See LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* 81-88 (2000) (arguing that ruling parties ratify international agreements to lock in commitments from which subsequent governments will have difficulty withdrawing); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 231-33 (2000) (arguing that new and unstable European democracies sought to prevent future governments from backsliding away from democratic rule by delegating authority to an independent human rights tribunal and granting individuals the right to petition the tribunal directly); Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2057 (2003) (reviewing theories by which actors, including nation states, restrict their future freedom as a means of achieving welfare gains).

110. Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 52, 59-60 (2003) [hereinafter Alter, *Do International Courts Enhance Compliance?*]; Karen J. Alter, *Delegation to International Courts: Four Varieties and their Implications for State-Court Relations* 10 (Sept. 19-20, 2003) (paper prepared for the project on *Delegation to International Institutions*, UCSD, Sept. 19-20, 2003) (on file with authors); see also Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103, 104 (2001) (citing credibility enhancement as the reason why European Union member states delegate authority to the independent European Commission to initiate new legislation and monitor their compliance with existing EU law); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WISC. L. REV. 551, 563 ("Enforcement benefits promissors; it enables them to make credible promises to perform."). As Karen Alter has persuasively argued, states that create international tribunals view judges not as agents, but as trustees or fiduciaries. The rationale for selecting an agent is strikingly different than the rationale for selecting a trustee:

"Agents" are selected primarily for technical competence and because their values and objectives are similar to that of the principal. In fiduciary delegation, the principal is seeking the credibility that comes from the reputation of the trustee, which . . . can entail selecting a

and identifying behavior that violates them, independent tribunals increase the likelihood that states will comply with their obligations in situations where compliance generates short-term political losses but long-term political gains.<sup>111</sup>

This claim should not be read to suggest that dependent tribunals are incapable of bolstering the credibility of state commitments. To the contrary, even dependent decision makers—such as ad hoc arbitral bodies—provide a measure of credibility enhancement as compared to purely political modes of negotiation and dispute settlement.<sup>112</sup> But dependent tribunals and decision makers provide fewer assurances of such enhancement than do independent judicial bodies, which are less directly accountable to the parties to a particular dispute and more committed to the tribunal as an institution, to the treaty that created it, and to the long-term development of a coherent body of legal rules.<sup>113</sup>

It might be argued, however, that our claim—that delegation to independent tribunals enhances the credibility of international commitments—is circular. Just as there is no coercive authority to enforce a state's initial promise to cooperate, there is also no such authority to compel adherence to the judgments of a tribunal which interprets that promise. Seen from this perspective, Posner and Yoo's theory implies that independent

trustee whose preferences and values are quite different from the principal. In traditional delegation, the principal expects the agent to carry out their wishes. In fiduciary delegation, the expectation is that the trustee will make decisions based on their best professional judgment, and in the best interest of the beneficiary of the trust.

Karen Alter, *Agents or Trustees? International Courts in their Political Context* 6-7 (July 2004) (working paper on file with authors) [hereinafter Alter, *Agents or Trustees?*].

111. Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *INTERNATIONAL REGIMES* 115, 120 (Stephen D. Krasner ed., 1983) (using a multi-player Prisoners' Dilemma to explain "dilemmas of common interests," which occur "when independent decision making leads to equilibrium outcomes that are Pareto-deficient—outcomes in which all actors prefer another given outcome to the equilibrium outcome").

112. Of course, not all methods of international arbitration are alike. The delegation of dispute settlement authority to ad hoc "party arbitrators," for example, provides less credibility enhancement than does delegation to arbitral institutions. Compare GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 65 (1994) (stating that few party arbitrators "will wish to disappoint the expectations of those who entrust to them the responsibility of deciding a significant case") with Hans Smit, *A-National Arbitration*, 63 *TUL. L. REV.* 629, 634-43 (1989) (analyzing the numerous supervisory functions performed by international arbitral institutions). The more closely arbitration comes to resemble international adjudication, however, the less control state "principals" can exercise over the decision-maker "agents."

113. See, e.g., Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 *AM. U. INT'L L. REV.* 657, 716-21 (1999) (criticizing arbitral awards as insufficiently reasoned and often based on "contextual justice" rather than careful legal analysis); Alan Scott Rau, *Integrity in Private Judging*, 38 *S. TEX. L. REV.* 485, 523, 534 (1997) (stating that arbitration, unlike adjudication, creates "a tendency to look for intermediate solutions . . . responsive to the uniqueness of each dispute" that often takes the form of "compromise awards" acceptable to both parties); see also Rt. Hon. Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 *INT'L ARB.* 141, 154 (1988) ("An arbitrator is not called upon to make detailed analysis of the legal principles canvassed before him or to review in any detail the legal authorities cited.").

international tribunals can do nothing to enhance the credibility of commitments, since states can as easily disregard the tribunal's rulings as they can ignore the obligations of the treaty that establishes it.<sup>114</sup>

This argument misses the mark in several key respects. First, it ignores the informational functions that international tribunals perform and their effect on a state's reputation for honoring its promises to other nations. Not all compliance disputes are clear cut. To the contrary, it is often difficult for a state to monitor the conduct of its treaty partners and to evaluate whether that conduct violates the treaty. These monitoring and evaluation costs reduce the risk that arguably nonconforming conduct will be detected or, if detected, will be accurately labeled as a breach. International tribunals reduce these monitoring and evaluation costs.<sup>115</sup> They create a mandatory process by which plausible rule violations are investigated and, at the conclusion of the case, they publicly identify the state that has violated its commitments. In short, tribunals increase the probability that violations of international obligations will be detected and correctly labeled as noncompliance.<sup>116</sup>

The higher probability of detecting and accurately labeling violations creates two sets of costs for a state considering violating its international commitments. First, it increases the likelihood that other states will impose sanctions as a penalty for breach. These sanctions may be authorized by the tribunal itself (as in the case of monetary awards issued by the ECHR) or by a multilateral process connected to it (as in the case of the WTO's Dispute Settlement Body).<sup>117</sup> Sanctions may also be imposed unilaterally through reductions in trade, aid, or other privileges previously granted by the adversely affected state.<sup>118</sup> Second, and perhaps more importantly, the higher probability of correctly identifying violations and branding violators

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114. See Scott & Stephan, *supra* note 110, at 554-55 ("Agreements may fashion their own enforcement mechanisms, but these have no greater authority than the instrument that creates them.").

115. International tribunals can also provide information in the form of "focal points" that clarify textual ambiguities or "signals" that cause parties to update their beliefs about facts. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1263-76 (2004). These interpretive functions provide substantial benefits to the states who delegate authority to a tribunal.

116. Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 304 (2002); see also James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137, 146 (2000) ("As official forums where complaints are filed and judged, dispute settlement mechanisms play an important role in monitoring treaty violations, helping to offset problems of information.").

117. See Guzman, *supra* note 116, at 305 (discussing sanctions authorized by the WTO Dispute Settlement Body); Zorn & Van Winkle, *supra* note 51, at 8 (discussing ECHR's practice of awarding compensation to individuals whose rights have been violated).

