

## Beyond Dispute: International Judicial Institutions as Lawmakers

### Prospects for the Increased Independence of International Tribunals

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#### A. Introduction

There appears to be a widespread perception, particularly among developing states, that international institutions continue to be disproportionately influenced by a small group of powerful states that played a dominant role in their creation and design. In recent years this has led to a growing acceptance among international legal scholars that the future legitimacy and credibility of international tribunals will be critically tied to the extent to which they are viewed as independent.<sup>1</sup>

To date, most of the literature on the independence of international tribunals, like most of the literature dealing with judicial independence at the domestic level, has focused on the rules connected with the ways that judges are nominated, selected, and tenured.<sup>2</sup> While it is true that these formal structural features have an important role to play in determining judicial independence, they are not sufficient in and of themselves. The effectiveness of international tribunals and their freedom to interpret and develop the law in the way that they deem appropriate is also a function of attributes of the broader political context in which they are embedded.

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<sup>1</sup> On the link between judicial independence and legitimacy, see, e.g., Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification* (2010), available at: <http://ssrn.com/abstract=1593543>; Ruth MacKenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARVARD INTERNATIONAL LAW JOURNAL 271 (2003).

<sup>2</sup> *Supra*, note 1. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo* 93 CAL. L. REV. 1, 44-57 (2005) discusses the political and structural factors that motivate states to create and constrain the independence of international tribunals. See also Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 460-62 (2000) (referring also to 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, as also playing a role in determining overall tribunal independence)

In this essay we draw upon the theoretical and empirical literatures on the evolution of court independence within modern democratic states to identify aspects of their political environments that have fostered judicial independence at the domestic level. We then extend that analysis to examine the role that these or similar factors are likely to play in facilitating the independence and legitimacy of international tribunals at the global level. We focus on two such broad aspects of the global environment not normally associated with the independence of international tribunals: the extent of political division between states that are parties to an international tribunal (interstate competition), and the extent of political division within states between state executives and national courts (interbranch competition). We suggest further that the conditions that facilitate independence have increased in recent years and are likely to continue to do so.

The proliferation of international tribunals in recent years has focused scholarly attention on the extent and legitimacy of their lawmaking functions. Although never explicit, an integral part of the judicial process is the making of new norms by way of interpreting relevant texts and applying them to novel situations. To understand the extent of judicial lawmaking at the international level and to be able to assess its political legitimacy it is necessary to explore the background conditions that have led to the emergence and growth of international tribunals. Below we argue that the most important determinant of political legitimacy at the international level is roughly the same as Ely and others have long argued that it is within the domestic sphere; i.e., the extent to which a given court is perceived to be sufficiently independent of the powerful actors that dominate the political sphere to take less powerful and minority interests into consideration.<sup>3</sup> There are, of course, any number of other factors involved in shaping the outcome of the litigation at the level of the international tribunal, such as the relative clarity of the relevant legal texts and the room for discretion they leave for the judges, the analytic qualities of the judges, and their moral convictions. In addition, there are a number of factors that enhance or detract from the perceived legitimacy of the law made by the international tribunal, such as the process of the litigation itself, the content of the new law, and the ways it affects diverse stakeholders. However, we argue below that the perceived independence of a given international tribunal from the handful of powerful states that have tended to dominate the institutional design process continues to be the most significant factor in shaping the extent to which judge-made law is regarded as legitimate in the eyes of less powerful states. Such political independence on the part of the international tribunals continues to be a necessary, if not sufficient, condition for the perceived legitimacy of their lawmaking.

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<sup>3</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

While normative assessments of judicial lawmaking usually assume that courts are independent, this is not always the case. In many parts of the world, courts regularly make laws that disproportionately promote the interests of a small group of powerful political actors at the expense of the majority of citizens and often function as their surrogate legislatures. The situation is similarly mixed at the international level. Lawmaking by international tribunals has always been and continues to be both the product of international tribunals that are effectively dependent agents of powerful states who employ them as delegated legislatures (“surrogate lawmaking”) as well as comparatively independent tribunals that have managed to employ their discretion to make law that may not be in line with the wishes of the dominant actors that created the international tribunal (“independent lawmaking”). Obviously, only the second type of lawmaking reflects what most commentators would regard as compatible with democratic principles. It is doubtful that surrogate lawmaking can ever be wholly democratically legitimated. A given decision may happen to be good law (e.g., ending impunity to war criminals, improved protection of global commons, etc.), but judicial independence is a necessary condition for legitimacy and surrogate lawmaking fails this test by definition. Moreover, it is doubtful whether opening up the international tribunal for public participation and reason-giving could remedy the inherent deficiencies of a dependent tribunal.

To facilitate the normative discussion about the legitimacy of lawmaking by international tribunals, this essay explores the geopolitical conditions in which lawmaking by “surrogate” and “independent” tribunals arise. Drawing on theoretical work on judicial independence conducted by political economists, we argue that judicial independence depends on the degree of political competition among the major political actors and the extent of policy differences among them. In general, the greater the competition and policy differences, the more “political space” is available for courts to operate within, and the broader their independence and discretion is in setting and implementing policies. The absence of these conditions facilitates what we term “surrogate” courts or lawmaking in which courts have little or no independence. While the conditions that facilitate the emergence of “surrogate” lawmaking are relatively simple to describe, the conditions under which powerful states might voluntarily agree to accept to surrender a substantial degree of control over international tribunals—and by so doing tolerate the prospect of growing constraints on their own discretion—has received relatively little attention.

While obviously international tribunals can possess varying degrees of independence and any given court can possess different amounts of discretion in different issue areas under their jurisdiction, it is useful to begin by contrasting two different ideal types of international tribunals: dependent international tribunals and independent ones. Part B below provides a brief description of lawmaking by dependent international tribunals. Part C describes the conditions that allow international tribunals sufficient political space to make law relatively independently. Part D concludes.

## B. Surrogate Lawmaking

In many cases, the composition and mandates of international tribunals is overseen by a small group of powerful states that enjoys a relatively high level of consensus with respect to the way they perceive the role of the international tribunals. The five permanent members of the UN Security Council are united in their desire for ineffective review of Security Council Resolutions by the International Court of Justice (ICJ), and limited review of internal administrative matters.<sup>4</sup> The founders of these international tribunals possess the capacity and incentive to directly monitor the members of the tribunals. They dominate the process of nomination, define the criteria for renewing the appointments, and approve the court's budget.<sup>5</sup> They can also limit the court's independence by disregarding its judgments, by threatening to abandon it for a different venue,<sup>6</sup> by institutionalizing ways to overcome its interpretations,<sup>7</sup> or by simply renegotiating treaty obligations.<sup>8</sup> To the extent that this group of states can remain united they can employ these instruments of control to both limit the discretion of international tribunals and pressure them into adopting a jurisprudence that will be more conservative in terms of the existing status quo than that of their national court counterparts and the international tribunals that they monitor less closely.

