

A NEW GENERATION OF INTERNATIONAL ADJUDICATION

GARY BORN[†]

ABSTRACT

This Article challenges the conventional view of contemporary international adjudication. It identifies a new generation of international tribunals, which has been largely ignored by commentators, and argues that these tribunals offer a highly successful, alternative model to traditional public-international-law adjudicatory bodies.

The proliferation of international tribunals is widely regarded as one of the most significant developments in international law over the past century. The subject has given rise to an extensive and robust body of academic commentary. Although commentators reach widely divergent conclusions about many aspects of international law and adjudication, they all agree that international tribunals differ fundamentally from national courts. In particular, according to the commentary, international tribunals such as the International Court of Justice lack the power to render enforceable decisions or to exercise compulsory jurisdiction.

This Article argues that commentators have proceeded from a flawed and incomplete understanding of contemporary international adjudication. Virtually all commentary on the subject ignores the

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development of a second generation of international tribunals, best represented by international commercial and investment tribunals, World Trade Organization panels, and claims-settlement mechanisms. Contrary to the conventional wisdom about international adjudication, this new generation of international tribunals has the power to exercise what is effectively compulsory jurisdiction and to render enforceable decisions that can often be coercively executed against states and their commercial assets.

These second-generation tribunals have been the most frequently used and, in many respects, the most successful form of international adjudication in recent decades. The caseloads of these tribunals have grown rapidly over the past forty years and now substantially exceed those of traditional public-international-law tribunals. Moreover, an analysis of state treaty-making practice over recent decades shows that states have virtually never concluded treaties accepting the jurisdiction of traditional first-generation tribunals—concluding less than one treaty per year—whereas they have frequently accepted the jurisdiction of second-generation tribunals capable of rendering enforceable decisions—accepting some fifty treaties per year. More fundamentally, second-generation tribunals have played an essential role in facilitating international trade, finance, and investment; have contributed to the development of important fields of international law; and have provided leading contemporary examples of international law working in practice.

Although largely ignored by the commentary, the success and frequent use of second-generation tribunals have important implications for conventional analysis of international adjudication. The success of these tribunals flatly contradicts the claims, advanced by a number of academic commentators, that international adjudication is unimportant in contemporary international affairs and that states do not use international tribunals—particularly tribunals that would be effective. In reality, second-generation tribunals have been frequently and successfully used in vitally important fields, in part because they issue effective and enforceable decisions. At the same time, the success of second-generation tribunals also contradicts prescriptions, offered by a number of commentators, that future international tribunals be modeled on “independent” first-generation tribunals or, alternatively, on entirely “dependent” adjudicative mechanisms. Successful second-generation tribunals exhibit a blend of structural characteristics that defy blanket prescriptions for either “independence” or “dependence” and that counsel for more tailored, nuanced institutional designs.

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INTRODUCTION

The past half-century has seen the development of a rich, highly diverse field of international adjudication. The field encompasses proceedings before a wide range of tribunals—including international courts, such as the International Court of Justice (ICJ); regional courts, such as the Inter-American Court of Human Rights (IACHR); international arbitral tribunals, such as those constituted by the Permanent Court of Arbitration (PCA); and specialized international tribunals, such as the World Trade Organization (WTO). The emergence of these forms of international adjudication is rightly regarded as one of the most important developments in international law in recent decades.

The conventional wisdom is that international tribunals differ from national courts in fundamental respects. As Part I of this Article discusses, academic commentators from every perspective agree that, unlike national courts, international tribunals do not possess mandatory jurisdiction and their decisions cannot be coercively enforced against states or their assets. Rather, it is said that contemporary international tribunals merely “provide information”¹ to states that choose to use them.

Although they share this premise, commentators vigorously debate the efficacy and significance of contemporary forms of international adjudication, reaching widely divergent conclusions. Proponents of a robust view of international law argue that factors such as reciprocity, retaliation, and reputational concerns typically lead states to comply with the decisions of international tribunals, notwithstanding those decisions’ unenforceable character. These commentators regard adjudication as an effective and increasingly important aspect of the international legal system. Skeptics, however, regard international adjudication, and international law more generally, as a marginal aspect of international relations, contending that considerations of reciprocity and reputation are relatively insignificant in international affairs, particularly where adjudicatory mechanisms are concerned.

Despite their differences, all sides of this debate proceed from an incomplete and inaccurate view of contemporary international adjudication. In particular, the debate ignores an important new form

1. Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 179 (2008).

of international adjudication that has developed progressively over the past forty years. As Part II discusses, this more recent generation of international adjudication departs from traditional models of public international law and involves international tribunals whose decisions are effectively enforceable against states and whose jurisdiction, although limited, is often essentially mandatory. Adjudicatory bodies structured on this model include arbitral tribunals in investment arbitrations under bilateral and multilateral investment treaties; arbitral tribunals established pursuant to international commercial-arbitration agreements between states and private parties; modern claims-settlement mechanisms, including the Iran-U.S. Claims Tribunal; dispute-settlement bodies of the WTO; and national courts adjudicating decisions against foreign states under contemporary foreign-sovereign-immunity legislation.

Unlike traditional forms of international adjudication, these second-generation tribunals do not merely provide information to states. Rather, these international tribunals render binding and enforceable decisions that can be, and often are, used to seize state assets in enforcement proceedings, much like domestic judgments. Moreover, in many instances, use of these types of tribunals is effectively compulsory for states because such use serves as a prerequisite for meaningful participation in contemporary international trade and investment relations.

As Part III discusses, the development of second-generation tribunals has important implications for conventional understanding of international adjudication. In particular, it affects both assessments of the efficacy of contemporary international adjudication and prescriptions for the design of future international tribunals.

First, the development of second-generation tribunals squarely contradicts the claims of skeptics who argue that international adjudicatory mechanisms, and international law more generally, are ineffectual and seldom used. In fact, second-generation tribunals are frequently and successfully used to resolve important international disputes and play vital roles in contemporary international affairs, particularly in the areas of international trade, finance, and investment.

Although they are a relatively recent development, second-generation tribunals are, by a wide measure, the most frequently used forms of international adjudication. The caseloads of second-generation tribunals have substantially outpaced those of traditional international tribunals for more than two decades, now exceeding

them by some one-hundred-fold in annual filings, and, while the usage of second-generation tribunals continues to expand, that of traditional first-generation tribunals stagnates. Likewise, an analysis of treaties entered into over the past several decades shows that states have provided far more frequently for enforceable adjudication by second-generation tribunals than for dispute resolution by traditional first-generation tribunals such as the ICJ, the PCA, or the International Tribunal for the Law of the Sea (ITLOS). Indeed, virtually no treaties concluded during the past twenty-five years include ICJ submission agreements—less than one per year—whereas substantial numbers of treaties include provisions for enforceable mechanisms of adjudication—nearly fifty per year.

Second-generation tribunals also play vitally important roles in contemporary international affairs. They routinely issue decisions—that are both enforceable and, if necessary, enforced—involving substantial economic stakes, important national regulatory policies, and significant issues of international law. More importantly, the availability of second-generation tribunals to render such decisions is an essential underpinning of contemporary international-trade and investment regimes, and the decisions of these tribunals have been central to the development of important bodies of international law in fields such as trade, investment, procedure, and remedies. Most broadly, the decisions of second-generation tribunals provide repeated, tangible examples of international law effectively placing significant limitations on state action—including, thus far, deterring or providing remedies for expropriatory or arbitrary conduct, enforcing multilateral trade rules, and holding states to their commercial and other agreements.

Second, the frequent use and success of second-generation tribunals has important implications for prescriptions regarding the design of future international tribunals. A number of commentators urge that future international tribunals should be designed to resemble traditional first-generation tribunals, characterized by the attributes of “independent” national appellate courts—standing judicial panels, broad and compulsory jurisdiction, and standard procedural rules; other commentators prescribe the opposite model of “dependent” tribunals that are almost entirely subject to the parties’ control and thus lack meaningful authority. The widespread, successful use of second-generation tribunals challenges these conventional prescriptions, suggesting that these new types of

tribunals provide an equally viable—and, arguably, a significantly better—model for most forms of international adjudication.

Importantly, the design of second-generation tribunals differs materially from that of either “independent” national courts or entirely “dependent” tribunals, instead exhibiting a blend of “dependent” and “independent” structural characteristics and procedures within more nuanced institutional designs. In particular, second-generation adjudication is generally modeled on international commercial-arbitration procedures, with a number of putatively “dependent” features—tribunals selected by the parties for specific cases, limited jurisdictional mandates, and procedural rules tailored to particular parties and disputes. At the same time, however, second-generation adjudicatory mechanisms frequently incorporate limited forms of appellate review, typically by somewhat more “independent” tribunals. A detailed analysis of these procedural aspects of second-generation tribunals and their strengths and weaknesses is beyond the scope of this Article. The essential point for present purposes is that second-generation tribunals display distinctive, nuanced, and effective institutional structures that cannot continue to be ignored in prescriptions for future international adjudicatory bodies.

Part I of this Article summarizes the proliferation of international tribunals over the past several decades and outlines the academic debate on the characteristics and efficacy of those tribunals. Part II describes the historical development of international adjudicatory mechanisms, focusing on the increasing use of second-generation tribunals that have the power to make enforceable decisions. Finally, Part III addresses the implications of second-generation tribunals for analysis of the characteristics and efficacy of international adjudication, addressing in particular the relative success of second-generation tribunals and their importance for prescriptions for the design of future forms of international adjudication.

I. THE “PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS”²

A wide variety of international courts and tribunals have developed during the past century. The emergence of these various methods of adjudicating international disputes is a marked change from earlier eras³ and has rightly been described as one of the most significant developments in international law during the twentieth century.⁴ This phenomenon has prompted an extensive body of academic commentary, variously addressing the “[p]roliferation of [i]nternational [c]ourts and [t]ribunals,”⁵ the growth of “supranational adjudication,”⁶ and the increasing resort to “international tribunals.”⁷

This academic commentary has defined international adjudication broadly as encompassing any form of adjudicatory or quasi-adjudicatory process in which states participate in resolving

2. Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 267 (2001); see also Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 709 (1999) (“When future international legal scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age.”); Stephen M. Schwebel, *The Proliferation of International Tribunals: Threat or Promise?*, in JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE 3, 3 (Mads Andenas & Duncan Fairgrieve eds., 2000) (“The creation of new international judicial bodies is fundamentally a positive development, welcome rather than worrisome. It reflects the vitality and relative maturity of today’s international life.”).

3. See, e.g., WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 141 (1964) (“[T]he role of international courts and tribunals in the evolution of international law is still a modest one.”).

4. Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 457 (2000); Romano, *supra* note 2, at 709.

5. Buergenthal, *supra* note 2, at 267.

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

7. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 3 (2005); see also JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW* 2 (1999) (“International conflict led, for example, to the refinement of new rules . . . just as clearly as successive disputes have seen the confirmation of basic rules”); Guzman, *supra* note 1, at 173 (“International dispute resolution and international tribunals are all the rage. On the one hand, many international lawyers celebrate them as a powerful tool in the effort to bring order to our anarchic world. On the other hand, critics view these tribunals—perhaps inconsistently—as both a threat and a waste of resources.” (footnotes omitted)); Bruno Simma, *International Adjudication and U.S. Policy—Past, Present, and Future*, in DEMOCRACY AND THE RULE OF LAW 39, 39 (Norman Dorsen & Prosser Gifford eds., 2001) (“International courts and tribunals are proliferating, and the caseload of some of these institutions appears to explode.”).

international disputes—including litigation, arbitration, conciliation, mediation, and advisory reports. Representative of this definition is the Project on International Courts and Tribunals (PICT), which catalogues some ninety international judicial bodies and courts, arbitral institutions, and other quasi-adjudicatory mechanisms.⁸ Other commentators define international adjudication equally expansively, referring to permanent international judicial bodies, such as the ICJ or ITLOS; arbitral or other tribunals established to resolve specific disputes or categories of disputes, such as the Iran-U.S. Claims Tribunal or individual PCA arbitral tribunals; and national courts hearing international disputes.⁹

8. The PICT, established by New York University and the University of London, maintains a list of international tribunals and a database of developments in the field of international adjudication. See PROJECT ON INT'L COURTS & TRIBUNALS, THE INTERNATIONAL JUDICIARY IN CONTEXT (2004), available at http://www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf (“The purpose of this chart is to provide international legal scholars and practitioners with a compendium of all international judicial bodies.”). The PICT list includes both “international courts”—defined as permanent bodies of independent judges—and other international “tribunals”—also termed “other Dispute Settlement Bodies.” *Id.* The PICT list, presented in chart form, includes the Permanent Court of International Justice (PCIJ), ICJ, ITLOS, WTO, International Criminal Court (ICC) and specialized criminal tribunals, and European Court of Justice (ECJ) and other regional judicial bodies. *Id.* It also includes arbitral tribunals constituted under the auspices of the PCA, North American Free Trade Agreement (NAFTA), International Centre for the Settlement of Investment Disputes (ICSID), and Court of Arbitration for Sport, along with claims-settlement tribunals such as the Iran-U.S. Claims Tribunal and the UN Compensation Commission (UNCC). *Id.*

9. Commentators typically define international adjudication as including not only entities officially designated “courts,” such as the [ICJ], but also less formal or permanent bodies established to resolve specific disputes Examples include panels convened under the 1947 General Agreement on Tariffs and Trade (GATT), dispute settlement procedures available under various environmental treaties, the underutilized [PCA], and ad hoc interstate arbitration tribunals.

Helfer & Slaughter, *supra* note 6, at 285 n.35; see also Keohane et al., *supra* note 4, at 457 n.1 (“By the strictest definition, there are currently seventeen permanent, independent international courts. If we include some bodies that are not courts, but instead quasi-judicial tribunals, panels, and commissions charged with similar functions, the total rises to over forty.”); Ernst-Ulrich Petersmann, *Constitutionalism and International Adjudication: How To Constitutionalize the U.N. Dispute Settlement System?*, 31 N.Y.U. J. INT’L L. & POL. 753, 753 n.2 (1999) (“WTO dispute settlement panels, like the dispute settlement mechanisms of the U.N. Law of the Sea Tribunal . . . , are successful examples of legally binding adjudication of international disputes among states.”).

Other commentators adopt similarly broad definitions of international adjudication, including such bodies as the PCA, PCIJ, ICJ, ITLOS, WTO, ICC, ECJ, European Court of Human Rights (ECHR), UN Human Rights Council (UNHRC), and national courts hearing international disputes. See, e.g., ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 150 (2009) (giving numerous examples of international judicial bodies); ROBERT E. SCOTT & PAUL B. STEPHAN, LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 33 (2006) (“A range of institutions, both national and international,

This definitional approach is unsurprising and correct. Different forms of international adjudicatory mechanisms, ranging from permanent courts to ad hoc arbitral tribunals to hybrid bodies, perform the same types of functions—dispute resolution, interpretation and articulation of legal rules, and review of government actions—involving the same sets of legal instruments and rules.¹⁰ Not surprisingly, the same or very similar categories of disputes can be submitted to and resolved by two or more very different types of adjudicatory bodies.¹¹ In assessing the field of international adjudication and the design of future international tribunals, it is both appropriate and necessary to consider all of these different adjudicatory mechanisms, regardless of their particular forms or structures.

can . . . apply [customary international law] to the disputes before them.”); José E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT’L L.J. 405, 407 (2003) (“International adjudication, like its domestic counterpart, is routinely seen as involving four basic elements: (1) independent judges applying (2) relatively precise and pre-existing legal norms after (3) adversary proceedings in order to achieve (4) dichotomous decisions in which one of the parties clearly wins.”); Guzman, *supra* note 1, at 185 (“[A] broader definition is appropriate. Thus, a tribunal is defined here as a disinterested institution to which the parties have delegated some authority and that produces a statement about the facts of a case and opines on how those facts relate to relevant legal rules.”); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2371 (1991) (identifying five factors that characterize transnational litigation); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430 (2003) (“[T]here are now more than fifty international courts, tribunals, and quasi-judicial bodies”); W.M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT’L L. 1, 1 n.1 (1969) (“In international law, in fact, the term adjudication has been used generally to refer to *any process of peaceful dispute settlement.*”).

10. All of the various types of international tribunals, broadly defined, interpret and apply principles of international law, both public and private, to disputes involving one or more persons, states, or state entities. These tribunals also all perform the familiar adjudicative functions of dispute resolution, review of the legality of government actions against either a contractual treaty or other international legal rules, and enforcement. See Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37, 41 (2008) (defining the four roles of court systems as “dispute-adjudication,” “enforcement,” “administrative review,” and “[c]onstitutional review” (emphasis omitted)).

11. For example, interstate boundary disputes can be submitted, variously, to the ICJ, to ad hoc interstate or commercial arbitral tribunals, to regional courts, to conciliation mechanisms, and to national courts. See Aman Mahray McHugh, Comment, *Resolving International Boundary Disputes in Africa: A Case for the International Court of Justice*, 49 HOW. L.J. 209, 239 (2005) (discussing the potential alternatives to boundary-dispute resolution by the ICJ, including resort to other courts, arbitral tribunals, and negotiation). Similarly, expropriation claims by or on behalf of foreign investors can be submitted, again variously, to the ICJ, to international commercial arbitration, to investment arbitration, to claims-settlement tribunals, or to national courts. Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475, 479–80 (2008).

Commentators on the field of international adjudication all share a common starting point, before proceeding to diverge widely in their assessments of existing mechanisms for international adjudication and prescriptions for future tribunals. The conventional wisdom is that, in stark contrast to domestic courts in developed states, existing international tribunals lack both mandatory jurisdiction and the authority to render enforceable decisions. Instead, almost all commentators agree that contemporary international tribunals merely provide information to states to enable them better to monitor and induce compliance with international obligations through the use of retaliation, reciprocity, and reputational considerations and to influence domestic constituencies, such as courts and advocacy groups.¹²

On the one hand, from a perspective of deep skepticism about the efficacy of international adjudication, and international law more generally,¹³ commentators such as Professors Eric Posner and John Yoo underscore the lack of mandatory jurisdiction in international adjudication. These commentators start from the premise that “[i]nternational adjudication, however impressive in outward appearance, lacks an essential feature of adjudication that occurs *within* states: . . . mandatory jurisdiction.”¹⁴ They observe that

[t]he founders of the [ICJ] sought to create a type of “mandatory” jurisdiction by giving states the option to submit to any claims brought against them, or a subset of those claims, or claims associated with particular treaties. But states can, and frequently have, withdrawn from jurisdiction when it has served their

12. Posner & Yoo, *supra* note 7, at 17; *see also, e.g.*, Guzman, *supra* note 1, at 179 (“[A court’s] sole contribution to the dispute is information concerning what happened, what law governs, and how the law applies to the facts.”). Professors Robert Scott and Paul Stephan are a partial exception. They distinguish “legalized, institutionally based, privately initiated mechanisms from the traditional informal means of enforcement that remain subject to state control,” and they include investment and commercial arbitral tribunals, some claims-settlement tribunals, and some national courts in the “formal enforcement” category. SCOTT & STEPHAN, *supra* note 9, at 4; *see also infra* note 320 and accompanying text.

13. POSNER, *supra* note 9, at 34; Posner & Yoo, *supra* note 7, at 6–7; *see also* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S98 (2002) (“This means that even in an increasingly integrated international system, reputational concerns cannot by themselves begin to ensure a high level of compliance with every international agreement.”).

14. POSNER, *supra* note 9, at 33; *see also* Posner & Yoo, *supra* note 7, at 13 (“International tribunals are more like domestic arbitrators than domestic courts because nothing prevents disputants from ignoring them if they do not believe that submitting disputes to tribunals serves their interest.”).

interests—and, unlike the domestic case, no one has found a way to prevent states from doing this.¹⁵

On the other hand, commentators with fundamentally different views regarding international adjudication—notably, Professors Anne-Marie Slaughter, Laurence Helfer, and other proponents of international adjudication¹⁶—share the premise that “international dispute resolution tribunals are substantially less effective than most domestic courts,” largely because “[i]nternational tribunals lack a direct coercion mechanism to compel . . . appearance.”¹⁷

The same unanimity of opinion prevails as to the unenforceable character of decisions by international tribunals. Professor Posner says that “when international courts issue judgments, they have no means to enforce them,”¹⁸ and goes on to claim that “domestic courts depend on enforcement by the executive branch or enforcement arm of the government; . . . there is no such international enforcement agency on which courts can depend . . . States may voluntarily

15. POSNER, *supra* note 9, at 33.

16. See, e.g., Guzman, *supra* note 1, at 174 (“These institutions are important to the international legal system. To begin with, they are a useful tool for the peaceful settlement of disputes.”); Helfer & Slaughter, *supra* note 6, at 300–36 (using a multifactor checklist to describe the authors’ conception of what qualities are important in an international judicial body); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 904 (2005) (“The benefits that states derive from independent tribunals far exceed the provision of information to the disputing parties.”); Keohane et al., *supra* note 4, at 457 (“What transnational dispute resolution does is to insulate dispute resolution to some extent from the day-to-day political demands of states.”); see also SCOTT & STEPHAN, *supra* note 9, at 115 (“To say that the WTO [Dispute Settlement Body], the ICJ, and the ITLOS embody informal enforcement of international obligations is not to argue that they are ineffectual. . . . [I]nformal enforcement may provide robust, and in some circumstances, optimal, incentives for cooperation.”); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 456 (2000) (“In this light, we argue vigorously against those who discount international legalization because it is so often soft.”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2659 (1997) (“Participation in transnational legal process creates a normative and constitutive dynamic. By interpreting global norms, and internalizing them into domestic law, that process leads to reconstruction of national interests, and eventually national identities.”); Martinez, *supra* note 9, at 528 (describing two possible views of the international judiciary—one motivated by a traditional definition and one based on complexity theory).

17. Helfer & Slaughter, *supra* note 6, at 285. The same scholars conclude that contemporary international tribunals lack the “power to compel a party to a dispute to defend against a plaintiff’s complaint.” *Id.* at 283.

18. POSNER, *supra* note 9, at 33; see also Posner & Yoo, *supra* note 7, at 13 (“By contrast, international tribunals do not operate as part of a coherent and unified world government. They exist in an interstitial legal system that lacks a hierarchy, an enforcement mechanism, and a legislative instrument that allows for centralized change.”).

comply with judgments, and they sometimes do. But they need not.”¹⁹ Despite their very different perspective, Professors Slaughter and Helfer again agree: “International tribunals lack a direct coercion mechanism to compel . . . compliance,” and “[t]he mechanisms of coercion available to enforce international judgments are those generally available to states or groups of states to enforce international law against one another.”²⁰ Professor Andrew Guzman concludes, even more pointedly, that

[i]n the context of a domestic dispute, the failure of a losing party to comply with the ruling of a court . . . leads to sanctions—most typically a seizure of property or person. . . . In contrast, when a state loses before an international tribunal, no formal legal structure exists to enforce the ruling. The assets of the noncompliant state will not be seized, nobody will be arrested, and the state will not even lose its ability to file complaints.²¹

Proceeding from these premises, the conventional wisdom is that the principal function of international adjudication is to provide information to the parties, a function that international tribunals are supposedly better able to perform than the parties themselves. Thus, as Professor Posner puts it, “[I]nternational tribunals [are] practical devices for helping states to resolve limited disputes when the states are otherwise inclined to settle them.”²² International courts only “help resolve bargaining failures between states by providing (within

19. POSNER, *supra* note 9, at 34; *see also* Posner & Yoo, *supra* note 7, at 13.

20. Helfer & Slaughter, *supra* note 6, at 285–86.

21. Guzman, *supra* note 1 at 178–79; *see also* Abbott & Snidal, *supra* note 16, at 426 (“[I]nternational regimes do not even attempt to establish legal obligations centrally enforceable against states.”); Alvarez, *supra* note 9, at 416 (“As is well known, the Security Council has chosen to enforce only one ICJ decision in its history—against Libya and only with that state’s concurrence.”); Peter H. Kooijmans, *The International Court of Justice: Where Does It Stand?*, in *THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE ROLE AFTER FIFTY YEARS* 407, 408 (A.S. Muller, D. Rai & J.M. Thuránszky eds., 1997) (“These [states], which make up the system, are . . . entities which do not recognize a higher authority . . .”); Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 *AM. J. INT’L L.* 1, 6 (1960) (“For these reasons, a closer look at the problems of enforcement is warranted. Recent experience has revealed uncertainties and shortcomings that appear to call for clarification and remedial measures.”); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 *EUR. J. INT’L L.* 73, 74 (2009) (“Not only did international courts have little influence over the sword and the purse, their jurisdictional powers tended to be limited in scope and marginalized in substance.”).

22. POSNER, *supra* note 9, at 129; *see also* Posner & Yoo, *supra* note 7, at 17 (“[J]ust as a domestic court can reduce the transaction costs of writing contracts by enforcing the hypothetical optimal contract, an arbitrator can reduce the transaction costs of writing treaties by enforcing the hypothetical optimal treaty.”).

limits) information in (within limits) an impartial fashion.”²³ And, more starkly, “Adjudication itself only adds information.”²⁴

Professor Guzman adopts a similar view, declaring that “[i]nternational tribunals are simply tools to produce a particular kind of information.”²⁵ He concludes that, in international adjudication, “the tribunal simply announces the relevant legal rules and, in the context of those rules, its interpretation of events,” with “[i]ts sole contribution to the dispute [being the provision of] information concerning what happened, what law governs, and how the law applies to the facts.”²⁶ Put simply, “tribunals serve to provide information.”²⁷

Likewise, Professors Slaughter and Helfer emphasize “the informational functions that international tribunals perform and their effect on a state’s reputation for honoring its promises to other nations”²⁸ and link international tribunals’ effectiveness to their “ability to provide information to, and hence empower, domestic political actors.”²⁹ In particular, they argue that “[i]ndependent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts” by “raising the probability that violations of those commitments will be detected and accurately labeled as noncompliance.”³⁰

Despite this agreement on the basic characteristics of contemporary international tribunals, the commentary on international adjudication nevertheless diverges widely in its analysis of the consequences of these descriptions. The focus of the academic debate is on the efficacy of international adjudication—starting from the premise that the decisions of international tribunals are nonmandatory and unenforceable. For skeptics about international law, such as Professors Posner and Yoo, international adjudication has been relatively unimportant, playing only a minimal role in international affairs. Professor Posner’s statement that

23. POSNER, *supra* note 9, at 129; *see also* Posner & Yoo, *supra* note 7, at 17 (“The tribunal’s function is to provide information.”).

24. Eric A. Posner & John C. Yoo, *Reply to Helfer and Slaughter*, 93 CALIF. L. REV. 957, 960 (2005).

25. Guzman, *supra* note 1, at 235.

26. *Id.* at 179.

27. *Id.*

28. Helfer & Slaughter, *supra* note 16, at 934.

29. *Id.* at 903.

30. *Id.* at 904.

“[a]djudication today remains marginal to world affairs” is representative of this view.³¹ Professors Posner and Yoo describe states as having created a succession of tribunals, none of which they ultimately are willing to use or, if they do use them, to obey.³²

In contrast, for Professors Slaughter and Helfer, and for other proponents of international adjudication, international tribunals play significant roles in contemporary international affairs, notwithstanding their lack of mandatory jurisdiction and enforcement power. They claim that states are “setting up more independent tribunals and quasi-judicial review bodies and using them more frequently.”³³ They postulate that this is because such tribunals increase the likelihood that violations of international law will be identified and, in turn, that the accurate labeling of violations will lead to higher probabilities of reputational or other costs for parties that have breached their obligations.³⁴ Because adjudication thereby enhances the credibility of international commitments, “states all over the world, presumably acting in their rational self-interest, are proliferating . . . independent tribunals and sending more and more cases to the ones they already established.”³⁵ At the same time, international tribunals are contributing to a “dense web of relations that constitutes a new, transgovernmental order,”³⁶ creating constituencies within states for compliance with international law. Despite the absence of mandatory jurisdiction and the lack of enforceable decisions, proponents of international adjudication nonetheless see international tribunals as playing important roles in contemporary international affairs and as contributing materially to securing compliance with international law.

These views of contemporary international adjudication inform prescriptions for future international tribunals. Thus, skeptics about

31. POSNER, *supra* note 9, at 132; *see also* Posner & Yoo, *supra* note 7, at 74 (arguing that new international tribunals will face “diminished chances of success”).

32. POSNER, *supra* note 9, at 173; *see also id.* at 167 (“[T]he most plausible reason for the proliferation of courts [is that] states become unhappy with an existing international court, and they work around it by depriving it of jurisdiction and establishing additional courts or adjudication mechanisms as needed.”); Posner & Yoo, *supra* note 7, at 74 (“Our analysis suggests that [the ICC, the WTO, and the ITLOS] will have diminished chances of success, and the steps being taken by states to avoid or weaken their jurisdiction supports our claim.”).

33. Helfer & Slaughter, *supra* note 16, at 903.

34. *Id.* at 935.

35. *Id.* at 955.

36. Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.–Oct. 1997, at 183, 184.

international adjudication argue that states will use international tribunals only if those tribunals are both powerless and “dependent” on the parties—in the sense of being chosen by the parties for specific cases, subject to a high degree of control by the parties, and lacking meaningful enforcement power.³⁷ In their view, “International courts succeed best when they are subject to strict limitations—voluntary jurisdiction, limited jurisdiction, weak remedies and so forth.”³⁸

In direct contrast, proponents of international adjudication claim that international tribunals will be effective only if they are “independent,” exercising broad jurisdiction and being composed of standing panels of tenured judges; if they provide private parties with access to adjudicatory proceedings; and if they are “embedded” in the domestic legal systems of participating states.³⁹ Proponents urge that international adjudicatory mechanisms should be structured “more like . . . court[s]”⁴⁰ and, in particular, more like “independent” courts such as the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR). To that end, they propose a catalogue of structural and other features, derived from the ECJ’s institutional design, as a model for both designing future international tribunals and restructuring existing international bodies.⁴¹

In sum, there is broad disagreement among commentators about both the efficacy and significance of contemporary international adjudication and about prescriptions for the design of future international tribunals. Skeptics claim that international adjudication has, and can only have, a very limited role in contemporary international affairs; they argue that future international tribunals should be “dependent” and relatively powerless because states will

37. Cf. Posner & Yoo, *supra* note 7, at 5–8, 72 (“Tribunals are likely to be ineffective when they neglect the interests of state parties and, instead, make decisions based on moral ideals, the interests of groups or individuals within a state, or the interests of states that are not parties to the dispute.”). Professors Posner and Yoo define the independence of international tribunals in the following terms: “A tribunal is independent when its members are institutionally separated from state parties—when they have fixed terms and salary protection, and the tribunal itself has, by agreement, compulsory rather than consensual jurisdiction.” *Id.* at 7.