118. See ELISABETH ZOLLER, *PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES* (1984).

increases the reputation costs of noncompliance.<sup>119</sup> “Being identified as having violated international law is costly for a state because it leads to a loss of reputation in the eyes of both its counterparty and other states,”<sup>120</sup> a loss that, in turn, makes it more difficult to enter into future agreements with other nations.<sup>121</sup>

By increasing the probability of both material sanctions and reputational harm, international tribunals raise the cost of violations, thereby increasing compliance and enhancing the value of the agreement for all parties.<sup>122</sup> States can thus foresee that shirking compliance will be more difficult when a tribunal can be called upon to monitor their conduct and interpret their promises than when it cannot. As a result, when states delegate authority to an international tribunal, the commitments they entrust to it will be viewed as more credible than commitments not subject to judicial scrutiny.<sup>123</sup>

The circularity objection described above also fails to account for domestic politics. The informational and reputational consequences of establishing a tribunal operate principally on an interstate level. However, tribunals and the decisions they issue also make international law more salient for domestic interest groups and political actors. By clarifying the meaning of an agreement, finding facts, and determining whether a particular course of conduct is justified, tribunal rulings can mobilize compliance constituencies to press governments to adhere to their treaty obligations.<sup>124</sup> This effect is most pronounced for those supranational tribunals where private parties may invoke the tribunal’s jurisdiction directly, since no “political filter” exists to screen out cases that are legally meritorious but diplomatically or politically embarrassing.<sup>125</sup> But the effect can also operate

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119. See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823 (2002) (discussing the role of reputation in promoting state compliance with international agreements).

120. Guzman, *supra* note 116, at 304-05; see also Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179, 197 (2002) (analyzing how international tribunals “enhance[] the reputational costs of cheating”).

121. See George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. 95 (2002) (suggesting that the reputational costs of violating international law are not fungible across the entire legal system).

122. See, e.g., Guzman, *supra* note 116, at 326.

123. See *id.* at 306, 309-15 (presenting a formal model demonstrating that international tribunals generate credibility and compliance gains, but that only under certain conditions will those gains outweigh the costs of delegating mandatory dispute settlement authority to international tribunals).

124. See Karen Alter, *The European Union’s Legal System and Domestic Policy: Spillover or Backlash?*, 54 INT’L ORG. 489, 507-08 (2000); Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT’L ORG. 661, 675 (2000).

125. Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* 19-24 (Oct. 11, 2004) (unpublished manuscript on file with authors) (analyzing “political filters” which allow governments to bring only those enforcement actions that produce joint welfare gains).

in purely interstate adjudication, if the tribunal's rulings benefit domestic interest groups who are motivated to lobby governments in favor of compliance.<sup>126</sup> In either case, the domestic political costs of international adjudication make it more difficult for states to shirk compliance. Anticipating this result, states will view international agreements supervised by tribunals (especially supranational tribunals) as more credible than agreements that do not provide for judicial review.

This conception of international tribunals as credibility enhancers is inconsistent with the theory of dependent adjudication that Posner and Yoo adopt. Indeed, international tribunals can *only* make state commitments more credible if they are independent. If a tribunal were dependent—that is, if it were susceptible to pressure to conform its decisions to state interests at the time a dispute arises—the credibility enhancement flowing from the initial act of delegation would vanish. States would anticipate that the dependent tribunal would bow to these pressures and, as a result, that they could elude their international law obligations with relative ease. As a consequence, defections would increase and the long-term benefits of interstate cooperation would quickly unravel.<sup>127</sup>

*B. Triangulating the Interests of States and Independent Tribunals:  
Three Multilateral Examples*

We have thus far explained why states, so often jealous of their sovereignty, would choose to establish an international court, tribunal, or quasi-judicial review body whose members are independent. We need a better understanding, however, of precisely how the interests of independent tribunals relate to those of the states that create them.

For non-judicial institutions, credibility enhancement may require a wide divergence between the preferences of government officials and those of independent decision makers. Political scientists such as Majone have argued, for example, that the members of the European Commission should have “policy preferences [that] differ systematically from the preferences of the delegating [states].”<sup>128</sup> Such systematic divergences may be appropriate for an entity like the Commission, which operates in a more overtly political environment. But for international judges, who are bound by the inherently constraining nature of law, all that credibility enhancement requires is that tribunals apply generally applicable legal principles to

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126. See Goldstein & Martin, *supra* note 32, at 614-15 (discussing actions of domestic interest groups that favor or oppose compliance with rulings of WTO Dispute Settlement Body); SHAFFER, *supra* note 32, at 144-47 (discussing influence of private parties in WTO dispute settlement process and subsequent compliance with WTO rulings).

127. See Alter, *Four Varieties of Delegation*, *supra* note 110, at 10 (“[A]n agent bound to follow the directions of the delegating politicians could not possibly enhance the credibility of their commitment.”) (quoting Majone, *supra* note 110, at 110).

128. Majone, *supra* note 110, at 104.

hold states to the promises they made when negotiating a treaty or contributing to or acquiescing in the formation of customary law.

In the narrowest case, therefore, independent tribunals would do no more than hold states to the precisely defined international obligations to which they had initially agreed. International law is rarely so clear, however. In practice, giving a tribunal a mandate to resolve the parties' dispute in accordance with preexisting rules also includes an implicit mandate to complete the parties' contract by filling gaps and clarifying ambiguities. Such interpretative ventures often require the tribunal to engage in some type of minimal lawmaking.<sup>129</sup> Some tribunals have a more capacious mandate: to achieve a treaty's overall objectives or to read its specific rules in the light of those objectives.<sup>130</sup> At the outer margins, a tribunal may interpret its mandate even more expansively, advancing particular substantive goals during periods of political impasse among the member states.<sup>131</sup> These are different degrees of judicial expansiveness, and governments respond to them in different ways, using one or a combination of the structural/formal and political-control mechanisms that we describe below.<sup>132</sup>

Putting to one side where a tribunal positions itself along this spectrum of judicial expansiveness, we suggest that states seeking to enhance the credibility of their commitments will be more likely to create an independent tribunal when they face three specific types of multilateral cooperation problems: (1) international agreements that require extensive modifications of existing national law and practices; (2) treaties that regulate public goods or commons problems; and (3) treaties that create rights or benefits for private parties.

### 1. "Deep" International Agreements

The first type of multilateral cooperation problem encompasses what Downs, Rocke, and Barsoon call "deep" agreements, i.e., treaties that require states to change their behavior significantly from the status quo.<sup>133</sup>

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129. See James Bacchus, *The WTO Must Open its Trade Dispute Proceedings*, 5 EUR. AFF. 88, 91 (2004) (citing statement by former Chairman of the WTO Appellate Body that, in the absence of negotiation of "more and better rules" on the relationships between trade and other areas of international law, "many of [these relationships] will be resolved, necessarily, through dispute settlement"), available at [http://www.europeanaffairs.org/current\\_issue/2004\\_spring/2004\\_spring\\_88.php4](http://www.europeanaffairs.org/current_issue/2004_spring/2004_spring_88.php4); Allison Marston Danner, *The International Criminal Tribunals as International Courts 4* (2005) (unpublished manuscript, on file with authors) (analyzing lawmaking by the ICTY and ICTR in the area of international humanitarian law and the responses to such lawmaking by states); Tom Ginsburg, *International Judicial Lawmaking*, 45 VA. J. INT'L L. (forthcoming Spring 2005) (comprehensively analyzing judicial lawmaking by a variety of international tribunals).

130. Human rights courts, tribunals, and quasi-judicial review bodies are prominent examples.

131. Only the ECJ has interpreted its mandate this expansively.

132. See *infra* Part IV.

133. George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379, 383 (1996); see also Smith, *supra* note 116, at 148 (suggesting that "the more ambitious the level of proposed integration, the more willing political leaders should be to

These scholars argue that the deeper the agreement, the greater the resistance to compliance and the stronger the enforcement and sanctioning mechanisms required to achieve it. Assuming this claim to be true, an international tribunal that states establish to aid enforcement by identifying violations or authorizing the sanctioning of violators must hold the parties fast to their initial agreement or risk defections that cause cooperation to unravel. Seen from this vantage point, the correlation between the “deepening” of the trade regime from the GATT to the WTO (as shown by its lower trade barriers and expanding subject areas) and the enhancement of judicial independence (from GATT panels to the WTO Appellate Body) is not accidental but causative. It reflects an understanding by governments that greater judicial independence was necessary to deter the increased incentives for defection that greater depth engendered.