In general, the more influential a given court is and the more significant the consequences of its decisions are for the interests of the dominant states, the more likely it is that these tools will be employed. This perspective suggests that the ICJ's "infuriatingly transactional" jurisprudence, "sparse reasoning," beating around the bush with respect to applications of

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<sup>4</sup> This can be inferred from the decisions of the ICJ in cases like those mentioned in notes 36-38 *infra*.

<sup>5</sup> For an analysis of the methods for controlling international tribunals, see Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VIRGINIA JOURNAL OF INTERNATIONAL LAW 412 (2008); Tom Ginsburg, *International Judicial Lawmaking* (2005), available at: <http://ssrn.com/abstract=693861>.

<sup>6</sup> On the effects of the ability of states to pick and choose among international tribunals, see Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STANFORD LAW REVIEW 595, 628 (2007).

<sup>7</sup> Such as the NAFTA Free Trade Commission composed of representatives of the three member states that has the authority to overrule interpretations of the NAFTA by arbitrators. See NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 31 July 2001, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/nafta-interpr.aspx?lang=en>. Similarly, "[t]he [ECJ's] discretion to interpret secondary legislation was curtailed by the move from unanimity to [Qualified Majority Voting] in the [European] Council" (George Tsebelis & Geoffrey Garrett, *The Institutional Foundations of Intergovernmentalism and Supranationalism in the European Union*, 55 INTERNATIONAL ORGANIZATION 357, 359 (2001)).

<sup>8</sup> On the widespread renegotiating of investment treaties, see UNCTAD World Investment Report 2010, 86, available at: <http://www.unctad.org/Templates/Page.asp?intItemID=1465>.

*jus cogens*, and lack of progressivity compared to other international tribunals<sup>9</sup> are more attributable to the powerful state scrutiny that the court labors under than to the judicial philosophies of its judges.

In addition to settling interstate disputes in ways that broadly reflect the interests of the system's principal designers, international tribunals provide them with several other important services.

### *I. Internal Monitoring of the Bureaucracies of International Organizations*

Designers of any large-scale organization or system have reason to worry that the bureaucratic agents to whom they delegate day-to-day operational authority will exploit their informational advantage and undermine their interests, and international organizations are no exception. Assigning international tribunals detailed internal oversight functions and vesting them with broad disciplinary power provides the system's designers with a relatively low cost way to discipline bureaucracies of international organizations for failing to implement their preferred policies or complying with what they believe to be the norms of good governance. The reputation for impartiality and independence that international tribunals often enjoy enables them to oversee and, if necessary, rule against bureaucrats, regardless of nationality, and reduces the political costs of direct control that system designers would otherwise have had to assume. Lawmaking in this context is likely to focus on good governance requirements, and/or on transparency and broad participatory rights that would privilege representatives of constituencies of the powerful states. Pertinent examples include administrative tribunals that oversee employment conditions<sup>10</sup> and the independence of office-holders,<sup>11</sup> as well as treaty bodies that review the implementation of policies by the management of the international body, such as the World Bank Inspection Panel.<sup>12</sup>

### *II. Imposing Treaty-Based Obligations on Weaker Member States*

Since the primary function of international tribunals is to ensure the compliance of parties to an international organization with its rules and obligations, such as the compliance of

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<sup>9</sup> Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EJIL 265, 288 (2008).

<sup>10</sup> See, e.g., *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, 166 (ICJ reviews legality of judgment of United Nations Administrative Tribunal).

<sup>11</sup> Administrative Tribunal of the International Labour Organization, *Bustani v. Organisation for the Prohibition of Chemical Weapons*, Judgment No. 2232 of 16 July 2003, available at: <http://www.ilo.org/public/english/tribunal/fulltext/2232.htm> (The Tribunal reaffirms that the independence of international civil servants is an essential guarantee for the proper functioning of international organizations).

<sup>12</sup> For WBIP cases, see <http://www.inspectionpanel.org/>.

members of the WTO with WTO norms, lawmaking in this context generally means expanding the obligations that member states have beyond what they envisioned at the time of concluding the treaty. International tribunals tend to interpret widely the powers of international organizations under the “implied powers” doctrine and hence their authority vis-à-vis member states.<sup>13</sup> International tribunals have also interpreted widely their own authority to obtain information related to the litigation directly from constituencies not represented by governments,<sup>14</sup> an interpretation that was vehemently opposed by developing countries.<sup>15</sup> In disputes concerning foreign investments, international tribunals have developed rules concerning the amount of damages and other reparations that host states—predominantly developed ones—owe under international law, absent specific treaty provisions on this matter.<sup>16</sup> The law on internal armed conflict was developed by international tribunals, thereby overcoming the need to have developing countries (the main target of this law) agree to them.<sup>17</sup>

For the most part, powerful states are advantaged by a fragmented system of treaty regimes because such a regime makes it difficult for weaker parties, who are more likely than powerful states to possess disparate preferences, to increase their bargaining power by creating cross-issue coalitions so that they can act collectively.<sup>18</sup> On the surface, it

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<sup>13</sup> See, e.g., *Reparations for Injuries Suffered in the service of the United Nations*, ICJ Reports 1949, 178, 182; *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, ICJ Reports 1962, 151, 172; JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 92-95 (2005); JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 70-71 (2002).

<sup>14</sup> The WTO Appellate Body decision in *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, 18 September 2000 and WT/DS135/AB/R, 12 March 2001.

<sup>15</sup> On the negative reactions of developing countries, see Petros C. Mavroidis, *Amicus Curiae Briefs Before The WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01, available at: <http://centers.law.nyu.edu/jeanmonnet/papers/01/010201.html>.

<sup>16</sup> E.g., Thomas W. Wälde & Borzu Sabahi, *Compensation, Damages and Valuation*, in: *THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW*, 1049 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds, 2008).

<sup>17</sup> On the lawmaking by international criminal tribunals, see Milan Kuhli & Klaus Günther, *Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals*, in this issue; Mia Swart, *Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and ‘Adventurous Interpretation’*, 70 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 459 (2010); Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 *VANDERBILT LAW REVIEW* 1 (2006). Cogan cites statements by the representatives of Argentina and Venezuela during the Security Council debates on the establishment of the ICTY and the ICTR to the effect that these international tribunals would not have powers to modify international law, Cogan (note 5), 438.

<sup>18</sup> Benvenisti & Downs (note 6). On the difficulties of developing countries to create coalitions at the WTO, see Sonia E. Roland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 *HARVARD INTERNATIONAL LAW JOURNAL* 483 (2007).

might appear to be the case that such international tribunal-created linkages (e.g., between environmental protection or human rights and state obligations under WTO law) might perform a similar function of facilitating the creation of weaker state coalitions and eroding the dominance of powerful states. In practice, however, this is rarely the case for two reasons. First, for the most part these international tribunal-created linkages have rarely been substantively significant. Even when tribunals have shown sensitivity to related considerations, for example to environmental protection in trade or investments disputes, their ultimate focus was on the technical question whether those related considerations had actually been used as pretext to evade treaty-based obligations.<sup>19</sup> Second, and more importantly, the judge-made linkages do not offer the same “space” for weaker countries to congregate and develop their own common agenda as extended treaty negotiations would. Judge-made linkages are equivalent to giving fish to developing countries rather than fishing rods.

