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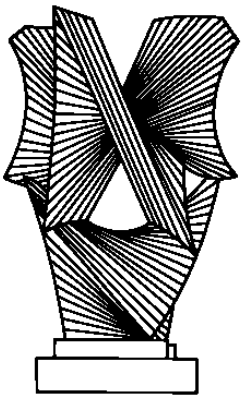

POLITICAL CONSTRAINTS ON INTERNATIONAL COURTS

Tom Ginsburg

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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CHAPTER 22

POLITICAL CONSTRAINTS ON INTERNATIONAL COURTS

TOM GINSBURG*

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* Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar, and Professor of Political Science at the University of Chicago Law School; Research Professor at the American Bar Foundation. Thanks to the Russell Baker Scholars Fund for support and to Nathan Bishop for helpful research assistance.

1 Introduction: The Problem of Political Constraints

The complicated relationship between politics and law has long been a central concern among international lawyers. The project of international law has, for more than a century, sought to construct a zone for autonomous legal decision-making, immune from political considerations, to resolve international disputes. Yet the context of international adjudication is, almost by definition, an intensely political one, and the efficacy of international law requires some consideration of that context. International disputes frequently involve high stakes, and so the dream of autonomous law providing technically correct solutions to resolve problems has always confronted the hard realities of international politics.

At the same time, the very success of international adjudication suggests that some courts and tribunals have been able to effectively navigate this tension. We know that courts operate under political constraints, but this is not something to be ignored or wished away. Indeed, the specifications of those constraints help us understand both the possibilities and limits of international adjudication. Political constraints are a central issue in the study of international law and politics.

The increased institutionalization of international law in the post-Cold War era has provoked a renewed debate about international adjudication, and the normative and positive questions about its relationship to politics. Some see in the rise of international law a new set of threats to traditional concerns of sovereignty, and as such fear the increasing power of judges. Political constraints, according to this view, are necessary to ensure accountability. Others see a risk of "politicization" that threatens the viability of beneficial international solutions to problems of governance. The debate has been useful but has not resolved all the issues. This chapter surveys some of the main arguments, providing a synthetic positive theory of political constraints on courts. It also provides illustrative examples from the practice of selected international courts. In doing so, it notes the important contributions made by scholars of domestic courts, who have developed a set of important tools that also help elucidate political constraints in the international sphere.

2 Between Lauterpacht and Morgenthau: The Evolving Literature

Contrary to the caricatures of some later scholars, international lawyers have long had some sensitivity to the real world context in which international law must operate.[1] The high-minded rhetoric of the Hague Peace Conferences of 1899 and 1906, which articulated the dream that international disputes could be resolved through peaceful means as a substitute for war, gave rise to significant efforts to institutionalize international dispute resolution. These culminated in the creation of the Permanent Court of Arbitration and the Permanent Court of International Justice. In examining these bodies, international legal scholars recognized that the international context limited the ability of courts to deliver on their promise in a purely legal way. The theory of the League of Nations architecture was not that all disputes were inherently capable of legal resolution. Rather, it was that *some* disputes were of this character. For other disputes, the League's political institutions would play a more central role.

Legal scholars debated whether political or legal considerations ultimately dominated.[2] Hans Morgenthau, who later founded the realist school of international relations in the United States, argued in his doctoral dissertation that the distinction lay with matters of state interest. Where vital interests were concerned, the state could not be subjected to external constraint by courts, and so these disputes were inherently incapable of resolution through adjudication.[3] Because it was ultimately up to the state to determine, as a political matter, whether to comply with judicial decisions, Morgenthau thought that politics overwhelmed law. Hersch Lauterpacht's important work, *The Function of Law in the International Community*, attacked both this view and the broader claim that some disputes, by their nature, are not capable of adjudication.[4] International judges, as judges, were obligated to find solutions to questions properly posed, and there was no dispute, in principle, that was not capable of judicial resolution, according to Lauterpacht.

The two schools took hold in different disciplines. In international relations the Morgenthau view was dominant, leading to realists such as John Mearsheimer to argue that international law was "epiphenomenal."[5] On the other hand, international

[1] Compare J Goldsmith and E Posner, *The Limits of International Law* (Oxford University Press 2005).

[2] See, in this handbook, O'Connell and VanderZee, Ch. 3.

[3] H Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (Leipzig: Universitätsverlag Noske 1929), as discussed in M Koskaniemmi, "C Schmitt, Hans Morgenthau and the Image of Law in International Relations" in M Byers (ed), *The Role of Law in International Politics* (Oxford University Press 2000) at 17.

[4] H Lauterpacht, *The Functions of Law in the International Community* (Oxford University Press 1933).

[5] JJ Mearsheimer, "The False Promise of International Institutions" (1994–1995) 19 International Security 5.

lawyers tended to assume the efficacy of legal solutions and to bemoan evidence to the contrary. The former view raised the question of what exactly international tribunals were doing, while the latter failed to provide any theories on the observed limitations on the scope of international adjudication.

The post-Cold War era saw a boom in international courts and, with it, some progress on the theory and rationale behind their creation and functioning.[6] However, there was a revival at this time of views that the courts were purely political. Eric Posner and John Yoo, for example, launched a major attack on international tribunals, arguing that they are least effective when they are "independent."[7] Conflating independence with institutionalization, Posner and Yoo defined independent courts as those that are permanent, staffed by judges with fixed terms, and possessed of compulsory jurisdiction over certain kinds of disputes. Posner and Yoo argued that "independent" courts would impose rules on states and constrain sovereignty, leading to ineffectiveness. Instead, they believed that tribunals appointed in an ad hoc way to resolve particular disputes will be more effective.