38. POSNER, *supra* note 9, at 173.

39. See, e.g., Keohane et al., *supra* note 4, at 458–59, 487–88 (“We define low independence, access, and embeddedness as the ideal type of interstate dispute resolution and high independence, access, and embeddedness as the ideal type of transnational dispute resolution.”); Helfer & Slaughter, *supra* note 16, at 908 (citing with approval the approach of Professors Keohane, Moravcsik, and Slaughter).

40. Helfer & Slaughter, *supra* note 6, at 365.

41. *Id.* at 298–337.

use only ineffectual forms of adjudication. In contrast, proponents claim that international adjudication has significant effects on state behavior and that future international tribunals should be modeled on “independent” and relatively powerful national courts. Regardless of their conclusions, however, virtually all commentators start from the shared premise that, in contrast to national courts, international tribunals lack the power to issue enforceable decisions or to exercise compulsory jurisdiction and then focus their debate on whether and how such unenforceable decisions nonetheless affect state behavior. With this commentary in mind, it is useful to turn to the history and practice of contemporary international adjudication, focusing on developments over the past century.

II. TWO GENERATIONS OF INTERNATIONAL ADJUDICATION

Commentary on contemporary international adjudication rests on an incomplete and therefore distorted premise. It is correct that an important set of international tribunals has the characteristics described by most commentary: traditional public-international-law tribunals like the Permanent Court of International Justice (PCIJ) and the ICJ lack both compulsory jurisdiction and the power to render enforceable decisions. It is therefore plausible to describe these traditional tribunals as simply “providing information” to disputants—and, more broadly, to the international community—to facilitate responses based on reciprocity, retaliation, or other actions.⁴²

42. Nonetheless, the “providing information” metaphor is flawed in important respects. It ignores the distinction between formally *nonbinding* adjudicatory decisions, such as reports by commissions of inquiry or mediators, and formally *binding* decisions, such as those of many international courts and arbitral tribunals, and implies that both have the same function and status—namely, that of “providing information.” This implication is misleading.

International instruments frequently provide that commissions of inquiry, mediations, and conciliations are nonbinding. *See, e.g.*, Convention for the Pacific Settlement of International Disputes art. 6, Oct. 18, 1907, 36 Stat. 2199, 2213, 1 Bevens 577, 586 (“Good offices and mediation . . . have exclusively the character of advice, and never have binding force.”); *id.* art. 35, 36 Stat. at 2220, 1 Bevens at 591 (“The Report of the Commission is limited to a statement of facts, and has in no way the character of an Award. It leaves to the parties entire freedom as to the effect to be given to the statement.”). These are archetypal examples of tribunals whose purpose is solely, and expressly, to provide information.

In contrast, the same international instruments provide that arbitral awards, *id.* art. 37, 36 Stat. at 2220, 1 Bevens at 591; *see also infra* text accompanying notes 55–56, and international court judgments, *see infra* text accompanying note 88, are binding on the parties. The agreement by states that a tribunal’s decision will be binding gives that decision a function and character that is vitally different from that of nonbinding information provided by third parties; in

It is not correct, however, that all international tribunals conform to the description provided by conventional wisdom: in reality, international adjudication is more complex and more interesting. Over the past four decades, states have developed an important new category of international adjudication—composed of tribunals with characteristics that differ markedly from those of traditional international adjudicatory mechanisms. Although it has been largely ignored by the commentary on international adjudication, this new generation of tribunals has precisely those essential characteristics denied by the conventional wisdom—the power to render enforceable decisions and, in many cases, to exercise what is effectively, although not formally, compulsory jurisdiction over defined categories of disputes.

As this Part explains, states have developed two basic models of international adjudication. In general terms, these two models have developed chronologically, with an earlier generation of standing international courts aspiring to broad jurisdiction over classic public-international-law disputes and the later generation of much more specialized tribunals, usually constituted on a case-by-case basis, exercising relatively narrow jurisdiction over particular categories of international disputes.⁴³ Importantly, while first-generation tribunals have never been given the power to render enforceable decisions,

addition to providing information, which a commission of inquiry or mediator does, a binding decision imposes a specific and agreed upon obligation to comply with the decision of a neutral third party. A state's refusal to comply with such a decision entails a further noncompliance with its international obligations, beyond its initial violation of its underlying obligations. Moreover, this additional violation is generally unambiguous and unconditional; it is difficult for a state to explain its breach, for example, by reference to changed or extenuating circumstances or to its counterparty's conduct. As a consequence, noncompliance with a binding international decision generally entails materially increased costs beyond either breach of an underlying international obligation or a refusal to comply with a nonbinding recommendation. See Guzman, *supra* note 1, at 181–82 (“[In] dispute resolution at the WTO . . . [w]rongdoers . . . face both reputational and retaliatory consequences when they lose a case.”). Describing both binding and nonbinding decisions as merely providing information is unhelpful because it ignores, and impliedly rejects, this distinction and the special character of the information that is provided by a binding decision.

43. These forms of international adjudication involved the application of traditional rules of international law that formed the bulk of international-law obligations before World War II. See Koh, *supra* note 16, at 2607–13 (tracing the progression of international legal thought and institutions); Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1563–68 (1999) (tracing the progression from earlier international courts' focus on sovereign relations to later international courts' focus on private-party relations).

second-generation tribunals have almost always been granted, and subsequently have exercised, precisely this authority.⁴⁴

First, building on the Hague Conventions for the Pacific Settlement of International Disputes and the PCA, states established a number of standing international judicial bodies over the course of the twentieth century. As discussed in Section A, these tribunals were typically established in multilateral settings and were often inspired by high political and religious ideals, with aspirations for universal compulsory jurisdiction over broad categories of traditional public-international-law disputes. The PCIJ, the ICJ, and the ITLOS are prime examples of this model for international tribunals. Notably, none of these first-generation tribunals have been empowered to render enforceable decisions; at the same time, and despite other important accomplishments, none of these tribunals have enjoyed significant usage by states or have commanded particularly impressive compliance with their decisions.

Second, beginning in the 1960s, states began to establish a new generation of international adjudicatory mechanisms. As discussed in Section B, states did so by progressively concluding substantial numbers of bilateral treaties and contractual instruments that provided for international arbitration of specified categories of disputes and by accepting, through state practice, the jurisdiction of national courts over significant categories of international disputes involving states or state entities. This new generation of adjudication was largely inspired by pragmatic, commercial considerations and includes arbitral tribunals constituted pursuant to bilateral investment treaties (BITs), such as the North American Free Trade Agreement (NAFTA)⁴⁵ and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID

44. A chronological account of first- and second-generation tribunals is broadly accurate. Most first-generation tribunals, including the PCA, PCIJ, and ICJ, developed between 1900 and 1950; in contrast, second-generation tribunals first began to develop in the 1960s and 1970s, following adoption of the restrictive theory of sovereign immunity and widespread ratification of the ICSID and New York Conventions. *See infra* Part II.B. It is true that the model first reflected by traditional first-generation tribunals has continued to be used in more recent years, as illustrated by the formation of the ITLOS in the 1980s and the formation of various regional courts since 1990. *See infra* Part II.A.4–6. It remains the case, however, that the development of second-generation tribunals with the authority to render enforceable international decisions is a comparatively recent phenomenon that came after the development of most first-generation international tribunals.

45. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

Convention)⁴⁶; international commercial-arbitration agreements between states and private parties; the dispute-resolution mechanisms of the WTO; and claims-settlement tribunals, such as the Iran-U.S. Claims Tribunal. Significantly, all of these tribunals have been empowered to render decisions that are effectively enforceable, and they have frequently done so; at the same time, in contrast to traditional models of international adjudication, these second-generation tribunals have enjoyed significant, and increasing, usage by states and other actors, as well as relatively high compliance with their decisions.

A. *The First Generation of International Adjudication*

The first generation of contemporary international tribunals emerged at the outset of the twentieth century with the creation of the PCA, followed by that of the PCIJ and the ICJ. These tribunals were established with high, often utopian, ambitions—in particular, that the mandatory adjudication of virtually all disputes between states would play a central role in ensuring a Kantian vision of world peace. These aspirations continued to be reflected, albeit much less ambitiously, in later international tribunals, including the ITLOS and the International Criminal Court (ICC).⁴⁷

The PCA, PCIJ, and ICJ have made substantial contributions to the development of international law. Despite their founders' aspirations, however, these first-generation tribunals have been distinguished by their lack of authority—both formal and practical. In particular, none of these tribunals enjoy mandatory jurisdiction or are empowered to render enforceable decisions.⁴⁸ Moreover, despite these tribunals' achievements, states have resorted to them to resolve disputes only infrequently, and the significance of these tribunals in international affairs has been limited.⁴⁹

46. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

47. I do not separately discuss the ICC, both because it is unclear whether that Court will enjoy significant usage or compliance and because that Court hears criminal proceedings by an international institution against individuals rather than disputes involving foreign states. I also do not discuss other international tribunals that hear criminal proceedings against individuals rather than disputes involving states or state entities, such as the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Tribunal for Sierra Leone, or the Special Tribunal for Lebanon.

48. *See infra* text accompanying notes 55–63, 84–88, 95–101.

49. *See infra* text accompanying notes 65–70, 90–92, 103–06, 124–25.

1. *Permanent Court of Arbitration.* The modern era of international adjudication can be traced to the 1899 and 1907 Hague Peace Conferences, which established the PCA.⁵⁰ In both its aspirations and its eventual form, the PCA exhibits what came to be the characteristic features of traditional first-generation tribunals.

The PCA was a child of the nineteenth-century peace movement and, more specifically, of the 1899 Hague Peace Conference.⁵¹ A central topic of the Conference's program was the use of adjudication to prevent and resolve conflicts between states, a goal that was embodied in proposals for an ambitious multilateral convention requiring arbitration of most international legal disputes. Under these proposals, contracting states would have been obligated to arbitrate virtually all disputes with other contracting states under a wide range of treaties—disputes involving, for example, communications, transport, navigation, intellectual property, inheritance, health, and judicial cooperation—as well as all claims for monetary damages for wrongful state actions.⁵²

These proposals were unacceptable to most states. The delegates instead adopted the 1899 Hague Convention for the Pacific Settlement of International Disputes, which contained provisions for voluntary arbitration. In particular, the 1899 Convention encouraged—but did not require—contracting states to resolve their

50. There was, of course, a lengthy tradition of international adjudication prior to 1900. See generally J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 1–126 (4th ed. 2005) (tracing the use of negotiation, mediation, inquiry, conciliation, and arbitration, including their use prior to 1900); JACKSON H. RALSTON, *INTERNATIONAL ARBITRATION FROM ATHENS TO LOCARNO* (1929) (tracing international-dispute adjudications from ancient Greece through the early twentieth century).

51. See David J. Bederman, *The Hague Peace Conferences of 1899 and 1907*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY* 9, 9 (Mark W. Janis ed., 1992) (“[T]he 1899 and 1907 Peace Conferences are remembered *both* for their contributions to the laws of war . . . and to the rules for the peaceful settlement of disputes between nations.”); Geoffrey Best, *Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After*, 75 *INT’L AFF.* 619, 619–21, 623–31 (1999) (describing the proceedings of and some of the events surrounding the 1899 Hague Peace Conference); Mark W. Janis, *Protestants, Progress and Peace in the Influence of Religion: Enthusiasm for an International Court in Early Nineteenth-Century America*, in *THE INFLUENCE OF RELIGION ON THE DEVELOPMENT OF INTERNATIONAL LAW* 223, 223 (Mark W. Janis ed., 1991) (“[T]o a surprising extent, the 20th century’s international courts were inspired and fashioned by 19th century American religious enthusiasts.”).

52. 1 JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907*, at 276–77, 319–85 (1909).

international disputes through arbitration.⁵³ The Convention declared that “[i]n questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes.”⁵⁴ But nothing in the Convention imposed any obligation to pursue arbitration, or any other form of adjudication, in particular cases.

The 1899 Convention suggested that when states chose to arbitrate a dispute, the award would be binding. Article 18 of the Convention provided that an agreement to arbitrate “implies the engagement to submit loyally to the Award.”⁵⁵ The Convention also distinguished the binding character of arbitrations from the resolution of disputes through “commissions of inquiry,” “good offices,” and “mediation”—each of which were provided for by the Convention, but none of which entailed a binding decision.⁵⁶ At the same time, however, the Convention contained no means to enforce arbitral awards, and the Convention’s language underscored the tenuous nature of any obligation to comply with an award—providing only that states impliedly engaged to submit in good faith to awards.

To encourage states to resort to arbitration, the 1899 Convention also established the grandly titled—but essentially powerless—“Permanent Court of Arbitration.”⁵⁷ In fact, the PCA is neither “permanent,” nor a “court,” nor is it even responsible for conducting “arbitrations.”⁵⁸ The Convention established no standing tribunal,

53. See Best, *supra* note 51, at 630 (“Arbitration enthusiasts had hoped that the use of [the 1899 Convention] would be obligatory. The Great Powers were not having that!”); David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4, 15 (2000) (“Organized public opinion would have been surprised to learn that it was quite clear from early in the conference that arbitration would not be obligatory and that any court that was established would not be permanently in session.”).

54. Convention for the Pacific Settlement of International Disputes art. 16, July 29, 1899, 32 Stat. 1779, 1788, 1 Bevens 230, 237.

55. *Id.* art. 18.

56. See *id.* art. 6 (“Good offices and mediation . . . have exclusively the character of advice and never have binding force.”); *id.* art. 14 (“The report of the International Commission of Inquiry is limited to a statement of facts, and has in no way the character of an Arbitral Award.”); *supra* note 42.

57. Convention for the Pacific Settlement of International Disputes, *supra* note 54, arts. 20–29, 32 Stat. at 1789–93, 1 Bevens at 237–39.

58. Manley O. Hudson, *The Permanent Court of International Justice—An Indispensable First Step*, 108 ANNALS AM. ACAD. POL. & SOC. SCI. 188, 189 (1923); see also John Bassett Moore, *The Organization of the Permanent Court of International Justice*, 22 COLUM. L. REV.

whether denominated a court or otherwise, and it contained no grant of mandatory jurisdiction, whether to the PCA or otherwise. Rather, the Convention established the PCA, a rudimentary form of arbitral institution responsible for maintaining a list of arbitrators who might be appointed to tribunals in future cases—if states chose to agree to such arbitrations⁵⁹—and it offered skeletal procedural rules that could be applied in proceedings—again, if states agreed to such arbitrations.⁶⁰

Less than a decade after the 1899 Hague Conference, the contracting states reconvened, this time making adjudication central to their discussions. A number of delegations again advocated a system of compulsory adjudication to replace the optional mechanism of the 1899 Convention.⁶¹ These proposals foundered because of disagreements about the composition of the contemplated international court,⁶² and the 1907 Conference ultimately made no significant changes to the treatment of international adjudication under the 1899 Convention.⁶³

PCA arbitral tribunals have issued a handful of well-reasoned awards that have played a material role in the development of customary international law.⁶⁴ In general, however, the PCA has

497, 511 (1922) (“As submission to the jurisdiction of the Court . . . is wholly voluntary, it follows that the amount of the business which may come before the Court depends upon the will and inclination of the world’s governments.”).

59. Convention for the Pacific Settlement of International Disputes, *supra* note 54, arts. 22–25, 32 Stat. at 1789–91, 1 Bevens at 237–38.

60. The Convention contained procedural rules addressing limited aspects of the arbitral process. *Id.* arts. 30–57, 32 Stat. at 1793–98, 1 Bevens at 240–43. The PCA is also responsible for providing limited services as a registry: the International Bureau. *Id.* arts. 22, 28, 32 Stat. at 1789–90, 1792, 1 Bevens at 237–39. These services did not include many of the functions of more developed arbitral institutions, such as appointing arbitrators, hearing challenges to arbitrators, and removing arbitrators.

61. 1 SCOTT, *supra* note 52, at 330–43.

62. JAMES BROWN SCOTT, THE PROJECT OF A PERMANENT COURT OF INTERNATIONAL JUSTICE AND RESOLUTIONS OF THE ADVISORY COMMITTEE OF JURISTS 29 (1920).

63. Compare Convention for the Pacific Settlement of International Disputes, *supra* note 42, arts. 37–90, 36 Stat. at 2220–34, 1 Bevens at 591–602, with Convention for the Pacific Settlement of International Disputes, *supra* note 54, arts. 30–57, 32 Stat. at 1793–98, 1 Bevens at 240–43.

64. See, e.g., *Island of Palmas (U.S. v. Neth.)*, 2 R.I.A.A. 829, 839 (Perm. Ct. Arb. 1928) (“Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States . . .”); *N. Atl. Coast Fisheries (U.K. v. U.S.)*, 11 R.I.A.A. 167, 196 (Perm. Ct. Arb. 1910) (limiting the application of customary international law’s three-mile rule regarding bays in a case in which a treaty was found to encapsulate any type of bay); *Pious Fund (U.S. v. Mex.)*, 9

enjoyed very modest usage and has addressed few cases of international importance.⁶⁵ All told, during the first seventy years of the PCA's existence, only twenty-five arbitrations were submitted to PCA tribunals,⁶⁶ for a filing rate of 0.3 cases per year; even fewer nonbinding PCA conciliations or inquiries were conducted.⁶⁷ By comparison, nearly two hundred non-PCA interstate arbitrations were conducted between 1900 and 1970, often pursuant to ad hoc submission agreements or compromissory clauses in bilateral treaties.⁶⁸

In an ironic turnaround, the PCA's caseload has increased materially since 1995. Between 1995 and 2009, eighty-six cases were conducted under PCA auspices⁶⁹ for an annual filing rate of roughly six cases per year—a twenty-fold increase over historical figures. A substantial majority of these newer filings were either international commercial or investment arbitrations, rather than classic interstate proceedings; both involve second-generation tribunals with the power to make enforceable awards.⁷⁰ This development—a disused first-

R.I.A.A. 1, 6 (Perm. Ct. Arb. 1902) (applying res judicata principles to international arbitrations).

65. Cf. Best, *supra* note 51, at 630 (“The great days of the Hague’s Court of Arbitration were over by 1914.”).

66. PERMANENT COURT OF ARBITRATION, 109TH ANNUAL REPORT annex 2, at 43–45 (2009), available at <http://www.pca-cpa.org/upload/files/09%20Annex%20%20en%2043-48%281%29.pdf>; Gilbert Guillaume, Member, Permanent Court of Arbitration, The Contribution of the Permanent Court of Arbitration and Its International Bureau to Arbitration Between States, Address at a Commemorative Meeting of the Permanent Court of Arbitration’s Administrative Council 2 (Oct. 18, 2007) (transcript available at <http://pca-cpa.org/upload/files/Guillaume%20EN.pdf>); see also MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS: PAST AND FUTURE 7 (1944) (stating that fifteen arbitrations had been conducted by 1920).

67. There have been only three recorded PCA conciliations. PERMANENT COURT OF ARBITRATION, *supra* note 66, annex 4, at 57.

68. See SURVEY OF INTERNATIONAL ARBITRATIONS: 1794–1989, at 237–450 (A.M. Stuyt ed., 3d ed. 1990) (surveying arbitrations between 1900 and 1970); Christine Gray & Benedict Kingsbury, *Inter-State Arbitration Since 1945: Overview and Evaluation*, in INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY, *supra* note 51, at 55, 61 (“Another striking feature of post-Second World War arbitral practice . . . is the ad hoc nature of the tribunals.”).

69. Bette Shifman, *The Permanent Court of Arbitration: An Overview*, in THE HAGUE: LEGAL CAPITAL OF THE WORLD 128, 141–44 (Peter van Krieken & David McKay eds., 2005); Memorandum from the Permanent Court of Arbitration to Brooks Daly 1 (Oct. 14, 2010) (on file with the *Duke Law Journal*).

70. See Paul-Jean Le Cannu & Daniel Drabkin, *Assessing the Role of the Permanent Court of Arbitration in the Peaceful Settlement of International Disputes*, 27 L’OBSERVATEUR DES NATIONS UNIES 181, 194 (2010) (listing the number of pending cases in 2009, including thirty-five investment arbitrations, fourteen commercial arbitrations, two environmental arbitrations and three interstate or intrastate arbitrations); Memorandum from the Permanent Court of Arbitration to Brooks Daly, *supra* note 69, at 1–2 (classifying the eighty-six cases in which the

generation tribunal's coming to enjoy significant usage only through the adoption of second-generation adjudicatory mechanisms—is representative of the development of international adjudication during the late twentieth and early twenty-first centuries.

Also during the early twentieth century, states negotiated large numbers of bilateral⁷¹ and multilateral⁷² treaties that provided for the compulsory arbitration of defined, but generally broad, categories of disputes—along the lines of the proposals rejected at the Hague Conferences. Multilateral arbitration treaties from this period include the draft 1924 Geneva Protocol for the Pacific Settlement of International Disputes⁷³ and the 1928 Geneva General Act for the Pacific Settlement of International Disputes,⁷⁴ both of which provided for the compulsory arbitration of a broad range of international disputes. In addition, several hundred bilateral-arbitration treaties were entered into between 1900 and 1939; these treaties generally provided for compulsory arbitration of a wide range of disputes between the contracting states.⁷⁵ As the League of Nations' Committee on Arbitration and Security noted in 1928, “[T]he immense output of arbitration treaties ha[s] been such that to-day they constitute a forest, a very dense forest, in which it is difficult to find one's way.”⁷⁶

PCA provided administrative support from 1995 to 2009 into groups, with seventy-three commercial or investment cases and only thirteen interstate disputes).

71. See HELEN MAY CORY, *COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES* 64–65, 136–44 (1932) (citing compulsory bilateral-arbitration treaties from 1900 to 1930); Louis B. Sohn, *The Function of International Arbitration Today*, 108 *RECUEIL DES COURS* 1, 26–27, 33–34, 38–40 (1963) (citing compulsory bilateral-arbitration treaties from the 1920s and 1930s).

72. See CORY, *supra* note 71, at 145–52 (discussing compulsory multilateral-arbitration treaties from the 1920s); Sohn, *supra* note 71, at 29–33 (discussing the 1924 Geneva Protocol for the Pacific Settlement of International Disputes, a compulsory multilateral-arbitration treaty).

73. Protocol for the Pacific Settlement of International Disputes, Oct. 2, 1924, LEAGUE OF NATIONS O.J., special supp. 21, at 21.

74. General Act of Arbitration (Pacific Settlement of International Disputes), Sept. 26, 1928, 93 L.N.T.S. 343.

75. Between 1900 and 1940, an estimated sixty-eight bilateral general arbitration treaties, providing for arbitration of a broad range of disputes between the two contracting states, were concluded. Sohn, *supra* note 71, at 26–27, 33–34, 38–40. Between 1914 and 1939, “hundreds” of additional bilateral-arbitration treaties were also concluded. Hans von Mangoldt, *Arbitration and Conciliation Treaties*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 230, 232 (Rudolf Bernhardt ed., 1992).

76. *Minutes of the First Sess. of the Comm. on Arbitration and Sec.*, at 38, League of Nations Doc. C.667.M.225.1927.IX (1928).

Nonetheless, most states remained skeptical of such treaties and declined to ratify them—or, if they did ratify them, to use them.⁷⁷ Following World War II, the popularity of compulsory-arbitration treaties declined precipitously; in the words of one author, they “were abandoned almost entirely.”⁷⁸ Moreover, as with the PCA itself, usage of those treaties that were ratified was very modest, with fewer than ten arbitrations being conducted pursuant to general compulsory-arbitration treaties between 1920 and 1990.⁷⁹

As this Section shows, the ambitions and development of the PCA are representative of traditional first-generation forms of international adjudication. The Hague Conferences were accompanied by high aspirations for a standing, independent international court with broad, multilateral, compulsory jurisdiction over classic interstate disputes—aspirations that were reflected in the inapt title “Permanent Court of Arbitration.” Nevertheless, the PCA and the subsequent general arbitration treaties provided almost entirely optional and ad hoc adjudicatory mechanisms that did not render enforceable, or even clearly binding, awards. In practice, states have generally declined to use these dispute-resolution mechanisms, save for a limited number of non-PCA arbitrations, typically involving post hoc submission agreements or narrow compromissory clauses in individual treaties. Despite this lack of success, in subsequent years, other forms of international adjudication pursued a similar model—of standing tribunals with broad jurisdictional authority—and typically experienced the same results as the PCA.

2. *Permanent Court of International Justice.* Following World War I, proponents of an international court continued their efforts—again with the objective of founding a standing tribunal for peacefully resolving a wide range of international disputes.⁸⁰ The proposed

77. See von Mangoldt, *supra* note 75, at 233 (“In contrast to the astoundingly high number of general arbitration and conciliation treaties concluded since the beginning of this century, the frequency of their application to actual disputes is just as astoundingly low.”).

78. Sohn, *supra* note 71, at 39–40.

79. See PERMANENT COURT OF ARBITRATION, *supra* note 66, annex 2, at 44–45 (listing general compulsory-arbitration proceedings); cf. SURVEY OF INTERNATIONAL ARBITRATIONS: 1794–1989, *supra* note 68, at 340–452 (providing information on all arbitration agreements between 1920 and 1970).

80. The League’s founders regarded the PCIJ as a fulfillment of the work of the Hague Conferences. The purpose of the Court was sweeping: to secure world peace by “induc[ing] governments, instead of resorting to violence, to come before the tribunal which has now been

League of Nations became the focal point for these aspirations, with the formation of an international judicial organ a central element of the League's Covenant.

The League's Covenant contemplated the establishment of a Permanent Court of International Justice, which was to have jurisdiction over a significant range of disputes between members of the League.⁸¹ In turn, the PCIJ Statute established a court modeled on the domestic appellate courts in developed jurisdictions, with a tribunal of fifteen judges enjoying fixed terms and remuneration.⁸² Unlike the PCA, the PCIJ was not merely a catalogue of names of arbitrators who might be selected to sit on future tribunals; rather, the PCIJ was a permanent, standing court with a predefined membership of tenured judges, available to hear a potentially wide range of disputes between members of the League of Nations.⁸³

Despite these differences, the PCIJ bore important similarities to the PCA. During negotiation of the PCIJ Statute, proposals to grant the Court mandatory jurisdiction over all "legal" disputes between members of the League were tabled.⁸⁴ Just like the similar proposals at the Hague Conferences, these proposals were ultimately rejected by the League's Council.⁸⁵ Instead, the PCIJ Statute limited the Court's jurisdiction to those disputes that states agreed to submit to it.⁸⁶ The PCIJ Statute also permitted states to declare generally that

established, which is continuously organized and always open to them, and [to] submit their controversies to its final and peaceful decision." Moore, *supra* note 58, at 511.

81. League of Nations Covenant art. 14 (directing the Council to "formulate and submit to the Members of the League . . . plans for the establishment of a Permanent Court of International Justice").

82. Statute of the Permanent Court of International Justice arts. 3, 13, 32, Dec. 16, 1920, 6 L.N.T.S. 390, 391, 395, 403. See generally Manley O. Hudson, *The 1936 Rules of the Permanent Court of International Justice*, 30 AM. J. INT'L L. 463 (1936) (discussing the procedures for selecting judges following rule amendments in 1936).

83. The PCIJ was also open to states that were eligible to join the League but that had not done so—in particular, the United States. Statute of the Permanent Court of International Justice, *supra* note 82, arts. 34–36, 6 L.N.T.S. at 403; League of Nations Covenant annex I.

84. The Advisory Committee of Jurists proposed that the PCIJ be granted mandatory jurisdiction over cases of a "legal nature" that fell within four broad categories, but the Council of the League of Nations rejected their suggestion. Christian Tomuschat, *Article 36*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 589, 593–94 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., 2006).

85. *Id.* at 593.

86. Statute of the Permanent Court of International Justice, *supra* note 82, art. 36, 6 L.N.T.S. at 403 ("The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.").

they accepted PCIJ jurisdiction on the basis of reciprocity, but it imposed no obligation on states to make such declarations.⁸⁷

The enforceability of PCIJ judgments generally mirrored that of arbitral awards under the Hague Conventions. As with PCA awards, neither the League Covenant nor the PCIJ Statute provided an enforcement mechanism for PCIJ judgments. Although the Court's Statute did provide, more explicitly than the Hague Conventions' provisions regarding awards, that PCIJ judgments were "final and without appeal,"⁸⁸ it contained no mechanism giving effect to this provision.

The PCIJ rendered a number of carefully reasoned and influential decisions, including several in significant disputes arising from the World War I peace arrangements.⁸⁹ Nonetheless, despite its founders' aspirations, the Court enjoyed only a modest caseload.⁹⁰ Between 1922 and 1939, when World War II led to a suspension of its activities, the PCIJ heard only thirty-eight contentious cases and twenty-eight requests for advisory opinions⁹¹—a filing rate of roughly

87. *Id.*

88. *Id.* art. 60, 6 L.N.T.S. at 409.

89. *See, e.g.*, Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 27–30 (Apr. 5) (recognizing longstanding claims to land as a valid source of territorial authority); Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 5 (Sept. 13) ("The Government of the German Reich . . . submitted . . . a suit concerning the reparation which . . . is due by the Polish Government . . . [under the treaty] concluded at Geneva on May 15th, 1922, between Germany and Poland . . ."); S.S. "Lotus" (Fr./Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 22 (Sept. 7) (considering whether, as France alleged, Turkey had violated Article 15 of the Convention of Lausanne by prosecuting a French steamboat captain); Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 15–16 (May 25) (discussing payment for German land and assets ceded to Poland following World War I); *see also* HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 9–25, 43–45, 162 (1958) (noting that the use of judicial precedent by the Court created a source of international law and that "the Court, in resorting to the doctrine of abuse of rights, lent its authority to the creation of a new source of international responsibility").

90. Roughly two-thirds of the states eligible to do so at the time recognized the compulsory jurisdiction of the PCIJ via the optional clause in Article 36(2) of the PCIJ Statute. Neither the United States nor the Soviet Union accepted the PCIJ's compulsory jurisdiction. *See Minutes of the Conf. of States Signatories of the Protocol of Signature of the Statute of the Permanent Court of Int'l Justice*, League of Nations Sales No. 1926.V.26 (1926) (listing forty signatory states to the PCIJ, not including the United States or the Soviet Union).

91. ROSENNE'S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 11 (Terry D. Gill ed., 6th rev. ed. 2003); *id.* app. V, at 319; *see also* HUDSON, *supra* note 66, at 11 ("[T]he Court gave thirty-two judgments, twenty-seven advisory opinions, and more than two hundred orders."). Fifty of the PCIJ's cases—out of sixty-six total cases—were filed during the period between 1922 and 1932. ROSENNE'S THE WORLD COURT, *supra*, app. V at 319. After 1932, usage of the Court declined markedly. *Id.*

two contentious cases and 3.5 cases in total per year. In particular, the PCIJ's irrelevance during the years leading up to World War II stood in painful contrast to its contemplated role as a guardian of world peace. In one observer's words, "[T]he hope of the peace movement of the late 19th and early 20th centuries, that international adjudication was the substitute for war, was . . . ill-founded and unduly idealistic."⁹²

3. *International Court of Justice.* The aftermath of World War II saw the replacement of the PCIJ with the ICJ—identified by the United Nations (UN) Charter as the “principal judicial organ of the United Nations.”⁹³ The ICJ replicated the PCIJ's high aspirations: “[T]he primary purpose of the International Court . . . lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law.”⁹⁴ Similarly, the ICJ largely replicated the PCIJ's institutional structure and jurisdictional competence, as well as its patterns of usage.