Conversely, a correlation between the depth of a treaty and the independence of the tribunal that monitors it may explain why, for example, multilateral environmental agreements—many of which are “shallow” in the sense that they require governments to do little more than their national environmental policies already require—do not provide for review by an international tribunal, make such review optional, or allow governments to settle disputes through arbitration.<sup>134</sup> The validity of this hypothesis could be tested by calculating the depth of a broad cross section of multilateral agreements and comparing the independence of the dispute settlement mechanisms they establish, after controlling for supranational jurisdiction, treaty membership, and other relevant variables.

## 2. *Treaties that Regulate Public Goods or Commons Problems*

Independent tribunals are also more likely to help states resolve cooperation problems arising from treaties that regulate public goods or the global commons.<sup>135</sup> This problem arises when one state generates negative externalities that are not fully absorbed by other states. In these situations,

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endorse legalistic dispute settlement,” a concept that includes permanent tribunals that may be accessed by private parties).

134. See George W. Downs et al., *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 COLUM. J. TRANSNAT'L L. 465, 479-80, 482, 504-06 (2000) (surveying multilateral environmental agreements and noting that they contain relatively “shallow” obligations and eschew “coercive and adversarial mechanisms such as adjudication procedures and multilateral sanctions”). See generally WTO and UNEP Secretariats, *Compliance and Dispute Settlement Provisions in the WTO and in Multilateral Environmental Agreements*, WT/CTE/W/191 (June 6, 2001) (comparing dispute settlement and compliance procedures in the WTO and multilateral environmental agreements).

135. We recognize that depth and public goods or global commons problems may point in opposite directions, making empirical claims more difficult to test. For example, many environmental agreements are both shallow and involve regulation of the global commons.



contrary to what Posner and Yoo assert,<sup>136</sup> it is not merely appropriate but necessary to consider the interests of nonparties.

As an example, imagine a dispute between two states over the harvesting of a species of migratory fish, such as a dispute over fishing rights near the border of the states' exclusive economic zones. A dependent tribunal would, by definition, feel pressure to reach a decision acceptable to the two disputing states. Because those states do not internalize the full effects of their behavior, however, such a conciliatory approach would undervalue the importance of restricting the use of a finite natural resource. Stated another way, a dependent tribunal would be compelled by politics to eschew minimizing the parties' negative externalities upon all member states, thereby undervaluing the treaty's preservationist objectives.<sup>137</sup> By contrast, an independent tribunal—particularly one that can hear arguments by other states and nonstate actors—could consider these objectives with less fear of reprisal. This conjecture is testable by comparing different types of public goods and commons treaties with the dispute settlement options states establish for them.

### 3. *Treaties that Create Rights or Benefits for Private Parties*

The third type of cooperation problem that independent tribunals can more effectively resolve concerns multilateral agreements for which private parties have stronger incentives to monitor and challenge violations than do states. These greater incentives may arise because the agreement expressly grants rights to private parties (as occurs, for example, in human rights and some investment treaties), or because those parties are the indirect beneficiaries of obligations between states (as is the case in many trade agreements). In these circumstances, authorizing an international tribunal to hear cases filed by private parties significantly increases the credibility of initial treaty bargains. It also promotes compliance with treaty commitments, since private litigants are also constituents of government officials and can pressure those officials to implement the tribunal's rulings in their favor.

Where a dependent tribunal hears cases by private parties, we would expect neither credibility enhancement nor increased compliance. Dependent tribunals rely on states for their existence, not on private

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136. Posner & Yoo, *supra* note 1, at 7 (asserting that international tribunals are likely to be ineffective when they make decisions based on "the interests of states that are not parties to the dispute").

137. See Tim Stephens, *The Limits of International Adjudication in International Law: Another Perspective on the Southern Bluefin Tuna Case*, 19 INT'L J. MARINE & COASTAL L. 177, 188 (2004) ("Encouraging the parties to a dispute to reach a compromise may well produce more harmonious international relations but it will not necessarily lead to optimal environmental outcomes. In many cases it may serve to restore (or enhance) comity but only at the expense of the protection and preservation of the environment.").

parties. It is states who create the tribunal, define its jurisdiction, appoint and reappoint its members, fund its operations, and decide whether it will continue to exist. States make these decisions for independent tribunals too, of course, but their control is less direct and immediate than in the case of dependent tribunals. Aware of these greater retained powers, a decision maker serving on a dependent tribunal can anticipate a negative reaction from states if she consistently rules in favor of private parties, even assuming their claims are meritorious. An independent tribunal, by contrast, faces far fewer pressures "to pander to the governments at whose sufferance it exists."<sup>138</sup>

As we noted in our earlier discussion of omitted variable bias, there is a strong correlation between tribunals that possess the formal indicia of independence and those that can review cases filed by private parties. This correlation suggests another empirically testable hypothesis: that states which create independent tribunals also select private party access as a design feature to help the tribunals retain their independence over time.

### C. *Dependent Tribunals and Bilateralism*

The theory we have developed thus far explains why states are increasingly delegating dispute settlement authority to independent tribunals and describes three multilateral cooperation problems that are particularly well suited to adjudication by independent tribunals. There is, however, one additional category of disputes—bilateral disputes—for which dependent international adjudication may indeed be as effective.

Posner and Yoo's conjecture about the correlation between dependence and effectiveness is not restricted to a particular type of dispute or issue area. It is notable, however, that the examples they cite are overwhelmingly bilateral. Specifically, they mention the boundary commission that fixed the river border between Mexico and the United States, the arbitration between Holland and the United States over the territorial sovereignty of the Island of Palmas, and the Iran-United States Claims Tribunal, all of which are dependent arbitral bodies charged with resolving disputes between two countries.<sup>139</sup> Although Posner and Yoo do not develop a bilateralism-specific theory of dependent adjudication, such a theory merits consideration. In particular, we believe disputes arising out of bilateral relationships may be correlated with the use of dependent tribunals in ways that disputes concerning multilateral relationships are not.

Certain strategies are available to states in a bilateral relationship that may be sufficient in and of themselves to induce compliance. Diplomatic negotiations, threats of tit-for-tat reciprocity, reprisals, and other self-help measures are standard modes of interaction in bilateral settings. If these

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138. Helfer & Slaughter, *supra* note 15, at 313.

139. Posner & Yoo, *supra* note 1, at 16-20, 33-34.

strategies are effective at inducing compliance, states in bilateral relationships do not need an independent tribunal to enhance the credibility of their commitments, since those commitments are already credible at the time they are made.<sup>140</sup>

Dependent tribunals may thus be more effective at resolving certain types of bilateral disputes precisely because they operate as an extension of nonlegal, diplomatic methods of dispute resolution and compliance inducement. Crucially, these compliance-inducing strategies remain available even where the parties to a bilateral agreement have submitted their dispute to an arbitral body or dependent tribunal. Because the settlement of bilateral disputes operates in the shadow of these extrajudicial measures to promote compliance, it may be entirely appropriate for states to exert stronger controls over the tribunal.