A key part of Posner and Yoo's argument is contrasting international courts with domestic courts, which they believe are subject to mechanisms of political control.[8] Indeed, this distinction between international courts operating in anarchy and domestic courts, backed by the power of the state, is central to much of the writing in the field. Yet the literature on domestic political constraints on courts is now well developed, and a close reading of it suggests that the basic institutional distinctions between international and domestic courts are overstated.[9] Like several other chapters in this handbook, we seek to soften the distinction between the literatures on international and domestic courts.[10] Focusing on political constraints is helpful for developing a unified theory of judicial power that operates at both the domestic and international levels.[11] We draw on ideas developed for the domestic sphere in literature on comparative courts.

Positive theories of domestic courts start with the assumption that judicial decision-making about the law is the product of interactions among various political institutions.[12] Courts issue decisions that comport with some presumed combination of legal requirements and judicial preferences,[13] but whatever their goals,

[6] See, in this handbook, Alter, Ch. 4.

[7] E Posner and J Yoo, "Judicial Independence in International Tribunals" (2005) 93 Cal. L. Rev. 1.

[8] Posner and Yoo, note 7, at 49.

[9] J Staton and W Moore, "Judicial Power in Domestic and International Politics" (2011) 65 Int'l. Org. 553.

[10] See, in this handbook, Huneeus, Ch. 20, and Voeten, Ch. 25.

[11] Voeten, Ch. 25; J Goldsmith and D Levinson, "The Law of States" (2009) 122 Harv. L. Rev. 1791.

[12] L Epstein and J Knight, *The Choices Justices Make* (Washington D.C.: Congressional Quarterly Press 1999); McNollgast, "Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law" (1995) 68 S. Cal. L. Rev. 1631; McNollgast, "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation" (1992) 80 Geo. L. J. 705.

[13] See also, in this handbook, Voeten, Ch. 25.

judges must pay some attention to the preferences of other actors. For example, in domestic legal systems, a legislature can overrule a judicial interpretation of a particular statute by passing a subsequent statute. This may be easier or more difficult, depending on the institutional structure and array of political preferences at any given time.[14] Legislatures also signal information about their reactions to courts, such that explicit overruling is not always necessary. These factors determine the size and shape of strategic space in which courts operate.

Analogous mechanisms can and do operate at the international level. States can both overrule and discipline tribunals that adopt rules outside the scope of state interests. This suggests that the debate over the merits of "independent" and "dependent" courts is less helpful than a contextual examination of the political constraints under which all international courts operate. Variations in these constraints will go a long way toward explaining the actual behavior of international tribunals, and their ability to effectively constrain the states at which their decisions are directed. We ask, then, not whether international adjudication is purely legal or political; clearly, it is both. Understanding the power and scope of international adjudication requires attention to how courts function as institutions in their political context. This in turn requires elaboration of the sources and modes of political constraint on judicial decision-making.

3 A Synthetic Framework: *ex ante* vs. *ex post* Institutional Constraints

One way to characterize political constraints is to focus on the points in time at which they are exercised, distinguishing between *ex ante* and *ex post* constraints. *Ex ante* constraints are implemented before decisions are made and include the definition of jurisdiction; formal appointment mechanisms that shape the court; and discursive techniques to get judges to internalize state values. *Ex post* constraints, on the other hand, are exercised after the judges render a decision, and include efforts to ignore, overrule, or reject decisions. An initial point at which political constraints become apparent is institutional design. The instruments that establish and regulate tribunals provide opportunities for states to tinker with institutional design in ways that ensure responsiveness to political interests, both *ex ante* and *ex post*.

[14] RD Cooter and T Ginsburg, "Comparative Judicial Discretion: An Empirical Test of Economic Models" (1996) 16 Int'l Rev. L. & Econ. 295, reprinted in S Voigt (ed.), *Constitutional Political Economy II* (Cheltenham: Edward Elgar 2003) at 160, 161.

3.1 *Ex ante* constraints

Scholars of domestic courts often argue that institutional design can affect political responsiveness, though the evidence for this proposition may be more mixed than is sometimes assumed. Still, in recent years a large body of research in comparative judicial politics has focused on institutional factors as determinants of independence and autonomy in decision-making.[15] Key aspects of institutional design include appointment processes,[16] judicial terms, and jurisdiction. This section examines these arguments, especially as they relate to international tribunals.

When judges can be appointed unilaterally by a state, one might think that the judge will be responsive to state interests. On the other hand, where judicial appointment is by election, judges will in theory be less beholden to any particular state, but arguably more responsive to the collective interests. Even in appointment systems with a single actor, states are constrained from appointing judges who are perceived as *too* partisan. After all, the judge must make credible legal arguments to convince colleagues in rendering decisions. This highlights the fact that international judicial decision-making is typically *collective* in nature. Judicial decisions are, at least in some instances, more than the sum of their parts, and courts are more than fora for preference aggregation. The need to make legal arguments means that states cannot appoint pure agents.