Like the PCIJ Statute, the ICJ Statute adopted the model of a national appellate court and provided for a standing tribunal of fifteen members with fixed terms and remuneration.⁹⁵ Also like the PCIJ, the ICJ was open to all states—but not to individuals or corporate entities⁹⁶—and was envisioned as a world court with universal jurisdiction over any “legal” dispute among states. Nonetheless, the ICJ was not granted general compulsory jurisdiction over interstate disputes. Instead, like the PCIJ's, the Court's jurisdiction was limited to disputes that states agreed to submit to it—for example, in compromissory clauses in bilateral or multilateral treaties.⁹⁷ The Court's jurisdiction was also governed by the so-called

92. Stephen M. Schwebel, *The Performance and Prospects of the World Court*, 6 PACE INT'L L. REV. 253, 257 (1994).

93. U.N. Charter art. 92; Statute of the International Court of Justice art. 1, June 26, 1945, 59 Stat. 1055, 1055, 3 Bevens 1153, 1179.

94. LAUTERPACHT, *supra* note 89, at 3–5.

95. Statute of the International Court of Justice, *supra* note 93, arts. 3, 13, 32, 59 Stat. at 1055–57, 1059, 3 Bevens at 1179, 1181–82, 1185.

96. U.N. Charter art. 93. The Court's jurisdiction also permits it to provide advisory opinions, in limited circumstances, upon request by a UN body. *Id.* art. 96; Statute of the International Court of Justice, *supra* note 93, art. 65, 59 Stat. at 1063, 3 Bevens at 1191–92.

97. Article 36(1) of the Court's Statute provides for ad hoc submissions of particular disputes to the Court or for submissions pursuant to compromissory clauses that were included in particular treaties to cover future disputes. Statute of the International Court of Justice, *supra* note 93, art. 36(1), 59 Stat. at 1060.

optional clause in Article 36(2) of the ICJ Statute, which aimed at vesting the ICJ with broad, effectively mandatory jurisdiction by providing for states to make general declarations accepting the Court's compulsory jurisdiction over disputes with other states that had similarly accepted the Court's compulsory jurisdiction.⁹⁸

Also paralleling the PCIJ Statute, the ICJ Statute provides that ICJ judgments are "final and without appeal."⁹⁹ Nonetheless, neither the UN Charter nor the ICJ Statute provides an effective enforcement mechanism for ICJ decisions. If an offending party does not comply with an ICJ judgment, the prevailing party is authorized to seek recourse from the Security Council under the UN Charter.¹⁰⁰ As the Statute's drafters feared, however, recourse to the Security Council has proved to be a highly imperfect remedy that has rarely been invoked and never clearly applied.¹⁰¹

Despite its limitations, the ICJ has played an important role in the development of international law, rendering a number of opinions

98. *Id.* arts. 35(1), 36(2), 59 Stat. at 1159–60, 3 Bevens at 1186–87.

99. *Id.* art. 60, 59 Stat. at 1063, 3 Bevens at 1191; *see also* U.N. Charter art. 94, para. 1 ("Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

100. U.N. Charter art. 94, para. 2; *see also* Mary Ellen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VA. J. INT'L L. 891, 905–12 (1990) ("The drafters of the U.N. Charter gave responsibility for enforcement to the Security Council . . ."); *cf.* Reisman, *supra* note 9, at 1 ("Most frequently the real problem is not in arriving at an answer in [international] law, but in *enforcing* an answer in law.").

101. Among other difficulties, the Security Council's limited jurisdictional mandate, its discretion to decline enforcement, its political focus, its busy schedule, and the veto rights of the Council's permanent members make enforcement of ICJ judgments via the Council both unlikely and unsatisfactory. *See* Rudolf Bernhardt, *Article 59, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 84, at 1231, 1246 (noting that only one case of ICJ noncompliance has come before the Security Council and that Security Council enforcement "will be meaningless if directed against a permanent member of the Security Council"); Reisman, *supra* note 9, at 14–16 ("Security Council decisions may commission armed force . . . *only* if peace is threatened. Clearly, not every act of noncompliance constitutes an imminent threat to peace." (footnote omitted)). *See generally* Attila Tanzi, *Problems of Enforcement of Decisions of the International Court of Justice and the Law of the United Nations*, 6 EUR. J. INT'L L. 539 (1995) (discussing difficulties with Security Council enforcement under Article 94, Paragraph 2). Article 94, Paragraph 2 was arguably invoked in the boundary dispute between Chad and Libya. Because both states supported Security Council "enforcement," however, the example is unrepresentative. *See* Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 830–31 ("Libya . . . , together with Chad, sought and received Security Council assistance to monitor the full withdrawal of Libyan troops . . .").

that have addressed significant issues of international law.¹⁰² Nonetheless, as both proponents and critics acknowledge, usage of the ICJ has been disappointing, even if one takes into account the limited number of entities able to commence ICJ proceedings—a maximum of 150 states at most relevant times.¹⁰³ In total, the ICJ has heard 124 contentious cases and has considered twenty-six requests for advisory opinions in its sixty-five-year history,¹⁰⁴ resulting in an annual filing rate of slightly more than two cases—contentious or advisory—per year. Between 1945 and 1990, only eighty-two cases were filed with the Court—less than two cases per year.¹⁰⁵ Following the breakup of the Soviet Union, the Court enjoyed a modest

102. See, e.g., *North Sea Continental Shelf* (W. Ger./Den.; W. Ger./Neth.), 1969 I.C.J. 3, ¶ 101 (Feb. 20) (determining “the principles and rules of international law applicable to the delimitation . . . of the continental shelf in the North Sea”); *Arbitral Award Made by the King of Spain on 23 December 1906* (Hond. v. Nicar.), 1960 I.C.J. 192, 217 (Nov. 18) (upholding a 1906 arbitration award of land to Honduras); *Fisheries Case* (U.K. v. Nor.), 1951 I.C.J. 116, 128 (Dec. 18) (“The Parties being in agreement on the figure of 4 miles for the breadth of the territorial sea, the problem which arises is from what base-line this breadth is to be reckoned.”); *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 187–88 (Apr. 11) (determining the conditions under which the United Nations may bring international claims for its agents’ injuries); see also Robert Y. Jennings, *The United Nations at Fifty: The International Court of Justice After Fifty Years*, 89 AM. J. INT’L L. 493, 493 (1995) (citing the *Continental Shelf*, *Fisheries*, and *Reparations* cases as having had a “major impact upon the general system of international law . . . and the law of the sea”); Manfred Lachs, *Some Reflections on the Contribution of the International Court of Justice to the Development of International Law*, 10 SYRACUSE J. INT’L L. & COM. 239, 245 (1983) (“In the development of international law, the [ICJ] plays a special role.”); Stephen M. Schwebel, *Commentary, Preliminary Rulings by the International Court of Justice at the Instance of National Courts*, 28 VA. J. INT’L L. 495, 499 (1988) (“Over the years, the International Court of Justice and its predecessor have not only settled a not insubstantial number of international legal disputes; they have contributed significantly to the progressive development of international law.”).

103. See LAUTERPACHT, *supra* note 89, at 4 (“[I]t would be an exaggeration to assert that the Court has proved to be a significant instrument for maintaining international peace.”); Kooijmans, *supra* note 21, at 418 (“In a world in which the Westphalian system is still prevalent, an adjudicative body can only play a limited role.”); Shigeru Oda, *The Compulsory Jurisdiction of the International Court of Justice: A Myth?*, 49 INT’L & COMP. L.Q. 251, 260 (2000) (“It can be said that in the period prior to 1975, a meaningful result . . . was achieved in only seven cases”); Simma, *supra* note 7, at 49–51 (“[T]he constitutional role of the World Court remains rather limited, and its genuine judicial function, the decision of disputes submitted to it unilaterally, is not working too well either.”).

104. *List of Cases Referred to the Court Since 1946 by Date of Introduction*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited Dec. 19, 2011).

105. *Id.* These figures overstate the number of true cases—both contentious judgments and advisory opinions—by approximately 15 percent. This overstatement principally results from multiple filings in single disputes and forum prorogatum filings that were not accepted. Oda, *supra* note 103, at 252–55.

increase in popularity: sixty-seven cases were filed between 1991 and 2010—roughly three cases per year.¹⁰⁶

Acceptance of the Court's compulsory jurisdiction under Article 36(2) has also been unsatisfactory. Only 66 of the 193 UN members have accepted the ICJ's compulsory jurisdiction under Article 36(2).¹⁰⁷ Measured as a percentage of all UN members, this 30 percent acceptance figure is an all-time low, compared with 60 percent acceptance by UN members in 1950 and 65 percent acceptance of the PCIJ's compulsory jurisdiction.¹⁰⁸ Moreover, treaty-based submissions to ICJ jurisdiction have also been infrequent and are declining. Between 1946 and 1965, states entered into roughly 9.7 treaties providing for ICJ jurisdiction per year; that number fell to roughly 2.8 treaties per year between 1966 and 1985 and 1.3 per year between 1986 and 2004.¹⁰⁹ As Part III.A.2 discusses, the one exception to this decline in treaty-based submissions to the ICJ involves the designation of the ICJ president as an appointing authority in treaty

106. *List of Cases Referred to the Court Since 1946 by Date of Introduction*, *supra* note 104. The increase in cases filed after 1991 reflected, in part, multiple filings in a single dispute. For example, claims arising from NATO's military actions against Serbia resulted in ten cases being filed with the ICJ in 1999. Annual filings in contentious cases in recent years include three in 2010, three in 2009, six in 2008, zero in 2007, three in 2006, one in 2005, one in 2004, three in 2003, three in 2002, and three in 2001. *Id.*

107. *See Declarations Recognizing the Jurisdiction of the Court as Compulsory*, INT'L COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> (last visited Dec. 19, 2011) (listing the states that recognize compulsory ICJ jurisdiction).

108. Moreover, a substantial number of major states have either withdrawn from—the United States and France—or refused to accept—China and Russia—ICJ compulsory jurisdiction. *See Tomuschat, supra* note 84, at 626 (“Of the permanent members of the Security Council, only the United Kingdom still recognizes the jurisdiction of the ICJ France withdrew its acceptance, . . . and the United States followed suit Russia (formerly the Soviet Union) and China have never submitted to the compulsory jurisdiction of the ICJ”).

109. Eric A. Posner, *The Decline of the International Court of Justice* 9 (Univ. of Chi. Pub. Law & Legal Theory Working Paper Series, Paper No. 81, 2004), available at <http://ssrn.com/abstract=629341>. These figures are absolute, during a period in which both the number of states that could accept ICJ jurisdiction and the number of treaties concluded annually increased substantially. *Id.* Even in the early years of the Court, only a small percentage of all treaties contained ICJ-jurisdiction clauses. *See* PETER H. ROHN, *TREATY PROFILES passim* (1976) (showing that 6 percent of treaties concluded between 1946 and 1965 contained ICJ-jurisdiction clauses). A review of the treaties concluded between 1990 and 2010 confirms these findings: only twenty-seven treaties concluded during this period—out of approximately 18,750 reported treaties—provide for ICJ jurisdiction; of these twenty-seven treaties, only ten provide for binding ICJ jurisdiction over disputes. *See* Gary Born, *ICJ Jurisdiction Clauses for Settlement of Disputes in Recent International Treaties—Review of the Treaties and International Agreements Concluded Between 1990 and 2010 Registered or Filed and Recorded with the Secretariat of the United Nations* (Nov. 1, 2011) (unpublished manuscript) (on file with the *Duke Law Journal*).

provisions that submit future disputes to interstate arbitration—providing for the ICJ president to select arbitrators in cases in which states are unable to agree upon an appointment. Treatymaking practice has seen frequent use of this appointment mechanism.¹¹⁰

Compliance with ICJ judgments has also been mixed, particularly in compulsory-jurisdiction cases. The United States has refused to comply with a number of the Court's judgments, and other states, including France, Iceland, Albania, Libya, and Iran, have done the same.¹¹¹ Similarly, a number of states have withdrawn their consents to ICJ jurisdiction in connection with pending, threatened, or concluded cases before the Court;¹¹² in other instances, the Court has simply declined jurisdiction when noncompliance appeared likely.¹¹³

All told, it is impossible to conclude that the ICJ has played a significant role in international affairs over the course of its sixty-five-year history. The Court's principal achievements have been its contribution to the elaboration of principles of customary international law¹¹⁴ and its successful resolution of a relatively limited number of boundary disputes, often involving the Court's special-agreement jurisdiction.¹¹⁵ Other areas of the ICJ's jurisdiction,

110. See *infra* text accompanying note 351. As discussed, the ICJ president is designated as an appointing authority in an average of forty-five treaties per year. See *infra* text accompanying note 351.

111. Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 436–56, 458–59 (2004) (showing that out of thirteen final judgments between 1987 and 2004, there was good compliance in eight cases and less-satisfactory compliance in five cases). Although assessments are far from clear-cut, Professors Posner and Yoo claim a 40 percent compliance rate in compulsory-jurisdiction cases and a 72 percent compliance rate in special-agreement or treaty cases. Posner & Yoo, *supra* note 7, at 53.

112. These states include the United States, France, Australia, and Iceland. See Mark Weston Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, 81 AM. J. INT'L L. 144, 144 (2007) (“[T]he Court's compulsory jurisdiction cases have been beset with nonappearing defendants”); Gillian Triggs & Dean Bialek, *Australia Withdraws Maritime Disputes from the Compulsory Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea*, 17 INT'L J. MARINE & COASTAL L. 423, 423 (2002) (“Australia issued declarations excluding from the jurisdiction of the [ICJ] and the [ITLOS] all disputes relating to the delimitation of maritime zones. . . . The risk has been that East Timor . . . will seek final delimitation of the sea-bed boundary between it and Australia by making an application to the ICJ.”); *supra* note 108.

113. See Reisman, *supra* note 9, at 3 & n.7 (“When the Court anticipated that a state was likely to impugn a judgment, it not infrequently disseised itself of jurisdiction.”).

114. See *supra* note 102.

115. See, e.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon./Malay.)*, 2002 I.C.J. 625, ¶¶ 148–50 (Dec. 17) (recognizing a territorial claim made by Malaysia based on colonial landholdings); *Kasikili/Sedudu Island (Bots./Namib.)*, 1999 I.C.J. 1045, ¶ 103 (Dec. 13)

especially its compulsory jurisdiction under Article 36(2), have seen limited use, and equally limited practical effects.

4. *International Tribunal for the Law of the Sea*. The model of first-generation tribunals continued to be followed in structuring the ITLOS,¹¹⁶ which was established pursuant to the 1994 UN Convention on the Law of the Sea (UNCLOS)¹¹⁷. Like the ICJ, the ITLOS is a permanent, standing court whose twenty-one members enjoy fixed terms and remuneration.¹¹⁸ The tribunal was conceived with broad jurisdictional competence that potentially extended to any questions arising between contracting states under the UNCLOS.¹¹⁹

ITLOS judgments are “final” and, pursuant to the ITLOS Statute, “shall be complied with by all the parties to the dispute.”¹²⁰ Like the PCA, ICJ, and PCIJ, however, the UNCLOS and ITLOS Statute do not generally provide enforcement mechanisms for ITLOS decisions.¹²¹

(resolving a territory dispute between Namibia and Botswana); Gabíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 7, ¶ 155 (Sept. 25) (resolving conflicts that had arisen during a joint waterworks project on the Hungarian-Slovak border). The only category of the ICJ’s caseload that has increased meaningfully since the 1970s is special-agreement cases, which involve the submission of existing disputes to the Court. During the ICJ’s first thirty years, only four special-agreement cases were filed, but ten such cases were filed in the ICJ’s next thirty-five years. Posner, *supra* note 109, at 9; *see also List of Cases Referred to the Court Since 1946 by Date of Introduction*, *supra* note 104. As others have noted, the ICJ’s special-agreement jurisdiction, particularly when used by parties to select a Chamber of the Court, bears more resemblance to *ad hoc* interstate arbitration than to the ICJ’s contemplated mandatory jurisdiction. Posner, *supra* note 109, at 9–10.

116. U.N. Convention on the Law of the Sea annex VI, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 561 [hereinafter UNCLOS].

117. UNCLOS, *supra* note 116.

118. *Id.* annex VI, arts. 3, 5, 1833 U.N.T.S. at 561–62.

119. The ITLOS’s jurisdiction is comparatively broad, extending to any dispute concerning the interpretation or application of the UNCLOS, as well as to disputes concerning any “international agreement related to the purposes of th[e] Convention” and principles of customary international law. *Id.* art. 288(2), 1833 U.N.T.S. at 510; *see also id.* arts. 288(1), 293(1), 1833 U.N.T.S. at 510, 512 (defining further ITLOS’s jurisdiction and the applicable law in its proceedings); *id.* annex VI, art. 21, 1833 U.N.T.S. at 566 (same); Jillaine Seymour, *The International Tribunal for the Law of the Sea: A Great Mistake?*, 13 IND. J. GLOBAL LEGAL STUD. 1, 1 (2006) (“The Convention appears to vest this Tribunal with very broad jurisdiction . . .”).

120. UNCLOS, *supra* note 116, annex VI, art. 33(1), 1833 U.N.T.S. at 568.

121. The only exception is the specialized Seabed Disputes Chamber, whose decisions are subject to enforcement in national courts in the same manner as national court judgments. *Id.* annex VI, art. 39, 1833 U.N.T.S. at 570. Seabed disputes—which concern activities in the International Seabed Area—are subject to the mandatory jurisdiction of the Seabed Disputes Chamber of the ITLOS. *Id.* art. 187, 1833 U.N.T.S. at 475–76; ROBIN ROLF CHURCHILL &

In practice, the vast majority of states have declined to accept the ITLOS's jurisdiction, instead opting for alternative means of dispute resolution. Article 287 of the Convention allows states to file a declaration selecting among three options for the resolution of disputes under the UNCLOS: (i) the ITLOS, (ii) the ICJ, and (iii) arbitration.¹²² Very few of the UNCLOS contracting states have accepted the ITLOS's jurisdiction pursuant to Article 287. As of September 2010, only 27 of the 161 contracting states had chosen the ITLOS as their preferred dispute-resolution mechanism, and, of these, 12 selected the ITLOS along with another form of dispute resolution.¹²³

Since the tribunal began functioning in 1998, only nineteen cases have been filed with it—ten of which were claims for provisional relief.¹²⁴ During these years, the ITLOS has issued only one decision

ALAN VAUGHAN LOWE, *THE LAW OF THE SEA* 458–59 (3d ed. 1999). The Seabed Disputes Chamber consists of eleven members of the ITLOS; the judges sit in “ad hoc chambers” in particular disputes, which consist of three judges selected by the parties from the Seabed Disputes Chamber or, failing agreement, by the Chamber’s presiding judge. UNCLOS, *supra* note 116, annex VI, arts. 35(1), 36, 1833 U.N.T.S. at 569–70.

Judgments of the Chamber are, like other ITLOS judgments, “final” and “shall be complied with by all the parties to the dispute.” *Id.* annex VI, arts. 33(1), 40(1), 1833 U.N.T.S. at 568, 570. Additionally, however, Article 39 of the ITLOS Statute provides that decisions of the Chamber, unlike other ITLOS judgments, are directly enforceable in contracting states: “The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.” *Id.* annex VI, art. 39, 1833 U.N.T.S. at 570.

122. *Id.* art. 287, 1833 U.N.T.S. at 509–10. Arbitration under the UNCLOS may include both arbitration under Annex VII and “special” arbitration under Annex VIII—for expert factfinding on issues of fisheries, marine environment, marine-scientific research, or navigation. *Id.* art. 287(1)(c)–(d), 1833 U.N.T.S. at 510; *see also id.* annex VIII, art. 1, 1833 U.N.T.S. at 575 (listing the subjects for special arbitration). Exceptionally, Articles 187 and 292 of the UNCLOS provide for mandatory ITLOS jurisdiction for cases in which vessels are detained in violation of the UNCLOS and for “seabed disputes”—disputes arising under the UNCLOS regime for rights to the international seabed. *Id.* arts. 187, 292, 1833 U.N.T.S. at 475–76, 512.

123. *See Settlement of Disputes Mechanism*, UNITED NATIONS, http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (last updated Nov. 11, 2010) (displaying a table with member parties’ choices of dispute-settlement methods).

124. *See List of Cases*, INT’L TRIBUNAL FOR THE LAW OF THE SEA, <http://www.itlos.org/index.php?id=35&L=0> (last visited Dec. 19, 2011).

on the merits.¹²⁵ Not surprisingly, there are substantial doubts about the usefulness of the ITLOS and about its future viability.¹²⁶

Like the ICJ and PCIJ, the ITLOS was established as a permanent judicial body, with aspirations to broad jurisdiction over a wide range of international-law disputes; yet it lacks any means to issue enforceable decisions. Also like the ICJ and PCIJ, the ITLOS ultimately was not granted compulsory jurisdiction; instead, the contracting states insisted upon retaining the ability to accept or decline the ITLOS's jurisdiction, and they have generally declined. Finally, like the PCA, ICJ, and PCIJ, states have decided not to use the ITLOS—filing, at best, one case per year—and consequently the tribunal has played no material role in international affairs.

5. *Regional Courts and Tribunals.* A number of the regional tribunals established since World War II share various characteristics of the PCA, PCIJ, ICJ, and ITLOS—they are modeled on the institutional structure of independent national appellate courts but lack the power to render enforceable decisions. None of these regional tribunals precisely parallel the institutional structures of the original first-generation tribunals, and most differ in significant respects—particularly because many of these tribunals are part of broader regional integration efforts.¹²⁷ Nevertheless, because these tribunals have been featured in some of the commentary on international adjudication, they warrant a brief discussion. Notably, like classic first-generation tribunals, very few of these tribunals have enjoyed more than modest usage or compliance, and many of them have been entirely unsuccessful.¹²⁸

The African Court of Justice and Human Rights (ACJHR) is representative of many regional judicial institutions. Founded by the

125. The one case that has been decided on the merits is *M/V Saiga (No. 2)* (St. Vincent v. Guinea), Case No. 2, Judgment of July 1, 1999, 3 ITLOS Rep. 10. See Seymour, *supra* note 119, at 2 (noting that only *M/V Saiga (No. 2)* has reached judgment on the merits); *List of Cases*, *supra* note 124 (listing ITLOS cases, only one of which was brought for provisional measures under Article 290 and received a judgment).

126. See, e.g., Shigeru Oda, *Dispute Settlement Prospects in the Law of the Sea*, 44 INT'L & COMP. L.Q. 863, 864 (1995) ("The creation of [the ITLOS] . . . will prove to have been a great mistake."); Seymour, *supra* note 119, at 35 ("Whatever the impetus behind creation of the Tribunal, its present challenge is to justify its existence." (footnote omitted)).

127. In the context of the European Union, regional political and economic unions involve largely sui generis considerations that make it difficult to use regional tribunals as evidence of or models for international adjudication. See *infra* Part II.A.6.

128. The most important exceptions are the ECJ and the ECHR. See *infra* Part II.A.6.

African Union in 2008, the ACJHR was intended to merge the African Court on Human and Peoples' Rights (ACHPR) and the African Court of Justice (ACJ) and to serve as the judicial organ of the African Union.¹²⁹ Like the ACHPR and ACJ before it, the ACJHR formally possesses broad jurisdictional competence over disputes between African Union member states.¹³⁰ The ACJHR is a standing court of sixteen judges who serve six-year terms.¹³¹ Under the ACJHR Statute, judgments of the ACJHR are final and binding on the parties, but the Statute includes no meaningful enforcement mechanism.¹³²

Although they are routinely included in lists of contemporary international tribunals,¹³³ neither the ACJ, the ACHPR, nor the ACJHR has attracted anything more than nominal support from member states or played any role in the adjudication of international disputes. Before being merged out of existence in 2008, neither the ACHPR nor the ACJ had ever commenced judicial activities or heard a single case.¹³⁴ Similarly, although it was established to replace the ACJ and ACPHR, the ACJHR has not commenced judicial activities.¹³⁵

129. Protocol on the Statute of the African Court of Justice and Human Rights arts. 2–3, July 1, 2008, 48 I.L.M. 337, 340.

130. *Id.* annex, art. 28, 48 I.L.M. at 347.

131. *Id.* annex, arts. 3, 8(1), 48 I.L.M. at 343.

132. *Id.* annex, art. 46, 48 I.L.M. at 351. Articles 46(3) and (4) authorize the referral of cases to the African Union Assembly of cases when parties fail to comply with a judgment. *Id.*

133. *See, e.g.*, Helfer & Slaughter, *supra* note 16, at 912 tbl.1 (identifying the ACJ and the ACHPR as courts that must be considered in addressing international adjudication); *African Court of Human and Peoples' Rights*, PROJECT ON INT'L COURTS & TRIBUNALS, <http://www.pict-pcti.org/courts/ACHPR.html> (last visited Dec. 19, 2011) (listing the ACHPR in the drop-down menu for "Courts and Tribunals").

134. In both instances, member states of the African Union were slow to ratify the Courts' respective constitutive instruments. *See* Gino J. Naldi, *Aspects of the African Court of Justice and Human Rights*, in *INTERNATIONAL LAW AND DISPUTE SETTLEMENTS: NEW PROBLEMS AND TECHNIQUES* 321, 322–23 (Duncan French, Matthew Saul & Nigel D. White eds., 2010) (giving the date of adoption and the date entered into force for both Courts' protocols). Ironically, only when the ACPHR's Protocol was eventually ratified, at least theoretically permitting the ACPHR to begin judicial functions, did the African Union agree to merge the nascent Court into the ACJ to produce the new ACJHR—which had not begun functioning as of January 2012. *See id.* at 323–25 (describing the timeline for the ACPHR's entering into force and for the decision to merge the Courts); Bernard James, *African Rights Court a White Elephant?*, ALLAFRICA.COM (Dec. 25, 2010), <http://allafrica.com/stories/201012260008.html> (“[T]he [ACHPR] . . . has received only one case so far . . .”).

135. The ACJHR Protocol and Statute had not yet received the number of ratifications required to come into force. *See* Simon M. Weldehaimanot, *Unlocking the African Court of*

The Central American Court of Justice (CACJ) provides a substantially similar example. Established by the Organization of Central American States in 1991,¹³⁶ the Court's jurisdiction extends broadly to disputes among Central American contracting states and to disputes between contracting states and any national of a contracting state.¹³⁷ Pursuant to its Statute, the CACJ consists of a standing body of judges serving ten-year terms.¹³⁸ Decisions of the CACJ are, under the terms of its Statute, final and not subject to appeal, but they lack any enforcement mechanism.¹³⁹

The CACJ has been used infrequently. To date, only El Salvador, Honduras, and Nicaragua have ratified the CACJ's Protocol, and Guatemala, Costa Rica, and Panama have refused.¹⁴⁰ During the Court's first ten years, forty-seven cases were filed, and twenty-one judgments were delivered.¹⁴¹ At the same time, the

Justice and Human Rights, 2 J. AFR. & INT'L L., no. 2, 2009, at 167, 176 n.45 (stating that only Libya had ratified at that time).

136. A predecessor of the CACJ was founded in 1907 but was dissolved in 1918 after hearing ten cases. Sasha Maldonado Jordison, *The Central American Court of Justice: Yesterday, Today, and Tomorrow?*, 25 CONN. J. INT'L L. 183, 195–96, 199 (2009). The Carta de la Organización de Estados Centroamericanos (ODECA) [Charter of the Organization of Central American States (OCAS)], Dec. 12, 1962, 552 U.N.T.S. 15, reestablished the CACJ in 1962, *id.* arts. 2, 14–16, 552 U.N.T.S. at 24–26, 30, but no steps were taken to create a functioning court until 1991. *See id.* at 207–09 (describing the emergence over time of the CACJ and stating “that the Court was established through the ODECA Charter, even though the Charter did not contain certain information important to the establishment of the Court”).

137. Convenio de los Estatutos de la Corte Centroamericana de la Justicia [Convention on the Statute of the Central American Court of Justice] art. 22, Dec. 10, 1992, 1821 U.N.T.S. 279, 298–99; Jordison, *supra* note 136, at 220–21; Thomas Andrew O'Keefe, *The Central American Integration System (SICA) at the Dawn of a New Century: Will the Central American Isthmus Finally Be Able To Achieve Economic and Political Unity?*, 13 FLA. J. INT'L L. 243, 252–53 (2001).

138. Convention on the Statute of the Central American Court of Justice, *supra* note 137, art. 11, 1821 U.N.T.S. at 297; Jordison, *supra* note 136, at 222–23; *see also* Convention on the Statute of the Central American Court of Justice, *supra* note 137, arts. 14–15, 44, 1821 U.N.T.S. at 298, 301–02 (implying the permanent nature of the Court by requiring that judges be independent of their home countries, abstain from working as anything but a judge on that Court, and receive a full salary).

139. Convention on the Statute of the Central American Court of Justice, *supra* note 137, art. 38, 1821 U.N.T.S. at 301; *see also id.* art. 39, 1821 U.N.T.S. at 301 (declaring that the only available enforcement mechanism is to inform the other member states of noncompliance so that they can take appropriate action to enforce the judgment); Jordison, *supra* note 136, at 221 (“Decisions of the Court are final and cannot be appealed.”).

140. Jordison, *supra* note 136, at 224–25; O'Keefe, *supra* note 137, at 251.

141. Jordison, *supra* note 136, at 223; *see also* O'Keefe, *supra* note 137, at 253 (“Although the [CACJ] has been operating since 1994, its caseload has been light because only three countries . . . actively participate in the Court.”).

CACJ's compliance record has been poor; several highly publicized cases have resulted in noncompliance or the suspension of a country's participation in the Court.¹⁴² Again, given this record, it is impossible to regard the CACJ as a successful example of international adjudication.

Other regional judicial bodies have track records that are substantially similar to the ACJHR and CACJ. Examples include the Benelux Court of Justice, the Economic Court of the Commonwealth of Independent States, the Court of Justice for the Common Market of Eastern and Southern Africa, the Court of Justice for the Arab Magreb Union, and the Judicial Tribunal for the Organization of Arab Petroleum Exporting Countries. In most instances, these Courts have heard either zero or a de minimis number of disputes and have played no role in international or regional affairs.