The regime that powerful states have promoted to protect their foreign investments extends the design principle of fragmentation to the resolution of investment disputes. The bilateral investment treaties and other investment-related agreements enable the powerful states not only to tune the capital importing states’ obligations in ways beneficial to capital exporting states, but also to resort to a diffuse system of ad hoc arbitration panels composed of private professionals. Several scholars have decried the outcome of the jurisprudence emerging from those arbitration awards as grossly unfair for capital importing countries,<sup>20</sup> some even calling them capitulation agreements.<sup>21</sup> Others have blamed the expansion of doctrines protecting investors and limiting the regulatory authority of host states on the dependence of arbitrators in ad hoc investment dispute panels “on two powerful actors in the system: executive officials (that are designated as appointing authorities under investment treaties) and prospective claimants.”<sup>22</sup>

The latter explanation is not fully convincing, because arbitrators who seek to expand the chances of reappointment should act impartially. The defending states appoint as many

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<sup>19</sup> This was ultimately the concern of the Appellate Body in the *Shrimp/Turtle Case*. See Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 491 (2002).

<sup>20</sup> DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION: INVESTMENT RULES AND DEMOCRACY’S PROMISE* (2008); GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007). See also a public statement by scholars, available at: [http://www.osgoode.yorku.ca/public\\_statement/](http://www.osgoode.yorku.ca/public_statement/).

<sup>21</sup> David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 TEXAS INTERNATIONAL LAW JOURNAL 387 (2000). For support of the system, referring to it as an “Athenian” type of empire emerging out of the myriad of investment treaty regimes, see José E. Alvarez, *Contemporary Foreign Investment Law: An “Empire of Law” or the “Law of Empire”?*, 60 ALABAMA LAW REVIEW 943 (2009).

<sup>22</sup> VAN HARTEN (note 20), 169.

arbitrators as the claimants do, and both arbitrators and executive officials share an interest in maintaining their personal reputation and that of the system as impartial.<sup>23</sup> More importantly, self-motivated arbitrators who are keen to expand their reappointment opportunities would seek collectively to reduce barriers to litigation (recognizing lower standing requirements, disregarding procedural limitations, etc.), thereby potentially increasing the number of litigations, rather than err on the side of the investors. In fact, an empirical study by Susan Franck demonstrates just that: While investors were largely successful at the jurisdictional phase, governments were more successful on the merits, and overall, governments won almost 58% of the cases.<sup>24</sup>

There may be several reasons for this failure to counterbalance powerful state interests apart from the arbitrators' lack of independence. Susan Franck, for example, has suggested that because the arbitrators are disproportionately drawn from Western countries,<sup>25</sup> they may tend to have predispositions about the sincerity of regulatory decisions in developing countries. We doubt these explanations. We suspect that the lack of balance springs from three more systemic reasons. First, arbitrators in investment disputes are called upon to interpret and apply discrete treaties where the pro-investor bias is firmly embedded. The arbitrators simply cannot level the playing field and counterbalance the treaty provisions as other tribunals sometime do. Second, the arbitrators may realize that such interpretative effort would be futile given the ease by which powerful states can renegotiate treaties or otherwise modify the outcomes of awards.<sup>26</sup> The third systemic reason is the diversity of the ad hoc panels that increase the coordination costs of all arbitrators to come up with consistent positions. These three systemic factors reduce the independent authority of arbitrators to modify the law (which is distinct from their independence in ruling for or against the state party). All too frequently arbitrators have neither the power to impose their will on strong states, nor the sense of responsibility for doing so.

### *III. Shaping the Default Rules of International Law*

In the two above-mentioned contexts, international tribunals function as mechanisms by which powerful states can exercise indirect control over international organizations and their bureaucracies or modify the parties' specific treaty-based commitments. But

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<sup>23</sup> On the importance for arbitrators of their reputation, see Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM LAW REVIEW* 1521, 1596 (2005).

<sup>24</sup> Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 *NORTH CAROLINA LAW REVIEW* 1, 50 (2007).

<sup>25</sup> *Id.*, 78.

<sup>26</sup> See the ruling of the NAFTA FTC (note 7).



international tribunals can also serve as vehicles for implementing legal changes in a broader context by altering existing norms or creating new ones in a context that would traditionally have required the consent of all state parties. Lawmaking by international tribunals is a way for system designers to set the default rules of the international legal system, namely the rules that would apply unless they are changed by interstate agreements. By laying the ground rules of international law, international tribunals increase the costs for those states that seek different norms and which would need to obtain state consent to different treaty obligations.

The main vehicle for such lawmaking is the use of customary international law as a source of legal obligation. International tribunals exercise considerable discretion in both “finding” state practice and in determining whether such practice reflects states’ acknowledgement of its binding quality.<sup>27</sup> Courts rarely engage in systematic review of state practice and instead use proxies such as adopted treaties or decisions of other international institutions as reflecting state practice.<sup>28</sup> The recourse to customary international law was instrumental for imposing general obligations to cooperate in the area of global commons, where the ICJ adopted the concept of international watercourses as “shared” property.<sup>29</sup> While the ICJ might appear to be primary locus for the creation of new law that conforms to P5 interests, it is certainly not the only such institution. Ad hoc international criminal tribunals, set up by the UN Security Council, are good examples of lawmakers in the laws of war area that transformed the law on the regulation of internal armed conflict, thereby overcoming persistent opposition of developing countries to accept limits on their internal use of force.<sup>30</sup>

Sometimes the primary purpose of litigation lies less with the specific case at hand than with the intention to influence the evolution of general international law. One clear example is the ELSI case, brought by the US against Italy before the ICJ in 1987. The suit centered on Italy’s alleged responsibility for taking over a failing factory in Sicily owned by US companies. The sole reason for the suit was the precedent it set for *other potential*

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<sup>27</sup> As Lauterpacht observed already in 1958, “In few matters do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of customary international law.” HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 368 (1958).

<sup>28</sup> Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AJIL 817, 819 (2005); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757, 758-759 (2001).

<sup>29</sup> See the International Court of Justice judgments in *Case concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), ICJ Reports 1997, 7; *Case Concerning the Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 20 April 2010.