Empirical research has struggled to delineate the influence of appointments on judicial behavior in different courts. Analyzing the International Court of Justice (ICJ), Eric Posner and Miguel de Figuierdo used a multivariate analysis and found that judges rarely vote against their home states, and that they favor states whose wealth level is close to that of their own state.[17] Their research also showed connections, although weaker ones, between judges' voting patterns and the interests of the party that is politically or culturally most similar to that of the judge's home country. Eric Voeten took a similar multivariate approach in his comprehensive analysis of voting patterns on the European Court of Human Rights (ECtHR). He concluded that while judges on the ECtHR do show a slight tendency to favor their own home country when it is a party to a dispute, they do not generally exhibit cultural or geopolitical biases, and the court as a whole can be considered independent.[18] Voeten provided a wealth of additional interesting analysis, showing that career background makes a difference, with former diplomats being more supportive of

[15] See, e.g., G Helmke and J Rios-Figueroa, "Introduction" in G Helmke and J Rios-Figueroa (eds), *Courts in Latin America* (Cambridge University Press 2010) at 1.

[16] For a discussion of judicial appointments and elections, see, in this handbook, Mackenzie, Ch. 34.

[17] E Posner and M de Figuiredo, "Is the International Court of Justice Biased?" (2005) 34 J. Legal Studies 599. Although the authors find no evidence of regional bias, they have little data regarding this last issue because of the lack of participation of two-thirds of the UN membership.

[18] E Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights" (2008) 102 Am. Poli. Sci. Rvw. 417.

national governments.[19] These contrasts could reflect the fact that the membership of the ECtHR, and thus the appointment of its judges, is limited to European countries, which are more homogeneous in their interests and views than is the overall body of UN members. The ICJ, on the other hand, has some features—state consent to jurisdiction and ability to appoint an ad-hoc judge—that make it more akin to an arbitral body than a court,[20] and so there may be some expectation of loyalty on the part of the national judge in a particular case.

Another category of political constraints is discursive. States might promote international law doctrines of fidelity to the constituent instrument, and avoidance of judicial creativity as a kind of *ex ante* constraint to prevent judges from "going rogue." This shows that legal doctrine itself may have a political character, further undermining the law/politics binary that has long dominated certain discussions of international adjudication.

Terms of judges are additional factors that might affect judicial responsiveness to political interests. The crucial factor, it is usually thought, is whether judges can be reappointed or not. When judges can be re-appointed they are incentivized to perform well, but also may be reluctant to challenge powerful state interests. Some international courts allow re-appointment (e.g. the ICJ), while others limit it to a second term only (the WTO Appellate body), and some generally prohibit it (the International Criminal Court, or ICC, and now the ECtHR). Term lengths also vary from the relatively short four years of the WTO Appellate body to nine years at the ICC and ICJ.

Finally, control over the jurisdiction and power of the court, as laid out in its constituent instrument or founding treaty, is an essential tool of *ex ante* control. International adjudicators are only entitled to hear cases properly brought, and the ability of states to define the law is an important source of constraint. Treaty provisions can be laid out with a wide range of detail, either in loose standards or precise rules. As has long been observed, the latter tend to more tightly constrain judicial decision-makers.

Sometimes, of course, states will be unable or unwilling to articulate rules with sufficient precision to constrain judges, but they rarely seem to contemplate broad lawmaking power. Further, states seem to be reluctant to allow judges to decide cases *ex aequo et bono.* The Statute of the International Court of Justice, for example, allows states to permit the court to decide on the basis of such equitable considerations. Historically, however, such permission has not been granted and the court uses equitable considerations very rarely—at least outside the important context of maritime delimitation.[21]

[19] See, in this handbook, Voeten, Ch. 25. See also FJ Bruinsma, "The Room at the Top: Separate Opinions in Grand Chambers of the ECHR (1998-2006)" (2007) 28 Recht der Werkelijkheid 7.

[20] T Ginsburg and R McAdams, "Adjudicating in Anarchy" (2004) 45 Wm. & Mary L. Rev. 1228.

[21] UN Statute of the International Court of Justice (April 18, 1946), Art. 38(2).

In short, defining the terms under which judges will labor, establishing appointment mechanisms and laying out the relevant law and its level of precision all provide sources of constraint through which political considerations can be brought to bear. These techniques tend to be exercised *before* any individual decision is rendered and may have an impact on how judges actually vote.

3.2 *Ex post* constraints

In contrast, *ex post* constraints occur after a judicial decision has been rendered. They are easy to understand using Albert Hirschman's classic framework outlined in "Exit, Voice and Loyalty."[22] A party unhappy with a court decision can comply with the decision that it does not like, remaining loyal to its obligations. Alternatively, it can exit the court's jurisdiction, abandoning the regime. A third possibility is to exercise various forms of voice, remaining loyal to the regime but seeking to modify the ruling it does not like, or to influence future rulings from the tribunal. A fourth possibility is to ignore the ruling or fail to comply with it. This is both a way to avoid certain costs associated with the case at hand and an act of voice that influences future cases.

3.2.1 *Exit*

As an extreme measure, states unhappy with judicial decisions may seek to exit the broader regime of which the court is part. Treaties typically allow for denunciation with notice; the Vienna Convention on the Law of Treaties provides a default provision of 12 months' notice.[23] Decisions by France and the United States to exit the "optional clause" regime of the ICJ after adverse decisions are two high-profile illustrations. The "optional clause" regime, under Art. 36(2) of the ICJ Statute, allows states to file declarations that accept as compulsory the general jurisdiction of the court vis-à-vis any other state that has made a similar declaration. As with international obligations generally, these declarations can be withdrawn, which is exactly what happened after the famous *Nicaragua* case when the court rejected the preliminary objections of the United States.[24] France, too, exited the optional clause after an adverse decision in the *Nuclear Tests* cases.[25] Similarly, the United

[22] AO Hirschman, *Exit Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press 1970). See also JHH Weiler, "The Transformation of Europe" (1990) 100 Yale L.J. 2403, 2411.