In a few cases, regional courts such as the Court of Justice for the Andean Community (CJAC) have attracted a respectable degree of usage in connection with largely unsuccessful regional integration efforts.¹⁴³ Notably, however, this usage has virtually always occurred in very limited and unusual circumstances, typically involving only one or a few states and "islands" of disputes over very limited subject areas, such as specialized intellectual-property issues.¹⁴⁴ The only

142. See, e.g., Jordison, *supra* note 136, at 228–31 (describing a case in which the Nicaraguan president brought suit against the Nicaraguan National Assembly and in which the assembly refused to comply with the CACJ's orders); O'Keefe, *supra* note 137, at 243, 254–55 (describing both parties' noncompliance with court orders concerning a case brought by Nicaragua against Honduras after Honduras signed a treaty with Colombia that, in part, recognized Colombia's territorial claim to land that Nicaragua had long claimed).

143. The CJAC is sometimes cited as an example of a successful regional court, with a reasonably sizable docket. See, e.g., Laurence R. Helfer, Karen J. Alter & M. Florencia Guertzovich, *Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community*, 103 AM. J. INT'L L. 1, 2 (2009) ("[The CJAC] is the world's third most active international court . . .").

144. Importantly, the CJAC's caseload consists almost entirely—97 percent—of a limited range of intellectual-property issues—principally trademark regulation—originating largely—approximately 66 percent—in one state: Colombia. *Id.* at 14–15. The CJAC's specific characteristics make it difficult to cite as a model of successful international adjudication. Rather, it is an example of how an otherwise-disused tribunal can be adapted to fill a very specific and limited purpose in a limited number of states. The same observations apply to the Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA), as the substantial majority of that Court's cases originate from the Ivory Coast. See Claire M. Dickerson, *Harmonizing Business Laws in Africa: OHADA Calls the Tune*, 44 COLUM. J. TRANSNAT'L L. 17, 57–58 & n.164 (2005) ("[T]he national supreme courts are in fact not sending all their business-related cases to the [CJAC], and the parties apparently often do not insist that their case be removed. The supreme courts' motivation is clear enough; legal professionals within the region confirm that parties are equally reticent due

exception to this pattern in the performance of regional tribunals involves European institutions—specifically, the European Court of Human Rights and the European Court of Justice, which is discussed in the next Section.

Finally, the IACHR, established pursuant to the 1969 American Convention on Human Rights, has been more successful than most other regional courts. The Court has jurisdiction to hear cases filed by the Inter-American Commission on Human Rights (Commission), which, in turn, has jurisdiction to hear petitions filed by individuals or groups;¹⁴⁵ the IACHR itself does not have jurisdiction to hear cases filed directly by individuals.¹⁴⁶ Decisions of the IACHR are formally binding, but the Convention provides no enforcement mechanisms for cases of noncompliance.¹⁴⁷

Usage of the IACHR was initially modest but has been growing. In 2009, the Commission received 1431 complaints, compared to 435

to the perceived cost of removing the final appeal to the [CJAC] in Abidjan. The fact that the vast majority of appeals to the [CJAC] come from Côte d'Ivoire supports that conclusion.” (footnote omitted)).

145. Convención Americana Sobre Derechos Humanos [American Convention on Human Rights] arts. 44, 61, Nov. 22, 1969, 1144 U.N.T.S. 123, 155, 159; *see also* JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 6 (2003) (“[A]n individual . . . must first file a complaint directly with the Inter-American Commission If the Commission attributes the human rights violation to the State, the Commission may make recommendations to the State. A State that decides to challenge the Commission’s attribution of responsibility may submit the case to the Inter-American Court. The Commission may submit a case to the Court only if the State has accepted the Court’s jurisdiction.” (footnotes omitted)); James Cavallaro & Stephanie Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT’L L. 768, 778 (2008) (“The quasi-judicial Commission acts as the first instance for victims of human rights violations who wish to bring cases before the system. . . . The Court, on the other hand, is an exclusively judicial body that issues binding decisions in cases of human rights violations submitted to it by the Commission.”). The Convention authorizes contracting states to make a declaration upon ratification, consenting to the IACHR’s jurisdiction. American Convention on Human Rights, *supra*, art. 62, 1144 U.N.T.S. at 159. Twenty-four states accept some measure of IACHR jurisdiction, although the United States, Canada, Trinidad and Tobago, Dominica, Grenada, and Jamaica do not. *See American Convention of Human Rights “Pact of San Jose, Costa Rica,”* ORG. OF AM. STATES, <http://www.oas.org/juridico/english/sigs/b-32.html> (last visited Dec. 19, 2011). The IACHR comprises seven members, each serving six-year terms. PASQUALUCCI, *supra*, at 9–10.

146. American Convention on Human Rights, *supra* note 145, art. 61(1), 1144 U.N.T.S. at 159 (providing that the state members and the Commission are the only parties that can bring suit before the IACHR). In contrast, the Commission may entertain petitions filed by individuals. *Id.* art. 44, 1144 U.N.T.S. at 155.

147. *Id.* arts. 67–68, 1144 U.N.T.S. at 160 (declaring that judgments are final and that the parties to the Convention agree to comply with the judgments); *see also* PASQUALUCCI, *supra* note 145, at 8 (“[T]he Court has no effective mechanism to enforce its judgments . . .”).

in 1997.¹⁴⁸ Of these complaints, the Commission initiated eleven cases before the IACHR, up from two in 1997.¹⁴⁹ The IACHR can order two general types of remedies: (a) monetary compensation for individuals who have been deprived of their human rights and (b) orders for the trial and punishment of perpetrators of human-rights violations and for changes in domestic law.¹⁵⁰ In light of the absence of enforcement mechanisms, states have seldom complied with orders to punish perpetrators, to change domestic laws, or to take similar steps, but they generally have paid monetary compensation to victims, albeit often after delays.¹⁵¹ Although precise figures vary, it is generally accepted that a substantial number of the Court's judgments do not enjoy full compliance.¹⁵²

148. Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], *Annual Report of the Inter-American Commission on Human Rights, 2009*, at 33 tbl.b, OEA/Ser.L/V/II, doc. 51, corr. 1 (2009), available at <http://www.cidh.oas.org/pdf%20files/ANNUAL2009.pdf>.

149. *Id.* at 39 tbl.a. Since 2001, the Commission has filed roughly one dozen cases per year with the IACHR. Cavallaro & Brewer, *supra* note 145, at 780. Before 2001, the Court heard between one and four cases annually. *Id.* at 780–81. It remains the case that the Court is “an organ of extremely limited access for the vast majority of victims of human rights violations.” *Id.* at 781.

150. PASQUALUCCI, *supra* note 145, at 8–9; see also *id.* at 17–18 (describing the reparations in a particular case). See generally *id.* at 230–79, 281–85 (detailing the victim reparations process).

151. *Id.* at 8–9. There have been a number of instances of outright defiance of IACHR judgments. See, e.g., Inter-Am. Comm'n H.R., *Democracy and Human Rights in Venezuela*, at 77–80, OEA/Ser.L/V/II, doc. 54 (2009), available at <http://www.cidh.org/pdf%20files/VENEZUELA%202009%20ENG.pdf> (criticizing Venezuela's Supreme Court for rejecting the IACHR's judgment regarding biased judges); PASQUALUCCI, *supra* note 145, at 288–89 (describing how Honduras initially refused to comply with an order to pay compensation and successfully blocked an OAS General Assembly consideration of the issue).

152. See Inter-American Court of Human Rights [Inter-Am. Ct. H.R.], *Annual Report of the Inter-American Court of Human Rights, 2009*, at 10–12, OEA/Ser.L/V/III.86, doc. I (2010), available at http://www.corteidh.or.cr/docs/informes/eng_2009.pdf (giving various graphs and charts showing levels of compliance); Cavallaro & Brewer, *supra* note 145, at 784–88 (“A review of the [IACHR's] past cases demonstrates that the Court does face frequent nonimplementation of its judgments. Governments may openly reject certain orders, but even more commonly they assert that they will comply or are in the process of complying, yet fail to take the steps necessary to bring their practices into line with the requirements of the Court's judgment.”); Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 56 (2010) (“[F]ull compliance [with IACHR orders] has occurred . . . 6% of the time. . . . [T]he state has not complied with any compliance orders . . . 11% [of the time]. Thus, 83% of the cases . . . hav[e] partial compliance . . .”).

6. *Regional Exceptionalism: The European Court of Justice.* The “Story of Europe”¹⁵³ has figured prominently in commentary on international adjudication. In particular, proponents of international adjudication regard the evolution of the ECJ as a model for other international tribunals.¹⁵⁴ Considered in historical context, however, it is difficult to see these regional European institutions as representative of more general trends in international adjudication.

The ECJ was established by the Treaty of Rome, with its jurisdiction directed toward interpretation of the treaty in disputes between member states of the European Community—now the European Union (EU)—or between member states and EU organs.¹⁵⁵ The ECJ is a permanent judicial body whose judges enjoy fixed terms of six years and fixed remuneration.¹⁵⁶

As initially adopted, the Treaty of Rome granted the ECJ comparatively limited authority; the Court was envisaged as being principally limited to actions brought by the EU Commission or by member states. Despite these initial restrictions, the ECJ progressively extended the scope of its jurisdiction, developing a body of decisions holding that the treaty and other EU agreements could be invoked in national court proceedings by private parties.¹⁵⁷ Over time, as the EU progressed rapidly toward integration, the ECJ effectively claimed broad competence over an extensive range of EU legal instruments.¹⁵⁸ The formal enforceability of ECJ judgments

153. See generally Helfer & Slaughter, *supra* note 6, at 290–98 (tracing and comparing the histories of the ECJ and the ECHR).

154. See generally *id.* at 298–337 (developing a checklist of important factors for a successful international tribunal by, in large part, analyzing the ECJ and the ECHR).

155. Treaty Establishing the European Economic Community arts. 164, 169–70, Mar. 25, 1957, 298 U.N.T.S. 11, 73, 75; see also J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2419 (1991) (“Two sets of legislative acts and administrative measures are subject to judicial review: (1) the measures of the Community itself (principally acts of the Council of Ministers, Commission, and European Parliament) . . . and (2) the acts of the Member States . . .”). *But cf.* Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1, 6 & n.15 (1981) (“To date, only a single case has been decided by the Court upon the complaint of a member state under Article 170, and a relatively limited number were instituted by the Commission under Article 169. . . . [M]ost of the ‘constitutional’ cases . . . were referred to the Court under Article 177 as a result of litigation instituted by individuals or companies against their governments . . .”).

156. Consolidated Version of the Treaty on the Functioning of the European Union art. 253, Sept. 5, 2008, 2010 O.J. (C 83) 47, 158.

157. The classic account of the evolution of ECJ authority is Stein, *supra* note 155.

158. See ANTHONY ARNULL, ALAN DASHWOOD, MICHAEL DOUGAN, MALCOLM ROSS, ELEANOR SPAVENTA & DERRICK WYATT, WYATT AND DASHWOOD’S EUROPEAN UNION LAW 125–202 (5th ed. 2006) (giving an account of the development of various European

remains unsettled,¹⁵⁹ but the Court's judgments have been met with relatively high compliance.¹⁶⁰

It is very doubtful that the ECJ's evolution provides real guidance for most other forms of international adjudication. The Court was one element of a broad institutional effort that fulfilled powerful political commitments to European integration among states with comparatively homogeneous cultures and political systems.¹⁶¹ Because these circumstances and commitments lack parallels in most other international contexts, drawing analogies between the experience of the ECJ and that of other types of tribunals is difficult. Moreover, because of the success of European integration efforts, the ECJ is, in most respects, unlike an international tribunal that decides disputes between parties of different nationalities and is instead more akin to a national tribunal

Community law doctrines that have increased the effect of European Community law within a member state's legal system). See generally Hjalte Rasmussen, *Between Self-Restraint and Activism: A Judicial Policy for the European Court*, 13 EUR. L. REV. 28 (1988) (providing a proto-theory to evaluate whether the ECJ has been too activist in expanding its reach).

159. See TC HARTLEY, *THE FOUNDATIONS OF EUROPEAN UNION LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN UNION* 345 (7th ed. 2010) ("Enforcing Union law has always been problematic. Since the Union institutions have no means of direct enforcement—there are no Union bailiffs, policemen, or soldiers to arrest members of the national Government—they must rely in the last resort on political pressure from other Member States.").

160. See Alan Dashwood & Robin White, *Enforcement Actions Under Articles 169 and 170 EEC*, 14 EUR. L. REV. 388, 411 (1989) ("In the small minority of cases that have run their full course the Member State concerned has almost always taken the steps necessary to comply with the judgment . . ."); Helfer & Slaughter, *supra* note 6, at 292 ("Acceptance of these doctrines [developed by the ECJ] by national courts has given the judgments of the ECJ in cases referred to it under Article 177 roughly the same effect as judgments issued by domestic courts in the member states of the European Union.").

161. See HARTLEY, *supra* note 159, at 1–10 ("It is not easy to compare [the EU] with other political entities: it contains some of the features of a traditional international organization and, less prominently, some features of a federation."); FRANCIS G. JACOBS, *THE SOVEREIGNTY OF LAW: THE EUROPEAN WAY* 35–56 (2007) ("When the European Community was founded . . . , the ECJ was set up to protect against misuse of the powers of institutions and to ensure respect by member states for their treaty obligations."). At the same time, EU integration involved a limited number of relatively homogeneous states, sharing common traditions of legalization. See, e.g., Jost Delbrueck, *International Protection of Human Rights and State Sovereignty*, 57 IND. L.J. 567, 576 (1982) ("[T]he regional experience . . . , made in more or less culturally and politically homogeneous regions, . . . hardly could be taken as a model that could be easily transferred elsewhere . . .").

that decides disputes between parties of the same—European—nationality.¹⁶²

Also significant is the fact that the ECJ was not granted its broad authority by any deliberate decision of the EU member states but instead incrementally acquired its power through its own decisions during the ongoing process of European integration.¹⁶³ The ECJ's most significant powers did not derive from decisions made by states about international adjudication, but rather from the ECJ's ability to use broader political progress toward European integration as a basis for extending its own essentially *domestic* authority, even beyond what member states had initially intended.¹⁶⁴ These *sui generis* attributes of the ECJ make it an unrepresentative model for hypotheses about international adjudication or for the design of most other international tribunals.¹⁶⁵

162. Thus, the ECJ's jurisdiction encompasses principally disputes between EU nationals and EU member states—not between non-EU nationals and EU member states or EU nationals. *See supra* note 155.

163. *See* Karen J. Alter, *The European Union's Legal System and Domestic Policy*, 54 INT'L ORG. 489, 491 (2000) (“[T]hese powers the ECJ created for itself, despite the intention of members states.”); Stein, *supra* note 155, at 24–26 (“[T]he authority of the Community and of the Court itself has grown substantially at the expense of national governments and courts.”).

164. Even the ECJ's explanation for its jurisdictional claims rejected traditional international-law doctrine, instead relying on the European treaties' asserted status as “constitutional” instruments within a new European political structure. *See* Stein, *supra* note 155, at 1, 5–6, 11–12 (noting that the Court has “construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology”); J.H.H. Weiler & Joel P. Trachtman, *European Constitutionalism and Its Discontents*, 17 NW. J. INT'L L. & BUS. 354, 373–74 (1997) (“[T]he Court . . . referred to the treaties as the constitutional charter of the Community.”).

165. A broadly similar analysis applies to the ECHR. The ECHR is not an EU institution; it was created by the European Convention on Human Rights under the auspices of the Council of Europe, and it includes a number of non-EU members, such as Turkey and Russia. ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS* 17–38, 49 & n.17 (2010). Nonetheless, the ECHR has played a significant role in Europe's integration, both for existing EU member states and for future candidates for membership. That role distinguishes the Court from adjudicatory tribunals in most other international settings. It is also significant that the ECHR has encountered most of its difficulties with compliance with states outside the EU—notably, Turkey, Russia, Ukraine, Moldova, Bulgaria, and Romania. *See* COMM. OF MINISTERS, COUNCIL OF EUR., *SUPERVISION OF THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS: ANNUAL REPORT, 2009*, app. 2, at 50–54 (2010), available at <https://wcd.coe.int/wcd/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=1824760&SecMode=1&DocId=1565496&Usage=2> (presenting statistics on the respect of payment deadlines by ECHR member states); Cavallaro & Brewer, *supra* note 145, at 772–75 (“[T]he majority of ECHR judgments awaiting compliance supervision by the committee . . . now involve Eastern European member states and Turkey.”). This observation suggests that EU integration and regional homogeneity are the principal

B. The Second Generation of International Adjudication

The debate among commentators about international adjudication—which focuses on first-generation tribunals—ignores a critically important category of substantially more active, more effective, and more interesting international adjudicatory mechanisms that have developed over the past four decades. In particular, the commentary has devoted little or no attention to a newer generation of tribunals—a generation that includes arbitral tribunals constituted pursuant to investment treaties, such as NAFTA and the ICSID Convention; international commercial-arbitration tribunals, such as the Iran-U.S. Claims Tribunal and the UN Claims Commission; the WTO; and national courts adjudicating claims against foreign states.

The origins of this newer generation of tribunals differ markedly from those of traditional forms of international adjudication. Second-generation tribunals were not the creations of multilateral conferences with high aspirations of securing world peace—like the Hague Conferences or the UN Conference—but instead evolved progressively from a multitude of practical, ad hoc arrangements, often involving bilateral relationships between states or between private parties and state entities, and typically concerning trade or investment. These arrangements were part of an incremental and pragmatic evolution of adjudicatory mechanisms aimed at providing improved means of impartially, efficiently, and effectively resolving disputes, particularly those disputes that impeded the development of international trade and investment. As discussed in the following Sections, these kinds of mechanisms have been used much more frequently and, for the most part, have worked much more effectively than traditional first-generation tribunals.

1. *Litigation Involving Foreign States in National Courts.* Somewhat surprisingly, the origins of the new generation of international adjudication can be traced to developments in the mid-twentieth century regarding foreign-state immunity. Although their existence is noncontroversial, these developments have been largely

explanations for the ECHR's adjudicatory mechanism. Finally, the ECHR's caseload overwhelmingly involves disputes between European states and their own nationals, not nationals of other states. The best analogy for that category of disputes is a national court, such as the U.S. Supreme Court or the German federal constitutional court (Bundesverfassungsgericht), which applies domestic constitutional protections to claims by local nationals or residents—not an international tribunal that hears claims by nationals of one state asserting claims against a foreign state.

ignored in commentary about international adjudication.¹⁶⁶ Despite this omission, these developments have played a central role in the evolution of contemporary modes of international adjudication.

Before World War II, most states adopted a policy of “absolute immunity,” affording foreign states and their property complete immunity from the jurisdiction of national courts.¹⁶⁷ Thus, although commercial interactions between states and private parties were common, disputes arising from these activities were not subject to the jurisdiction of national courts. If a private party wished to pursue a claim against a foreign state with which it had done business, it would have had to persuade its home state to espouse its claim against the foreign state—virtually always by means of diplomatic negotiations between the two states.¹⁶⁸ These negotiations were heavily influenced by political, security, and other considerations and, consequently, often produced anomalous and arbitrary results.¹⁶⁹

Equally familiar is the gradual development during the first half of the twentieth century of a “restrictive theory” of sovereign immunity.¹⁷⁰ This theory provided, in general terms, that a foreign

166. Commentary on contemporary international adjudication sometimes considers litigation in national courts under human-rights legislation such as the U.S. Alien Tort Statute, 28 U.S.C. § 1350 (2006), but it does not address the larger corpus of litigation involving foreign states and state entities. *See, e.g.*, POSNER, *supra* note 9, at 207 (limiting its discussion to the use of the Alien Tort Statute against multinational corporations); Helfer & Slaughter, *supra* note 6, at 293–97 (discussing human-rights claims brought before the ECHR and the role of ECHR judgments and treaty obligations in national judicial proceedings).

167. *See* H.R. REP. NO. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.A.N. 6604, 6607 (“Since World War II, the United States has increasingly become involved in litigation in foreign courts.”); S. REP. NO. 94-1310, at 10 (1976) (same); GARY BORN & PETER RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 219–24 (4th ed. 2007) (“[I]nternational practice . . . saw widespread acceptance of absolute immunity.”); Peter D. Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235, 252–63 (1986) (“On the Continent, . . . the possible emergence of a restrictive immunity approach . . . was then eclipsed by the absolute immunity principle . . .”). *See generally* GAMAL MOURSİ BADR, *STATE IMMUNITY: AN ANALYTIC AND PROGNOSTIC VIEW* 9–70 (1984) (discussing the historical development of the sovereign immunity doctrine).

168. *See* EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 144 (1919) (observing during the early twentieth century that “[t]he government’s power to settle the claim of its citizen against a foreign country is practically unrestricted”); Guy I.F. Leigh, *Nationality and Diplomatic Protection*, 20 INT’L & COMP. L.Q. 453, 455 (1971) (“[W]hile a state has the right to exercise diplomatic protection, it has no obligation to do so. Whether or not . . . it chooses to act on behalf of a national is entirely within its own discretion.”).

169. *See infra* notes 174–75.

170. *See* JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 4–14, 26–31 (2d ed. 2003) (“By 1950 most countries that were neither ‘socialist’ . . . nor within the common law tradition had adopted the restrictive theory.”);

state would enjoy immunity from the jurisdiction of national courts for its “sovereign” actions but not for its “private” acts.¹⁷¹ Importantly, application of this theory had the effect of transferring disputes involving foreign states from the diplomatic arena to adjudicatory forums—in particular, to litigation in national courts. In the words of one commentator, “The embrace of the restrictive theory of the immunity of foreign states around the globe is representative of the ongoing legalization of international relations.”¹⁷²

The gradual replacement of the absolute theory of sovereign immunity by the restrictive theory was reflected in the enactment of foreign-sovereign-immunity legislation in most developed jurisdictions, including the United States, Europe, and elsewhere.¹⁷³ These enactments aimed to resolve disputes between foreign states in accordance with generally applicable legal rules in adjudicatory settings, rather than in politicized diplomatic forums,¹⁷⁴ and to provide

Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 RECUEIL DES COURS 87, 126–82, 185–86 (1976) (“[By the end of the Second World War,] an ever-growing majority of recent and contemporary writers—assuming the complexion of the general consensus of opinion—[had] subscribed to a restrictive doctrine of immunity.”). See generally BADR, *supra* note 167, at 9–70, 79–139 (discussing the transition to a restrictive approach).

171. See BADR, *supra* note 167, at 91 (noting that sovereign immunity generally turns on whether the sovereign is acting in its official state capacity or in some private capacity—losing its immunity in the latter scenario). See generally Trooboff, *supra* note 167, at 275–96 (describing case law in the United States under the Foreign Sovereign Immunities Act (FSIA) of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.)), that has interpreted the distinction between sovereign and private action).

172. DELLAPENNA, *supra* note 170, at 5.

173. E.g., FSIA; *Foreign States Immunities Act 1985* (Cth) (Austl.), reprinted in 25 I.L.M. 715 (1986); State Immunity Act, S.C. 1980-81-82-83, c. 95 (Can.); [Act on the Civil Jurisdiction of Japan with Respect to a Foreign State], Act No. 24 of 2009 (Japan); State Immunity Act, 1985, c. 313 (Sing.); State Immunity Act, 1978, c. 33 (U.K.), reprinted in 17 I.L.M. 1123 (1978); European Convention on State Immunity, *opened for signature* May 16, 1972, 1495 U.N.T.S. 181.

174. The FSIA’s legislative history explained:

A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.

H.R. REP. NO. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606; S. REP. NO. 94-1310, at 9 (1976); see also *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11,315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 31 (1976) (statement of Bruno A. Ristau, Chief, Foreign Litig.

a means for the effective enforcement of national court judgments against states and their property.¹⁷⁵

By the 1980s, legislation adopting the restrictive theory of sovereign immunity had been enacted not only in most developed states but in many other states as well. In broad terms, this legislation granted national courts jurisdiction over disputes involving commercial activities, real property, expropriatory actions, and a limited number of other specified actions, as well as over disputes in which states had waived their immunity, particularly through arbitration agreements.¹⁷⁶ The same statutes also provided for the enforcement of national court judgments against the commercial assets of foreign states.¹⁷⁷ The gradual acceptance of the restrictive theory of sovereign immunity culminated in the 2004 UN Convention on Jurisdictional Immunities of States and Their Property,¹⁷⁸ which gave broad effect to the theory.

The shift from absolute to restrictive immunity had significant consequences for the adjudication of disputes involving foreign states. As already outlined, prior to the 1960s, claims by nationals of one state against foreign states were almost exclusively the subject of

Section, Civil Div., U.S. Dep't of Justice) (“[T]he bill is designed to depoliticize the area of sovereign immunity by placing the responsibility for determining questions of immunity in the courts.”).

175. The FSIA, for example, was intended to

remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. [This bill] seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.

H.R. REP. NO. 94-1487, at 8; S. REP. NO. 94-1310, at 9.

176. *E.g.*, Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1605 (2006); *Foreign States Immunities Act 1985* ss 10–22; State Immunity Act, R.S.C. 1985, c. S-18, arts. 4–8 (Can.); Foreign States Immunities Act 87 of 1981 §§ 3–12 (S. Afr.); State Immunity Act, 1978, §§ 2–11 (U.K.); European Convention on State Immunity, *supra* note 173, arts. 4–12, 1495 U.N.T.S. at 183–85. *See generally* DELLAPENNA, *supra* note 170, at 323–468 (discussing the extent to which sovereign immunity is restricted over various categories of state action).

177. *E.g.*, FSIA, 28 U.S.C. §§ 1609–1611; *Foreign States Immunities Act 1985* s 32 (Austl.); State Immunity Act, 1978, § 13 (U.K.); European Convention on State Immunity, *supra* note 173, art. 26, 1495 U.N.T.S. at 189–90. *See generally* DELLAPENNA, *supra* note 170, at 743–89 (describing the extent to which states are immune from executions against different types of state assets).

178. U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, annex, U.N. GAOR, 59th Sess., Supp. No. 49, U.N. Doc. A/59/49 (Dec. 2, 2004).

diplomatic negotiations or claims-settlement mechanisms.¹⁷⁹ Adoption of the restrictive theory of immunity moved the overwhelming bulk of these claims into adjudication in national courts in which private parties could directly participate—a shift that produced a new and significant caseload.¹⁸⁰

Importantly, the emergence of this newer category of international adjudication has subjected states to the mandatory jurisdiction of national courts. Foreign states are no longer given the option of consenting, or of withholding consent, to litigation under the European Convention on State Immunity,¹⁸¹ the Foreign Sovereign Immunities Act of 1976 (FSIA),¹⁸² or similar instruments. Rather, if a state fails to appear in a proceeding, it is subject to default proceedings and a default judgment—much like a private litigant.¹⁸³ Similarly, judgments issued against a foreign state or state entity are enforceable against the state's commercial property, subject to specified procedures and exceptions.¹⁸⁴ If a foreign state or state-related entity fails to pay a judgment, its commercial assets may be forcibly seized in substantially the same manner as a private party's.¹⁸⁵

On any view, litigation against foreign states under foreign-sovereign-immunity legislation has become a significant category of contemporary international adjudication. In terms of usage, it is likely

179. See *supra* notes 167–68. In some instances, interstate judicial proceedings or arbitrations addressed claims by nationals of one state against a foreign state. See, e.g., *Factory at Chorzów* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26) (evaluating the claims of German factory owners against the Polish government); *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1925 P.C.I.J. (ser. A) No. 5 (Mar. 26) (evaluating the claims of a Greek national against the British government).

180. See *infra* notes 186–87 and accompanying text. At the same time, states also began to use foreign courts to pursue claims against private parties. See Koh, *supra* note 9, at 2369–71 (“The most novel development in transnational public law litigation has been its expansion beyond individual to state plaintiffs.”).

181. European Convention on State Immunity, *supra* note 173.

182. Foreign Sovereign Immunities Act (FSIA) of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

183. E.g., State Immunity Act art. 10 (Can.); State Immunity Act, 1985, c. 313, § 14 (Sing.); European Convention on State Immunity, *supra* note 173, art. 16, 1495 U.N.T.S. at 185–86. *But cf.* DELLAPENNA, *supra* note 170, at 725–35 (noting that foreign states are subject to default proceedings, albeit with some procedural safeguards not extended to private litigants).

184. E.g., FSIA, 28 U.S.C. §§ 1610–1611; State Immunity Act art. 12 (Can.).

185. Recent examples of such execution include *Ram Media, Ltd. (In Administration) v. Ministry of Culture of the Hellenic Republic (Secretariat General of Sport)*, [2008] EWHC (QB) 1835 (Eng.), and *Sedelmayer v. Russian Federation*, [District Court] 2010-10-11, T 15420-10 (Swed.). In practice, foreign states ordinarily resolve disputes or pay judgments against them, rather than allowing execution against state assets to proceed.

that some one thousand cases involving claims against foreign states are pending in national courts at any given time and that some 250 new cases are filed each year. Electronic archives and other materials indicate that annual filings of new cases number in the hundreds in some jurisdictions and in the dozens in others.¹⁸⁶ They also indicate that these figures have been increasing over the past decade.¹⁸⁷ In quantitative terms, the volume of international litigation involving foreign states in national courts exceeds, by a fairly wide margin, the total caseload of all of the first-generation tribunals discussed in Part II.A.

Litigation involving foreign sovereigns is not only frequent but also deals with significant legal issues. National courts adjudicate a wide range of important international matters, including commercial disputes, often involving very substantial contracts or projects,¹⁸⁸ expropriations,¹⁸⁹ and human-rights violations.¹⁹⁰ More fundamentally,

186. DELLAPENNA, *supra* note 170, at xiv (observing that over three thousand FSIA cases were filed between 1977 and 2000, for a filing rate of roughly 130 cases per year). A Westlaw search in the Federal Cases (ALLFEDS) database using the following terms-and-connectors search—CI([insert year]) & SY(FSIA)—yields roughly fifty reported FSIA cases per year, suggesting substantially more unreported decisions and filings.

187. *Id.*

188. *See, e.g.*, *EM Ltd. v. Republic of Argentina*, 389 F. App'x 38 (2d Cir. 2010) (reviewing a suit brought by bondholders against Argentina for payment on defaulted bonds); *Reed Int'l Trading Corp. v. Donau Bank AG*, 866 F. Supp. 750 (S.D.N.Y. 1994) (considering a contract dispute between international-trading companies and Russian banks); *J.H. Rayner (Mincing Lane) Ltd. v. Dep't of Trade & Indus.*, [1990] 2 A.C. 418 (Eng.) (examining the insolvency of the International Tin Council); *Owners of Cargo Lately Laden on Bd. the Playa Larga v. Owners of the I Congreso del Partido*, [1983] 1 A.C. 244 (Eng.) (considering a shipping dispute involving a state-owned ship); *Donegal Int'l Ltd. v. Republic of Zambia*, [2007] EWHC (Comm) 197, [2007] 1 Lloyd's Rep. 397 (Eng.) (adjudicating Zambia's obligation to repay a debt held by Donegal International).