<sup>30</sup> On the lawmaking by international criminal tribunals, see, *supra*, note 17.

disputes concerning foreign investments. As explained by Terry Gill, The ICJ judgment in the ELSI case was

an important decision in what [wa]s ostensibly a relatively unimportant case. The interests of a financially shaky Italian subsidiary of a U.S. corporation and damages totaling a mere \$12,679,000, plus interest, do not appear at first sight to be of major significance. However, there was considerably more at stake than might appear from a cursory examination of the Judgment. The United States maintains a substantial network of bilateral relations based on FCN [Friendship, Commerce and Navigation] and investment protection treaties with similar or identical provisions to those in the FCN Treaty with Italy. The U.S. interest in the provisions of this Treaty that protect U.S. shareholders that own and control foreign subsidiaries in host countries extends considerably beyond the fate of ELSI.<sup>31</sup>

At times, the desired default rules of customary international law would have the character of open-ended standards that provide powerful states with sufficiently wide discretion and bargaining space. Although the choice of vague standards can make eminent sense at times, they can have distributional effects. Vague standards might work better for powerful states than clear rules that either immunize weaker countries' jurisdiction and resources from external interference or improve their bargaining position either in bilateral or multilateral settings. Therefore when interpreting treaties or "finding" customary international law in matters which could restrict the powerful states' bargaining position, the preference of the stronger states would be for less rather than more clarity in the law. For example, in the Fisheries Jurisdiction case, the ICJ rejected Iceland's attempt to assert its exclusive authority under customary international law over a fishery zone in the North Sea, despite various precedents and a clear economic rationale supporting such a declaration. The ICJ effectively sent Iceland and the other coastal states to the multilateral bargaining at the UN Conference on the Law of the Sea, stating that the court should not "anticipate the law before the legislator has laid it down."<sup>32</sup>

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<sup>31</sup> Terry D. Gill, *International Decisions (on ELSI)*, 84 AJIL 248, 257 (1990).

<sup>32</sup> *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Merits, Judgment, ICJ Reports 1974, 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, ICJ Reports 1974, 175, paras 45, 53 respectively: "The Court is aware that a number of States has asserted an extension of fishery limits. The Court is also aware of present endeavours, pursued under the auspices of the United Nations, to achieve in a third Conference on the Law of the Sea the further codification and progressive development of this branch of the law [...] The very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to

#### IV. *Overcoming Domestic Political and Judicial Resistance*

Because the interpretation of treaties and the finding of customary international law by international tribunals do not need to be endorsed by state parties, they enable powerful states to preempt potential resistance on the part of both weaker state parties and also of domestic actors in all states. Similarly, the rulings of the international tribunal do not need to be endorsed by the domestic ratification processes of the state parties, and they make it more difficult for domestic courts to reach a different conclusion as to the content of the international norms. As much as powerful governments can use lawmaking by international tribunals to preempt weaker state resistance, they may benefit from it also by overcoming lawmaking by domestic actors in strong states. The ICJ was instrumental in curbing the efforts of the Belgian legislature to prosecute incumbent foreign agents,<sup>33</sup> and currently the same court is seized with an application by Germany against the Italian courts' rejection of Germany's immunity for damages claims for crimes committed during WWII.<sup>34</sup>

#### V. *General Observations Concerning Surrogate Lawmaking by International Tribunals*

Obviously, dependent international tribunals may be motivated by more than one of the above-mentioned goals. It is also possible that states have established international tribunals without these goals in mind but have come to pursue them through the courts in hindsight. It is also true that international tribunals are rarely in an either/or situation, and much depends on more specific constraints under which they operate. Some of the international tribunals have multiple roles: They may have jurisdiction to develop norms of internal governance, interpret the specific treaty regimes of international organizations, and make statements about general international law. However, there is any number of other explanations for the differing appetites of international tribunals for lawmaking across different issues. International tribunals—like states themselves—might simply place a higher priority on some issues than on others, or they might possess scarce resources in terms of time and cases, which forces them to focus their attention on a

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proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea. Such a general desire is understandable since the rules of international maritime law have been the product of mutual accommodation, reasonableness and co-operation. So it was in the past, and so it necessarily is today. In the circumstances, the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down."

<sup>33</sup> International Court of Justice, *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium), Judgment of 14 February, available at: <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm>.

<sup>34</sup> International Court of Justice, *Case Concerning Jurisdictional Immunities* (Federal Republic of Germany v. Italy), Application of the Federal Republic of Germany, 23 December 2008, available at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=60&case=143&code=gi&p3=0>.

limited set of issues. This is especially likely to be true in the early stages of the international tribunals' efforts to increase their reputation, discretion, and/or independence.

One reliable indicator of dependency of an international tribunal is the relative ease by which its lawmaking functions can be preempted by the state parties. As we saw earlier,<sup>35</sup> while investment tribunals may be quite independent in applying the law of the treaty to a case at hand, they are quite ineffective in modifying the law against the wishes of the state party that can easily renegotiate the text of the relevant treaty. Two additional, relatively reliable if not necessarily conclusive, indicators of dependency include the congruence of international tribunal and powerful state preferences over time and the frequency with which a change in the jurisprudence of the international tribunal appears to follow on heels of a recent change in the expressed preferences of one or more powerful states. These indicators become apparent especially in situations where the international tribunal is led to adopt mutually contradictory positions. One case in point is the seemingly conflicting approaches adopted by the ICJ concerning its own authority. The ICJ found implicit authority based on scant language in the UN Charter for the UN General Assembly to set up an international tribunal to adjudicate internal employment matters (the UN Administrative Tribunal),<sup>36</sup> but refused to find a similar authority to have "the ultimate authority to interpret the Charter"<sup>37</sup> and review the compatibility of Security Council resolutions with the Charter.<sup>38</sup> In general, the ICJ consistently avoided challenges to the fundamental interests of the P5, as for example in its treatment of the request for an advisory opinion on the legality of nuclear weapons,<sup>39</sup> or its effort not to rule on the legality of nuclear tests in the atmosphere,<sup>40</sup> and likewise sought to evade issues over

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<sup>35</sup> *Supra*, notes 20-26 and accompanying text.

<sup>36</sup> *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (1953-1954)*, Advisory Opinion of 13 July 1954, ICJ Reports 1954, 47. Also, despite grave concerns the ICTY found implicit authority for the Security Council to set up criminal courts for enforcing the laws of war, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995.

<sup>37</sup> "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted." *Certain Expenses* (note 13), 168.

<sup>38</sup> Undoubtedly, it asserted, "the Court does not possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned." *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, 16, para. 89. The ICJ did not accept the invitation to review the legality of the Security Council's Resolution to impose sanctions on Libya *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, 3.

<sup>39</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226.

<sup>40</sup> *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, 253; *Nuclear Tests (New Zealand v. France)*, Judgment, ICJ Reports 1974, 457.

which the P5 were split. For example, its treatment of the various legal issues arising out of the conflict in former Yugoslavia, including the recent skirting of the question of legality of the Kosovo declaration of independence,<sup>41</sup> attest to its unwillingness to assert claims that would favor one P5 member over others or might be disregarded.