This framing of dispute settlement as an extension of diplomacy does not, however, translate to multilateral settings. Not only is the need to enhance the credibility of commitments greater in such settings,<sup>141</sup> but unilateral strategies for inducing compliance are far less effective. As Kenneth Oye has explained using a game-theoretic model, “as the number of players increases the feasibility of sanctioning defectors diminishes. Strategies of reciprocity become more difficult to implement without triggering a collapse of cooperation. In two-person games, tit-for-tat works well because the costs of defection are focused on only one other party.”<sup>142</sup> By contrast, where multiple parties are involved, defection imposes costs on all parties, and “the power of strategies of reciprocity is undermined.”<sup>143</sup>

If the claim that states use different international dispute settlement mechanisms in bilateral and multilateral settings to achieve different objectives holds true, then Posner and Yoo’s theory of effective dependent adjudication may help to explain only one segment of the international legal landscape, specifically, the resolution of bilateral disputes. However, the most pressing issues of international cooperation in the twenty-first century—including human rights, humanitarian law, trade, and environmental protection—generally require multilateral, not bilateral, cooperation, and thus cannot be explained by their theory.

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140. See Alter, *Do International Courts Enhance Compliance?*, *supra* note 110, at 64. The threat of reciprocity is rarely a complete deterrent to defection, however. Parties in a bilateral relationship may therefore choose to submit their disputes to an independent tribunal.

141. See *supra* Part III.B.

142. Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in COOPERATION UNDER ANARCHY 1, 19-20 (Kenneth A. Oye ed., 1986); see also Lisa L. Martin, *The Rational State Choice of Multilateralism*, in MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 91, 97 (John Gerard Ruggie ed., 1993) (identifying impediments to the adoption of a strategy of specific reciprocity to deter defections in multilateral cooperation settings).

143. Oye, *supra* note 144, at 20.

## IV

## A THEORY OF CONSTRAINED INDEPENDENCE FOR INTERNATIONAL TRIBUNALS

We have shown that states establishing an international tribunal face a basic choice between dependent and independent courts, tribunals, and quasi-judicial review bodies, and we have theorized that this decision depends upon the type of cooperation problem that states seek to resolve. That preliminary choice does not, however, resolve all issues of regime design. To the contrary, even after states have created a permanent tribunal with compulsory jurisdiction and tenured judges, they face a second level of design decisions in which they must fine-tune their influence over the tribunal and its jurisprudential output using a diverse array of structural, political, and discursive controls. It is these more fine-grained calibrations of judicial structure—nearly all of which Posner and Yoo ignore—that limit overreaching even by tribunals that score highly on the formal independence scale that Posner and Yoo construct.

These control mechanisms do not, however, create a system of judicial dependence in disguise. To the contrary, many of the mechanisms we discuss below are difficult or costly to exercise, or achieve their objectives only partially or imperfectly. Some require the consent of other states, others generate opposition from domestic interest groups, and still others require a significant time or political capital to implement. These limitations on state control are design choices, not design flaws. They are part of a system we label as “constrained independence,” in which states task judges to behave as fiduciaries<sup>144</sup> (albeit fiduciaries with limited mandates) rather than as closely controlled agents.

Constrained independence maximizes the benefits of delegation to independent decision makers while minimizing its costs. It allows states to enhance the credibility of their commitments while signaling to independent courts, tribunals, and quasi-judicial review bodies when they are approaching—or have exceeded—the politically palatable limits of their authority.

In addition to providing the means for states to influence the docket and jurisprudential output of international tribunals, these limited and more precise mechanisms of judicial control have a second important effect. They help to map out the contours of Richard Steinberg’s concept of the “strategic space”<sup>145</sup> within which international tribunals actually operate. This strategic space restricts the range of methodological, interpretative, and decisional choices available to independent judges. Many of these

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144. See Alter, *Agents or Trustees?*, *supra* note 110, at 6-7.

145. Steinberg, *supra* note 100, at 249.

choices will be legally plausible; only a subset will also be politically tolerable.

Judges are sensitive to these political limits on their authority. But they are also participants in a global community of domestic courts and international tribunals,<sup>146</sup> a community that helps to shield judges from overtly political influences. Triangulating these competing pressures, international judges will self-select those methodologies and interpretive tools that are both legally convincing to their brethren and that lie within broadly acceptable political parameters. In the process, they will internalize a set of discursive constraints that obviate, or at least reduce, the need for overt correction by the states subject to their jurisdiction. The participation of tribunal members in the global community of law is thus a key component of the system of constrained independence we describe below.

The following table illustrates our theoretical approach. The left side of the table summarizes the specific control mechanisms that states use to regulate independent tribunals, grouping them into four ideal types.<sup>147</sup> The right side illustrates the discursive constraints of the global community of law. This community and the state control mechanisms together define the strategic space that an independent international tribunal occupies. In the Parts that follow, we describe each of the state regulatory tools in greater detail and provide real world examples. We then discuss the discursive constraints generated by the global community of law and how those constraints are internalized by international judges and tribunal members.

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146. See *supra* text accompanying note 14 (describing global community of law as articulated in our earlier writings).

147. The discussion below draws inspiration from Michael Reisman's foundational work on internal and external controls in international adjudication and arbitration. See W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 1-7 (1992). For a more recent discussion of checking mechanisms in international adjudication, see Laurence R. Helfer & Graeme B. Dinwoodie, *Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy*, 43 WM. & MARY L. REV. 141, 218-23 (2001).

TABLE 3  
The System of Constrained Independence of International Tribunals

<u>Mechanisms for State Regulation of Independent Tribunals</u>		<u>Tribunal's Strategic Space</u>	<u>Global Community of Law</u>
<i>Ex Ante</i> Mechanisms	<i>Ex Post</i> Mechanisms		Discursive constraints (e.g. procedural rules, interpretive methodologies, and substantive norms) generated by interactions among participants in the global community of law and internalized by tribunal members.
<ol style="list-style-type: none"> <li>1. precisely defined substantive rules</li> <li>2. precisely defined interpretive methodologies or standards of review</li> <li>3. reservations to substantive rules</li> <li>4. reservations to tribunal's jurisdiction</li> <li>5. rules to regulate access and procedure</li> <li>6. rules for selection, tenure, and composition of judges or members</li> </ol>	<ol style="list-style-type: none"> <li>1. reinterpretation of substantive rules</li> <li>2. renegotiation of tribunal's jurisdiction, access rules, or procedural rules</li> <li>3. power to reappoint judges / members</li> <li>4. delay in implementing a decision</li> <li>5. unilateral withdrawal from tribunal's jurisdiction or denunciation of underlying treaty</li> </ol>		
<b>Formal/Structural Mechanisms</b>	<b>Political Mechanisms</b>		
<ol style="list-style-type: none"> <li>1. informal understandings regarding selection of judges / members</li> <li>2. differential ability to file cases or to defend cases filed by others</li> <li>3. inadequate funding or resources</li> <li>4. tribunal's relationship to other tribunals and dispute settlement mechanisms</li> </ol>	<ol style="list-style-type: none"> <li>1. challenges to legitimacy of tribunal or of a particular decision</li> <li>2. non-compliance or partial compliance</li> <li>3. docket control</li> <li>4. forum shopping to tribunals with competing jurisdiction</li> </ol>		

A. *Formal and Structural Ex Ante Control Mechanisms*

Precision in drafting commitments is perhaps the most obvious formal control mechanism that states can exercise *ex ante*. Clearly defined substantive rules impose real constraints on tribunals and the parties that wish to use them. They encourage early settlement of disputes, and they inhibit the creation of expansive jurisprudence by requiring judges to provide a persuasive justification for departing from a shared textual meaning.