189. *E.g.*, *Altmann v. Republic of Austria*, 317 F.3d 954 (2d Cir. 2002) (involving the expropriation of paintings that had been confiscated by the Nazis); *Zappia Middle E. Constr. Co. v. Emirate of Abu Dhabi*, 215 F.3d 247 (2d Cir. 2000) (considering whether the loss of a government contractor's intangible contract rights amounted to an expropriation); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987) (considering whether an expropriation occurred when the Mexican government instituted currency-exchange controls that undermined the value of U.S. certificates of deposits from Mexican banks).

190. *See, e.g.*, *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (examining the assassination of a California resident that was allegedly authorized by a high-ranking Chinese official); *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) (adjudicating a wrongful-death claim against the Republic of Chile for its supposed involvement in the assassination of the Chilean ambassador to the United States); *see also Koh, supra* note 9, at 2371, 2391 (“Transnational litigation, which originated in the context of private commercial suits against foreign governments, has now migrated into the realm of public human rights suits against the United States and foreign governments and officials.”).

the availability of fora for the adjudication of claims against foreign states, pursuant to generally applicable substantive rules, plays an essential role in contemporary international trade and finance. Without the assurance of such fora, which are often specified in contractual forum-selection clauses, private contractors, lenders, and others would not enter into commercial relationships with foreign states or would demand unacceptable terms.¹⁹¹

In terms of compliance, foreign states almost always participate in national court proceedings brought against them,¹⁹² and they frequently satisfy adverse judgments. In cases in which judgments are not voluntarily complied with, enforcement proceedings have been instituted and have frequently succeeded, albeit often after the kinds of delays that attend any litigation process.¹⁹³ Of course, a state's refusal to comply with a judgment against it, a response that necessitates recourse to enforcement processes, is no different from a refusal by a private litigant to comply with a judgment, a response that also triggers the need for coercive enforcement.¹⁹⁴

191. As one commentator more broadly concludes, litigation involving foreign states in U.S. courts "weav[es] the doctrinal tapestry that . . . help[s] shape geopolitical and economic relationships among America and its global partners." Koh, *supra* note 9, at 2395; see also *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11,325 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 27 (1976) (statement of Monroe Leigh, Legal Adviser, U.S. Dep't of State) ("[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause. The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.").

192. Cf. DELLAPENNA, *supra* note 170, at 728–29 (noting all of the reported instances of default by foreign states).

193. See, e.g., *Republic of Argentina v. NML Capital Ltd.*, [2010] EWCA (Civ) 41 (Eng.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jan. 25, 2005, Bull. civ. I, No. 39 (Fr.); see also DELLAPENNA, *supra* note 170, at 728, 729 n.111 (citing successful executions of default judgments against foreign states while cautioning that "one should not overestimate the ease of obtaining a default judgment" against a foreign state). Judgments against a foreign state in one jurisdiction are, subject to generally applicable rules regarding recognition of foreign judgments, enforceable in other jurisdictions. BORN & RUTLEDGE, *supra* note 167, at 1009–82 (offering cases and materials analyzing when courts are willing to give foreign judgments effect, while noting that this practice is generally discretionary); DELLAPENNA, *supra* note 170, at 790–811 (describing the circumstances under which courts are likely to recognize and enforce foreign judgments); 1 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 567, 574–79 (Lawrence Collins et al. eds., 14th ed. 2006) (discussing the enforcement and recognition of foreign judgments under English common law).

194. See *infra* note 331 and accompanying text.

2. *International Commercial Arbitration Involving State Parties.*

In parallel with the development of the restrictive theory of sovereign immunity, states began to agree in significant numbers of cases to the resolution of commercial, financial, and other disputes with private parties by international commercial arbitration. Historically, states and state-related entities had sometimes included arbitration clauses in commercial or investment contracts with foreign parties.¹⁹⁵ During the 1960s and 1970s, however, the frequency with which states agreed to arbitrate disputes with private parties as part of their commercial arrangements with those parties significantly increased¹⁹⁶—again moving a substantial category of disputes out of diplomatic negotiations, where they had historically been resolved, and into adjudicatory proceedings involving private parties.

The increased use of arbitration in states' commercial agreements coincided with a more general use of international arbitration by private parties following World War II and with the development of robust legal regimes that aimed to give effect to the international arbitral process.¹⁹⁷ In particular, the New York

195. See ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* § 1.18 (2009) (“There were a number of arbitrations arising out of concession agreements made in the 1920s between Western companies and the Soviet Union.”). See generally V.V. Veeder, *The Lena Goldfields Arbitration: The Historical Roots of Three Ideas*, 47 *INT’L & COMP. L.Q.* 747 (1998) (describing the arbitration proceedings initiated against the Soviet Union by an English mining company under an arbitration clause contained in a concession agreement).

196. See STEPHEN J. TOOPE, *MIXED INTERNATIONAL ARBITRATION* 204, 213 (1990) (“[T]he number of ICC cases involving ‘public authorities’ increased sharply in the 1960s. It would appear that the involvement of states in ICC arbitration has remained substantial throughout the 1970s and early 1980s.” (footnote omitted)); Georges R. Delaume, *State Contracts and International Arbitration*, 75 *AM. J. INT’L L.* 784, 784 (1981) (noting that “a network of treaty, statutory, and judicial developments . . . greatly improve[d] the effectiveness of the arbitration process” and created “new incentives to have recourse to arbitration” during the 1960s and 1970s); cf. KARL-HEINZ BÖCKSTIEGEL, *ARBITRATION AND STATE ENTERPRISES: SURVEYS ON THE NATIONAL AND INTERNATIONAL STATE OF LAW AND PRACTICE* 11 (1984) (“When state enterprises thus participate in international commerce, they are obviously confronted with a desire of their foreign business partners commonly to agree to arbitration as the prevailing technique to be used for settling disputes in international business relations.”). See generally Martin Domke, *Arbitration Between Government Bodies and Foreign Private Firms*, 17 *ARB. J.* 129 (1962) (observing in the early 1960s that many international legal institutions were advocating greater reliance on private arbitration to settle disputes between government entities and business enterprises).

197. See 1 GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 90–106, 111–43 (2009); Martin Domke & Ottoarndt Glossner, *The Present State of the Law Regarding International Commercial Arbitration*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 307, 307 (Maarten Bos ed., 1973) (“There has been a trend, since the Sixties, towards multilateral and bilateral commercial arbitration conventions and to drafts of uniform

Convention¹⁹⁸—signed in 1958 and progressively ratified thereafter—established an effective enforcement mechanism for international arbitration agreements and awards.¹⁹⁹ By 1990, the Convention had 80 contracting states; by 2012, it had 146 parties.²⁰⁰ During the same period, states around the world enacted progressively more effective legislation for giving effect to the Convention and enforcing arbitration agreements and awards.²⁰¹

By the beginning of the twenty-first century, it was fair to say that international arbitration was the preferred means of dispute resolution for commercial and investment agreements between private parties and foreign states or state-related entities.²⁰² Except in

commercial arbitration laws. This trend has also become a concern of the United Nations Commission on International Law with the goal of harmonization and unification of arbitration laws of various countries.”).

198. U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

199. See 1 BORN, *supra* note 197, at 92–101 (providing background information on the New York Convention, “the most significant contemporary legislative instrument relating to international commercial arbitration”); ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 10 (1981) (“[T]he New York Convention is in essence limited to two aspects of international commercial arbitration: the enforcement of those arbitration agreements which come within its purview (Art. II(3)) and the enforcement of foreign arbitral awards (Arts. I and III–VI.)”); Herbert Kronke, *Introduction to RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 1, 3 (Herbert Kronke et al. eds., 2010) (referring to the New York Convention and later international-arbitration provisions as a “success story”).

200. 1 BORN, *supra* note 197, at 98–99; *Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. COMM’N ON INT’L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Dec. 19, 2011).

201. See 1 BORN, *supra* note 197, at 111–43 (“[V]irtually every major developed country has substantially revised or entirely replaced its international arbitration legislation, in every case, to facilitate the arbitral process and promote the use of international arbitration.”).

202. See NIGEL BLACKABY & CONSTANTINE PARTASIDES WITH ALAN REDFERN & MARTIN HUNTER, *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* ¶ 810, at 469 (5th ed. 2009) (“Whilst in 1998 ICSID registered eight cases with 19 cases pending, in 2008 it registered 31 new cases with 128 cases pending.”); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* ¶ 1.07 (2007) (“Since the potential of [international commercial arbitration] was realized, the results have been dramatic.”).

There has been some criticism of the rise of international commercial arbitration as a form of international dispute resolution, typically on the basis that it favors international businesses from developed states and disfavors state interests. See, e.g., Amr Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 419 (2000) (“The question of bias in North-South arbitration and the skewed distributive consequences of awards were heated topics of debate throughout the 1970s and early 1980s . . .”); Muthucumaraswamy Sornarajah, *The Climate of International*

unusual circumstances, parties to significant commercial contracts involving foreign states insisted on the resolution of disputes related to the contract by arbitration, ordinarily in a neutral forum and pursuant to institutional arbitration rules.²⁰³ The rationale behind these agreements was to ensure the impartial adjudication of disputes through the application of the terms of the parties' agreement, objective legal principles, and neutral procedural rules, rather than through contests of political, diplomatic, or similar pressure.

Importantly, this new category of international adjudication produces enforceable decisions, which can be the basis for coercive execution against a state's assets. Under the New York Convention and implementing legislation in most states, arbitral proceedings may go forward, and thus may produce a binding award, in the absence of a defaulting party,²⁰⁴ once a foreign state commits to international arbitration, it is bound to that commitment, and the arbitral tribunal's jurisdiction is effectively compulsory. Similarly, arbitral awards are presumptively subject to recognition and enforcement in the 146 states that are parties to the Convention.²⁰⁵ Finally, foreign-sovereign-immunity legislation in most states provides for the enforcement of awards against a foreign state's commercial property,²⁰⁶ an outcome

Arbitration, 8 J. INT'L ARB., no. 2, 1991, at 47, 47 (“[Developing] States have seen international arbitration as a system that is weighted in favour of the capital exporting States.”).

203. See, e.g., BLACKABY ET AL., *supra* note 202, ¶ 1.190, at 63 (“The private party to such a contract will almost always prefer to submit to arbitration as a ‘neutral’ process”); PAUL D. FRIEDLAND, *ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS* 7 (2d ed. 2007) (“[P]arties regularly choose arbitration over litigation for international contracts”).

204. 2 BORN, *supra* note 197, at 1865–68, 2439–40, 2753–54.

205. See 1 BORN, *supra* note 197, at 96 (“[T]he Convention’s provisions prescribe uniform rules that . . . require national courts to recognize and enforce foreign arbitral awards”); Kronke, *supra* note 199, at 3 (“[T]he single most important advantage of arbitration . . . is the degree of certainty a party can have that an award will be recognized and enforced almost anywhere in the world.”).

The New York Convention provides a limited number of grounds for denial of recognition, including lack of jurisdiction, procedural unfairness, and public policy. See New York Convention, *supra* note 198, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 41–42 (giving reasons for which a signatory may refuse recognition of an arbitration award); Andrés Jana, Angie Armer & Johanna Klein Kranenberg, *Article V(1)(b)*, in *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS*, *supra* note 199, at 231, 235 (comparing the due-process exception under Article V(1)(b) of the New York Convention with the public-policy exception under Article V(2)(b)). See generally 2 BORN, *supra* note 197, at 2730–33, 2736–2872 (discussing potential grounds for refusing to recognize international arbitral awards).

206. See, e.g., Foreign Sovereign Immunities Act (FSIA) of 1976, 28 U.S.C. § 1610(a)(6) (2006) (“The property in the United States of a foreign state . . . used for a commercial activity in the United States, shall not be immune . . . if . . . the judgment is based on an order confirming an arbitral award rendered against the foreign state”); *Foreign States Immunities*

that occurs in practice when awards are not complied with voluntarily.²⁰⁷

Although arbitration agreements are a classic example of consensual jurisdiction, in practice, foreign states are often effectively subject to a form of mandatory jurisdiction. For most states and state-related entities, accepting an international-arbitration clause that provides for the resolution of future contractual disputes by binding arbitration is a necessary condition to concluding significant international commercial and investment contracts: unless the state accepts international arbitration, it will not be able to conclude commercial arrangements, at least not with serious counterparties.²⁰⁸ As a consequence, although consensual as a formal matter, accepting arbitration is, in many circumstances, effectively mandatory for states that wish to do business with foreign private parties.

Although international commercial arbitration is seldom mentioned in commentary assessing international adjudication,²⁰⁹ arbitrations involving foreign states and state-related entities are a significant category of contemporary international dispute resolution. Precise statistics do not exist because many arbitrations are confidential, but at least three hundred international commercial

Act 1985 (Cth) s 17(2) (Austl.), reprinted in 25 I.L.M. 715, 719 (1986) (waiving the immunity of foreign states that agree to submit to arbitration agreements); State Immunity Act, 1978, c. 33, §§ 9, 13(2) (U.K.), reprinted in 17 I.L.M. 1123, 1125–26 (1978) (“Where a State has agreed . . . to submit . . . to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration.”); Cass. 1e civ., July 6, 2000, Bull. civ. I, No. 207 (Fr.) (finding that when a state had agreed to arbitration, it had thereby waived its immunity from execution of the order); see also DELLAPENNA, *supra* note 170, at 775 (“Thus section 1610(a)(6) authorizes execution against any commercial property of the foreign state proper”); Claudia Annacker & Robert T. Greig, *State Immunity and Arbitration*, 15 ICC INT’L CT. ARB. BULL., no. 2, 2004, at 70, 70 (“We are now at the threshold of a universal convention on State immunity.”).

207. *E.g.*, *Orascom Telecom Holding SAE v. Republic of Chad*, [2008] EWHC (Comm) 1841 (Eng.) (finding that Chad had waived its immunity by agreeing to international arbitration); Cass., July 6, 2000, Bull. civ. I, No. 207 (finding that submission to ICC arbitration had resulted in a waiver of state immunity from execution); Oberlandesgericht Frankfurt am Main [OLG Frankfurt] [Frankfurt Higher Regional Court] Sept. 26, 2002, 30 Y.B. Comm. Arb. 505 (508), 2005 (Ger.).

208. See *infra* note 247 and accompanying text.

209. Professors Slaughter and Helfer do not separately include either commercial or investment arbitration on their lists of international courts and tribunals, see Helfer & Slaughter, *supra* note 16, at 926 tbl.2(a), 927 tbl.2(b), or in their discussions of international and supranational adjudication, see Helfer & Slaughter, *supra* note 6, at 282–89. Similarly, Professors Posner and Yoo do not list forms of investment or commercial arbitration, instead referring only to the PCA. See Posner & Yoo, *supra* note 7, at 52 tbl.6, 53 tbl.7; cf. Alter, *supra* note 10, at 57–60 tbl.2 (listing international-arbitration courts by their years of establishment).

arbitrations involving foreign states or state-related entities are filed each year,²¹⁰ and this figure appears to have been growing solidly since the early 2000s.²¹¹ If international commercial arbitrations more generally—not necessarily involving state entities—are considered, annual filing rates run well in excess of five thousand cases per year.²¹²

International commercial arbitral tribunals decide a wide range of significant disputes, both in terms of monetary amounts and the nature of disputed issues. Dozens of international arbitrations involving states are filed annually, with very large financial and commercial stakes.²¹³ Moreover, awards routinely resolve claims involving important legal issues, including corruption,²¹⁴ public international law,²¹⁵ and regulatory legislation, such as competition

210. See BÖCKSTIEGEL, *supra* note 196, at 59 (reporting that 29.7 percent of ICC arbitrations at the time involved state entities); 2009 *Statistical Report*, 21 ICC INT'L CT. ARB. BULL., no. 1, 2010, at 5, 8 (“The number of cases involving one or more States or parastatal entities rose to 78 in 2009, representing 9.5% of all cases filed during the year.”). Conservatively assuming that some three thousand international arbitrations are filed per year, with 10 percent involving state entities, roughly three hundred international arbitrations involving state entities are filed each year. If the more realistic figure of five thousand cases per year is used, then there are approximately five hundred arbitrations filed per year involving states or state entities.

211. The number of international commercial arbitrations filed annually has substantially increased each year over the past several decades. See 1 BORN, *supra* note 197, at 69 (charting annual numbers of international commercial arbitrations filed with various arbitral institutions from 1993 to 2007).

212. See *id.*

213. See Michael D. Goldhaber, *Arbitration Scorecard*, FOCUS EUR., Summer 2009, at 28, 28–39 [hereinafter Goldhaber, *Arbitration Scorecard 2009*] (listing 59 contract and 33 investment arbitrations in which at least \$1 billion was at stake and roughly 250 pending commercial arbitrations that have amounts in dispute in excess of \$500 million); Michael D. Goldhaber, *Arbitration Scorecard*, FOCUS EUR., Summer 2007, at 22, 28–37 [hereinafter Goldhaber, *Arbitration Scorecard 2007*] (listing fifty pending international commercial arbitrations with amounts in dispute in excess of \$650 million, including thirty-eight arbitrations in excess of \$1 billion).

214. *E.g.*, *Navy of the Republic of China v. Thales S.A.*, Focus Eur., Summer 2011, at 43 (ICC Int'l Ct. Arb. 2010) (resolving a claim of bribery); *EDF (Servs.) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (Oct. 8, 2009) (rejecting the claim that Romania had illegally expropriated EDF funds after EDF refused to bribe Romanian officials); *Westinghouse v. Republic of the Philippines*, Mealey's Int'l Arb. Rep., Jan. 1992, at B-1 (ICC Int'l Ct. Arb. 1992) (requiring charges of bribery to be proven by clear and convincing evidence).

215. *E.g.*, *Elf Aquitaine Iran v. Nat'l Iranian Oil Co.*, 11 Y.B. Comm. Arb. 97 (Ad Hoc Arb. 1986) (asserting the arbitrator's competence to resolve a dispute over Iran's nullification of an oil contract); *Kuwait v. Am. Indep. Oil Co.*, 21 I.L.M. 976 (Ad Hoc Arb. Trib. 1982) (resolving claims arising from Kuwait's termination of a 1948 oil concession); *Texaco Overseas Petrol. Co. v. Libyan Arab Republic*, 17 I.L.M. 1, 19 (Ad Hoc Arb. 1977) (addressing Libya's nationalization of foreign oil concessions).

and securities legislation.²¹⁶ More fundamentally, the availability of international arbitration as an effective means of resolving business disputes, particularly disputes involving states and state entities, is essential to the structure and success of contemporary international trade, finance, and investment. Without a neutral, enforceable means of dispute resolution in which private parties can directly participate, neither businesses nor many states or state entities would be prepared to conduct international commerce in its current form.

In terms of compliance, states that have concluded international commercial-arbitration agreements virtually always participate in arbitral proceedings and frequently voluntarily satisfy awards that are made against them.²¹⁷ In the rare cases in which awards are not voluntarily complied with, enforcement proceedings have been instituted and frequently have succeeded.²¹⁸ Progressively developing from a multitude of pragmatic business dealings and given effect by the decentralized, but effective, international enforcement regime established by the New York Convention, international commercial arbitration now indisputably plays an active and highly important role in contemporary international trade and finance.

3. *International Arbitration Under ICSID, BITs, NAFTA, and Other Investment Regimes.* Another example of second-generation adjudication is investment arbitration, which has also progressively developed over the past four decades. Starting in the late 1950s, states began to conclude a network of bilateral and multilateral investment treaties; over time, these treaties have come to provide for arbitration of numerous kinds of significant investment disputes and have assumed many of the characteristics of other second-generation forms of international adjudication.

Central to the international investment-arbitration regime is the ICSID Convention. Signed in 1965, the Convention now has 146

216. See Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471, 474 (2005) (“[P]rivate international law involves policy choices with regulatory impact.”). See generally 1 BORN, *supra* note 197, at 766–841 (discussing the nonarbitrability doctrine).

217. See 2 BORN, *supra* note 197, at 2327 (“[E]mpirical studies and anecdotal evidence indicate[] that the percentage of voluntary compliance with arbitral awards exceeds 90% of international cases.”); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 ARB. INT'L 121, 129 n.24 (1997) (“It has been estimated that about 98 per cent of awards . . . are honoured . . .”).

218. See *supra* text accompanying notes 204–08.

contracting states.²¹⁹ The Convention established a basic legal framework for the arbitration of a specific category of disputes—namely, “investment disputes”²²⁰—arising between a contracting state and foreign investors who are nationals of another contracting state.²²¹ Arbitration under the ICSID Convention is only available when a contracting state and foreign investor have agreed to submit to ICSID arbitration, typically pursuant to either an investment agreement or, as discussed next, a BIT.²²²

At the same time that the ICSID Convention was being negotiated, states began to enter into BITs, beginning with a 1959 treaty between the Federal Republic of Germany and Pakistan.²²³ BITs became increasingly common during the 1980s and 1990s and were widely regarded as encouraging investment in developing markets.²²⁴ More recently, states from all regions of the world and in

219. See *List of Contracting States and Other Signatories of the Convention*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES (2011), <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English> (listing contracting states and signatories as of May 5, 2011). As of May 5, 2011, a total of 157 states had signed the convention, while only 147 had deposited their instruments of ratification. *Id.* at 1. Several states, including Bolivia, Venezuela, and Ecuador, have renounced, or have indicated intentions to renounce, the ICSID Convention. *E.g.*, Press Release, Int’l Ctr. for Settlement of Inv. Disputes, Bolivia Submits a Notice Under Article 71 of the ICSID Convention (May 16, 2007), available at <http://icsid.worldbank.org/ICSID/StaticFiles/Announcement3.html>; Press Release, Int’l Ctr. for Settlement of Inv. Disputes, Ecuador Submits a Notice Under Article 71 of the ICSID Convention (July 9, 2009), available at <http://icsid.worldbank.org/ICSID/StaticFiles/Announcement20.html>.

220. ICSID Convention, *supra* note 46, arts. 1(2), 25(1), 17 U.S.T. at 1273, 1280, 575 U.N.T.S. at 162, 175; see also CHRISTOPH H. SCHREUER WITH LORETTA MALINTOPPI, AUGUST REINISCH & ANTHONY SINCLAIR, *THE ICSID CONVENTION: A COMMENTARY* 550 (2d ed. 2009) (“The Convention does not provide substantive rules for the relationship between host States and foreign investors. It is merely designed to establish a procedural framework for the settlement of investment disputes.”).

221. See SCHREUER ET AL., *supra* note 220, at 458 (“The request for arbitration may come from either the host State or the investor.”).

222. ICSID Convention, *supra* note 46, art. 25(1), 17 U.S.T. at 1280, 575 U.N.T.S. at 175; see also SCHREUER ET AL., *supra* note 220, at 190 (“Consent by both or all parties is an indispensable condition for the jurisdiction of the [ICSID].”). Investment agreements frequently contain arbitration clauses providing that future disputes relating to the agreement will be resolved by arbitration.

223. Treaty for the Promotion and Protection of Investments, Pak.-Ger., Nov. 25, 1959, 457 U.N.T.S. 24.

224. See U.N. CONFERENCE ON TRADE & DEV., *BILATERAL INVESTMENT TREATIES IN THE MID-1990S*, at 122, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) (“[S]ome two-thirds of BITs have been concluded in the 1990s . . .”); RUDOLPH DOLZER & MARGRETE STEVENS, *BILATERAL INVESTMENT TREATIES* 12 (1995) (“BITs have served to establish the rules according to which [investments in developing markets] could be safeguarded.”); Kenneth J. Vandavelde, *The Economics of Bilateral Investment Treaties*, 41

all stages of development have entered into BITs. In 1999, there were some 1800 BITs in force,²²⁵ and, although the rate at which states are concluding BITs has declined in the past decade, by 2010, the figure exceeded 2600.²²⁶

Most BITs provide significant protections for investments made by foreign investors, including guarantees against both expropriation and denials of fair and equitable or national treatment.²²⁷ Since the early 1980s, BITs have also ordinarily contained dispute-resolution provisions that permit foreign investors to require arbitration of specified categories of investment disputes with the host state—sometimes inaccurately referred to as “arbitration without privity” because of the absence of a traditional arbitration agreement.²²⁸

Both developing and developed states have pursued a multilateral investment-protection convention at various points during the late twentieth and early twenty-first centuries. These efforts foundered following disagreements between capital-exporting and capital-importing states, because they had differing views about the appropriate levels of investor protection.²²⁹ Rather than adopting a multilateral solution, states instead adopted a network of numerous individual bilateral investment-protection relationships—enabling methods of dispute resolution and levels of investment protection to

HARV. INT'L L.J. 469, 470 (2000) (“The explosion in BIT negotiations is particularly remarkable since these agreements are based on principles to which developing states historically have objected.”).

225. U.N. CONFERENCE ON TRADE & DEV., *BILATERAL INVESTMENT TREATIES 1959–1999*, at iii, U.N. Doc. UNCTAD/ITE/IIA/2 (2000) (reporting that the number of BITs increased from “385 at the end of the 1980s to 1,857 at the end of the 1990s”).

226. Persephone Economou, John H. Dunning & Karl P. Sauvart, *Trends and Issues in International Investment, 2008–2009* Y.B. ON INT'L INVESTMENT L. & POL'Y 3, 17 (2009).

227. See MCLACHLAN ET AL., *supra* note 202, ¶¶ 1.24–30, 2.20 (discussing the substantive rights of investors under investment treaties); NEWCOMBE & PARADELL, *supra* note 195, §§ 4.8, 6.13–15, 7.6–7 (describing “fair and equitable treatment” clauses and provisions that define and restrict expropriation as being nearly universal in BITs).

228. See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 232 (1995) (“This new world of arbitration is one where the claimant need not have a contractual relationship with the defendant and where the tables could not be turned . . .”).

229. See NEWCOMBE & PARADELL, *supra* note 195, § 1.40 (“[S]tates have been unable [to] agree on investment issues at a multilateral level.”); Rainer Geiger, *Towards a Multilateral Agreement on Investment*, 31 CORNELL INT'L L.J. 467, 472 (1998) (“Some critics argue that the [Multilateral Agreement on Investment] gives foreign investors a right to challenge government measures through dispute settlement, putting foreign investors in a better position than domestic enterprises.”).

be tailored to particular bilateral relationships in a more pragmatic and nuanced manner.²³⁰

A number of other multilateral treaties provide for the arbitration of international investment disputes in particular regions or industrial sectors. These include Chapter 11 of NAFTA,²³¹ the Energy Charter Treaty,²³² and the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement.²³³ Chapter 19 of NAFTA provides a similar mechanism for specified trade disputes.²³⁴ In various forms, each of these agreements permits foreign investors to arbitrate investment disputes with host states, typically even without a preexisting contractual arbitration agreement.

Virtually all forms of investment arbitration are conducted pursuant to procedures that parallel international commercial-arbitration procedures. The arbitration provisions of the ICSID Convention and the associated ICSID Arbitration Rules are modeled closely on international commercial-arbitration rules.²³⁵ Most BITs

230. Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251, 292–97 (1997) (discussing negotiations for a multilateral agreement on investment); Jeswald W. Salacuse, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24 INT'L LAW. 655, 656 (1990) (“[T]he general effect of the BIT movement has been to establish an increasingly dense network of treaty relationships between capital-exporting states and developing countries . . .”).

231. NAFTA, *supra* note 45, art. 1135, 32 I.L.M. at 646; *see also* MEG N. KINNEAR, ANDREA K. BJORKLUND & JOHN F.G. HANNAFORD, INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1115-1 to -12 (2009) (discussing the negotiating text of Chapter 11). Awards under NAFTA are limited to monetary damages or restitution; in the latter case, the respondent state has the option of paying monetary damages and interest. NAFTA, *supra* note 45, art. 1135(1), 32 I.L.M. at 646.

232. Energy Charter Treaty art. 26, Dec. 17, 1994, 2080 U.N.T.S. 95. *See generally* Kaj Hobér, *Investment Arbitration and the Energy Charter Treaty*, 1 J. INT'L DISP. SETTLEMENT 153 (2010) (giving an “overview of the investment protection regime of the Energy Charter treaty . . . and of the arbitration mechanism therein”); Thomas W. Wälde, *Investment Arbitration Under the Energy Charter Treaty: From Dispute Settlement to Treaty Implementation*, 12 ARB. INT'L 429 (1996) (discussing the relationship between the Energy Charter Treaty’s investment-arbitration provisions and its broader structure and objectives).

233. ASEAN Comprehensive Investment Agreement, Feb. 26, 2009, <http://www.asean.org/22244.htm>.

234. NAFTA, *supra* note 45, arts. 1901–05, 32 I.L.M. at 682–85.

235. *See* SCHREUER ET AL., *supra* note 220, at 6–8 (“The ICSID Convention . . . offers a system for dispute settlement that contains not only standard clauses and rules of procedure but also institutional support for the conduct of proceedings. It assures the non-frustration of proceedings and provides for an award’s recognition and enforcement.” (citations omitted)). The procedures in Chapter 11 arbitrations under NAFTA are similar. *See* KINNEAR ET AL.,

provide for arbitration either pursuant to the ICSID Rules, the UNCITRAL Rules, or the rules of a commercial arbitral institution.²³⁶

In practice, the procedures used in international commercial arbitration are the model for investment arbitration, including the number and selection of arbitrators, the presentation of evidence, the conduct of hearings, and the awards—in part because of overlaps in the individuals and law firms that serve as arbitrators and counsel in both sets of proceedings.²³⁷

Voluntary compliance with investment-arbitration awards has generally been relatively good, particularly when compared with compliance under traditional first-generation tribunals.²³⁸ In any

supra note 231, at 24–27 (explaining that Chapter 11 of NAFTA grew out of the already-existing BIT rules governing arbitration in international trade disputes).

236. DOLZER & STEVENS, *supra* note 224, at 129–30 (“In fact, most modern treaties allow for the possibility of a choice between different arbitral regimes.”); *see also* Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW & POL’Y INT’L BUS. 633, 655–56 (1995) (“One reason ICSID is important is because most bilateral investment treaties designate it as the prospective arbitration center for disputes, refer to it as an appointing authority, or indicate that its rules would be applicable in ad hoc arbitrations.”).

237. A sui generis aspect of ICSID arbitration is its annulment procedure, which provides for the review—on very narrow grounds—of ICSID awards by an annulment committee. *See* SCHREUER ET AL., *supra* note 220, at 1035–36 (“The Convention’s text itself indicates that an *ad hoc* committee is not under an obligation to annul but is merely authorized to do so.”). Unlike ICSID arbitral tribunals, annulment committees are not selected by the parties but by ICSID. *See id.* at 1027 (“A suggestion to give the parties the right to appoint *ad hoc* committees was rejected The right to appoint persons to *ad hoc* committees is with the Chairman of the Administrative Council.”). A separate annulment committee is formed for each case in which annulment of an award is sought. ICSID Convention, *supra* note 46, art. 52, 17 U.S.T. at 1290, 575 U.N.T.S. at 102; *see also* SCHREUER ET AL., *supra* note 220, at 899 (“[A]nnulment is always put into the hands of a different body, called the *ad hoc* committees.”).