[23] UN Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force January 27, 1980), Art. 56. See E Gaillard and Y Banifatemi, "The Denunciation of the ICSID Convention" (2007) 237 N.Y.L.J. 1; LR Helfer "Exiting Treaties" (2005) 91 Va. L. R. 1579.

[24] United States, "Statement on the U.S. Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice" (1995) 24 ILM 246.

[25] *New Zealand v. France* (*Nuclear Tests* cases) [1974] ICJ 457; *Australia v. France* (*Nuclear Test* cases) [1974] ICJ 253.

States withdrew from the Optional Protocol of the Vienna Convention on Consular Relations after the *Avena* decision in 2004.[26]

Another prominent instance of exit was a decision by several Caribbean states to exit the jurisdiction of the Privy Council in London in response to decisions implementing ECtHR prohibitions against the death penalty.[27] These states established a new Caribbean Court of Justice to replace the appellate jurisdiction of the Privy Council and to interpret the Treaty Establishing the Caribbean Community. Proponents of the new court argued that European judges were imposing their own preferences on Caribbean societies. In addition to these withdrawals, some states withdrew from the American Convention and the Optional Protocol to the International Covenant on Civil and Political Rights. Helfer interpreted these withdrawals as instances of exit in response to human rights adjudicators ignoring the preferences of states.[28]

It should be made clear that the costs of exit are not uniform across states within a given regime. Relatively easy exit from international regimes will allow small numbers of states that are powerful in the issue area to threaten to leave and establish new mechanisms.

3.2.2 *Voice*

When unable or unwilling to exit a regime, states often utilize voice, in the sense of articulating concerns so as to influence others. Joseph Weiler's classic article "The Transformation of Europe" argued that as exit from the European Communities was precluded for legal, economic, and political reasons, state demands for voice increased.[29] This section considers several ways in which states can exercise voice, using mechanisms that operate at the level of individual decisions or mechanisms that operate more generally. In the former category, states can communicate with the court by *ignoring* a particular decision, and hoping that whatever powers the court or other institutions have to enforce the decision will not be effective. Through the latter category, states can also seek to *overrule* the court's interpretation by amending the treaty regime or engaging in formal interpretation when it is provided for. More general mechanisms include the ability to *attack* the court, either explicitly by communicating displeasure or implicitly by trying to limit the court's jurisdiction, composition, or effective power in future cases. States can also seek to limit lawmaking by promoting an attitude of judicial passivity on the part of judges.

[26] *Mexico v. United States of America (Avena and Other Mexican Nationals)* [2004] ICJ 12.

[27] *Pratt and Morgan v. Jamaica* [1994], 2 AC 1, [1993] PC. See generally, J Harrington, "The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean" (2004) 98 AJIL 126; LR Helfer, "Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes" (2002) 102 Colum. L. Rev. 1832.

[28] Helfer, note 27. [29] Weiler, note 22.

States in some cases can simply ignore the decision of an international court, as Iceland did in the 1970s with the ICJ.[30] Such actions tend to undermine the general application of the rules pronounced in the cases at issue, though this is not always the case. Ignoring a decision is a communicative act expressing displeasure with a court ruling.

In domestic constitutional systems, legislatures can overrule wayward court decisions by passing subsequent legislation. This is the focus of much of the separation of powers literature. In the international arena, the analogous process is formal treaty amendment, but this is usually quite difficult and seldom exercised. There are several reasons for the relative rarity of amendment of treaty provisions to "correct" interpretation of a judicial decision in the international arena. First, to the extent that consent-based treaty regimes require accordance of *all* states to amend the regime, amendment in response to a decision will be difficult. An adverse judicial decision for one party is usually a beneficial decision for another. In bilateral settings, this fact alone makes it unlikely that both parties will agree to overturn a judicial decision. Even if the parties consider the judicial decision Pareto-inferior, they may simply choose to ignore it or conclude a side deal without formally amending the treaty.

In multilateral settings, the analysis is more complicated. Multiple parties typically do not build easy amendment procedures into the treaty design, and the more parties involved the more difficult any amendments will be to conclude. The WTO treaty, for example, involves multi-sectoral trade-offs of commitments by more than 100 countries. For this reason, the treaty is amended only as a package on the basis of multi-year negotiating rounds. The transaction costs of any amendment to multilateral treaties are intentionally high; in order to make the commitments effective, they must be difficult to escape. This makes the potential scope of lawmaking capacity greater in multilateral settings and is a source of concern about courts becoming runaway lawmakers.

Many international courts are embedded in broader international organizations, such as the UN or WTO. The bundling of international courts with broader regimes insulates the tribunals from certain forms of pressure, but also provides a point of leverage to pressure the courts into greater alignment with state preferences. That is, courts can draw on broader institutional resources by resisting pressure, but the institutional structures of larger regimes can also suffer because of adverse decisions. In some cases, the broader organization can act to constrain the jurisdiction of the court in response. One example is the Tribunal of the Southern African Development Community (SADC), which in one of its first cases ruled against the government of Zimbabwe in an eviction case.[31] After Zimbabwe withdrew, the other

[30] *UK v. Iceland* (*Fisheries Jurisdiction* case) [1974] ICJ, LR 3; *Federal Republic of Germany v. Iceland* (*Fisheries Jurisdiction* case) [1974] ICJ, LR 175. See also Shigeru Oda, "The Compulsory Jurisdiction of the International Court of Justice: A Myth?" (2000) 49 Int'l. & Comp L.Q. 251, 260.