As scholars such as Joel Trachtman have demonstrated, however, writing comprehensive international agreements entails substantial costs.<sup>148</sup> Where the costs of completing a contract is high, negotiators may adopt an alternative approach. They may tolerate some textual ambiguity, in effect agreeing to disagree over the scope of their substantive obligations, but specify which interpretive methodologies the tribunal may employ (as in Article 3.2 of the WTO Dispute Settlement Understanding)<sup>149</sup> or the degree of deference it must give to national decision makers (as in Article 17.6 of the WTO Antidumping Agreement<sup>150</sup> and the national emergency clauses of human rights conventions<sup>151</sup>).

These drafting devices are a subject for negotiation among governments. For states that are unable to convince their treaty partners to adopt their preferred textual restriction, or for those states that join a treaty regime after negotiations have concluded, unilaterally carving out a set of issues from dispute settlement may be a logical response. Such carve-outs may take the form of reservations, either to the substantive treaty that the tribunal is interpreting or to a declaration recognizing the tribunal's jurisdiction. Both types of reservations are common practice in international

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148. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 346-50 (1999) (discussing the issues raised by incomplete international agreements).

149. Article 3.2 instructs WTO jurists to "clarify the existing provisions of" the WTO agreements "in accordance with customary rules of interpretation of public international law," but not to "add to or diminish the rights and obligations" those agreements contain. Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 2, art. 3.2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS vol. 31, 33 I.L.M. 1226, 1227.

150. Under Article 17.6(ii) of the Antidumping Agreement, where a WTO dispute settlement panel "finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the [member's] measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1A, art. 17.6(ii), LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 81, at 168, 193 (1994).

151. See, e.g., American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 27, 1144 U.N.T.S. 123, 152 (1979) (authorizing states, "in time of war, public danger, or other emergency that threatens [their] independence or security," to derogate from specific provisions of the Convention, but only "to the extent and for the period of time strictly required by the exigencies of the situation"); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 4(1), 999 U.N.T.S. 171, 174 (similar restriction); European Convention, *supra* note 17, art. 15, 213 U.N.T.S. at 232-34 (similar restriction).

law and can constrain tribunals from veering away from their defined mandates.<sup>152</sup>

A third set of structural *ex ante* controls relates to the details of the tribunal's operation. These encompass the rules for selection, composition, and tenure of judges that Posner and Yoo survey.<sup>153</sup> But they range far more broadly, and include detailed rules regulating access to the tribunal, the scope of its procedures, its fact-finding powers, the type and form of its decisions, the remedies it awards, and fundamental issues such as whether its decisions are legally binding or not.

The use of these formal and structural control devices, whether singly or in combination, does not guarantee that a tribunal will scrupulously adhere to the restrictions states impose on it. International law's interpretive methodologies are elastic and allow decision makers a fair degree of interpretive discretion. This elasticity has enabled some tribunals to push textual or structural boundaries by using teleological or purposive approaches that reify a treaty's broad aims rather than its textual details.<sup>154</sup> But the move away from text is not always in favor of expanding a tribunal's authority. To the contrary, judges have also deferred to the governments whose actions they review, even where their textual mandate suggests a more assertive role.<sup>155</sup>

### B. *Political Ex Ante Control Mechanisms*

Although formal and structural controls are the most familiar to international lawyers, states also regulate international tribunals through political means. Some of these measures operate in the shadows; others are the product of power and resource distributions within particular treaty regimes. Regardless of their origins, using these tools of political influence

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152. Examples of the former are too numerous to mention. *See, e.g.*, John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AMER. J. INT'L L. 372 (1980). Examples of the latter are also common, and include (1) reservations to declarations recognizing the ICJ's compulsory jurisdiction that exempt from the Court's scrutiny disputes within a state's domestic jurisdiction, (2) restrictions on declarations filed with ITLOS limiting the tribunal's jurisdiction to specified maritime subjects, and (3) reservations to the ICCPR's First Optional Protocol specifying temporal limits to the petitions that the UNHRC may receive from individuals. *See* International Court of Justice, *Declarations Recognizing as Compulsory the Jurisdiction of the Court*, <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm> (last visited Jan. 26, 2005); *Oceans and Law of the Sea: Settlement of disputes mechanism*, [http://www.un.org/Depts/los/settlement\\_of\\_disputes/choice\\_procedure.htm](http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm) (last updated Dec. 9, 2004); *Declarations and Reservations to the First Optional Protocol*, [http://www.unhcr.ch/html/menu3/b/treaty6\\_asp.htm](http://www.unhcr.ch/html/menu3/b/treaty6_asp.htm) (as of Feb. 2002).

153. *See* Posner & Yoo, *supra* note 1, at 22-27.

154. *See* Helfer & Slaughter, *supra* note 15, at 345-57 (discussing UNHRC); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 638, 663-64 (1999) (discussing the ECJ).

155. *See* HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996) (describing how ECHR has used this doctrine to defer to the decisions of European governments concerning human rights).



may be as effective as formal and structural controls in calibrating the authority conferred on international decision makers and inhibiting their ability to overreach.

Consider the procedures by which states appoint international judges and tribunal members. Often, these appointment rules differ radically from the formal appointment rules specified in the agreement establishing the court or tribunal. The Appellate Body provides a notable example.<sup>156</sup> The WTO Agreement provides that the seven members of the Appellate Body are to be selected by a consensus decision of the WTO Dispute Settlement Body.<sup>157</sup> In practice, the initial phase of the appointments process is carried out by a Selection Committee over which powerful WTO members exert significant influence.<sup>158</sup> Those members use this influence, which in some cases amounts to a veto power, to “ensure that the candidates selected to serve on the Appellate Body are not exceedingly activist, biased, or expansive lawmakers.”<sup>159</sup>

Uneven distributions of power among states circumscribe international adjudication in another way. Differences in material resources send an informal signal to tribunal members as to which states are most likely to resist hard-edged restrictions on governmental authority or fresh accretions of judicial power. In the WTO, for example, the United States and the European Communities are the most powerful state actors by virtue of their large economies and their active use of the WTO dispute settlement system.<sup>160</sup> According to Richard Steinberg, “judicial lawmaking that consistently results in the loss of dispute settlement cases by a powerful member (as both a complainant and a respondent) would not be sustainable

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156. There is evidence of similar actions in the selection procedures for other international tribunals. See Keohane et al., *supra* note 23, at 471 (“It was widely rumored . . . that the German government sought to rein in the ECJ by appointing a much less activist judge in the 1980s than previous German candidates, but hard evidence is virtually impossible to find.”); Jo M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 348 (2003) (“Despite the Convention’s requirements, governments may intentionally . . . undermine the Court by nominating judges who lack high-level expertise. Some nominations have reflected cronyism rather than qualifications.”) (footnote omitted).

157. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. IX., 33 I.L.M. 1144, *supra* note 149, at 1148.

158. Steinberg, *supra* note 100, at 264 (“The European Communities and the United States have enjoyed ‘special privileges’ at this stage of the process, enabling them to object to some candidates, which has amounted to a veto power.”).

159. *Id.*; PASQUALUCCI, *supra* note 156, at 348-49 (“Politics have sometimes influenced the election [of judges to the court]; certain nations have reportedly voted in block to elect a candidate despite weak qualifications.”).

160. Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 AM. J. INT’L L. 231, 232 (1997) (“[R]icher countries tend to be more powerful in trade negotiations than poorer countries since, in the international trade context, ‘power’ may be seen as a function of relative market size.”); SHAFFER, *supra* note 32, at 6 (stating that “either the United States or [the European Communities] was a plaintiff or defendant in 75 percent of WTO complaints filed, and in 84 percent of complaints that resulted in judicial decisions.”).

politically, for it would constitute a shift in property rights that would likely engender a political reaction.”<sup>161</sup> Yet there is little risk of such a reaction in the face of dispute settlement losses by poorer developing countries. Although the percentage of these countries involved in WTO dispute settlement proceedings has increased from its level under the GATT, significant structural and material factors continue to impede their meaningful participation.<sup>162</sup> This suggests that control mechanisms may have ancillary distributional consequences.

A third political check that states use to regulate international tribunals *ex ante* (as well as *ex post*) relates to funding. Security Council members established the ICTY to satisfy public opinion, but then initially denied the tribunal the resources it needed to prosecute defendants.<sup>163</sup> Human rights tribunals have experienced similar financial pressures. In 2001 the Inter-American Commission on Human Rights adopted new rules of procedure that are expected to significantly increase its own caseload and that of the court.<sup>164</sup> Whether OAS member states are willing to provide the resources necessary to support the enhanced judicial activity engendered by these wider access rules is unclear, however. If they do not, “the lack of monetary contributions by the member states could seriously impede the court [and Commission] from fulfilling [their] role of deciding human rights cases in the region.”<sup>165</sup>

A final, less obvious political check arises from the competition among tribunals that states have created to hear similar types of disputes.<sup>166</sup> As one of us has written elsewhere, where more than one judicial body has jurisdiction over a dispute, states and private parties can “forum shop” for the tribunal they believe will be the most sympathetic to their case.<sup>167</sup> Forum shopping may lead a tribunal to assert its own authority more

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161. Steinberg, *supra* note 100, at 268-69. Based on an empirical review of the first eight years of the WTO case law, Steinberg finds little support for such concern. *Id.* at 269-72.

162. Compare Romano, *supra* note 36, at 385-97 (documenting evidence of increased participation by developing countries) with Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides?: The Case of TRIPs and Pharmaceutical Patent Protection*, 7 J. INT'L ECON. L. 459, 472-73 (2004) (discussing structural and material impediments restricting access of developing countries to WTO dispute settlement system).

163. David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401, 401-22 (1994). In recent years, however, the Security Council has provided ample funding to the ICTY. See Ginsburg, *supra* note 129, at 32-35 (comparing funding of the ICTY to the ICJ).

164. See Dinah Shelton, *New Rules of Procedure for the Inter-American Commission on Human Rights*, 22 HUM. RTS. L.J. 169 (2001).

165. Ismene Zarifis, *News From the Inter-American System*, 9 HUM. RTS. BRIEF 31, 31-32 (2001), available at <http://www.wcl.american.edu/hrbrief/hrbrief091.pdf>.

166. See YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* 75-175 (2003).

167. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 288-90 (1999).

expansively, as when a tribunal carves out a particular area of expertise as a way to attract new cases.<sup>168</sup> But the existence of multiple venues for dispute settlement creates competition among tribunals that curbs such expansions. The force of this constraint will depend on whether states or private parties are claimants, the competence of the alternative forum, and the ease with which disputants may move from one venue to another. These are not merely hypothetical constraints. A judge on ITLOS has noted the stiff competition his court faces from the ad hoc arbitral tribunal that states established as an alternative dispute settlement forum for law of the sea issues.<sup>169</sup> This competition is likely to increase as a result of recent conflicting rulings interpreting the concurrent jurisdiction of ITLOS and the tribunal.<sup>170</sup>

### C. *Formal and Structural Ex Post Control Mechanisms*

If, notwithstanding the ex ante controls described above, a tribunal issues a decision or series of decisions that one or more states find objectionable, there are several options available for states to signal their displeasure. Reinterpreting the substantive obligations of the treaty that the tribunal oversees is one obvious choice.<sup>171</sup> Formal amendment of the treaty is also possible. But states often make renegotiation difficult, creating cumbersome and time-consuming procedural hurdles that preserve existing treaty bargains but also make the “legislative” overruling of an international tribunal harder.<sup>172</sup>

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168. See Anne F. Bayefsky, *The U.N. Human Rights Regime: Is It Effective?*, 91 ASIL PROC. 466, 469 (1997) (stating that “word is spreading that the Committee . . . will decide for itself in deportation cases whether there are substantial grounds for believing that the author of the communication would be in danger of being subjected to torture if returned to the country of origin,” resulting in a “marked increase in the number of individuals” approaching the Committee after their asylum claims have failed).

169. Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT’L L. & POL. 809, 817 (1999).

170. See Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 HARV. INT’L L.J. 541 (2002); Leah Sturtz, *Southern Bluefin Tuna Case: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455 (2001).

171. The three NAFTA parties, acting as the NAFTA Free Trade Commission, chose this approach in late 2001. The Commission issued a statement “to clarify and reaffirm the meaning of” a provision of NAFTA Chapter 11 which guarantees that foreign investors will receive “fair and equitable treatment” from the host state. The Commission acted after an investor-state dispute settlement panel had expansively interpreted that phrase. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpreten.asp> (July 31, 2001). Significantly, a later Chapter 11 panel considered itself bound to follow the Commission’s statement. See David A. Gantz, *International Decisions: Pope & Talbot, Inc. v. Canada, NAFTA Chapter 11 Arbitration Tribunal, 2000-2002*, 97 AMER. J. INT’L L. 937, 945-47 (2003).

172. These hurdles include a requirement that any amendment be approved by all or a supermajority of member states, or a requirement that any changes to the text must be formally ratified by each state before they can take effect. Helfer & Dinwoodie, *supra* note 147, at 219 n.265; see also Stephan, *supra* note 107, at 337 (stating that “[c]oordinated amendments involving all members will be difficult to enact due to holdout states”). But see Bernhard Boockmann & Paul W. Thurner, *Flexibility*

Perhaps the most pointed threat that states can direct against an independent tribunal is to rewrite jurisdictional, access, or procedural rules to restrict its authority. Scholars are divided over the potency of these tactics. Some have argued that such threats are credible, especially where the restriction is supported by the treaty regime's most powerful states.<sup>173</sup> Others are more dubious, reasoning that the political hurdles to formally revising treaty provisions are sufficiently high to thwart most jurisdiction-stripping initiatives.<sup>174</sup> The existing empirical record is mixed and thus open to conflicting interpretations.<sup>175</sup>

In contrast to using textual methods to refine treaty obligations, the power of reelection is a more indirect and less subtle method of control.<sup>176</sup> Most tribunals permit their members to serve a second term, and judges generally wish to be reelected.<sup>177</sup> The prospect of facing reelection may or may not affect judicial behavior significantly. From a political perspective, however, control over reelection provides states a measure of accountability for jurists who serve on tribunals that are otherwise highly independent.<sup>178</sup>

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Provisions in Multilateral Environmental Treaties, (Ctr. European Econ. Research, Discussion Paper No. 02-44 (2002) (documenting a wide range of flexibility arrangements for states seeking to revise environmental protection treaties), available at <ftp://ftp.zew.de/pub/zew-docs/dp/dp0244.pdf>.

173. Steinberg, *supra* note 100, at 264-65.

174. Alter, Agents or Trustees?, *supra* note 110, at 29-32.

175. Powerful countries such as the United States have advanced proposals to modify the WTO Dispute Settlement Understanding, but their fate remains uncertain pending the conclusion of the Doha Round. Steinberg, *supra* note 100, at 265-66. Proposals to curb the ECJ's jurisdiction are more frequent and have occasionally succeeded. Compare Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998) with Alter, Agents or Trustees?, *supra* note 110, at 12, 29 n.13.