238. Although there is no systematic data, anecdotal evidence indicates that states have virtually always satisfied ICSID and BIT awards against them, though in some instances they have negotiated the amount and terms of payment. *See* Alan S. Alexandroff & Ian A. Laird, *Compliance and Enforcement*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1171, 1185 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008) (“[A]necdotal evidence would suggest that state respondents . . . have . . . abid[ed] by final awards.”); Andrea Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT’L ARB. 211, 231 (2010) (“The instances in which states have refused to pay are still rare.”); Richard Happ, *Enforcement of Investment Treaty Awards Against States*, in PROTECTION OF FOREIGN INVESTMENT THROUGH MODERN TREATY ARBITRATION: DIVERSITY AND HARMONISATION 217, 230 (Anne K. Hoffmann ed., 2010) (“The majority of States comply voluntarily with an award. Where that is not the case, ICSID awards are easier to enforce than non-ICSID awards.”); August Reinisch, *Enforcement of Investment Awards*, in ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS: A GUIDE TO THE KEY ISSUES 671, 697 (Katia Yannaca-Small ed., 2010) (“In the majority of that fraction of cases in which host States were found to have incurred liability, the awards seem to have been voluntarily complied with.

event, in each of these investment regimes, commitments to arbitrate are binding—and can be pursued even against defaulting foreign states—and awards are enforceable against states and state-related entities. Thus, the ICSID Convention and the ICSID Rules provide specifically for the possibility of default proceedings, in which an arbitration continues notwithstanding the nonparticipation of a state respondent.²³⁹ Similarly, the Convention provides that ICSID awards are final and binding on the parties to the arbitration.²⁴⁰

In addition, like the New York Convention, the ICSID Convention establishes a decentralized, but effective, mechanism for enforcing ICSID awards. The Convention contains provisions obligating the courts in all contracting states to enforce the pecuniary obligations imposed by such awards.²⁴¹ These latter obligations have been implemented by legislation in many jurisdictions,²⁴² and national courts have made clear that they will enforce ICSID awards against states and their commercial property.²⁴³

Enforcement in national courts appears to be a rare phenomenon.”). If there were significant instances of noncompliance, one would see reported enforcement actions in national courts.

239. ICSID Convention, *supra* note 46, art. 45(2), 17 U.S.T. at 1287, 575 U.N.T.S. at 188; ICSID ARB. R. 42, available at http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf.

240. ICSID Convention, *supra* note 46, art. 53(1), 17 U.S.T. at 1291, 575 U.N.T.S. at 194 (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”); *see also* SCHREUER ET AL., *supra* note 220, at 1099–1101 (“The binding nature of the award is inherent in the concept of arbitration. . . . The principle of the binding force of arbitral awards is expressed in most instruments governing arbitration . . . and is frequently restated in arbitration agreements.”).

241. ICSID Convention, *supra* note 46, art. 54(1), 17 U.S.T. at 1291, 575 U.N.T.S. at 194 (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that State.”); *see also* SCHREUER ET AL., *supra* note 220, at 1125–30, 1134–39 (“Art[icle] 54 is one of the most important provisions of the Convention. It provides for recognition and enforcement of ICSID awards by the courts of all States parties to the Convention.”).

242. *See, e.g.*, Convention on the Settlement of Investment Disputes Act of 1966, Pub. L. No. 89-532, § 3, 80 Stat. 344, 344 (codified at 22 U.S.C. § 1650a (2006)) (“An award of an arbitral tribunal . . . shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.”); *cf.* SCHREUER ET AL., *supra* note 220, at 1144 (“It is doubtful whether the Convention’s authorization to federal States to treat awards like judgments of constituent states and to have them enforced through their federal courts implies that the review mechanisms for judgments of constituent states that may exist in these States can be applied to ICSID awards.”).

243. *See* *Liberian E. Timber Corp. v. Republic of Liberia*, 650 F. Supp. 73, 77 (S.D.N.Y. 1986) (“The fact that [the plaintiff] is a French entity and Liberia a foreign sovereign does not

Likewise, most BITs provide that awards are subject to recognition and enforcement, including coercive enforcement against state property. BIT awards rendered pursuant to the ICSID Convention are subject to ICSID's enforcement provisions,²⁴⁴ whereas non-ICSID BIT awards are generally governed by both the New York Convention and national implementing legislation.²⁴⁵ In both

deprive the Court of subject matter jurisdiction. Thus, this Court had jurisdiction to direct the entry for judgment against Liberia to enforce the pecuniary obligation of the arbitration award in favour of [the plaintiff].”), *aff'd*, 854 F.2d 1314 (2d Cir. 1987); *Liberian E. Timber Corp. v. Republic of Liberia*, 2 ICSID Rev. 187, 187 (S.D.N.Y. 1986) (“[I]t is ORDERED that the . . . [ICSID] arbitration award . . . be docketed and filed by the Clerk of this Court in the same manner and with the same force and effect as if it were a final judgment of this Court”); *Liberian E. Timber Corp. v. Republic of Liberia*, 659 F. Supp. 606, 611 (D.D.C. 1986) (attaching Liberia’s assets in the United States but holding that “the bank accounts of the Liberian Embassy are immune from attachment . . . because they enjoy diplomatic immunity”); *Republic of Ecuador v. Occidental Exploration & Prod. Co.*, [2006] EWHC (Comm) 345, (2006) 8 Int’l Trade L. Rep. 948, *aff'd*, [2007] EWCA (Civ) 656, [2007] 2 Lloyd’s Rep. 352 (Eng.); Cass. 1e civ., June 11, 1991, 30 I.L.M. 1169, 1169 (Fr.) (“Whereas, however, a foreign State which has submitted to arbitration has thereby agreed that the award may be granted recognition (*exequatur*) which, as such, does not constitute a measure of execution that might raise issues pertaining to the immunity from execution of the State concerned”); Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., June 26, 1981, 20 I.L.M. 878 (1982) (Fr.) (reversing a lower court decision that property situated in France could not be taken to satisfy a judgment rendered against the People’s Republic of the Congo, thereby making the judgment fully enforceable against Congolese property in France).

The enforcement of awards against recalcitrant foreign states can face material obstacles, particularly if commercial assets cannot be located. *See* Andrea Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in *INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER* 302, 321 (Christina Binder et al. eds., 2009) (“[A] successful claimant must still locate commercial assets and defeat any arguments about their status that a State may raise.”); *cf.* KINNEAR ET AL., *supra* note 231, at 1115-1 (discussing the establishment of “a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal” (quoting NAFTA, *supra* note 45, art. 1115, 32 I.L.M. at 642)). Those obstacles are not fundamentally different from those that exist in the enforcement of judgments in private litigation and can often be overcome in practice.

244. *See* MCLACHLAN ET AL., *supra* note 202, ¶¶ 3.34, 7.73 (“[T]he rules of law pursuant to which the arbitration is conducted are supplied by the [ICSID] Convention as interpreted under principles of public international law. The laws of the physical place of arbitration have no bearing whatsoever on the arbitration procedure.”); SCHREUER ET AL., *supra* note 220, at 1123 (“The obligation to recognize and enforce awards applies to all States parties to the ICSID Convention.”).

245. *See, e.g.*, Treaty Concerning the Encouragement and Reciprocal Protection of Investment, U.S.-Ecuador, art. VI(5), Aug. 27, 1993, S. TREATY DOC. NO. 103-15, at 12 (“Any arbitration under [certain parts of the treaty] . . . shall be held in a state that is a party to the New York Convention.”); *Attorney Gen. v. S.D. Myers, Inc.*, [2004] 3 F.C.R. 368, para. 41 (Can.) (“In the case at bar, [Canada’s implementing legislation] spells out the limited jurisdiction of the Court to set aside an arbitration award.”); *see also* Piero Bernardini, *ICSID*

cases, effective enforcement is available in national courts. Similarly, NAFTA provides that monetary awards under Chapter 11 have “binding force” on the parties to an arbitration and that NAFTA states will enforce such awards in their courts.²⁴⁶

In addition to producing enforceable awards, investment arbitration regimes are effectively mandatory for many states. Although states are formally free to conclude or not to conclude BITs or individual investment agreements, most states face substantial pressure to enter into such agreements to attract foreign investment.²⁴⁷ Some states can resist that pressure,²⁴⁸ but the existence of nearly three thousand BITs indicates that they rarely do so.

Investment arbitration has played at best a minor role in most contemporary discussions of international adjudication, receiving only passing reference or less.²⁴⁹ Nevertheless, the various forms of investment arbitration discussed previously constitute a significant new category of international adjudication, encompassing disputes that historically have been resolved through force, diplomatic negotiations, or other political means.

Like other second-generation adjudicatory mechanisms, investment arbitration has seen robust growth. Over the past decade,

Versus Non-ICSID Investment Treaty Arbitration, in LIBER AMICORUM BERNARDO CREMADES 159, 161–63 (M.Á. Fernández-Ballesteros & David Arias eds., 2010) (explaining the differences between ICSID and non-ICSID BITs and noting that ICSID awards leave “no room for the application of the New York Convention,” whereas enforcement of non-ICSID awards “is in principle governed by the New York Convention”).

246. NAFTA, *supra* note 45, art. 1136(4), 32 I.L.M. at 646 (“Each Party shall provide for the enforcement of an award in its territory.”); *see also id.* art. 1136(6), 32 I.L.M. at 646 (“A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the Inter-American Convention”); KINNEAR ET AL., *supra* note 231, at 1136-36b (“Once an award is given the imprimatur of a national authority . . . the arbitral award is enforceable in the same way that a court decision of that jurisdiction is enforceable.”).

247. NEWCOMBE & PARADELL, *supra* note 195, § 1.48 (“[T]here remains strong competitive pressure for developing states to enter into [international investment agreements] and thereby signal to foreign investors that an enabling environment for foreign investment exists.”); Zachary Elkins, Andrew Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 266 (“Our theory is that the proliferation of BITs—and the liberal property rights regime they embody—is propelled in good part by the competition among potential host countries for credible property rights protections required by direct investors.”).

248. There are categories of states that have either not entered into BITs with one another, such as the United States with many European states; have not concluded BITs, such as Brazil; or have denounced BITs that they have concluded, such as Venezuela, Ecuador, and Bolivia. *See infra* note 272 and accompanying text.

249. *See supra* note 9; *infra* notes 327, 329.

roughly twenty-three new ICSID arbitrations have been filed each year, reflecting an increase from the 1990s, when approximately four new arbitrations were filed annually, and the 1980s, when two cases were filed annually.²⁵⁰ At the end of 2011, 140 ICSID arbitrations were pending, and a total of 368 ICSID arbitrations had been filed since 1972.²⁵¹ ICSID arbitrations also concern matters of substantial public import. ICSID proceedings frequently involve very large monetary claims,²⁵² matters of broad international importance—including, for example, the consequences of Argentina's financial difficulties²⁵³ and the lawfulness of Australia's and Uruguay's tobacco

250. Compare INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD—STATISTICS 7 (2011), available at <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English21> (showing that 262 cases were filed under the ICSID Convention from 2000 to 2010, whereas 43 cases were filed from 1990 to 1999 and 17 cases were filed from 1980 to 1989), with U.N. CONFERENCE ON TRADE & DEV., LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2010/3 (2010) (showing that 225 ICSID cases and 357 known investor-state treaty-based cases had been filed through the end of 2009).

251. See *List of ICSID Cases*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ListCases> (last updated Dec. 12, 2011) (listing 140 pending ICSID arbitrations and 228 concluded arbitrations, for a total of 368 total arbitrations). This increase was due in part to arbitrations brought pursuant to BITs. A nontrivial part of the increase was also attributable to proceedings against Argentina, initiated in connection with the country's economic crisis at the turn of the twenty-first century. See William Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199, 200 (2008) ("More than forty of the cases presently pending before ICSID have been brought against the Republic of Argentina . . .").

252. See U.N. CONFERENCE ON TRADE & DEV., DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT, at 9–10, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/6/Rev1 (2009) (referencing a number of awards in excess of \$100,000,000); *Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 69 (Feb. 6, 2008), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC791_En&caseId=C62 (awarding \$1 million); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Proceeding, ¶¶ 36–40, 163 (Sept. 25, 2007), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC687_En&caseId=C4 (upholding a \$133,200,000 award); *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award, ¶ 519 (Oct. 2, 2006), http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC648_En&caseId=C231 (granting a \$76,200,000 award); *Ceskoslovenskí Obchodní Banka A.S. v. Slovak Republic*, ICSID Case No. ARB/97/4, Award, ¶ 374 (Dec. 29, 2004) (granting an \$800,000,000 award), <http://italaw.com/documents/Cesk-Slovakia-AwardDec2004.pdf>.

253. See Burke-White, *supra* note 251, at 200–01 ("More than forty of the cases currently pending before ICSID have been brought against the Republic of Argentina . . . These cases are of extraordinary importance, not just because of the immense financial liability to which they expose Argentina, but also because, in response, Argentina has invoked a broad set of legal arguments about the rights of states to craft policy responses to extraordinary situations such as

regulations²⁵⁴—or important issues of international law or national regulatory competence.²⁵⁵

With respect to NAFTA, forty-two investor-state arbitrations have been filed under Chapter 11 since 1994—approximately 2.5 cases per year.²⁵⁶ NAFTA cases have generally involved both substantial monetary claims and significant questions regarding international-law limitations on national regulatory authority.²⁵⁷ In the case of the Energy Charter, twenty-three arbitrations, again involving

a massive financial collapse. . . . These arbitrations thus test both the limits of state freedom of action and investor protections under the BIT regime in exceptional circumstances.”).

254. See Andrew Mitchell & Tania Voon, *Regulating Tobacco Flavors: Implications of WTO Law*, 29 B.U. INT’L L.J. 383, 385 (2011) (“[I]n March 2010, Philip Morris launched arbitral proceedings against Uruguay—often identified as a champion of tobacco control—pursuant to a bilateral investment treaty between Uruguay and Switzerland. The proceedings challenge Uruguayan regulatory measures”); Tania Voon & Andrew Mitchell, *Time To Quit? Assessing International Investment Claims Against Plain Packaging in Australia*, 14 J. INT’L ECON. L. 515, 517 (2011) (“In their attempts to discredit Australia’s plain packaging scheme at an international level, tobacco companies are turning not only to the law of the World Trade Organization (WTO), but also to international investment law.”); cf. Paul E. Mason & Mauricio Fomm Ferreira dos Santos, *New Keys to Arbitration in Latin-America*, 25 J. INT’L ARB. 31, 53–55 (2008) (discussing the use of ICSID arbitration to control oil and gas usage and entitlements in countries like Venezuela).

255. See David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 LAW & SOC. INQUIRY 757, 758 (2000) (“As the arena for international trade and investment expands, there increasingly are calls for background legal conditions that will secure ideological gains and limit the force of majoritarian politics.”); Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT’L & COMP. L.Q. 371, 372, 378–80 (2007) (“[I]nvestment treaty arbitration encompasses the full panoply of the State’s regulatory relations with foreign investors.”).

256. See *NAFTA Investor-State Arbitrations*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/c3439.htm> (last visited Dec. 19, 2011) (listing the cases filed against the United States (sixteen), Canada (thirteen), and the United Mexican States (thirteen)).

257. See, e.g., *Loewen Grp. Inc. v. United States*, ICSID Case No. ARB(AF)/98/3, Award, ¶ 1 (NAFTA Ch. 11 Arb. Trib. June 26, 2003), 7 ICSID Rep. 442 (2005) (“This is an important and extremely difficult case. Ultimately it turns on a question of jurisdiction arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by [Claimant] of its NAFTA claims to a Canadian corporation owned and controlled by a United States corporation.”); *Pope & Talbot Inc. v. Canada*, Award in Respect of Damages, at 29–30 (NAFTA Ch. 11 Arb. Trib. May 31, 2002), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/damage_award.pdf (explaining that BITs have supplanted state law in many cases); *Pope & Talbot Inc. v. Canada*, Award on the Merits of Phase 2, at 15 (NAFTA Ch. 11 Arb. Trib. Apr. 10, 2001), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Award_Merits-e.pdf (“Instead, the Tribunal believes that the language of Article 1102(3) was intended simply to make clear that the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords *any* investment of its country, not just the best treatment it accords to investments of *its* investors.”); *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (NAFTA Ch. 11 Arb. Trib. Aug. 30, 2000), 40 I.L.M. 36, 54 (2001) (awarding \$16,685,000).

a range of substantial claims, have been filed since the charter came into force in 1998; of those cases, eighteen have been filed since 2005, a statistic that reflects strong growth in the first decade of the twenty-first century.²⁵⁸

It is more difficult to estimate the number of BIT arbitrations pursued outside the ICSID system because BITs frequently provide for noninstitutional arbitration. Nonetheless, observers estimate that more than one hundred noninstitutional BIT arbitrations have been filed since 1980.²⁵⁹ And, as with ICSID and NAFTA arbitrations, non-ICSID BIT cases have involved significant disputes, both with respect to the amounts in dispute²⁶⁰ and the disputes' legal or regulatory significance.²⁶¹

In sum, the number of investment arbitrations is both substantial—roughly four hundred arbitrations since 1990—and growing robustly—roughly forty new investment arbitrations being filed each year. Investment arbitrations have also frequently involved very sizeable financial claims and significant legal and regulatory issues, not merely contractual or private-law disputes. More generally, just as international commercial arbitration is an essential foundation for contemporary trade, investment arbitration is an essential foundation for contemporary international investment, by virtue of its role in providing a neutral forum in which investment disputes can be objectively resolved. At the same time, awards in

258. Hobér, *supra* note 232, at 168–74, 190.

259. ARIF HYDER ALI & ALEXANDRE DE GRAMONT, *THE ARBITRATION REVIEW OF THE AMERICAS 2008: ICSID ARBITRATION IN THE AMERICAS 6* (2007) (explaining that more than one hundred investor-state cases have been filed in non-ICSID fora). Some 60 percent of investment arbitrations are brought under ICSID procedures. U.N. CONFERENCE ON TRADE & DEV., *LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT*, at 2, U.N. Doc. UNCTAD/WEB/ITE/IIA/2008/3 (2008).

260. *See Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 114, 126 (D.D.C. 2007) (declining to reverse an arbitral award of \$185,285,485.85), *confirmed*, 764 F. Supp. 2d 21 (D.D.C. 2011); *Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, at 73 (London Ct. Int'l Arb. 2004), http://italaw.com/documents/Oxy-EcuadorFinalAward_001.pdf (awarding \$71,533,649); *Yukos Universal Ltd. v. Russian Fed'n*, PCA Case No. AA 227 (Perm. Ct. Arb. 2009), <http://italaw.com/documents/YULvRussianFederation-InterimAward-30Nov2009.pdf> (claiming \$33,000,000,000 in damages); Goldhaber, *Arbitration Scorecard 2009*, *supra* note 213, at 31 (listing “59 contract and 33 investment treaty arbitrations in which at least \$1 billion was at stake”); Goldhaber, *Arbitration Scorecard 2007*, *supra* note 213, at 22–37 (listing sixty-three treaty and contract disputes in which at least \$1 billion was at stake).

261. *See Anne van Aaken, Perils of Success? The Case of International Investment Protection*, 9 EUR. BUS. ORG. L. REV. 1, 1 (2008) (explaining that “States commit themselves to treaties that restrict their regulatory sovereignty in ways that are sometimes unpredictable”).

investment arbitrations have contributed to the development of an increasingly sophisticated body of international investment law that provides a vitally important legal regime for contemporary foreign investment.²⁶²

Investment arbitration has faced substantial criticism since the turn of the twenty-first century.²⁶³ Some of these complaints have been directed broadly at foreign investment and the basic premise of international investment protection, typically claiming that investment arbitration is skewed in favor of foreign investors.²⁶⁴ Other

262. MCLACHLAN ET AL., *supra* note 202, ¶¶ 1.34, 1.48–57, 3.83–103; NEWCOMBE & PARADELL, *supra* note 195, §§ 1.46, 2.22–23; Friedl Weiss, *Trade and Investment*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 238, at 182, 183–87 (“The ongoing proliferation of intergovernmental arrangements on foreign investments . . . has led to an increasingly dense and diverse web of overlapping instruments, including bilateral (BITs), regional, sectoral, and multilateral instruments, and non-binding initiatives which differ considerably in legal characteristics”); *see also* Benedict Kingsbury & Stephan Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, in 50 YEARS OF THE NEW YORK CONVENTION 5, 5 (Albert Jan van den Berg ed., 2009) (“Investor-State arbitration, and in particular arbitration based on international investment treaties, is not simply dispute resolution. It is also a structure of global governance.”).

263. *See* Jason Abbott, *The Political Economy of NAFTA Chapter Eleven: Equality Before the Law and the Boundaries of North American Integration*, 23 HASTINGS INT’L & COMP. L. REV. 303, 306–09 (2000) (discussing the various critiques based on environmental concerns and injustice-related concerns that have been lodged against the dispute-settlement mechanism in NAFTA Chapter 11); Charles H. Brower, II, *Structure, Legitimacy, and NAFTA’s Investment Chapter*, 36 VAND. J. TRANSNAT’L L. 37, 38 (2003) (“Debates about the investment chapter—Chapter 11—of the North American Free Trade Agreement (NAFTA) have become common fare.” (footnote omitted)); Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1523 (2005) (“Rather than creating certainty for foreign investors and Sovereigns, the process of resolving investment disputes through arbitration is creating uncertainty about the meaning of those rights and public international law.”); Gus Van Harten, *Investment Treaty Arbitration, Procedural Fairness, and the Rule of Law*, in INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW 627, 627 (Stephan W. Schill ed., 2010) (“Investment treaty arbitration is often promoted as a fair, rules-based system This claim is undermined, however, by procedural and institutional aspects of the system that suggest it will tend to favour claimants and, more specifically, those states and other actors that wield power over appointing authorities or the system as a whole.”); Public Statement, Gus Van Harten et al., Public Statement on the International Investment Regime 1 (Aug. 31, 2010), *available at* http://www.bilaterals.org/IMG/pdf_Public_Statement.pdf (expressing concern that investment arbitration has harmed the public welfare, particularly by “hampering . . . the ability of governments to act for their people in response to the concerns of human development and environmental sustainability”). Similar, if less pointed, critiques have been made of international commercial arbitration. *See supra* note 202.

264. *See, e.g.*, PUB. CITIZEN’S GLOBAL TRADE WATCH, NAFTA’S THREAT TO SOVEREIGNTY AND DEMOCRACY: THE RECORD OF NAFTA CHAPTER 11 INVESTOR-STATE CASES 1994–2005, at vii (2005) (“NAFTA rules grant foreign investors greater rights when

criticisms have focused on specific features of investment arbitration, including its lack of transparency,²⁶⁵ its insufficiently determinate legal standards,²⁶⁶ its lack of opportunities for amicus curiae participation,²⁶⁷ and its lack of appellate review.²⁶⁸

Notably, almost all of these criticisms have rested on the premise that investment arbitration plays a highly significant role in

operating within the United States than those available to U.S. residents or businesses Our findings demonstrate that NAFTA's model of extensive foreign investor privileges and their private enforcement outside of the domestic court system should not be replicated in future agreements."); Jason Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 LAW & SOC'Y REV. 805, 827–28 (2008) (claiming that no clear link between treaty protections and investment exists); Susan Rose-Ackerman & Jennifer Tobin, *Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties* 31 (Yale Law Sch. Ctr. for Law, Econ. & Pub. Policy, Research Paper No. 293, 2005), available at <http://ssrn.com/abstract=557121> (rejecting the claim that BITs encourage foreign direct investment in low- and middle-income countries).

265. See, e.g., Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 786 (2008) ("Investment arbitration embodies the confidential and secretive nature of the international commercial arbitration process. . . . As a result, the public is often unaware of pending or ongoing arbitrations."); cf. Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923, 924 (2003) ("[A]rbitration is primarily a private dispute resolution mechanism. Thus, the government's involvement in the dispute settlement process is merely ancillary. . . . [But] contractual disputes between parties of different nationalities can, and often do, have significant repercussions for the public at large.").

266. See, e.g., Brower, *supra* note 263, at 78–79 (discussing the "promulgation of interpretations that lack textual determinacy" by the Free Trade Commission); van Aaken, *supra* note 261, at 8 ("Many of the indeterminate and vague legal terms found in BITs have only recently been clarified"); Todd Weiler, *NAFTA Investment Arbitration and the Growth of International Economic Law*, 36 CAN. BUS. L.J. 405, 425–28 (2002) (discussing attempts by the Free Trade Commission to correct "mistakes" being made by NAFTA tribunals).

267. See Christina Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 ARB. INT'L 327, 328 (2007) (explaining the lack of a codified process for amicus curiae participation in NAFTA tribunals under UNCITRAL Arbitration Rules); Loukas A. Mistelis, *Confidentiality and Third Party Participation*, 21 ARB. INT'L 211, 221–23 (2005) (explaining that amicus curiae briefs are not always allowed in international arbitration).

268. See, e.g., HOWARD MANN & KONRAD VON MOLTKE, INT'L INST. FOR SUSTAINABLE DEV., *NAFTA'S CHAPTER 11 AND THE ENVIRONMENT: ADDRESSING THE IMPACTS OF THE INVESTOR-STATE PROCESS ON THE ENVIRONMENT* 6 (1999), available at <http://www.iisd.org/pdf/nafta.pdf> ("[Chapter 11] allows foreign investors to sidestep [many typical] processes and the safeguards they provide to all litigants, in favour of a non-transparent, secretive and non-appealable system of arbitration."); Andrew J. Shapren, *NAFTA Chapter 11: A Step Forward in International Trade Law or a Step Backward for Democracy?*, 17 TEMP. INT'L & COMP. L.J. 323, 329 (2003) ("The arbitration process is a closed and unaccountable one. . . . [T]here is no provision for amicus participation by outside interested parties, and no standard appeals process.").

international affairs and in the development of contemporary international law. It is precisely because of the significance of investment arbitration that critics have attached particular importance to improving or abolishing it.²⁶⁹ If investment arbitration were unimportant or peripheral, it would attract little or no interest, rather than being the subject of a relatively substantial body of concern and criticism.

States have taken a number of steps in response to these critiques, including negotiating new BIT terms; issuing interpretive statements; and revising institutional rules to provide more precise legal standards, greater transparency, and more opportunities for amicus participation.²⁷⁰ Despite continuing criticism, however, investment arbitration remains successful and robust: BITs continue to be ratified, including BIT provisions for investor-state arbitration;²⁷¹ only a few states have renounced existing BITs;²⁷² and investment-arbitration caseloads continue to increase.

4. *Contemporary Claims Tribunals.* Claims tribunals have been a feature of international adjudication since at least the eighteenth

269. *E.g.*, MANN & VON MOLTKE, *supra* note 268, at 2 (explaining how Chapter 11 of NAFTA has been used to shape international environmental law); van Aaken, *supra* note 261, at 2–3 (discussing the surge of BITs in recent years and the subsequent effects on international law).

270. *See, e.g.*, U.S. DEP'T OF STATE, 2004 MODEL BIT art. 28, *available at* <http://www.state.gov/documents/organization/117601.pdf> (“The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.”); *see also* Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 41 INT'L LAW. 47, 56 (2007) (explaining a controversial amendment to ICSID Arbitration Rule 32 that “provided that third-party attendance at or observations of hearings might be authorized by a tribunal only if there were no objections from a disputing party”); Suzanne A. Spears, *The Quest for Policy Space in a New Generation of International Investment Agreements*, 13 J. INT'L ECON. L. 1037, 1043–45 (2010) (discussing “a new generation of [international investment agreements] that possess one or a combination of several new features intended to allow host states greater policy space and thereby prevent regulatory chill” (internal quotation marks omitted)).

271. *See, e.g.*, Agreement on the Encouragement and Reciprocal Protection of Investments, Ger.-Pak., art. 10, Dec. 1, 2009, <http://www.pakemb.de/index.php?id=198&L=0> (including a provision for “Settlement of Disputes Between a Contracting State and an Investor of the Other Contracting State”). Since 2000, the rate at which new BITs are being concluded has fallen from that of the 1990s. *See* U.N. CONFERENCE ON TRADE & DEV., THE ENTRY INTO FORCE OF BILATERAL INVESTMENT TREATIES (BITs), at 3 tbl.1, U.N. Doc. UNCTAD/WEB/ITE/IIA/2006/9 (2006) (showing the numeric decline in the rate of BITs being concluded since 2000).

272. *See supra* note 219.

century.²⁷³ Historically, claims by nationals of one state against a foreign state for violations of international-law rights were not pursued by the individuals who had suffered injury, but were instead espoused by the claimant's home state—sometimes in diplomatic negotiations and sometimes before claims tribunals established by treaty.²⁷⁴ During the past forty years, new mechanisms have been developed on an ad hoc basis to deal with particular types of claims. Two significant examples of international claims tribunals are the Iran-U.S. Claims Tribunal and the UN Compensation Commission (UNCC). Both of these mechanisms authorized private parties to pursue claims in proceedings that were modeled on international commercial arbitrations and that produced enforceable awards;²⁷⁵ at the same time, both mechanisms successfully and effectively resolved the large numbers of disputes that were put to them.

a. Iran-U.S. Claims Tribunal. The Iran-U.S. Claims Tribunal was established in 1981 by the Algiers Accords as a mechanism for resolving various commercial claims between the United States, Iran, and their respective nationals.²⁷⁶ The Accords provided for a nine-

273. See 1 RICHARD B. LILICH & BURNS H. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* 26 (1975) (noting 249 instances of adjudication of claims between 1794 and 1939); David J. Bederman, *The Glorious Past and Uncertain Future of International Claims Tribunals*, in *INTERNATIONAL COURTS FOR THE TWENTY-FIRST CENTURY*, *supra* note 51, at 161, 161 (“The first international claims tribunals were established . . . between the United States and Great Britain on November 19, 1794 . . .”).

274. See Bederman, *supra* note 273, at 176–79 (explaining that, historically, disputes between international businesspeople and government administrators were brought by the state on behalf of the individual claimants and, that in doing so, the state “assert[ed] its own right, the right to ensure in the person of its nationals respect for the rule of international law”). Private parties were not permitted to participate directly in the proceedings, and the state espousing a claim was free to decline to assert or to settle that claim. *Id.*; see also BORCHARD, *supra* note 168, § 144, at 366 (“[A] necessary corollary of the government’s discretion in the presentation of claims is an unlimited control over them in the conduct of diplomatic negotiations. The government is the sole judge of what claims it will enforce It may refuse to present a claim at all. . . . The government’s power to settle the claim of its citizen against a foreign country is practically unrestricted.”).