[31] *Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe* [2007] SADCT 2.

member states agreed to limit the jurisdiction of the court to disputes among member states, removing jurisdiction over individual disputes.[32]

Even stand-alone courts such as the ICC are embedded in broader meetings of the states party. Regular meetings of the international organization or states party allow states to signal displeasure in a formal way. To the extent that the entire international organization's reputation is bundled up with that of the dispute resolution mechanism, the secretariat has an incentive to monitor and restrain the court. The embeddedness of certain international courts in broader organizations can thus bundle the legitimacy of the court with the legitimacy of the organization, providing a constraint on the court.

Furthermore, mobilizing public opinion against a court is also possible. The United States' sustained attacks against the ICC before it had even been created illustrate the attraction of this strategy to powerful states. This strategy is distinct from constraints imposed within the meetings of member states.

International tribunals may also be subject to budgetary constraints. States and international organizations can punish courts for negative decisions or reward them for positive ones through monetary resources. For example, the US Congress failed to increase the federal court's budget in the 1960s during a wave of judicial activism by Chief Justice Earl Warren's Court. The United States has from time to time sought to withhold dues from the UN and some of its agencies as a way of signaling displeasure. Pressure from donors to wind down the International Criminal Tribunal for the Former Yugoslavia (ICTY) is another example of such constraints being applied to an international court.[33]

3.2.3 *Facilitating loyalty*

Given the presence of these *ex ante* and *ex post* techniques for political constraints on international courts, what can courts and tribunals do to facilitate the "loyalty" response? The various legal techniques of judicial strategy are well understood in the domestic context. The quality of legal decisions is surely important in this regard. As Walter Murphy suggested a half-century ago, people "are more ready to accept unpleasant decisions which appear to be the ineluctable result of rigorously logical deductions."[34] Some have suggested that this appearance is facilitated by unanimous decisions. Another dimension is selection of cases. Choosing what questions to focus on is as important as the ultimate decisions. Courts have a long history of ducking particularly contentious issues and these techniques are as visible on the international plane as they are on the domestic one.

[32] For a discussion of the SADC Tribunal, see, in this handbook, Romano, Ch. 6.
[33] See, e.g., financing tribunals, in this handbook, Ingadottir, Ch. 27.
[34] W Murphy, *Elements of Judicial Strategy* (University of Chicago Press 1964) 17.

The job of courts is to make decisions that are complied with and, to do this effectively, courts need the support of particular audiences. Sometimes this will be a particular state or set of states powerful enough to insulate the court from attacks and pressure. In other instances, courts might find that it makes sense to appeal to the public.[35] James Cavallaro and Stephanie Brewer, for example, find that the Inter-American Court has frequently appealed to particular interest groups, the media, and the broader public to insulate its decisions from attack.[36]

These hardly exhaust the myriad techniques available to international courts. It is a characteristic of the political context that there is no fail-safe set of strategies. Furthermore, the ability to constrain international courts is differentially distributed in the international system, so that more powerful states are able to exercise greater control over tribunals. This leads to a hypothesis about the political perspective: the strategic decision spaces of international courts will be largely shaped by the power structure of the underlying regimes in which they are embedded. This is a claim subject to potential testing and verification and several studies have examined the issue in the context of particular tribunals.

4 Case Studies

This section provides several case studies of prominent tribunals: the ICJ, the dispute settlement mechanism of the North American Free Trade Agreement (NAFTA), the dispute settlement mechanism of the WTO, the international investment regime under the International Convention for the Settlement of Investment Disputes (ICSID) and the Inter-American Court of Human Rights (IACtHR). These are illustrative only, and we might have looked at any of the more than two dozen other international courts in existence. But the selected tribunals frequently deal with very powerful states and provide a range of illustrations of the dynamics set out in the earlier section.

[35] See G Vanberg, *The Politics of Constitutional Review in Germany* (Cambridge University Press 2005); J Staton, *Judicial Power and Strategic Communication in Mexico* (Cambridge University Press 2010).

[36] JL Cavallaro and SE Brewer, "Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court" (2008) 102 AJIL 768.

4.1 ICJ

As the principal judicial organ of the UN, the ICJ plays a central role in the international judicial system.[37] Appointment to the ICJ requires majority votes in both the General Assembly and the Security Council, but the system has evolved in such a way that powerful states have an informal right to nominate judges for a seat on the court. This illustrates how bundling a court with a broader institution can affect the appointment process: states' "true" preferences are constrained by the system of voting blocs in the UN as a whole.

The ICJ is also somewhat constrained by its institutional design. Its jurisdiction is largely consensual, with an advisory jurisdiction to allow certain UN bodies and international organizations to refer legal questions to the ICJ for a declaratory statement of the relevant law. This jurisdiction has been used successfully by international organizations to resolve disputes about their own scope of assignment and powers.[38] This provides the ICJ with at least one audience that can help to insulate the court somewhat from raw political pressure exerted by states.