Having said this, it has to be acknowledged that the ICJ has, on several occasions, departed from its pattern of supporting the position of the P5 and ruled against the United States, criticizing directly its military actions against Nicaragua<sup>42</sup> and Iran,<sup>43</sup> against its breaches of the Vienna Convention on Consular Relations,<sup>44</sup> or indirectly rejecting the US interpretation of treaty obligations (e.g., the *Wall* opinion on the applicability of human rights law in occupied territories).<sup>45</sup> While the complicated relationship between ICJ and the United States is beyond the scope of this paper, one might speculate that these relatively isolated events arose from the uniqueness of the U.S. position, which ensured that few other powerful states would be affected by the adverse rulings, either because they did not have similar problems (e.g., semi-independent sub-national units that defy the international obligations such as the consular rights treaty) or because they were not bound by bilateral treaties to litigate before the ICJ. In other words, while the ICJ may be dependent on the P5 with respect to matters of *common* interest of all the P5 members, it can act quite independently when it can single out one of the P5 members for more rigorous treatment. In such a case, non-compliance with ICJ rulings does not reflect on the ICJ but only on the losing party. As we will see below, one source of independence of international tribunals is what we term “interstate competition.”<sup>46</sup> Such interstate division is not impossible even within the group of the P5.

### C. Independent Lawmaking

Thus far we have dealt with what we have labeled “surrogate lawmaking,” a situation in which international tribunals are effectively “captured” by virtue of their dependence on powerful states and then operate as their agents. Since the rulings of prominent

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<sup>41</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010.

<sup>42</sup> International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, 14.

<sup>43</sup> *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment, ICJ Reports 2003, 16.

<sup>44</sup> See *Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment, ICJ Reports 2004, 12; *LaGrand* (Germany v. United States of America), Judgment, ICJ Reports 2001, 466.

<sup>45</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136.

<sup>46</sup> *Infra*, notes 53-54 and accompanying text.

international tribunals are likely to be the most politically and economically salient, monitoring their decisions and influencing the appointment of their judges provide powerful states with an efficient way to “manage” an increasingly extensive and fragmented system of international tribunals. There are, however, a growing number of occasions when international tribunals have acted in what appears to be an independent fashion and created what clearly conflicts with the expressed interests of one or more powerful states. We argue below that such increased independence is attributable to conditions that are similar to those that political economists have long argued foster court independence domestically within democratic settings. After presenting those factors, we focus on two potential sources for independence of international tribunals, namely political division between states that are parties to an international tribunal (interstate competition) and divisions within states, especially between state executives and national courts (inter-branch competition). We suggest further that the number of occasions where the conditions for independence have manifested themselves has increased and is likely to continue to do so.

*1. The Impact of Political Division Between and Within States on the Independence of International Tribunals*

One of the earliest and most prominent explanations for the evolution of judicial independence and the expansion of court lawmaking power in the domestic setting is the theory of judicial independence by McNollgast.<sup>47</sup> These authors argue that court independence is inversely related to the likelihood that its decisions will be ignored or overridden by the political branches. As a result, judicial independence waxes and wanes with the pattern of partisan control that exists in the political branches of government and institutional rules. In the United States, for example, the likelihood of the Supreme Court being overridden tends to be least and its political independence the greatest during periods when the government is under divided partisan control. In such an environment the chances are good that one of the legislative chambers or the executive branch will prevent the court’s decision from being overturned by vetoing any attempt to do so. An independent judiciary can also emerge and be sustained when two political parties enjoy an alternating or cyclical majority and anticipate that this situation is likely to continue into the future.

Stephenson (2003) develops a related theory of judicial independence.<sup>48</sup> In his model, the independence of the court is driven by the referee-like role that it plays in providing a

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<sup>47</sup> McNollgast, *Conditions for Judicial Independence*, Research Paper No. 07-43, April 2006, available at: <http://ssrn.com/abstract=895723>; McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 SOUTHERN CALIFORNIAN LAW REVIEW 1631 (1995). (McNollgast is a collective pen name that is employed by three longtime collaborators: Matthew McCubbins, Roger Noll, and Barry Weingast.)

<sup>48</sup> Matthew C. Stephenson, “*When the Devil Turns...*”: *The Political Foundations of Independent Judicial Review*, 32 JOURNAL OF LEGAL STUDIES 59 (2003).

public signal to the competing governmental and opposition parties regarding the constitutionality of a given law. This signal indicates whether the party in power complied with its constitutional obligations. Because this signal provides these parties with more reliable information than they themselves possess, it enables them to exercise mutual restraint, despite their lack of the necessary means for monitoring and enforcement of this restraint, to preserve a politically moderate cooperative equilibrium that they both value.<sup>49</sup>

According to Stephenson, in order for the independence of court to be sustained a number of conditions must be met that are similar to those described by McNollgast. Political competition needs to be at some intermediate level, judicial doctrine needs to moderate in the sense that the judiciary cannot lean too far in favor of either of the contending parties or else at least one of them will abandon its preference for judicial independence and both parties must be risk averse and place a relatively high value on the future. If the expected level of political competition diminishes such that one party becomes overwhelmingly dominant, that party will abandon its support of the existing cooperative equilibrium and judicial independence will perish with it.<sup>50</sup>

The McNollgast and Stephenson models are not, of course, directly applicable to the international system, which is made up of different kinds of actors and possesses weaker and more unstable rules and institutions. However, the models' central result, that political competition plays a key role in determining judicial independence, possesses a cross-contextual descriptive robustness. Hegemonic power and severe inequality are rarely if ever compatible with the emergence or sustainability of institutional independence in any political system. Historically, institutional checks and balances such as an independent judiciary have often emerged as the result of a political compromise between two relatively equally powerful actors (e.g. political parties, coalitions of states, interest groups) who believed that such a body would effectively monitor and assist in enforcing one or more agreements between them.

Stephenson (2004) explores a different model in which (1) court independence is contingent on the support of the government (i.e., a combined legislative-executive branch), (2) there is asymmetric information between voters and the government, and (3) the government is politically accountable.<sup>51</sup> He shows that the voters' decision as to

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<sup>49</sup> *Id.*, 84.

<sup>50</sup> *Id.*, 73. On the link between political competition and independent courts, see also TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 21–33 (2003); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 JOURNAL OF LEGAL STUDIES 721 (1994); William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 JOURNAL OF LAW AND ECONOMICS 875 (1975).

<sup>51</sup> Matthew C. Stephenson, *Court of Public Opinion: Government accountability and Judicial Independence*, 20 JOURNAL OF LAW, ECONOMICS & ORGANIZATION 379 (2004). On judicial review as a way to overcome the asymmetric

whether the government should cede some of its legislative power to courts depends on the relative reliability of the information that the branches provide voters, where reliability reflects the degree to which the voter can rely on a given branch's support of or opposition to a proposed piece of legislation as evidence that the proposal is in the voter's interest. For example, if judicial support is more reliable than government opposition and judicial opposition is more reliable than government support, voters will force government to cede some policy control to the courts and vice versa.

Given the opaque and uncertain character of political accountability in the international system, the potential contribution of such a public opinion model for understanding the emergence of independence of international tribunals is difficult to assess. Just as there are no well-defined parties, legislature, or executive branch at the international level, there is no well-defined court of public opinion. Nonetheless, it seems reasonable to assume that the prospects for judicial independence will be increased if that portion of the transnational "public" composed of weaker states and NGOs believes that international tribunals will provide them with significantly more reliable information about the consequences and legality of policies of international organizations than they would otherwise have. Once in hand, such information could function to create valuable focal points for weaker state/NGO coordination and reduce the risks associated with collective action. What is less clear is whether judgments of international tribunals about policies of international organizations and the grounds on which they are based will be able to reliably reach this public, and the extent to which international tribunals can help ensure that this occurs.