275. See David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT’L L. & POL. 1, 24–34 (1994) (discussing the UNCC and the Iran-U.S. Claims Tribunal as forms of international commercial arbitrations); *infra* text accompanying notes 280–84, 294–98.

276. See Declaration of the Government of the Democratic and Popular Republic of Algeria (General Declaration), 1 Iran-U.S. Cl. Trib. Rep. 3, 3 (1981) (establishing the government of Algeria “as an intermediary . . . in relations arising out of the detention of the 52 United States nationals in Iran”); David D. Caron & John R. Crook, *Getting Started*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION: A STUDY BY THE PANEL ON STATE RESPONSIBILITY OF THE AMERICAN*

person tribunal, seated in the Hague, with jurisdiction to hear claims brought by U.S. or Iranian nationals arising out of U.S.-Iran hostilities.²⁷⁷ The tribunal's competence included, as its principal focus, claims asserted by private parties; those claims could be pursued directly by companies or individuals and did not need to be espoused by the claimant's home state.²⁷⁸

Three tribunal members were appointed by Iran, three by the United States, and three by other states.²⁷⁹ Unlike most international arbitral proceedings, the tribunal was permanent, in the sense that a standing body of decisionmakers heard all of the cases falling within the tribunal's mandate. The tribunal conducted arbitral proceedings before three-person panels, pursuant to the UNCITRAL Rules, and its procedures closely resembled those employed in commercial arbitrations.²⁸⁰

The disputes submitted to the tribunal were principally contractual disputes—arising under commercial agreements between U.S. companies and Iranian state entities—and claims for

SOCIETY OF INTERNATIONAL LAW 11, 12 (David D. Caron & John R. Crook eds., 2000) (explaining that the Iran-U.S. Claims Tribunal “could hear official claims by either government against the other” in commercial contract disputes).

277. The Algiers Accords provided: “An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States” Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Claims Settlement Declaration) art. II(1), 1 Iran-U.S. Cl. Trib. Rep. 9, 9 (1981) [hereinafter Claims Settlement Declaration].

278. *Id.* art. III(3), 1 Iran-U.S. Cl. Trib. Rep. at 10; Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 261 (1984) (“[M]ost disputes . . . involve a private party on one side and a Government or Government-controlled entity on the other”); see also Brice M. Clagett, *The Perspective of the Claimant Community*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION, *supra* note 276, at 59, 59–63 (explaining that, notwithstanding other concerns, private claimants were partially relieved “that an international forum had been created” by the Algiers Accords).

279. Claims Settlement Declaration, *supra* note 277, art. III, 1 Iran-U.S. Cl. Trib. Rep. at 10; see also George H. Aldrich, *The Selection of Arbitrators*, in THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION, *supra* note 276, at 65, 65–69 (discussing the selection process that was followed by the three American arbitrators and the three Iranian arbitrators in choosing the three third-country nationals who would complete the nine-member tribunal).

280. See JACOMIJN J. VAN HOF, COMMENTARY ON THE UNCITRAL ARBITRATION RULES: THE APPLICATION BY THE IRAN-U.S. CLAIMS TRIBUNAL 5 (1991) (noting that the provisions governing the tribunal, as set out by the Claims Settlement Declaration, require the tribunal to “conduct all of its business in a manner consistent with the UNCITRAL Rules”).

expropriation.²⁸¹ The tribunal disposed of a large number of claims, ultimately hearing more than 3900 cases in roughly twenty years.²⁸² Compliance with the tribunal's awards was almost perfect, thanks to financial-security arrangements in the Algiers Accords; all of the tribunal's awards were satisfied, either from funds escrowed by Iran or otherwise.²⁸³ Additionally, the tribunal's awards were published and provide frequently cited authority on a range of international-law issues, including expropriation, nationality, remedies, and procedure.²⁸⁴ From almost any perspective, the tribunal fulfilled its mandate effectively and played a significant role in resolving the original—if not later—Iran-U.S. antagonisms.

281. See Charles N. Brower, *Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal*, 21 INT'L LAW. 639, 639–40 (1987) (discussing the tribunal's early expropriation decisions). See generally CHARLES N. BROWER & JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 26–122 (1998) (discussing the tribunal's jurisdiction). The Algiers Accords contained a choice-of-law provision, requiring the tribunal to make its decisions on the basis of “respect for law,” trade usages, and relevant contract provisions. Claims Settlement Declaration, *supra* note 277, art. V, 1 Iran-U.S. Cl. Trib. Rep. at 11.

282. David D. Caron & John R. Crook, *The Tribunal at Work*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION*, *supra* note 276, at 133, 137. The tribunal issued some five hundred awards, a number dealing with multiple cases. *Id.* at 135. The tribunal remains in existence, albeit with a very limited docket. See Ronald J. Bettauer, *The Task Remaining: The Government Cases*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION*, *supra* note 276, at 355–60 (discussing the few government cases remaining before the tribunal in 2000).

283. See Sean D. Murphy, *Securing Payment of the Award*, in *THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION*, *supra* note 276, at 299–311 (discussing the various methods of securing payment of tribunal awards and the success of those methods). Awards made by the tribunal were subject to enforcement under the New York Convention. See, e.g., *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992) (“[W]e have held that even a ‘final’ and ‘binding’ arbitral award is subject to the defenses to enforcement provided for in the New York Convention.” (quoting *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 517–19 (2d Cir. 1975))); *Ministry of Def. of Iran v. Gould, Inc.*, 969 F.2d 764, 770 (9th Cir. 1992) (“The award of the Claims Tribunal here has been held to fall under the New York Convention.”).

284. See, e.g., JOHN A. WESTBERG, *INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 113–47 (1991) (discussing the tribunal's findings regarding liability for expropriation); Caron & Crook, *supra* note 282, at 140–42 (discussing methods used by the tribunal for handling claims of dual nationals). See generally BROWER & BRUESCHKE, *supra* note 281 (discussing the tribunal's methods of handling issues with respect to nationality, procedure, expropriation, and remedies, as well as the overall contribution of the tribunal to international law).

b. UN Compensation Commission. The UNCC was established by the Security Council in 1991 and was granted the authority to award compensation for losses resulting from Iraq's invasion of Kuwait. Security Council Resolutions 686²⁸⁵ and 687²⁸⁶ provided that Iraq "[was] liable under international law for any direct loss, damage—including environmental damages and the depletion of natural resources—or injury to foreign Governments, nationals and corporations as a result of [Iraq's] unlawful invasion and occupation of Kuwait,"²⁸⁷ and they granted the UNCC jurisdiction to resolve claims against Iraq by foreign nationals.²⁸⁸ Resolution 687 also created a fund from Iraqi oil revenues to pay the amounts awarded by the UNCC.²⁸⁹

As with the Iran-U.S. Claims Tribunal, the UNCC heard claims by private parties, rather than simply hearing claims espoused by states.²⁹⁰ The claims asserted in the UNCC included the personal-injury and wrongful-death claims of individuals forced to flee Kuwait; claims involving business, property, or related losses by individuals and corporations; and claims by states, including claims for compensation for environmental loss and resettlement costs.²⁹¹ Additionally, the UNCC heard claims by foreign states and international organizations against Iraq.²⁹²

285. S.C. Res. 686, U.N. Doc. S/RES/686 (Mar. 2, 1991).

286. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).

287. *Id.* ¶ 16.

288. *Id.*; see also Bederman, *supra* note 275, at 1 ("[T]he United Nations Compensation Commission . . . was established to manage the staggering effort of providing billions of dollars of compensation to millions of claimants from over one hundred countries around the world."); Veijo Heiskanen, *The United Nations Compensation Commission*, 296 RECUEIL DES COURS 259, 267 (2002) ("In paragraph 18 of [Resolution 687] the Security Council decided 'to create a fund to pay compensation for claims that fall within paragraph 16 . . . and to establish a Commission that will administer the fund.'" (quoting S.C. Res. 687, *supra* note 286, ¶ 18)); Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 171 (2009) ("[The UNCC] was designed to process and pay claims arising from the Iraqi invasion of Kuwait in 1990.").

289. S.C. Res. 687, *supra* note 286, ¶ 18; see also S.C. Res. 692, ¶ 3, U.N. Doc. S/RES/692 (May 20, 1991) (establishing the fund).

290. In some cases, such as one concerning the claims of some 800,000 Egyptian workers in Iraq, a state espoused claims on behalf of a large number of similarly situated individuals. See McGovern, *supra* note 288, at 185 ("Included within these claims was a consolidated claim filed by the Central Bank of Egypt on behalf of over 800,000 Egyptian workers who had not received full compensation for their employment prior to the Iraqi invasion of Kuwait.").

291. Heiskanen, *supra* note 288, at 278–87; McGovern, *supra* note 288, at 185.

292. Heiskanen, *supra* note 288, at 285; McGovern, *supra* note 288, at 180.

The UNCC consisted of a Governing Council, composed of representatives of Security Council members, and fifty-nine commissioners, selected by the Governing Council, who sat in panels of three members to assess individual claims.²⁹³ The panels of commissioners were charged with making recommendations to the Governing Council, which was empowered to render binding decisions on claims.²⁹⁴ The commissioners proceeded in a relatively summary fashion, generally issuing recommendations of compensation based on written submissions and without oral hearings.²⁹⁵ Proceedings before the Governing Council were even more summary in character, again taking place without oral hearings or the presentation of evidence.²⁹⁶

In total, the UNCC received some 2.6 million claims, for compensation in excess of \$350 billion.²⁹⁷ The commission completed its work expeditiously, concluding the claims-review process in June 2005, only four years after the UNCC was established.²⁹⁸ In total, the UNCC awarded compensation totaling more than \$52 billion on approximately 1.5 million claims.²⁹⁹ The amounts awarded were either paid from Iraqi oil revenues or waived. Despite some complaints about “rough justice,”³⁰⁰ the UNCC resolved a formidable number of claims involving very large sums efficiently and effectively—notwithstanding its politically charged setting.

293. McGovern, *supra* note 288, at 180.

294. *Id.* at 181; Hans Wassgren, *The UN Compensation Commission: Lessons of Legitimacy, State Responsibility, and War Reparations*, 11 LEIDEN J. INT'L L. 473, 477 (1998) (“[The Commissioners] carry out the validation and assessment of the claims and the executive body, the Governing Council, [makes] the final determination.”).

295. See Carlos Alzamora, *Reflections on the UN Compensation Commission*, 9 ARB. INT'L 349, 355 (1993) (stating that “a simple, rapid and, in some cases, almost automatic procedure has been put in place” to handle claims); McGovern, *supra* note 288, at 181 (“[The Commissioners’] role was to sit in panels of three to review and evaluate claims and submit to the Governing Council their recommendations for payment.”).

296. McGovern, *supra* note 288, at 181 (“In practice . . . the Governing Council delegated most decisions and the application of their policies to the Commissioners.”).

297. McGovern, *supra* note 288, at 172.

298. *Id.*; see also Carlos Alzamora, *The UN Compensation Commission: An Overview*, in THE UNITED NATIONS COMPENSATION COMMISSION 3, 12 (Richard B. Lillich ed., 1995) (discussing the speed with which the tribunal dealt with early claims).

299. *Status of Processing and Payment of Claims*, UNITED NATIONS COMPENSATION COMM’N (Oct. 27, 2011), <http://www.uncc.ch/status.htm>.

300. McGovern, *supra* note 288, at 189; see also Heiskanen, *supra* note 288, at 315–16 (discussing the criticism that the UNCC’s resolution of claims “on a wholesale basis rather than through case-by-case adjudication” effectively amounts to a denial of Iraq’s right to due process).

5. *World Trade Organization.* The WTO includes several important dispute-resolution bodies, most notably WTO panels and the WTO Appellate Body.³⁰¹ The adjudicatory mechanisms established under the WTO's 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) have evolved incrementally from the much less formal, nonbinding mechanisms of dispute resolution that were used previously under the General Agreement on Tariffs and Trade (GATT) regime.³⁰² Many, but not all, of the aspects of the DSU's current adjudicatory mechanisms differ significantly from those of traditional first-generation tribunals and now bear a much closer resemblance to second-generation mechanisms.

WTO panels and the Appellate Body are empowered to decide disputes arising under specifically identified WTO agreements;³⁰³ in principle, neither body is authorized to decide disputes under, or to apply, other international-law instruments.³⁰⁴ WTO panels are constituted in a manner similar to that used to select tribunals in

301. The WTO's dispute-resolution mechanism is established by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]; see also ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* 182-91 (1997) (discussing the role of the DSU in the further legalization of panel procedures and the development of new appellate-review procedures).

302. See PETERSMANN, *supra* note 301, at 71 ("The Understanding... refers to the... GATT dispute settlement rules and procedures and replaces them by a new WTO dispute settlement system, which builds on the previous GATT dispute settlement system." (citation omitted)); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats*, 29 INT'L LAW. 389, 405 (1995) ("The Understanding decisively moves the GATT dispute-resolution process towards a unified, coherent adjudicatory system.").

303. DSU art. 3(2); see also Panel Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶ 7.179, WT/DS350/R (Oct. 1, 2008) (discussing the purpose of Article 3(2)—providing "security and predictability to the multilateral trading system").

304. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333, 338 (1999) ("The WTO dispute resolution system is clearly not a court of general jurisdiction, competent to apply all applicable international law."). Under the DSU, WTO panels and the Appellate Body are required to apply customary-international-law rules of interpretation in construing WTO agreements and are not authorized to "add to or diminish the rights and obligations provided in the covered [WTO] agreements." DSU art. 3(2); see also MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 109-11 (2d ed. 2006) (discussing the scope of the application of WTO agreements in the decisionmaking procedures of the WTO panels and the Appellate Body); John H. Jackson, *The Great 1994 Sovereignty Debate: United States Acceptance and Implementation of the Uruguay Round Results*, 36 COLUM. J. TRANSNAT'L L. 157, 173 (1997) ("[D]ecision-making procedures of the WTO have been significantly circumscribed by negotiated treaty text.").

international investment and commercial arbitration. Parties to a dispute are generally free to agree upon the identities of the members of the panel, which typically consists of three persons; if the parties do not reach an agreement, the WTO's director general selects the panel.³⁰⁵

The DSU prescribes a basic procedural framework, with an emphasis on efficiency, but individual panels have some flexibility to alter it in consultation with the parties.³⁰⁶ As with commercial and investment arbitrations, default decisions may be issued in WTO proceedings,³⁰⁷ making default virtually unthinkable. Although only states may formally participate in proceedings before WTO panels,³⁰⁸ in practice, private parties play a substantial behind-the-scenes role in case development and presentation.³⁰⁹

Absent either a negative consensus among all of the WTO members—including the party that prevailed—against the adoption of a report or an appeal against the report, panel reports are adopted promptly after they are issued.³¹⁰ This approach altered the pre-1994 approach under the GATT, according to which a positive consensus of all members—including the party that lost—was required to adopt a decision, making it virtually impossible for decisions to become binding.³¹¹ In contrast to many commercial arbitral regimes, WTO

305. DSU art. 8. Members of WTO panels are required to be independent. *Id.* art. 8(9). WTO panel members are selected from a list maintained by the WTO Dispute Settlement Body (DSB), which consists of experts in international-trade law. *Id.* art. 8(4). WTO member states may suggest names for inclusion on the list, and those names are then added following the approval of the DSB. *Id.*

306. *Id.* arts. 7, 12; *id.* app. 3.

307. *See id.* art. 6(1) (requiring a negative consensus to block the formation of a WTO panel).

308. *Id.* art. 1(1); Thomas J. Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 INT'L & COMP. L.Q. 647, 653 (1998).

309. *See* GREGORY C. SHAFFER, DEFENDING INTERESTS: PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 3–7, 15–17, 31–50, 66–101 (2003) (“Private parties—particularly well-connected, wealthier, and better-organized ones—attempt to use the WTO legal system to advance their commercial ambitions.”). In some jurisdictions, legislation provides private parties with formal mechanisms for requesting states to initiate WTO proceedings. *See* Junrong Song, *A Comparative Study on the Trade Barriers Regulation and the Foreign Trade Barriers Investigation Rules*, 41 J. WORLD TRADE 799, 799–800 (2007) (“By establishing a legal procedure for the private sector to petition their government to challenge foreign trade barriers, the Trade Barriers Regulation . . . in the European Union and the Foreign Trade Barriers Investigation Rules in China are aimed to forge such partnership.” (footnotes omitted)).

310. DSU art. 16.

311. *See* Young, *supra* note 302, at 392 (“It would appear that the general GATT practice of requiring that all decisions of the contracting parties be unanimous has been a bit of a barrier to

panel reports may be appealed to the Appellate Body—a standing body of seven members serving fixed terms.³¹² The Appellate Body sits in three-person tribunals, with members selected largely by rotation, to hear appeals “limited to issues of law covered in the panel report and legal interpretations developed by the panel.”³¹³ Appellate Body decisions are automatically adopted, again unless blocked by a negative consensus of all WTO members including the prevailing party.³¹⁴

In contrast to adjudication before traditional international tribunals, the WTO’s dispute-resolution mechanisms are compulsory: membership in the WTO requires acceptance of the DSU and the compulsory jurisdiction of WTO panels and the Appellate Body.³¹⁵ Decisions by WTO panels or the Appellate Body may also be enforced with reasonable efficacy, albeit not in the same manner as many other second-generation adjudicatory decisions. WTO decisions are not directly enforceable in national courts.³¹⁶ Nonetheless, the

authorizing the withdrawal of concessions.”). *See generally* PETERSMANN, *supra* note 301, at 66–131 (discussing the GATT dispute-settlement system as well as the clarification and development of GATT/WTO law).

312. DSU art. 17(1)–(2); *see also* MATSUSHITA ET AL., *supra* note 304, at 117 (“Any party to a dispute . . . may appeal a panel report to a seven-member standing Appellate Body established for this purpose.”). Members of the Appellate Body are selected by the DSB. DSU art. 17; Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in INTERNATIONAL ORGANIZATION AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 219, 229 (Laurence Boisson de Chazournes, Cesare P.R. Romano & Ruth Mackenzie eds., 2002). As a practical matter, WTO member states, particularly larger states, have a substantial role in suggesting and approving the members included on the Appellate Body. *See* Charnovitz, *supra*, at 228–29 (discussing the procedures used for nominating and approving members of the Appellate Body).

313. DSU art. 17(6); *see also* MATSUSHITA ET AL., *supra* note 304, at 108 (“The DSU creates an Appellate Body to review panel rulings.”).

314. DSU art. 17(14); *see also id.* art. 22(6) (requiring the DSB, under certain circumstances, to authorize a party to suspend concessions upon request “unless the DSB decides by consensus to reject the request”).

315. Marrakesh Agreement Establishing the World Trade Organization art. XII(1), Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]. In contrast to the fact that accession to the U.N. Charter and UNCLOS does not subject a state to the compulsory jurisdiction of the ICJ or ITLOS, *see supra* Part II.A.3–4, accession to the WTO subjects a state to the DSU and the jurisdiction of WTO panels and the Appellate Body, Marrakesh Agreement art. II(2).

316. *See, e.g.*, Marco C.E.J. Bronckers, *More Power to the WTO?*, 4 J. INT’L ECON. L. 41, 59–63 (2001) [hereinafter Bronckers, *More Power to the WTO?*] (proposing possible remedies for instances in which WTO members are unable or unwilling to comply with WTO decisions); Piet Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COMMON MKT. L. REV. 11, 57–58 (1997) (discussing arguments for and against giving WTO Agreements “direct effect” in domestic courts). Indeed, some national

WTO DSU provides a specific mechanism enabling a complainant state to impose otherwise-impermissible trade sanctions against a state that has been held to have violated WTO rules and that has failed to comply with the decision—but only up to a specified amount equal to the harm to the complainant state caused by the violation.³¹⁷ Although sometimes criticized,³¹⁸ the WTO enforcement mechanism has been frequently used and is reasonably effective in securing compliance with Appellate Body and panel decisions.³¹⁹ In particular, sanctions have been permitted in sectors unrelated to those in which WTO decisions have found violations of WTO rules, effectively allowing complainant states to obtain monetary redress for favorable decisions against any of a respondent state's trade.³²⁰

implementing legislation provides that WTO decisions are not domestically enforceable. *See, e.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-465, § 102, 108 Stat. 4809, 4815 (1994) (codified at 19 U.S.C. § 3512 (2006)) (“No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.”). *But cf.* Marco C.E.J. Bronckers, *From ‘Direct Effect’ to ‘Muted Dialogue’: Recent Developments in the European Courts’ Case Law on the WTO and Beyond*, 11 J. INT’L ECON. L. 885, 886 (2008) (pointing out that WTO substantive rules may, in some instances, be incorporated into EU law and made enforceable in EU courts).

317. DSU art. 22(3). Disputes over sanctions imposed by a complainant state are resolved through a further dispute-resolution mechanism. *Id.* art. 22(6)–(7).

318. *See, e.g.*, Bronckers, *More Power to the WTO?*, *supra* note 316, at 61 (“[I]t is . . . ill-advised that WTO members are free either to play along with a WTO ruling or pay compensation.”); Petros C. Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 11 EUR. J. INT’L L. 763, 811 (2000) (“WTO countermeasures, the *ultima ratio* of the system, fail[] on both effectiveness and impartiality grounds. Sometimes they can and sometimes they simply are not a structure that will induce compliance.”). Some commentators have suggested authorizing the imposition of monetary sanctions by WTO panels (paralleling investment- and commercial-arbitration remedies). *See, e.g.*, Bronckers, *More Power to the WTO?*, *supra* note 316, at 62 (“[I]f compliance really is the ultimate goal of the WTO dispute settlement understanding, then monetary damages are apt to be more of an incentive for the non-complying government, given ever present budgetary constraints.”). *But cf.* Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT’L L.J. 221, 235–37 (2003) (discussing the possibility of allowing private-party litigation of WTO resolutions as an alternative mechanism for enforcement).

319. *See* Steve Charnovitz, *The Enforcement of WTO Judgments*, 34 YALE J. INT’L L. 558, 562 (2009) (“[T]he WTO dispute system has been effective because there is an expectation that decisions will ultimately be complied with.”); Gary Horlick & Judith Coleman, *A Comment on Compliance with WTO Dispute Settlement Decisions*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES* 771, 773 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008) (finding rates of 67 percent for full compliance, 24 percent for partial compliance, and 9 percent for noncompliance).

320. Charnovitz, *supra* note 319, at 562. Professors Scott and Stephan contend that the WTO lacks the authority “to impose self-executing sanctions on wrongdoers.” SCOTT & STEPHAN, *supra* note 9, at 113. Their critique is misplaced: virtually no international

Some four hundred cases have been filed under the WTO DSU since 1995, for an average of roughly twenty-seven cases filed per year.³²¹ Annual filings at the WTO have varied, from highs of fifty in 1997 and forty-one in 1998, to lows of eleven in 2005, thirteen in 2007, and fourteen in 2009.³²² Rulings have addressed a wide range of trade issues that affect important areas of domestic and international regulation, including biotechnology, civil aviation, environmental regulation, tax, and antidumping.³²³ These decisions have not only resolved individual trade disputes that have substantial commercial, political, and regulatory consequences but have also contributed to the development of an extensive body of international-trade law that

adjudicatory decisions are “self-executing”; they instead require enforcement by the complainant, such as through the enforcement of a judgment or award in a separate enforcement action. *See, e.g.,* Anibal Sabater, *National Courts, Supranational Courts and Arbitral Tribunals in International Litigation*, CURRENTS: INT’L TRADE L.J., Summer 2005, at 3, 9–11 (“[E]nforcement does not always automatically follow a rendered award. . . . In [some] countries, such as the U.S., awards are enforceable only after judgment has been entered upon them.”). The essential point is that when a WTO decision is not complied with, specific, enforceable sanctions are available and are reasonably effective, *see supra* note 319; that state of affairs is similar to the enforceability of arbitral awards and national court judgments and is dissimilar to the (un)enforceability of ICJ, ITLOS, and similar decisions, *see supra* note 315. Professors Scott and Stephan also suggest that the principal users of the WTO—the EU and the United States—in practice use WTO dispute resolution only for symbolic disputes, employing diplomacy for matters of national significance. SCOTT & STEPHAN, *supra* note 9, at 123–27. In fact, the EU and the United States have frequently submitted commercially significant disputes to WTO dispute resolution, including civil aviation, information technology, biotechnology (GMO and beef-hormone regulation), and foreign taxation disputes. *See, e.g.,* WORLD TRADE ORG., ANNUAL REPORT 2010, at 82–101 (2010), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep10_e.pdf [hereinafter WORLD TRADE ORG., ANNUAL REPORT 2010] (listing all trade disputes presented to the WTO by the United States and the European Community in 2010); WORLD TRADE ORG., ANNUAL REPORT 2009, at 74–88 (2009), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep09_e.pdf (listing all of the trade disputes presented to the WTO by the United States and the European Community in 2009).

321. WORLD TRADE ORG., ANNUAL REPORT 2010, *supra* note 320, at 82.

322. *Id.* at 84.

323. *See, e.g.,* Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 CHI. J. INT’L L. 403, 406 (2001) (“Rules for service industries—banks, insurance companies, telecommunications and internet regulation, energy services, transportation, et cetera— . . . deal with complex issues that go deep into the economic and social structures of its member states”); Giorgio Sacerdoti, *The Dispute Settlement System of the WTO in Action: A Perspective on the First Ten Years*, in THE WTO AT TEN: THE CONTRIBUTION OF THE DISPUTE SETTLEMENT SYSTEM 35, 54 (Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes eds., 2006) (“Disputes concern specific, mostly bilateral issues—such as antidumping, safeguards, and countervailing duties (trade remedies)—but involve also issues of interpretation and implementation with a wider impact and involving several states”).

serves a vitally important function in the world trading system.³²⁴ Despite criticism, few would disagree that the WTO's dispute-resolution mechanisms now play a central and highly effective role in the regulation of international trade—just as international commercial and investment arbitration play vital roles in contemporary international commerce, finance, and investment.

* * *

As discussed, academic commentary evaluating contemporary international adjudication has focused almost entirely on first-generation tribunals—the PCA, PCIJ, ICJ, and ITLOS—and selected European regional courts.³²⁵ Regardless of its perspective, this

324. See JOHN H. JACKSON, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 59–100 (1998) (“The United States (as well as many other nations) has often expressed the view that the GATT and now WTO treaty texts are vitally important to improving a ‘rule-oriented’ international economic system, which should enhance the predictability and stability of the circumstances of international commerce”); Deborah Cass, *The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EUR. J. INT’L L. 39, 43 (2001) (“[T]he [WTO appellate-review tribunal] is beginning to create, wittingly or not, a constitutional structure for international trade law.”); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535, 540 (2001) (“[T]he WTO forms a general and increasingly universal framework for all (or almost all) of the trade relations between states.”); Ernst-Ulrich Petersmann, *Time for a United Nations ‘Global Compact’ for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EUR. J. INT’L L. 621, 644 (2002) (“[T]he WTO rules—even if formulated in terms of rights and obligations of governments—serve ‘constitutional functions’ for rendering human rights and the corresponding obligations of governments more effective in the trade policy area.”); Sacerdoti, *supra* note 323, at 35–60 (“Dispute resolution at the WTO stands out as a new chapter in the evolution of international justice.”); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 251 (2004) (“WTO judicial decisions have created an expansive body of new law.”).

325. See, e.g., Alvarez, *supra* note 9, at 411–12 (noting the existence of arbitration between “MNCs and states,” but not discussing it); Helfer & Slaughter, *supra* note 6, at 284–97 (examining the role of the ICJ and two European regional courts); Helfer & Slaughter, *supra* note 16, at 910–15 (analyzing regional courts on a five-point scale); Posner & Yoo, *supra* note 7, at 8–11 (discussing the PCA, PCIJ, ICJ, ITLOS, and regional courts). The same commentary also considers some international civil litigation in national courts, particularly litigation involving human-rights claims by private parties under the Alien Tort Statute in the United States. See POSNER, *supra* note 9, at 207–25 (describing Alien Tort Statute litigation as a “form of foreign litigation in domestic courts”); Helfer & Slaughter, *supra* note 6, at 290–97 (“Approximately half of the signatories to the Convention have incorporated the treaty into domestic law, thereby allowing individuals to invoke the treaty and the ECHR’s judgments in national judicial proceedings.”); Koh, *supra* note 9, at 2365 (“[F]ederal courts became increasingly obliged to adjudicate commercial suits brought by individuals and private entities against foreign governments.”); Koh, *supra* note 9, at 2371 (“Transnational litigation . . . has

commentary seldom mentions, much less discusses in any detail, either the many forms of second-generation tribunals—including international commercial and investment arbitral tribunals and claims-settlement mechanisms—or the capacity of this new generation of international tribunals to render enforceable decisions.

As a consequence, the conventional wisdom shared by virtually all commentary is that international tribunals lack both compulsory jurisdiction and the power to make enforceable decisions. As one author concludes,

In the Westphalian system . . . adjudicative bodies, whether of a permanent character like the World Court or of an *ad hoc* character like arbitral tribunals, are instruments in the hands of the entities which make up this system without them being subjected to an authority which can compel them to make use of these instruments and which can, if need be, enforce their decisions.³²⁶

This view is shared by commentators from every academic perspective. Reflecting deep skepticism about international adjudication, Professor Posner writes that “[s]tates may voluntarily comply with judgments, and they sometimes do. But they need not.”³²⁷ Instead, according to these critics, states use international tribunals to “provide information” to the parties to a dispute.³²⁸ At the same time, but from a very different perspective, proponents of international adjudication, such as Professors Slaughter, Helfer, and Guzman, agree that contemporary international tribunals cannot render enforceable decisions: international tribunals “lack a direct coercion mechanism to compel . . . compliance”³²⁹ and “are simply tools to produce a particular kind of information.”³³⁰

now migrated into the realm of public human rights suits against the United States and foreign governments and officials.”).

326. Kooijmans, *supra* note 21, at 408; *see also supra* text accompanying notes 13–30.

327. POSNER, *supra* note 9, at 34; *see also* Posner & Yoo, *supra* note 7, at 13–14 (“[O]ne should be skeptical of the claim that states would submit disputes to judges over whom they have no influence.”).

328. *See* POSNER, *supra* note 9, at 129 (“The courts help resolve bargaining failures between states by providing (within limits) information in (within limits) an impartial fashion.”); *supra* text accompanying notes 18–30.

329. Helfer & Slaughter, *supra* note 6, at 285–86; *see also* Helfer & Slaughter, *supra* note 16, at 903 (“Why would states ever agree to bind themselves to tribunals that they cannot control and that can hand down decisions that appear contrary to their national interests?”); *supra* text accompanying notes 10–21.