With regard to the contentious jurisdiction, things are trickier. As mentioned above, powerful states such as the United States and France have exercised the exit option. States have also ignored adverse decisions at times. For example, with regard to an ICJ decision in a case involving a border dispute between Nigeria and Cameroon, Nigeria took the position that it neither accepted nor rejected the pronouncement of the court.[39] Iran ignored the ICJ's decision in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* which called on it to release hostages held in 1980.[40] Still, Conrad Schulte, in a major study of final orders and decisions, has found relatively few instances of non-compliance.[41] Richard McAdams and I, in a parallel study, also found a high level of compliance, but argued that their results reflected an important selection bias.[42] Cases that go all the way to a final resolution are precisely those for which states have an interest in compliance, and generally concern low-stakes matters that do not go to core interests.

[37] See, in this handbook, Murphy, Ch. 9.

[38] *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ 174.

[39] See C Paulson, "Compliance with Final Judgments of the International Court of Justice since 1987" (2004) 98 AJIL 434, 450.

[40] *U.S. v. Iran* (*Case Concerning United States Diplomatic and Consular Staff in Tehran*) [1980] ICJ 64.

[41] C Schulte, *Compliance with Decisions of the International Court of Justice* (Oxford University Press 2004). See also J Collier and V Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press 2000) at 178 ("All decisions were, sooner or later, complied with."); MK Bulterman and M Kuijer (eds), *Compliance with Judgments of International Courts* (Dordrecht: Kluwer Law International 1996) 35 (most decisions complied with).

[42] T Ginsburg and R McAdams, "Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution" (2004) 45 Wm. & Mary L. R. 1229.

4.2 NAFTA

All treaty regimes have, implicitly, one mechanism analogous to domestic legislation to constrain courts: the possibility of amending the constituent instrument to correct erroneous or misguided interpretations that run foul of the states' preferences. The general rule in international law, however, is that unanimous consent is required to amend treaties. If the treaty regime has only two or three parties, this may not be a difficult threshold to reach. But the larger the number of parties to a multilateral treaty, the more difficult it will be to amend. So, for example, we ought to expect that formal overruling will be more difficult in the WTO, which has 159 states parties at this writing, than it will be in NAFTA, with three. For large multilateral treaties, international courts may have more freedom in which to maneuver than domestic courts, which can be "over-ruled" by majority rule.

NAFTA includes another mechanism for over-ruling decisions: a residual power of the states parties to interpret the international trade agreement.[43] One aspect of this is the power of the non-disputing treaty party to submit views on interpretive issues to the arbitral panel. In addition, NAFTA established a Free Trade Commission, comprised of cabinet-level officials from each of the parties, which is empowered to issue interpretations of the Treaty.[44] The Commission has the power to:

> (a) Supervise the implementation of [the] Agreement; (b) oversee its further elaboration; (c) resolve disputes that may arise regarding its interpretation or application; (d) supervise the work of all committees and working groups established under this Agreement;…and (e) consider any other matter that may affect the operation of this Agreement.[45]

This interpretive function, distinct from the dispute settlement system, serves as a lawmaking constraint on panels without the requirement of formally amending the underlying agreement. Chapter 11 of NAFTA provides that "[a]n interpretation by the [Free Trade] Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."[46] The states party thus sets up a special body that can both monitor the dispute resolution process and influence it by providing binding interpretations.

This process was used to interpret the standard of expropriation in NAFTA and its relation to general international law. NAFTA Art. 1105 provides that "[e]ach party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Some early NAFTA panels had suggested that the standards

[43] See, in this handbook, Baudenbacher and Clifton, Ch. 12.

[44] North American Free Trade Agreement (adopted December 3, 1993, entered into force January 1, 1994), Art. 2001.1, 32 I.L.M. 605, 693.

[45] NAFTA, Art. 2001.2. [46] NAFTA, Art. 1131.2.

for "fair and equitable treatment" and "full protection and security" were different under NAFTA than under general international law.[47] In an effort to clarify the meaning of Art. 1105, the Free Trade Commission issued an interpretive statement in 2001 that provided: "The concepts of "fair and equitable" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary standard of treatment of aliens."[48] Following this interpretive statement, the arbitral tribunal in *Loewen v. United States*, an ICSID arbitration brought by a Canadian funeral home operator, declared that " 'fair and equitable treatment' and 'full protection and security' are not free-standing obligations."[49] Rather, they constitute obligations of the host state "only to the extent that they are recognized by customary international law."[50] The *Loewen* tribunal also stated that to the extent earlier NAFTA tribunals in cases such as *Metalclad Corp. v. United Mexican States*, *S.D. Myers v. Government of Canada*, and *Pope & Talbot v. Government of Canada* "may have expressed contrary views, those views must be disregarded."[51]

This pattern shows that states were able to influence a prominent dispute settlement system on a core issue, requiring the panels to apply a relatively clear body of international law rather than create a new potentially conflicting body of law. This "correction" of the judicial panels was somewhat controversial. The late Sir Robert Jennings, former president of the ICJ, criticized this as a quasi-legislative intervention violating "the most elementary rules of due process of justice."[52] But such constraints are inherent in domestic systems of justice as well, and states will be reluctant to delegate *any* authority to resolvers of disputes if judges completely resist political control.

[47] See *Metalclad Corp. v. United Mexican States* (2001) 40 I.L.M. 35, para. 100–1. States were concerned that "fair and equitable" would become a license for arbitrators to award damages in any case where the arbitrators viewed the government action as unfair.

[48] "NAFTA Free Trade Comm'n, Notes of Interpretation of Certain Chapter 11 Provisions" (July 31, 2001), Art. B.2. These notes of interpretation also clarified that other NAFTA treaty norms, which are themselves international law, do not by the terms of Art. 1105 become subject to Ch. 11 dispute resolution. See A Afilalo, "Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Resolve their Legitimacy Crisis" (2004) 17 Geo. Int'l Envt'l L. Rev. 51, 61.