176. The use of reelection as a control mechanism suggests that states may distinguish between controlling the tribunal as an institution and controlling one of its judges whose decisions they disfavor. An illustration of the former control device occurs when states change reelection rules in response to a tribunal's aggregate performance over time. For example, judges of the ECHR were initially elected for nine-year renewable terms. With the adoption of Protocol 11, the renewable term was reduced to six years. Newly drafted Protocol 14 would again increase the term to nine years, but would not permit judges to be reelected. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature May 13, 2004, art. 2, available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> (last visited Jan. 26, 2005). Notably, the intent of this change is "to reinforce [the judges'] independence and impartiality." Council of Europe, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention: Explanatory Report ¶ 50, available at <http://www.conventions.coe.int/Treaty/EN/Reports/html/194.htm> (last visited Jan. 26, 2005).

177. See Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 279 (2003); Shelton, *supra* note 17, at 37. But see Alter, Agents or Trustees?, *supra* note 110, at 16 (arguing that "judges tend to care more about their legacy as an [international court] judge than they do for their professional future").

178. To our knowledge, there is no comprehensive empirical study on reelection to international tribunals. Anecdotally, however, commentators have stated that reelection is the exception rather than the rule. Shelton, *supra* note 17, at 38. If true, this trend is consistent with states' use of reelection as a control mechanism, although there are other plausible explanations.

All of the foregoing ex post control mechanisms require some degree of cooperation among states parties. Unilateral responses are also available, however. In the GATT, for example, a defending state could prevent the adoption of an adverse panel report. As far as we are aware, no independent tribunal permits that kind of unilateral blocking.<sup>179</sup>

Another unilateral response involves adopting a strategy of exit.<sup>180</sup> If a single state is unable to convince its treaty partners to rein in a wayward tribunal, it need not acquiesce to continued judicial review. Instead, international law generally permits a state to remove itself from a tribunal's jurisdiction, either by withdrawing a declaration recognizing its compulsory jurisdiction or by denouncing the treaty that confers such jurisdiction.<sup>181</sup>

This strategy has its limits, and its execution depends on the character of the treaty at issue. Some international agreements deter exit by requiring a disaffected state to denounce the entire treaty, not merely its jurisdictional provisions. Whether a state exercises this more consequential exit option depends upon "(1) the mix of obligations and institutions a treaty contains; (2) the costs to a state's reputation and to the credibility of its commitment to comply with other treaties; and (3) the willingness of a state to eschew exit in exchange for a greater voice in shaping the regime's future."<sup>182</sup> This calculus suggests that withdrawals from package-deal agreements such as the WTO are unlikely, whereas withdrawals from treaties with more limited subject matters, such as human rights agreements, are more plausible.<sup>183</sup>

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179. See David Palmetier, *National Sovereignty and the World Trade Organization*, 2 J. WORLD INTELL. PROP. 77, 81 (1999).

180. For a more detailed discussion of this strategy, see Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. (forthcoming Nov. 2005).

181. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1880-81 (2002) (describing denunciation of First Optional Protocol to ICCPR by Jamaica, Guyana, and Trinidad & Tobago); Keohane et al., *supra* note 23, at 480; Gillian Triggs & Dean Bialek, *Australia Withdraws Maritime Disputes from the Compulsory Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea*, 17 INT'L J. MARINE & COASTAL L. 423, 423 (2002).

182. Helfer, *supra* note 181, at 1887.

183. See Steinberg, *supra* note 100, at 267 (characterizing the threat of the United States leaving the WTO in reaction to judicial lawmaking as having "limited credibility"). In 1999, Peru attempted to withdraw from the compulsory jurisdiction of the IACHR but remain a party to the American Convention. Peru did not attempt to denounce the American Convention after the court rejected the possibility of such a partial denunciation. See Karen C. Sokol, *International Decisions: Jurisdiction of Inter-American Court of Human Rights—Effect of Attempted Withdrawal of Jurisdiction*, 95 AMER. J. INT'L L. 178 (2001). One year earlier, however, Trinidad & Tobago responded to delays in the review of petitions by death row defendants by withdrawing from the American Convention altogether. See Helfer, *supra* note 181, at 1880.

#### D. *Political Ex Post Control Mechanisms*

States use a variety of political mechanisms to limit overreaching by independent tribunals that are already functioning. Perhaps the most common of these involves questioning the tribunal's reasoning, identifying errors it has committed, or highlighting its abuses of authority. That governments attach importance to such "delegitimizing" strategies is suggested by the pains they take to denounce objectionable decisions even when they are purely hortatory.<sup>184</sup> The modes through which states convey such challenges range from statements addressed to the general public or to communities of interested observers, to criticisms expressed at meetings of intergovernmental organizations, and, more troublingly, to direct or mediated interventions with individual judges.<sup>185</sup>

A second ex post political control is noncompliance with the tribunal's decisions. State responses range from outright recalcitrance and defiance at one extreme to partial or delayed compliance at the other. Given the frequency with which governments are believed to shirk compliance with international as compared to domestic law, noncompliance, standing alone, may not be viewed as a sanction by jurists or by observers. It may, however, be perceived in this way when used to augment challenges to a tribunal's legitimacy. As a practical matter, the efficacy of noncompliance as a judicial control mechanism is likely to vary with the state's success in linking these two strategies. Where the material or reputation costs of noncompliance are well established or fairly automatic, it will be more difficult to pin the fault on the tribunal rather than on the noncomplying state. Conversely, a noisy act of noncompliance by a powerful state that occurs early in a tribunal's life may devastate its legitimacy.

A third ex post political checking mechanism involves starving a tribunal by eliminating or reducing its diet of cases. This can be accomplished through docket control (for example, by limiting the number or types of cases filed with the tribunal, or by settling disputes before the tribunal issues decisions) or by siphoning cases away from one tribunal and submitting them to another tribunal with overlapping jurisdiction. The

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184. Steinberg, *supra* note 100, at 266. For a recent example, see Benjamin Netanyahu, *Why Israel Needs a Fence*, N.Y. TIMES, July 13, 2004, at A19. In response to an ICJ advisory opinion holding that the building of a security fence in the West Bank violated international law, Israel's Finance Minister and former Prime Minister stated that "[b]ecause the court's decision makes a mockery of Israel's right to defend itself, the government of Israel will ignore it." *Id.*

185. See Steinberg, *supra* note 100, at 266 ("Senior secretariat officials have met with and advised members of the Appellate Body to show restraint, when those officials perceived that the Appellate Body was leaning toward an activist stance."). For more extreme examples of governmental meddling in dependent tribunals, see Shelton, *supra* note 17, at 57-58 (describing an incident in which "Iran forced the resignation of several of its nationals on the Iran-U.S. Claims Tribunal"); John H. Jackson, *The Role and Effectiveness of the WTO Dispute Settlement Mechanism*, 2000 BROOKINGS TRADE F. 179, 184 (noting "instances of a [GATT] contracting party government interfering with potential panel decisions by inappropriately pressuring a particular panelist").

degree to which a state can employ these measures may depend upon whether the tribunal's jurisdiction is interstate or supranational. For interstate tribunals, docket control can be as simple as deciding whether or not to bring a dispute to one forum or another, or to resolve it through negotiation or other non-judicial means. Controlling the case load of supranational tribunals is a far more difficult proposition. Inherent in the very nature of supranational jurisdiction is a loss of state control over which cases a tribunal hears, relegating states to the other control mechanisms we have identified.