The models of judicial independence described above emphasize the role of political competition and the ways that courts are able to expand their lawmaking ability during periods of division or disunity that unpredictably arise among the political branches of government. However, there is reason to believe the role of courts is sometimes less passive than most theories suggest. As will be further elaborated below (see section III), once political division has emerged, courts often have the ability to strategically sustain it to bolster their independence and increase their discretion by supporting the relatively weaker branch of government when the other stronger branch threatens to regain dominance. For example, by insisting on parliamentary pre-approval of executive action, courts have been able to ensure the input of legislatures that had been short-circuited by the executive. By lowering threshold requirements for initiating proceedings against executives and by allowing civil society to provide information to the court through amicus briefs, courts have enhanced their own opportunities to call the executive to give account for its policies. Moreover, faced with global coordination by executive branches that circumvented and weakened the role of national legislatures, national courts have turned

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information problem that is inherent in representative democracy, see also David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *GEORGETOWN LAW JOURNAL* 723 (2009).



to inter-judicial cooperation that has strengthened both their legislatures and, indirectly, themselves.<sup>52</sup>

## *II. How Political Divisions Influence the Independence of International Tribunals*

It might be useful to identify different types of political competition or political division at the global level that facilitate the independence of international tribunals. We can distinguish between two types. The first and the more common type is interstate competition between state parties that precludes them from disciplining an international tribunal that has made a ruling that they believe is inappropriate. The second type of political division, which has only recently shown signs of emerging, results from inter-branch division within states and occurs when executives of state parties are dependent on the support of the domestic legislature or judiciary for the ratification of their preferred policies that have been adopted at the global level.

### *1. Interstate Competition*

Interstate competition occurs at the level of an international organization where state parties compete for power and are divided on policies. These states, although they may be displeased with a ruling by an international tribunal, prefer to remain bound by the agreement that grants authority to the international tribunal. State parties may prefer to be bound by such agreement and concede to adverse ruling by an international tribunal when the benefits of participation outweigh the costs. The more costly the exit from the international tribunal's jurisdiction, the greater would be the independence of the tribunal. The relative independent lawmaking functions of the WTO Appellate Body (AB) vis-à-vis the United States and the EU can be explained by the fact that neither of them is seriously considering ignoring the AB's opinions. Therefore, internal division between state parties together with high exit costs for either state are likely to grant the relevant tribunal a relatively high measure of independence from the member states.

Regional human rights courts are another example of relatively independent tribunals. Their independence is derived from a division between a majority of states that would welcome the international tribunal's new law and a minority that would not. In such a case (take for example cases where the European Court of Human Rights (ECtHR) criticizes Russia for abusing convention rights), the reputational effects of ignoring rulings of human rights courts weigh heavier on the responding state than on the court. Those who would not comply with the law made by the international tribunal would suffer the reputational consequences of being noncompliant with an evolving human rights standard that others accept. Because petitions are usually brought consecutively against specific states rather

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<sup>52</sup> Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

than simultaneously against several states, the human rights international tribunal has an opportunity to single out the responding state as violator. In contrast, when a petition raises a matter of concern to most or many member states and the international tribunal cannot single out a sole violator—for example when suits were brought to the ECtHR against all NATO members<sup>53</sup> or members of KFOR<sup>54</sup>—the international tribunal may find it more difficult to limit the member states.

The most important interstate competition seems likely to be that created by growing economic power and political prominence of the developing countries. While different from each other in any number of ways, these states possess similar preferences on a wide range of issues such as climate change and trade that are likely to continue to dominate the international policy agenda in the coming years. In addition, they possess policy priorities that often differ considerably from those of the post-war coalition of powerful states that has dominated the governance of the international system up until this point. This creates the prospect that in the near future, the coalition of powerful states that will be governing the international system will be markedly less united and more politically competitive and divisive—a situation that as we have seen has historically given rise to greater court independence and expanded court lawmaking power. The increased competition between developed and developing nations and possibly growing divisions among the developed nations seems likely to result in greater independence for international tribunals and lawmaking discretion.

## 2. Domestic Inter-Branch Division

Inter-branch division—internal competition between the branches of government in state parties—can also facilitate the independence and influence of international tribunals. Such inter-branch division has increased substantially with the expansion of the international regulatory system. This has afforded the executives of powerful states and the domestic interest groups that support them with the opportunity to formulate policies that have important domestic repercussions in often opaque and fragmented decision-making apparatuses of international organizations without the institutional scrutiny that would normally take place at the domestic level, and the protection that this scrutiny offers to politically weaker domestic stakeholders.<sup>55</sup> As a result, the adoption of policies by state executives at the global interagency level is often viewed by national legislatures and courts as a strategy that executives use to evade domestic law. Increasingly wary of

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<sup>53</sup> European Court of Human Rights, *Bankovic and others v. Belgium and 16 others Contracting States*, 19 December 2001.

<sup>54</sup> European Court of Human Rights, *Behrami v. France and Saramati v. France, Germany and Norway*, 2 May 2007.

<sup>55</sup> See Eyal Benvenisti & George W. Downs, *Will National Court Cooperation Promote Global Accountability? Prospects for the Judicial Review of International Organizations* (draft paper).

this problem, national legislators and courts have begun to monitor the implementation of, and on occasion to offer resistance to, international agreements<sup>56</sup> and decisions of international organizations,<sup>57</sup> particularly those obtained via inter-executive bargaining that appear to threaten or erode the authority of legislatures and courts, or those that challenge the constitutional limitations on state power.

This inter-branch tension at the national level can be exploited by international tribunals to increase their own power and influence. Limitations imposed on a member state's executive by its own national courts diminish significantly the member state's ability to ignore the ruling by the international tribunal. As we mention below,<sup>58</sup> the European Court of Justice (ECJ) has exploited not only the horizontal division that was created by the requirement of consensus for changing the EC law, but also, and perhaps more importantly (although little noticed), it benefited from the inter-branch division that existed in three smaller members. The inter-branch division in the three Benelux countries resulted from domestic constitutional doctrines that ensured the supremacy of the ECJ law (as interpreted by the ECJ) over regular domestic legislation.<sup>59</sup> As a consequence, the ECJ has been able to rely on the compliance of at least these three member states with its rulings. The important role that domestic support plays in fostering lawmaking by international tribunals is demonstrated by what occurs when the basis of such support is absent. For example, in their study of the Andean Tribunal of Justice (ATJ), an international tribunal modeled on the ECJ, Karen Alter and Laurence Helfer attribute its modest lawmaking (compared to the extensive lawmaking by the ECJ) to the ATJ's inability to expect that the national courts of the member states and the other domestic interlocutors would support its rulings.<sup>60</sup>

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<sup>56</sup> See the Lisbon Treaty Judgment of the German Constitutional Court, 30 June 2009, available at: [www.bverfg.de/entscheidungen/es20090630\\_2bve000208en.html](http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html); *Brunner v. The European Union Treaty*, 1993 German Constitutional Court (trans. in [1994] COMMON MARKET LAW REPORTS 57); Czech Republic Constitutional Court, *Treaty of Lisbon II*, 3 November 2009, available at <http://www.usoud.cz/view/pl-29-09>.