[49] *Loewen Group, Inc. v. United States*, Award [2003] ICSID Case No. ARB (AF)/98/3, 42 I.L.M., para. 128.

[50] *Loewen Group, Inc. v. United States*, Award, note 49, para. 125.

[51] *Loewen Group, Inc. v. United States*, Award, note 49, paras 124–8; Compare *Pope & Talbot, Inc. v. Canada*, Damages, (NAFTA Ch. 11 Arb. Trib. May 31, 2002), 41 I.L.M. para. 47 ("[W]ere the Tribunal required to make a determination whether the Commission's action is an interpretation or an amendment, it would choose the latter.").

[52] See *Methanex Corp. v. United States* [2001] UNCITRAL 1105(1) (second opinion of Robert Y Jennings Q.C.), available at <http://italaw.com/sites/default/files/case-documents/ita0983.pdf> accessed July 27, 2012.

4.3 WTO

Richard Steinberg has analyzed judicial lawmaking at the WTO, and in particular the growth in expansive judicial interpretations that followed the switch from the General Agreement on Trade and Tariffs (GATT) in 1994.[53] This switch famously modified a rule requiring unanimity to adopt panel reports to one requiring unanimity to reject a report. This made it easier to adopt reports, thereby expanding judicial policy space. Steinberg also analyzed *ex ante* constraints, such as appointment processes, and *ex post* processes, such as overruling in the context of the WTO.

Ex ante mechanisms may be more effective than *ex post* ones at the WTO. Members of the Appellate Body are proposed by a special committee and selected by consensus. Major players in the trade arena, however, have informal veto powers, which serve to ensure a certain degree of consent over the composition. Manfred Elsig and Mark Pollack demonstrated that the process is becoming increasingly politicized.[54] Still, overruling the Appellate Body's interpretations is quite difficult because of the large number of parties to the WTO and high voting thresholds. While the WTO's Ministerial Conference and the General Council already have the formal power to adopt binding interpretations of the WTO Agreements by three-fourths majority vote, in practice, the WTO relies on norms of consensus.[55] Even when the formal WTO treaty allows voting, states parties have resisted it. The difficulty of reaching consensus and the need for such consensus to block the adoption of panel reports in turn greatly empowers the dispute resolution system. Some have proposed allowing the Dispute Settlement Body to adopt panel reports in part; others have proposed making legislation and amendment easier in practice. Any successful attempt to make lawmaking easier will lead to a corresponding reduction in the discretion of judicial lawmakers. Indeed, even the proposal may have some effect, as a court might take the threat of modification seriously enough to tone down its decisions. The point is that the states do have some explicit mechanisms for correcting erroneous interpretations of trade agreements, though they may not always choose to exercise them.

4.4 International investment arbitration

Even the international arbitration regime is subject to political influence. Investment law is usually conceived as involving a complex game of cooperation and competition between capital-exporters (home states) and capital-importers (host states).

[53] RH Steinberg, "Judicial lawmaking at the WTO: Discursive, constitutional, and political constraints" (2004) 98 AJIL 264.

[54] M Elsig and M Pollack, "Agents, trustees, and international courts: The politics of judicial appointment at the World Trade Organization" (forthcoming) 18 Eur. J. Int'l Relations.

[55] WTO Dispute Settlement Understanding, Art. IX.2.

For many years, host states criticized the regime of foreign investment centered around the ICSID and the large network of Bilateral Investment Treaties (BITs) providing the primary regulatory regime.[56] Many analysts believed that developing countries could not afford to leave the regime and were forced to submit to rules that were collectively suboptimal.[57]

In 2007, at a presidential summit, President Hugo Chavez announced Venezuela would be leaving several imperialist international organizations, including the ICSID. Shortly thereafter, Bolivia became the first country to withdraw from the ICSID Convention. Two years later, Ecuador followed suit, and, in early 2012, Venezuela became the third Latin American country in five years to exit the convention. This followed an adverse decision handed down by an ICSID arbitration committee against the country for nationalization of an Exxon project.

Beyond exit, host states have exercised voice. Venezuela put out a press release claiming—falsely—that ICSID tribunals "ruled 232 times in favor of transnational interests out of the 234 cases filed throughout its history."[58] The Argentine cases demonstrate another technique: ignoring adverse judgments. During the 1990s, Argentina engaged in an extensive program of liberalization to attract greater foreign investment. It concluded a BIT with the United States in 1991 and pegged its currency to the dollar. In the late 1990s, however, a balance-of-payments problem forced the Argentine government to seek a freeze on US PPI-based inflation adjustments that had been promised. In December 2001, it subsequently enacted an emergency set of capital controls, suspending convertibility of the currency into dollars, and canceling future tariff adjustments. A rash of ICSID claims followed, asserting a variety of claims grounded in international investment law. The claims included indirect expropriation, violation of the obligation to accord fair and equitable treatments, and discrimination. A majority of these decisions were found in favor of Argentina, while others were found against it, often on very similar facts.[59] Of some $40 billion in awards rendered as of this date, less than one percent of it has been collected so far. Argentina has not withdrawn from ICSID, and has instead simply failed to pay the judgments. In 2012, Argentina announced a new expropriation of shares of an oil company called YPF, which is owned by the Spanish firm Repsol.