*E. Discursive Constraints of the Global Community of Law*

In addition to controls that states impose upon tribunals, other constraints arise from the very act of international judging and are internalized by courts, tribunals, and review bodies that participate in the global community of law. As we stated in our earlier work, such a community creates a sense of transnational judicial solidarity among judges that helps to shield their rulings from overtly political influences.<sup>186</sup> This shielding function does not, however, give judges a blanket license to conform legal rules to their own moral or ideological values. To the contrary, a community of law imposes constraints on decision makers that are equally important and equally real.

With regard to the act of judicial decision making in particular, a web of relationships built upon the forms and function of law validates certain forms of legal analysis and strategic decision making while discouraging others, fleshing out the outer contours of constrained independence (see Table 3). Jurists who venture beyond these discursive parameters risk significant damage to their standing in the eyes of other actors in the community.<sup>187</sup> This concern for reputation causes international judges to internalize norms of self-restraint that reduce the potential for overreaching and the need for ex post correction by states.

Part of this self-restraint is manifested in court-made procedural rules and methodological approaches that restrict opportunities for expansive lawmaking by tribunals. These doctrines include "screening devices to avoid deciding certain cases on their merits, incrementalist decision-making strategies, and identification of subjects ill-suited for international adjudication."<sup>188</sup> When employing these methodologies to limit their own authority, international jurists often acknowledge the virtues of deferring to

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186. See Helfer & Slaughter, *supra* note 15, at 370.

187. See Alter, *Agents or Trustees?*, *supra* note 110, at 25 ("[T]he appointment [to an international tribunal] is a high status appointment, where reputation matters greatly.")

188. Helfer & Dinwoodie, *supra* note 147, at 222.

domestic actors and considering the broader political climate in which national governments will receive their decisions.<sup>189</sup>

Judicial self-restraint has a substantive dimension as well, as the death row phenomenon aptly illustrates.<sup>190</sup> The content of the death row phenomenon has been shaped by an exceptionally widespread and robust dialogue among international tribunals and national courts in many regions of the world.<sup>191</sup> The majority of courts and tribunals have held that the phenomenon raises serious constitutional or human rights concerns. But not all.

The UNHRC has repeatedly rejected the claim that detention on death row, no matter how prolonged, amounts to degrading treatment or punishment under the ICCPR.<sup>192</sup> Significantly, the UNHRC grounded its approach in both principled legal analysis and political pragmatism. Legally, the Committee recognized that a ruling recognizing the death row phenomenon could cause governments to speed up executions, a result contrary to the treaty's express goal of encouraging all states toward abolition of the death penalty. Politically, the Committee understood that adopting a more rights-protective interpretation, particularly one strongly endorsed by European countries and tribunals,<sup>193</sup> would create a serious risk of non-compliance by its more diverse constituency of member states.<sup>194</sup> The Committee did not, we should stress, opt out of the global legal community; it carefully considered and distinguished the reasoning of other tribunals. But it ultimately adopted a more circumspect approach, one that was both defensible to the global community of law and sensitive to the political limits of its authority.

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189. See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 211-13 (1996); Helfer, *supra* note 52, at 399-401 (1998). Considering the political context of their decisions allows international tribunals to mitigate the risk of noncompliance by states. See Alter, *Agents or Trustees?*, *supra* note 110, at 41 (discussing WTO decision that was "aimed at endeavoring compliance" and in which "strict legal fidelity would have done more harm than good").

190. The death row phenomenon arises from the physical and psychological hardships experienced by defendants subjected to prolonged incarceration while awaiting execution of a capital sentence.

191. See *Developments in the Law—International Criminal Law: VI. The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 HARV. L. REV. 2049, 2052-59 (2001).

192. See *Johnson v. Jamaica*, U.N. GAOR Hum. Rts. Comm., 56th Sess., Annex, U.N. Doc. CCPR/C/56/D/588/1994 (1996). For an analysis, see Helfer, *supra* note 167, at 328-29.

193. See, e.g., *Soering Case*, 161 Eur. Ct. H.R. (ser. A) (1989), reprinted in 28 I.L.M. 1063 (1989).

194. As former UNHRC member [now ICJ Judge] Rosalyn Higgins has written, "what may be an appropriate and sensitive interpretation for the Western European democracies is not necessarily so for a global system embracing highly diverse political and economic systems." Rosalyn Higgins, *The United Nations: Still a Force for Peace*, 52 MOD. L. REV. 1, 7-8 (1989); see also Helfer, *supra* note 167, at 329 ("Were the Committee to adopt the ECHR's more rigorous approach, it would be setting a standard of protection so far out of touch with domestic laws that many States might be unwilling to follow it.").



## CONCLUSION

The conditions under which international tribunals are more or less effective, and the range of choices open to national decision makers in creating or reforming such tribunals, lie at the heart of global governance. Posner and Yoo have thus chosen to tackle an issue of great intellectual and political importance to the international legal system. Moreover, they address this issue with an interdisciplinary approach that blends legal analysis with the tools of social science to evaluate the empirics of how international tribunals are structured and how they actually perform.

We therefore applaud the analytical approach that Posner and Yoo adopt in *Judicial Independence and International Tribunals*, even as we disagree with their analysis and conclusions. If, as Posner and Yoo claim, an international tribunal, whose structural features and decision-making incentives resemble those of independent domestic courts, has little chance of performing its assigned role effectively in a particular issue area—whether trade, human rights, or protection of the environment—then we should face that fact and turn to more explicitly political or diplomatic mechanisms.

As our Response has shown, however, the evidence to support such a turn away from legalized dispute resolution by independent judges is demonstrably lacking. Both the data that Posner and Yoo assess—and, more tellingly, the data they ignore—cannot support their theoretical conjectures—neither their strong claim (that dependent tribunals are more effective than independent tribunals) nor their weaker, fall-back position (that independent tribunals are no more effective than their dependent counterparts). On the contrary, when the complete empirical record is assembled and analyzed according to the same social science methods that Posner and Yoo embrace, it demonstrates that the three most effective tribunals in the international legal system are independent tribunals. Moreover, states all over the world, presumably acting in their rational self-interest, are proliferating these independent tribunals and sending more and more cases to the ones they already established.

Contrary to Posner and Yoo, we do not find these developments to be surprising. We draw on a wealth of scholarship in international law and international relations to show (1) 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 the benefits of that regime; and (2) that independent judges—while certainly less bound by political concerns than their dependent counterparts and more able to base their decisions on legal principle—are hardly “lone rangers.” They are influenced by a host of structural, political and discursive constraints that states can manipulate *ex ante* and *ex post*, as well as by the pressures of professional and personal socialization within a global judicial community.

We thus advance a theory supported by the evidence—that states are increasingly selecting the option we describe as constrained independence.

Finally, it is worth noting that we do not champion independent international tribunals out of some fuzzy-headed notion that states will somehow forgo their national interests or see them transformed the minute they sign on to an international court. We are not, as Posner and Yoo suggest about unnamed “international legal academics,” motivated by an idealistic vision of how to transpose the domestic rule of law to the international system. Nor is our analysis driven by some overarching urge to impose an international judiciary on resisting nations, as Posner and Yoo periodically imply. Rather, we seek to make the theory, methodology, and empirics of social science available to advocates, analysts, and policy advisers doing the necessary work of integrating international law and politics.

The debate over the relative effectiveness of different kinds of international tribunals is a debate worth having. And it is a debate that we hope more international lawyers and political scientists will join. But it is a debate that will be ultimately won on the facts. On that basis, Posner and Yoo have stated their claim but not made their case.