<sup>57</sup> ECJ Grand Chamber, Joint Cases C-402/05 and C-415/05, *Yassin Abdullah Kadi v. Council of the European Union*, Judgment of 3 September 2008.

<sup>58</sup> *Infra* note 64 and accompanying text.

<sup>59</sup> The Dutch Constitution of 1953 provided for the supremacy of international treaties over domestic statutes. The Luxemburg Court of Cassation (in 1950) and its Conseil d'Etat (in 1951) acknowledged the supremacy of treaty obligations over local laws. In its 1971 *Le Ski* decision, the Belgian Court of Cassation, unable to rely on express provision in the Belgian Constitution, invoked the monist theory of the primacy of international law over national legislation, in determining that treaties supersede subsequently incompatible national laws. See Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 EJIL 159, 163 (1993).

<sup>60</sup> Laurence R. Helfer & Karen J. Alter, *Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice*, 64 INTERNATIONAL ORGANIZATION 563 (2010).

The European Court of Human Rights is also sensitive to the inter-branch division and actively seeks to establish a professional rapport with the national courts of the member states. As Yonathan Lupo and Eric Voeten demonstrate in a recent paper,<sup>61</sup> one way of doing this is by increasing the citation of precedents where this might resonate well with domestic legal professionals and courts. The authors find that the ECtHR makes more reference to its precedents when it deals with politically sensitive cases (where the national court might face resistance from the executive) and when the international tribunal decides cases from common law countries whose legal systems rely more on precedents.

Of course, it is important to note that while inter-branch divisions can enhance the independence of international tribunals vis-à-vis the states' executives, the international tribunals will remain quite dependent on the preferences of potential domestic "allies"—the national courts and the legislatures. This is due to the fact that the international tribunals depend on those domestic allies to implement their judge-made law. Because these domestic allies are ultimately accountable to their domestic constituencies, they can be expected to usually give only limited and intermittent support to the international tribunal. There is, after all, no reason to believe that national courts and national legislatures will generally share the same preferences as the international tribunal. Moreover, the impact of inter-branch division tends to be limited because it is almost always confined to one state or a small group of states (e.g., between the executives and the national courts of a handful of powerful democracies) whereas interstate divisions are far more likely to be global in character. As a result, instances of independence of international tribunals stemming from inter-branch division can usually be expected to be more modest, localized, and transient relative to independence that is driven by interstate competition (e.g., by North-South differences).

Inter-branch division promises to bolster the independence of international tribunals vis-à-vis state executives due to the relatively greater independence and domestic legitimacy of national courts (as opposed to those of the international tribunals). The process by which judges are elected or appointed and their independence, once tenured, results in national court judges who are more insulated from executive influence than judges of international tribunals (some of whom can be re-appointed).<sup>62</sup> National courts in most democracies

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<sup>61</sup> Yonathan Lupo & Eric Voeten, *Precedent on International Courts: A Network Analysis of Case Citations by the European Court of Human Rights* (2010), available at: <http://ssrn.com/abstract=1643839>.

<sup>62</sup> This is especially the case with the ICJ where elections are dominated by the P5. See Mackenzie & Sands (note 1); Edward McWhinney, *Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges*, 13 SYRACUSE JOURNAL OF INTERNATIONAL LAW AND COMMERCE 1 (1986). But this is also the case with time-limited appointments: The Commission on Democracy through Law of the Council of Europe (the "Venice Commission") has determined that "time-limited appointments as a general rule can be considered a threat to the independence and impartiality of judges." (CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution, para. 57).

also enjoy greater domestic legitimacy than do international tribunals. The basis of their authority—the national constitutions—is usually more immune to intra-governmental interference or manipulation. Nor is the legal system they control one that the executive can easily exit from. As a result, national courts are almost invariably more independent than international tribunals, whose compositions and budgets are controlled by governments, and who are sometimes viewed as expendable by the most powerful states.

As the ECJ example suggests, national courts, for their part, can also benefit from cooperation with international tribunals. International tribunals can facilitate coordination between national courts by endorsing, or at least by not opposing, their shared interpretation of the law. Therefore, while serious areas of potential disagreement exist between national courts and international tribunals and are likely to persist, it is difficult to escape the conclusion that at this particular stage in their respective developments, international tribunals and national courts, like the couple in the familiar battle of the sexes game, will both be better off if they coordinate their actions than if they act independently.

### *3. Independence of International Tribunals Shaped by Both Interstate Competition and Inter-Branch Division*

It follows that the relative dependency of any given international tribunal is shaped both by interstate competition and inter-branch division. An international tribunal can be both interstate- and intrastate-dependent, be relatively independent on both axes, or enjoy only partial (either interstate or inter-branch) independence. For example, the ICJ is arguably interstate-dependent by virtue of the fact that the P5 control the process of judicial appointments and can veto requests to the Security Council to give effect to its judgments. It is also inter-branch-dependent because the implementation of many of its judgments (e.g., those regarding the responsibility for armed conflicts, the delimitation of boundaries, and the use of transboundary resources) depend solely on state executives.<sup>63</sup> In contrast, the ECJ has been both interstate- and inter-branch- independent. The interstate competition resulted from the different appetites for open markets between the larger and smaller states that composed the initial six member states. The inter-branch division was driven by the national courts of the Benelux states which demonstrated relatively more willingness than the national courts of the larger member states to refer questions of interpretation to the ECJ<sup>64</sup> and to implement its rulings despite executive

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<sup>63</sup> This may also be the case of the Andean Tribunal of Justice. Helfer & Alter (note 60) emphasize the ADJ's interbranch-dependency, but they also mention that member states have exited from the Andean Community and this would imply that the AGJ was also interstate-dependent.

<sup>64</sup> The greater appetite for open markets and more judicial receptivity to satisfy this appetite is reflected in the rate of judicial referrals to the ECJ. The courts of the smaller states referred questions to the ECJ significantly more (relatively to the size of their population) than those of the courts of the bigger states. Belgium and the Netherlands brought much more references per-person than the rest of the member states. Between 1970-79,

resistance. The courts of the big three—France, Germany and Italy—regarded the ECJ with suspicion. They—the French courts in particular—were significantly less enthusiastic about making references to the ECJ, and made clear that they would not automatically embrace the ECJ rulings.<sup>65</sup>

By capitalizing on a unique confluence of critical circumstances involving interstate and inter-branch division, the requirement of consensus for overcoming ECJ judgments, the unlikelihood of exit, and a steady flow of cases from member-states' national courts, the ECJ offers the most prominent example of an international tribunal that succeeded in making significant modifications to its legal system, by benefiting from both interstate competition and inter-branch divisions. To the extent that a transformation of the European order was achieved through law, it was the product of collaboration between the ECJ and the courts of the smaller member states rather than a collective effort on the part of European judges acting as a class.