[56] See, in this handbook, Schreuer, Ch. 14.

[57] A Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 Va. J. Int'l. L. 639.

[58] "Gobierno Bolivariano denuncia convenio con Ciadi" (January 25, 2012) <http://www.mre.gov.ve>. But see S Franck, "Development and Outcomes of Treaty Arbitration" (2009) 50 Harv. Int' l L. J. 435; "Come and get me: Argentina is putting international arbitration to the test" *The Economist* (February 18, 2012) 24 (reporting that 20 percent of cases are found in favor of investors).

[59] *LG&E Energy Corp. v. Argentina*, Award [2007] ICSID Case No. ARB/02/1. But see *CMS Gas Transmission Co. v. Argentina*, Decision on Objections to Jurisdiction [2003] ICSID Case No. ARB/01/8.

4.5 The IACtHR

The IACtHR is often celebrated for its progressive interpretation of human rights law and its creativity regarding remedies.[60] As late as the 1990s, scholars praised the court's ability to generate compliance with its decisions.[61] In the early 2000s, it issued a series of decisions overturning national amnesty laws, thereby allowing the retrospective examination of crimes committed during the region's decades of military rule.

Yet states have been willing to ignore the court and have occasionally even withdrawn. Peru withdrew briefly under the government of Alberto Fujimori but later returned. In recent years, however, there has been renewed challenge to the jurisdiction of the court, emanating this time from the left rather than the right. The so-called Bolivarian Alliance for the Americas, led by Venezuela under Hugo Chavez, has been vociferous in its attacks on the court. The court had criticized the attempts by Chavez to purge the judiciary, but Chavez had ignored its rulings.[62] Similarly, when the commission ruled that Venezuela had to allow an opposition politician, Leopoldo Lopez, to run for office, Chavez ignored it. Not content with ignoring the rulings, the governments began to exercise voice. Venezuela's ambassador to the Organization of American States (OAS) called the court "an instrument of the empire."[63] At the OAS annual meeting in June 2012, President Evo Morales of Bolivia suggested the elimination of the IACtHR and other Bolivarian Alliance countries threatened to withdraw if reforms were not made.

In 2011, the court found itself at odds with the government of Brazil over the large Belo Monte dam in the Amazon, requiring that construction halt for further consultation with local communities. This led the Brazilian government to suspend paying dues to the OAS for a year. The OAS responded with a debate over the IACtHR and agreed to weaken the commission by allowing countries to delay the publication of country-specific reports for a year and allow a right of reply. Further proposals are under discussion for modifying the right of individual petition and reducing the power to order precautionary measures. In a further sign of political backlash in late 2012, Venezuela announced that it was withdrawing from the court in response to adverse rulings, but the court continued to hear cases against it.

[60] *Velasquez-Rodriguez v. Honduras* [1987] Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988); *I Ximenes Lopez v. Brazil* [2006] Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 149, P 8 (July 4, 2006); *Moiwana Village v. Suriname* [2005] I Preliminary Objections, Merits, and Reparations, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 124, (June 15, 2005).

[61] D Cassel, "Peru Withdraws from the Court: Will the Inter-American Human rights System meet the Challenge?" (1999) 20 Hum. Rts. L.J. 167.

[62] Human Rights Watch, "A Decade Under Chávez: Political Intolerance and Lost Opportunities for Advancing Human Rights in Venezuela" (September 18, 2008) available at <http://www.hrw.org/reports/2008/09/18/decade-under-ch-vez>.

[63] "Chipping at the Foundations," *The Economist* (June 9, 2012) 41.

In short, the IACtHR seems to have neglected the need to have a core constituency willing and able to defend it against attacks from governments. By simultaneously challenging what were perceived as core policies of several states at once, including some that had a strong amount of domestic political support, the court seems to have provoked a serious backlash. At this writing, the outcome is uncertain. But the tale illustrates the general phenomenon of political constraints all too clearly.

5 Conclusion

It is useful, though somewhat unfair, to characterize the classical debates in international law as juxtaposing a purely "political" view, that law is simply a reflection of interests, with a "legal" view that sees law as the autonomous product of professional judgment. This parallels studies of the American Supreme Court that sometimes contrast the "attitudinal model," with a "legal model" in which they always vote the law. The domestic literature has increasingly shifted to a more synthetic "strategic" model, in which judicial ability is constrained by the preferences of other actors. Such constraints are always partial and, in every case, there is some zone of judicial autonomy or discretion. Judicial power is neither infinite nor epiphenomenal. In the sophisticated application of this model, the technicalities of the law are important, both in constructing the judicial "preferences" and for legitimation before the broader set of audiences that support judicial power.

This domestic literature has given us a powerful lens through which to examine international courts and tribunals. We now understand that there is a zone of judicial discretion, but that courts operate within political constraints. Indeed, it could hardly be otherwise, for political interests are involved in establishing international courts and providing them with ongoing material and political support.

Research Questions

1. How do institutional design factors, such as appointment processes, influence the behavior of international courts? We have some preliminary empirical work in this regard on Europe, but little on other courts.
2. How has the institutional design of tribunals changed over time? Are states learning new techniques of political control?

3. How do judges respond to states' exiting from jurisdiction after adverse decisions? Are the tendencies toward correcting the source of grievance?
4. To what audiences do states communicate displeasure over adverse decisions?

Suggested Reading

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Readers with comments may address them to:

Professor Tom Ginsburg
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
tginsburg@uchicago.edu

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