### *III. Strategies to Enhance the Independence of International Tribunals*

As mentioned above, there is reason to believe that the role of courts is sometimes less passive than what most theories, which emphasize the role of the political branches in creating or hindering judicial independence, suggest. While interstate and inter-branch division is usually a given from the perspective of the international tribunals, they have at times the opportunity to strategically sustain it for their own purposes by supporting the relatively weaker state or domestic actors in states that compete with the executive.

Independent international tribunals have been able to further increase interstate competition by weighing in on behalf of weaker state interests rather than operating as the agents of powerful states as they would have been forced to do under conditions of dependency. For example, we have documented the countervailing efforts by international tribunals supported by relatively weak states to confront the adverse consequences (for them) of fragmentation by developing a jurisprudence that was based

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(after the expansion from 6 to 12 member states) the courts of Belgium and the Netherlands referred 4 cases per 500,000 persons per year (CPPY), while German courts brought 2.2 CPPY and France, Italy, UK and Denmark less than 1. Between 1980-89 (after another expansion) the courts of Belgium and the Netherlands brought 7.1 CPPY each, while Germany 2.8, France 2.6, Italy 1 and UK less than 1. Between 1990-98 (yet another expansion) Belgian and Dutch courts brought 6 CPPY (Germany 3 CPPY, France 2, Italy 3, UK 1). While in the total account, the courts of the larger countries contributed the larger number of references, but even the absolute numbers are telling, with German courts referring 246 cases during 1980-89 while Dutch courts referring 224 cases during the same period. This information is taken from Figure 2.1 in KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW* 35 (2003).

<sup>65</sup> The French and the German courts presented the strongest resistance to the ECJ supremacy, see ALTER (note 64), ch. 3 (on German courts reaction to the ECJ rulings) and ch. 4 (on the reactions of the French courts).

on a view of international law as a system from which exit is conceptually impossible.<sup>66</sup> Inter-branch division can be enhanced by strengthening traditional checks on executive authority and unilateralism, namely national courts and civil society. This can be achieved primarily by relaxing standing requirements of individuals to initiate suits against governments on the international plane, or by increasing opportunities for public participation in judicial proceedings. In general, information that international tribunals generate could be instrumental domestically vis-à-vis the domestic political branches. The reasoning of the judgment of the international tribunal can in itself provide important information to the general public and thereby increase awareness to and criticisms of policies of powerful actors. As Lupu and Voeten show,<sup>67</sup> the reasoning of the case can also be a way of subtly communicating with national courts to persuade or motivate them to withstand domestic pressures. Finally, the international tribunal can empower national courts to act as its surrogates. As Christina Binder shows in this volume,<sup>68</sup> the Inter-American Court of Human Rights (IACHR) interpreted the American Convention on Human Rights (ACHR) as obliging national courts not to apply national norms, which were in violation of the ACHR. No doubt, when announcing this doctrine, the IACHR could anticipate the positive response of the relevant national courts, given the widespread domestic opposition to amnesty laws.

#### D. Conclusion

We have drawn on the domestic literature on judicial independence for guidance on the assumption that the independence of the judiciary and the perceived legitimacy of judicial lawmaking are closely connected. We suggested that the independence of international tribunals, which is a precondition for the perceived legitimacy of their lawmaking, depends on the background political conditions that shape decisions of international tribunals, especially the extent to which lawmaking by international tribunals is believed not to have been unduly influenced by the policy priorities of the great powers. Meeting this test is, of course, only one of many factors that determine the broader legitimacy of lawmaking by international tribunals, but there are reasons to believe that it is an important one.

Lawmaking by International tribunal raises several concerns, particularly on the part of weaker stakeholders such as smaller or less developed states and the diffuse domestic

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<sup>66</sup> See Benvenisti & Downs (note 6), 621. On the lack of exit, see *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission finalized by Martti Koskeniemi, 13 April 2006, UN Doc. A/CN.4/L.682, para. 176 (“States cannot contract out from the *pacta sunt servanda* principle - unless the speciality of the regime is thought to lie in that it creates no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie).”)

<sup>67</sup> *Supra*, note 61.

<sup>68</sup> Christina Binder, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in this issue.

constituencies within developed states whose interests receive little attention by dominant state executives and the international institutions they tend to control. However, if we are correct in believing that the growing political competition between the post-war coalition of powerful developed states and the one composed of developing powers will foster a more independent international court system, the discretion and independence of these tribunals will lead to their making rulings that less closely reflect the preferences of powerful states. As a result, such international tribunals should achieve greater legitimacy among developing country politicians and the general public than is currently the case. This greater legitimacy, in turn, should enable these bodies to contain better the level of political conflict in the system so that it does not jeopardize the effectiveness of the international institutions in dealing with the growing number of problems that confront them.

Having said that, it will not be easy for international tribunals to gain the trust of states that have good historical reason for believing that these tribunals continue to be effectively captured by the United States and its European and Asian allies. Such states will need to be presented with at least two types of evidence, neither of which is sufficient by itself. The first type of evidence will be derived from the presence or absence of the host of badly needed personnel, procedural, and structural reforms that are so well characterized by von Bogdandy and Venzke.<sup>69</sup> The second type of evidence is likely to be outcome-based in terms of the fairness and democratizing effects of the law produced by the international tribunals.

Another concern with lawmaking by international tribunals is the ancient worry about *gouvernement des juges*. The main difficulty with independent tribunals from the democratic perspective is, of course, the preemption of the political process when rulings by the tribunals limit the discretion of democratic legislatures. We therefore need to explain why we think that independence of international tribunals is not incompatible with the idea of democracy. This is a serious cause for worry, to which we can offer here only initial thoughts about two ways for providing an answer. First, in fragmented global lawmaking processes, characterized by numerous, weakly-related, and independent treaty-regimes, powerful state executives can diffuse the potential opposition of developing countries and also evade domestic democratic limitations on their powers, thereby disenfranchising both types of stakeholders. In contrast, competitive conditions at the political level (either between or within state parties) empower judges of international tribunals to promote their vested interest in rationalizing their environments, and this works inherently as a defragmentation tool. By creating generalizable principles and by privileging consistency and precedent, these judges not only reduce their own decision costs and increase their efficiency; they can also reduce the coordination costs of weaker states and also representatives of politically subordinate constituencies even within

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<sup>69</sup> *Supra*, note 1.



stronger states, by reducing the level of fragmentation. It is therefore our contention that lawmaking by *independent* international tribunals is no less representative of relevant stakeholders on the global and local level than lawmaking by state executives, particularly if these are executives of a small subset of powerful states. Second, to the extent to which independence of international tribunals is based on inter-branch division, the international tribunals depend on their domestic “allies”—the national courts, the legislatures, and the civil societies that can control the implementation of the law made by the international tribunals. Hence, lawmaking by independent international tribunals is potentially *more* democratic than international law made by the executives of powerful states.