330. Guzman, *supra* note 1, at 235.

As discussed, this conventional wisdom is mistaken. Although these accounts may accurately describe traditional forms of international dispute resolution, such as the ICJ and ITLOS, they ignore the most successful instances of contemporary international adjudication: the second-generation tribunals that have developed over the past forty years. Contrary to conventional accounts, commercial and investment arbitral tribunals, new types of claims-settlement tribunals, WTO panels, and national courts considering litigation against foreign states all have the authority to issue enforceable decisions and, in varying degrees, also possess effectively mandatory jurisdiction.

The decisions of second-generation tribunals are not enforceable by a centralized enforcement agency, as is typically the case in domestic legal systems. Rather, their decisions are enforceable by virtue of a highly decentralized process, in which effectively all states have the power—and, under universally applicable conventions such as the New York Convention and the ICSID Convention, the obligation—to enforce international decisions against the assets of foreign states. Although different in design, this decentralized mechanism of enforcement is no less capable of overcoming Westphalian theories of national sovereignty and giving effect to rules of international law than a centralized enforcement mechanism.

Indeed, this enforcement mechanism is achievable and effective precisely because it does not have a centralized enforcement authority. Diffused responsibility for enforcement obviates the need for a centralized and politically controversial enforcement authority, while maximizing the enforceability of decisions. At the same time, the intrusion on an individual state's sovereignty is minimized because, in practice, only assets outside a state's borders will be subject to execution to satisfy monetary awards. The frequent and relatively successful use of second-generation adjudicatory mechanisms, combined with their power to render enforceable decisions, squarely contradicts the conventional wisdom about the characteristics of international adjudication.

It is of course true that not all arbitral awards or WTO decisions are immediately enforced because states may, for example, conceal their assets or use political and economic measures to resist enforcement. This possibility is no different, however, from the reality surrounding judgments of national courts against private parties, which face similar barriers to enforcement. Even in developed legal systems, substantial numbers of judicial decisions that are not

voluntarily complied with are not capable of being fully enforced;³³¹ compliance rates in less efficient legal systems are correspondingly worse.³³² Indeed, given the very limited grounds available for the review of commercial and investor-state awards,³³³ these decisions are in fact materially *more* enforceable than domestic court judgments in most countries; the same is true of WTO and claims-settlement-tribunal decisions.³³⁴

III. THE SIGNIFICANCE OF SECOND-GENERATION INTERNATIONAL ADJUDICATION

Commentary on contemporary international adjudication has focused almost entirely on traditional first-generation tribunals and has thereby significantly distorted its descriptions of the field. In addition, the omission of second-generation tribunals from the academic debate has distorted the analysis of contemporary international adjudication. In particular, the development and success of second-generation tribunals has important implications both for analysis of whether international adjudication is successful and for prescriptions for future international tribunals.

First, the development of second-generation tribunals contradicts the claims of skeptics about international adjudication and international law more generally. Contrary to these claims, international adjudication before second-generation tribunals is

331. See, e.g., COLLIER & LOWE, *supra* note 7, at 5 (“It is said that something like 80 per cent of English court judgments are neither complied with voluntarily, nor enforced in their entirety.”); Hans Smit, *Enforcement of Judgments in the United States of America*, 34 AM. J. COMP. L. (SUPPLEMENT) 225, 230 (1986) (“The problems judgment creditors encounter in enforcing their judgments have been extensively documented.”).

332. Of course, judicial systems in most states qualify as less efficient; in reality, many are corrupt, arbitrary, and ineffective. See, e.g., Transparency Int’l, *Executive Summary: Key Judicial Corruption Problems*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS, at xxi, xxi–xxii (Diana Rodriguez & Linda Ehrichs eds., 2007), available at <http://www.transparency.org/content/download/19093/263155> (“[A] corrupt judiciary . . . diminishes trade, economic growth and human development . . . [I]n one third of [sixty-two] countries more than 10 per cent of [poll] respondents who had interacted with the judicial system claimed that they or a member of their household had paid a bribe to obtain a ‘fair’ outcome in a judicial case.”).

333. See 2 BORN, *supra* note 197, at 2553–2660 (“[T]he predominant tendency of contemporary arbitration legislation . . . is to limit the grounds on which an award can be annulled . . .”); Klaus Peter Berger, *The Modern Trend Towards Exclusion of Recourse Against Transnational Arbitral Awards: A European Perspective*, 12 FORDHAM INT’L L.J. 605, 617 (1989) (“[G]rounds for this recourse are limited to procedural deficiencies or violations of public policy.”).

334. See *supra* text accompanying notes 204–07, 238–44, 283, 300, 315–20.

widely used and highly successful. Over the past forty years, these tribunals have developed large and growing caseloads that substantially exceed those of most other forms of international adjudication, including, in particular, traditional first-generation tribunals. At the same time, second-generation tribunals play vitally important roles in contemporary international affairs, particularly international trade and investment. Their decisions provide a striking contemporary example of international law's being successfully applied to constrain and alter the conduct of states and to redress violations of international law.

Second, in considering what forms of adjudication are successful and how to design future international adjudicatory mechanisms, it is essential that the structure of second-generation tribunals be considered. Prescriptions for international tribunals have frequently called for the use of independent courts, modeled closely on domestic appellate courts, with standing panels of tenured judges exercising broad jurisdictional competence and applying uniform procedural rules. Conversely, other prescriptions have argued for highly dependent, ad hoc international tribunals, authorized to order only weak and ineffective remedies.

The design of second-generation tribunals is materially different from either of these prescriptions. Second-generation tribunals are modeled in large part on international commercial arbitral tribunals—with relatively dependent decisionmakers selected by the parties for specific cases, limited jurisdictional mandates, and tailored procedural rules. At the same time, second-generation tribunals are authorized to make enforceable decisions—a uniquely effective and powerful remedy by the standards of international adjudication. As discussed in Part II.B, tribunals with this structure have been the most popular, effective, and successful forms of international adjudication in recent decades. Prescriptions for future international adjudicatory mechanisms cannot continue to ignore either the success or the structure of second-generation tribunals.

A. Second-Generation Tribunals: The Success of International Adjudication

An analysis of the new generation of international tribunals that has developed over the past forty years is critical to an accurate understanding of contemporary international adjudication. Not only do second-generation tribunals render enforceable decisions, but they also represent a large, vibrant, and successful category of

international dispute resolution; indeed, by all appearances, they are more frequently used and more successful than traditional first-generation tribunals.

1. *Caseloads of Second-Generation Tribunals.* States have used second-generation tribunals to resolve large numbers of international disputes. These disputes have thus far been limited to specifically defined subjects—in particular, trade, investment, and related matters—but they have nonetheless resulted in very substantial caseloads for many second-generation tribunals.

As discussed, approximately three hundred international commercial arbitrations involving states or state entities are filed annually, whereas approximately forty new investment arbitrations are filed each year.³³⁵ Foreign-sovereign-immunity litigation in national courts has been almost as frequent, with roughly 250 suits filed against foreign states per year.³³⁶ Taken together, these figures alone exceed the total number of PCA, ICJ, and ITLOS cases filed each year by approximately sixty-fold.³³⁷ If the WTO's twenty-seven cases per year, the Iran-U.S. Claims Tribunal's 3900 total cases, and the UNCC's 2.6 million claims are added to the balance, the volume of disputes in second-generation adjudication is even more significant, and the quantitative difference between first- and second-generation adjudication is even more marked.³³⁸ All told, and recognizing the rough nature of statistics in the field, second-generation tribunals currently hear substantially more than one hundred times as many cases per year as first-generation tribunals.

Moreover, second-generation tribunals include the most vibrant types of contemporary international adjudication. The total number of PCA, ICJ, and ITLOS cases has remained largely stagnant since the late twentieth century.³³⁹ In contrast, the number of international investment and commercial arbitrations and litigations involving state entities has increased materially, both since 1990 and in more recent

335. See *supra* text accompanying notes 210–12, 250–62.

336. See *supra* text accompanying notes 186–87.

337. See *supra* text accompanying notes 65–70, 103–06, 124–25, 186–87, 210–12, 250–62. The figures are not altered by inclusion of regional courts and tribunals, such as the CACJ and ACJHR. See *supra* text accompanying notes 134–42.

338. See *supra* text accompanying notes 281–83, 297, 321–22.

339. See *supra* text accompanying notes 65–70, 103–05, 124–25.

years.³⁴⁰ Put simply, usage of second-generation adjudicatory bodies is high and robustly increasing, whereas usage of the ICJ, ITLOS, and PCA is relatively low and stagnant.

2. *Dispute-Resolution Provisions Selecting Second-Generation Tribunals: Contemporary Treaty-making Practice.* It is also useful to consider state practice over the past several decades with respect to including dispute-resolution provisions in treaties. These provisions evidence both existing state preferences and likely future caseloads because future disputes arise and are dealt with under existing treaties and dispute-resolution provisions. As with the existing caseloads of international tribunals, recent dispute-resolution provisions show that states are willing to use second-generation tribunals and enforceable forms of adjudication in significant numbers of cases and, again, much more frequently than traditional first-generation forms of dispute resolution.

A review of treaties filed with the UN Secretariat for 1990, 1995, 2000, and 2005 provides a representative sample of state practice with regard to dispute-resolution provisions in treaties and other international agreements.³⁴¹ As detailed in the Appendix, the texts of roughly 440 treaties are available for each of these years, for a total sample of 1755 treaties.³⁴² Of these, approximately 38 percent, or 672 treaties, include some sort of dispute-resolution provision,³⁴³ and conversely, roughly 62 percent of all treaties contain no dispute-resolution provision.

Of the treaties containing a dispute-resolution provision, roughly 45 percent, or 305 treaties, include only provisions for negotiations not involving any third-party decisionmaker.³⁴⁴ In effect, these treaties provide for little more than what general principles of international law already mandate: requiring the parties to negotiate in an effort to resolve any differences arising from the treaty but imposing no further obligations.³⁴⁵ The remaining 367 treaties, roughly 20 percent

340. See *supra* text accompanying notes 210–12, 250–61. WTO filings have decreased somewhat since 2000. See *supra* text accompanying notes 321–22.

341. See *infra* Appendix.

342. *Id.*

343. *Id.*

344. *Id.*

345. Thirteen treaties contain a specially designed “specific” dispute-resolution mechanism, often involving some sort of nonbinding third-party adjudication such as mediation, and another

of the 1755 reported treaties, contain some sort of binding dispute-resolution mechanism.

Of the treaties with binding dispute-resolution provisions, only three contain a provision providing for submission to the ICJ, ITLOS, or a similar body, out of a total of 1755 treaties studied.³⁴⁶ In contrast, 348 treaties, or 94 percent of the treaties containing a binding dispute-resolution provision, include some sort of arbitration clause.³⁴⁷ Of the 348 treaties providing for arbitration, 134 treaties are BITs providing for enforceable decisions by investment arbitration mechanisms.³⁴⁸ An additional sixty-one treaties are bilateral air-transport or air-services treaties concluded under the auspices of the International Civil Aviation Organization (ICAO),³⁴⁹ many of which also provide for enforceable arbitration mechanisms. Approximately a dozen of the remaining 146 treaties with arbitration clauses contain other provisions for enforceable forms of arbitration,³⁵⁰ whereas the

four treaties provide for submission of disputes to a regional court, such as the ECJ or CACJ. *Id.*

346. *Id.* The three ICJ treaties were a bilateral agreement between the UN High Commissioner for Refugees and Nicaragua concerning certain matters in Nicaragua, a multilateral agreement for controlling locusts in West Africa, and an interim agreement between Greece and Macedonia. Four additional treaties contain dispute-resolution provisions referring to the ECJ, CACJ, and ACJ. *Id.*

347. *Id.* Of these, and other than in BITs, only nine include PCA-arbitration provisions.

348. *Id.*; see also Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 304 & n.3 (2002) (“[In 100 surveys reviewed,] [o]f the 20 treaties with a mandatory dispute resolution clause, 12 were bilateral investment treaties.”).

349. The ICAO’s dispute-resolution mechanisms typically adopt an enforcement strategy like that under the WTO, providing that, if a state fails to comply with an arbitral award, its counterparty is free to withhold benefits promised under the treaty to the state and its nationals. *E.g.*, Air Transport Agreement, Austria-It., art. 7, Jan. 23, 1956, 393 U.N.T.S. 97, 103–04 (“Each Contracting Party reserves the right to withhold an operating permit from an airline designated by the other Contracting Party . . . in any case where the airline fails to comply with . . . an arbitral award made in accordance with the provisions of article 8”); see also Agreement on Air Transport, Can.-Neth., art. XXIII(5), Feb. 16, 2005, Trb. 2005, 167, p. 38 (Neth.) (“If . . . either Contracting Party fails to comply with any [arbitral] decision given under . . . this Article, the other Contracting Party may limit, withhold or revoke any rights or privileges which it has granted by virtue of this Agreement to the Contracting Party in default or to the designated airline in default.”); Air Services Agreement, Den.-Maced., art. 18(5), Mar. 20, 2000, 2137 U.N.T.S. 279, 288 (“If . . . either Contracting Party fails to comply with any [arbitral] decision under . . . this Article, the other Contracting Party may limit, withhold or revoke any rights or privileges which it has granted by virtue of this Agreement to the Contracting Party in default or to the designated airline in default.”).

350. *E.g.*, Development Credit Agreement (Social Action Fund Project), Tanz.-Int’l Dev. Ass’n, § 10.03(k), Aug. 30, 2000, 2138 U.N.T.S. 3, 41 (“If . . . the award shall not be complied with by the Association, the Borrower may take any such action for the enforcement of the

remainder provide only that awards will be “final,” “binding,” or not subject to appeal, without providing for any enforcement mechanism. In total, slightly more than 10 percent of the treaties contain express provisions for enforceable adjudication by some form of second-generation tribunal.

Although states devote substantial attention to designing dispute-resolution provisions, in recent decades they have virtually never concluded treaties that provide for the resolution of disputes by the ICJ, ITLOS, or other classic first-generation tribunals; only five times in the 1755 treaties studied did states agree to submit disputes to the ICJ or a similar tribunal. Indeed, and ironically, 179 treaties providing for interstate arbitration as a dispute-resolution mechanism specified the president of the ICJ as the default appointing authority for arbitrators.³⁵¹ Rather than using the ICJ to resolve disputes, states are instructed to use the president of the ICJ as a means of ensuring the timely appointment of arbitral tribunals, a revealing indicator of states’ current attitudes toward effective forms of international adjudication. Similarly, and again ironically, the PCA has emerged after decades of disuse in recent years—but only after reinventing itself as an appointing authority for international investment and commercial arbitrations, which have dramatically increased its caseload.³⁵²

In contrast, in the vast majority of treaties in which states agree to some form of binding third-party adjudication—94 percent, or roughly 20 percent of all reported treaties—they select some form of arbitration. Moreover, in a substantial number—roughly 10 percent of all reported treaties—states agree to arbitration mechanisms providing for enforceable awards, as is the case in most BITs and many bilateral air-transport treaties. This pattern of state practice both confirms the popularity of second-generation tribunals and

award against the Association.”); Loan Agreement (Rural Development Project), Pol.-Int’l Bank for Reconstruction & Dev., § 10.04(k), July 25, 2000, 2143 U.N.T.S. 3, 51 (“[A]ny party may: (i) enter judgement upon, or institute a proceeding to enforce, the award in any court . . . against any other party; (ii) enforce such judgement by execution; or (iii) pursue any other appropriate remedy . . . for the enforcement of the award and the provisions of the Loan Agreement or the Guarantee Agreement.”).

351. An additional seven treaties provide for concurrent appointing authorities between the ICJ and another entity, generally either the Secretary General of the UN or the Secretary General of the PCA.

352. *See supra* text accompanying notes 69–70.

suggests that usage of these tribunals will continue to be significant in the future.

3. *Importance of Second-Generation Tribunals to Contemporary International Affairs and Law.* Second-generation tribunals are also vitally important to contemporary regimes for international trade and investment and, more generally, to the development and application of international law. As discussed, international commercial and investment arbitrations, backed by the possibility of litigation in national courts against foreign states, play a central role in contemporary international trade and investment by providing a neutral, efficient means of resolving disputes.³⁵³ The WTO is equally central to resolving disputes over contemporary international-trade regulation.³⁵⁴ In each of these instances, second-generation tribunals are essential to the fabric and success of modern trade and investment: without this form of dispute resolution, international trade and investment would be materially riskier and more difficult.

As discussed, second-generation tribunals also deal with significant issues of national regulatory authority and the constraints imposed on that authority by international law. Investment arbitration and WTO decisions determine the compatibility of a wide range of domestic regulatory regimes with international standards, including the relationship between domestic prohibitions against expropriatory or inequitable conduct and WTO requirements regarding discriminatory treatment.³⁵⁵ Commercial arbitrations and national court litigation involving foreign states also frequently raise significant issues of international law, national regulatory policy, and government conduct.³⁵⁶ In each case, the decisions of second-

353. *See supra* text accompanying notes 188–91, 213–16, 260–61. The availability of this means of dispute resolution is critical to the willingness of parties to engage in international commercial transactions with state entities: if private parties and states do not have confidence that future disputes can be resolved fairly and efficiently, then they will not enter into international transactions.

354. *See supra* text accompanying notes 323–24.

355. *See supra* text accompanying notes 252–54, 323–24.

356. *See supra* text accompanying notes 188–90, 214–16. National court litigation involving foreign states also resolves disputes over international human-rights norms. *See, e.g.*, POSNER, *supra* note 9, at 207–25 (“If a plausible claim can be made that the emission of greenhouse gases violates human rights, and that these human rights are embodied in treaty or customary international law, then American courts may award damages to victims.”); Koh, *supra* note 9, at 2347 (“[E]xamples of this . . . include[] international human rights suits . . . as well as actions by foreign governments against individual, American government, and corporate defendants.”).

generation tribunals have contributed to the development of significant and growing bodies of international law that again are essential to contemporary international-trade and investment regimes.³⁵⁷

The vital role played by the decisions of second-generation tribunals in international trade and investment compares favorably with the role of first-generation tribunals in contemporary international affairs. As discussed, states make only limited use of traditional first-generation tribunals—both in drafting dispute-resolution mechanisms for contemporary treaties and in actually using adjudicatory mechanisms. Moreover, outside the context of boundary disputes, even when states have submitted disputes to traditional international tribunals, the resulting decisions have frequently had limited practical effect—in part because they often have involved largely symbolic matters, have been ignored, or for other reasons. Proceedings before the ICJ such as the *LaGrand Case*,³⁵⁸ *Legality of Use of Force*,³⁵⁹ *Oil Platforms*,³⁶⁰ *Military and Paramilitary Activities in and Against Nicaragua*,³⁶¹ and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*³⁶² have generated substantial media attention

357. The significant role of investment arbitration in the development of contemporary international law has been noted by both its proponents, e.g., Jan Paulsson, *International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law*, TRANSNAT'L DISP. MGMT. (Dec. 2006), <http://www.transnational-dispute-management.com/article.asp?key=883> (“[T]he field of international investment arbitration[s] . . . legal status as a source of law is in theory equal to that of other types of international courts or tribunals.”), and its critics, e.g., GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 4–10, 70 (2007) (“[I]nvestment treaty arbitration . . . should . . . be understood as an international system that is elaborate and well entrenched, that has wide geographic scope, and that governs the bulk of the capital flows into developing and former communist countries.”); William Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 283–96 (2010) (“[M]uch of investment treaty arbitration today must be understood as public regulatory or administrative law.”); Gus van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 149 (2006) (“[I]nvestment arbitration would appear to be the *only* case of global administrative law in the world today.”).

358. *LaGrand Case* (Ger. v. U.S.), 2001 I.C.J. 466 (June 27).

359. E.g., *Legality of Use of Force* (Serb. & Montenegro v. U.K.), Preliminary Objections, 2004 I.C.J. 1307 (Dec. 15).

360. *Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

361. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

362. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Geor. v. Russ.), Preliminary Objections (Apr. 1, 2011), available at <http://www.icj-cij.org/docket/files/140/16398.pdf>.

but have had limited impacts on the actual conduct of states. Similarly, none of the ITLOS's decisions have had any effect on the actual behavior of states or private parties.³⁶³

Instead, it is in commercial arbitrations, WTO cases, and BIT or ICSID proceedings that substantively important disputes have been decided: over the financial crises in Latin America and Asia, over the treatment of energy sectors in Russia and Venezuela, over civil-aviation subsidies in Europe and the United States, over environmental regulations in the United States, and over the civil-justice system. Similarly, it is increasingly in WTO, ICSID, and Iran-U.S. Claims Tribunal decisions—not ICJ, ITLOS, or PCA decisions—that important contemporary international-law principles dealing with issues of trade and investment, including expropriation and state responsibility, are found. Indeed, as noted previously, one of the primary reasons for the criticisms that have been leveled against some second-generation tribunals—notably, against investment arbitration and WTO tribunals—is concern about the increasing importance of their decisions.³⁶⁴

Finally, second-generation tribunals provide many of the best examples of the successful application of international law over the past forty years. International investment-arbitration tribunals have been generally successful in adjudicating a wide range of disputes involving alleged abuses of state authority during recent decades;³⁶⁵ at the same time, the existence of effective adjudicatory mechanisms for investment protections has had significant effects on state behavior.³⁶⁶

363. See *supra* text accompanying notes 124–26.

364. E.g., VAN HARTEN, *supra* note 357, at 4–11 (“[S]tates have enabled privately contracted adjudicators to determine the legality of sovereign acts and to award public funds to businesses that sustain loss as a result of government regulation. This undermines basic hallmarks of judicial accountability, openness, and independence.”); Burke-White & von Staden, *supra* note 357, at 283–87 (“[I]nternational investment arbitration has become ‘a part of the ‘normal’ investment landscape.’” (quoting U.N. CONFERENCE ON TRADE & DEV., LATEST DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT, at 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2009/6/Rev1 (2009))); see also *supra* text accompanying note 269.

365. See *supra* text accompanying notes 252–54. Second-generation tribunals have also played a vital role in developing a range of international-law topics, including procedural, evidentiary, remedial, and other issues. See CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION 3–4, 83–224 (2007) (“[I]nternational courts are increasingly recognizing that they have the power to issue judgements and awards in mandatory form. This appears to be an indispensable complement to the adjudicative function of international courts . . .”).

366. See, e.g., Kingsbury & Schill, *supra* note 262, at 59 (“States, and their legal advisors, would be rash not to consider the arbitral jurisprudence on a specific issue in deciding how to

Similarly, international commercial-arbitration tribunals have successfully resolved countless substantial disputes between states or state entities and private parties during the same time period and provide an effective mechanism for holding states to their commercial—and other—commitments.³⁶⁷ For its part, the WTO has adjudicated, again generally successfully, a number of significant trade disputes³⁶⁸ and has influenced state behavior in instances in which adjudication has not ensued.³⁶⁹ Likewise, the Iran-U.S. Claims Tribunal and the UNCC resolved significant disputes in difficult political circumstances.³⁷⁰ In all of these cases, second-generation tribunals have played vital roles in effectively applying contemporary international law and directly affecting state conduct.

B. Implications of Second-Generation Tribunals for International Adjudication

The success and frequent use of second-generation tribunals have significant implications for the analysis of contemporary international adjudication. These phenomena bear directly on conclusions about the efficacy and importance of international adjudication and, hence, about the resources and attention that should be devoted to designing and using adjudicatory mechanisms. They also are directly relevant to prescriptions for the design of future international tribunals.

1. *Efficacy and Importance of International Adjudication.* The success of second-generation tribunals directly contradicts central claims by skeptics about the efficacy and value of international adjudication and, more broadly, international law. It is wrong to conclude, as Professors Posner, Yoo, and others do, that

deal with a particular foreign investment. Regard to investment treaty awards is evident also in changes in State practice as States come to draft new investment treaties or revise existing ones.”); see also U.N. CONFERENCE ON TRADE & DEV., DISPUTE SETTLEMENT: INVESTOR-STATE, at 13, U.N. Doc. UNCTAD/ITE/IIT/30, U.N. Sales No. E.03.II.D.5 (2003) (“[T]he willingness to accept internationalized dispute settlement on the part of the host country may well be motivated by a desire to show commitment to the creation of a good investment climate. This may be of considerable importance where that country has historically followed a restrictive policy on foreign investment and wishes to change that policy for the future.”).

367. See *supra* note 217.

368. See *supra* notes 320, 323.

369. See, e.g., Guzman, *supra* note 1, at 225 (“The [WTO Appellate Body] is perceived to be quite effective, meaning that it promotes compliance with the underlying legal rules.”).

370. See *supra* Part II.B.4.

the proliferation of international courts is a sign of the weakness of the international system, not its strength. . . . States set up courts and then find they cannot control them. Rather than submitting to their jurisdiction, they set up even more courts or more arbitration panels—ones that they think they *can* control.³⁷¹

It is also wrong to conclude that “[a]djudication today remains marginal to world affairs.”³⁷²

On the contrary, the development of second-generation tribunals has entailed states’ devoting substantial effort to creating new forms of international adjudication that are more, not less, effective—including forms of enforceable, effectively compulsory adjudication. It has also involved states’ then using, not ignoring, those dispute-resolution mechanisms in a very substantial number of cases, particularly as compared with other forms of international adjudication—again, notwithstanding the fact that these mechanisms produce enforceable results. Moreover, in many circumstances, such as investment and commercial arbitration, foreign-sovereign-immunity litigation, and claims-settlement tribunals, states have created adjudicatory mechanisms that private parties—not just states—can use, taking the ability to determine whether or not to use these mechanisms out of state control.

None of these developments conform to the image of ineffective, marginal international adjudication ignored by states, an image that is central to skeptics’ evaluations of the field. Instead, states have created an almost entirely new generation of tribunals, vesting them with the power to issue peculiarly effective, enforceable decisions, often at the behest of private parties, and have then made frequent use of those tribunals. This is exactly the opposite of what Professor Posner’s, Professor Yoo’s, and other critics’ analyses claim. The frequent use and efficacy of these second-generation tribunals provide compelling evidence of the success of international adjudication and, more generally, of international law itself.³⁷³

371. Posner & Yoo, *supra* note 7, at 173–74; *see also id.* at 167 (“[T]he most plausible reason for the proliferation of courts [is that] states become unhappy with an existing international court, and they work around it by depriving it of jurisdiction and establishing additional courts . . .”).

372. POSNER, *supra* note 9, at 132.

373. Conversely, international investment and commercial arbitration and WTO dispute resolution are subject to criticism precisely because of their significance to contemporary international affairs and the development of international law. *See supra* text accompanying notes 263–69.

2. *Models for Future International Tribunals.* The frequent use and success of second-generation tribunals also have important implications for the design of contemporary international adjudicatory bodies. The success indicates that the structure of these forms of adjudication deserves at least the same attention as traditional first-generation tribunals; indeed, the evidence suggests that second-generation tribunals will often provide a more attractive and effective model than traditional adjudicatory mechanisms for future forms of international adjudication.

Nevertheless, most commentary has not regarded second-generation tribunals as helpful models for future international adjudicatory bodies. On the one hand, proponents of international adjudication argue that there is a “growing global consensus that adjudicatory bodies outside the nation state should be independent.”³⁷⁴ These commentators contend that international adjudicatory bodies should be structured “more like . . . court[s]”³⁷⁵—particularly, more like independent appellate courts such as the ECJ.³⁷⁶ On the other hand, skeptics of international adjudication take the opposite tack, arguing that “[i]nternational courts succeed best when they are subject to strict limitations—voluntary jurisdiction, limited jurisdiction, weak remedies, and so forth.”³⁷⁷

Neither of these prescriptions can be reconciled with the frequent use and success of second-generation tribunals over the past three decades. That success weighs strongly against using idealized conceptions of either independent courts or purely dependent tribunals as the exclusive models for international tribunals.

As discussed, virtually all first-generation tribunals have enjoyed very limited success—apart from the ECJ, which is a regional European exception with limited relevance in other international settings.³⁷⁸ The record of first-generation tribunals stands in stark

374. Helfer & Slaughter, *supra* note 16, at 914; *see also supra* text accompanying notes 40–41.

375. Helfer & Slaughter, *supra* note 6, at 365; *see also supra* text accompanying notes 37–41.

376. Helfer & Slaughter, *supra* note 6, at 276 (“[The ECJ] perche[s] atop national governments and national law with no direct relationship to either.”); *see also id.* at 387 (noting the success of the ECJ in making up for its “lack of direct coercive power by convincing domestic government institutions to exercise power on [its] behalf”).

377. POSNER, *supra* note 9, at 173.

378. *See supra* text accompanying notes 154–65. Although states have created significant numbers of nominally independent tribunals modeled on national appellate courts, such as the PCIJ, ICJ, ITLOS, and many regional courts, they have in practice made limited use of these tribunals. *See supra* text accompanying notes 65–68, 90–92, 103–06, 124–25.

contrast to the experience with second-generation tribunals, which have witnessed substantial and continuing usage and notable success—both in resolving individual disputes and in playing essential systemic roles in contemporary international affairs.³⁷⁹ Although the model of traditional first-generation adjudication may have useful applications in some circumstances, such as within some regional integration efforts, the structure and design of second-generation tribunals offer at least an equally—and often materially more—promising prospect as a model for most future international adjudicatory bodies.

Conversely, the success of second-generation tribunals also argues against prescriptions for entirely dependent adjudicatory mechanisms that are wholly subject to the state parties' control and that lack any enforcement authority. As discussed, second-generation tribunals have flourished, notwithstanding their power to render enforceable decisions, including decisions at the behest of private parties. Indeed, the success and frequent use of second-generation tribunals are partially attributable precisely to the enforceable character of their decisions, which enables states to make highly credible commitments and allows both states and private parties effectively to enforce those commitments.

Moreover, although the structures and procedures of second-generation tribunals have numerous elements of dependence, they also have important aspects of independence. In particular, second-generation tribunals share a number of institutional characteristics that differ from both “independent” first-generation tribunals and purely “dependent” tribunals. Thus, second-generation tribunals have: (a) been granted limited jurisdictional and remedial competence, ordinarily only the power to award monetary relief; (b) been utilized in individual cases, with substantial involvement of the parties; and (c) applied adjudicatory procedures that are aimed at efficient, effective factfinding, that are tailored to particular parties and cases, and that are frequently combined with some form of limited appellate review. These characteristics are most apparent with international commercial- and investment-arbitration tribunals and claims-settlement bodies, but can also be observed, less consistently, in WTO proceedings and foreign-sovereign-immunity litigation in national courts.

379. *See supra* Part III.A.

First, as discussed, the jurisdiction of international commercial- and investment-arbitration tribunals is defined narrowly and with considerable specificity by the arbitration provisions of either a commercial agreement, a bilateral treaty, or another document.³⁸⁰ Claims-settlement tribunals exercise comparably limited, determinate jurisdiction.³⁸¹ The WTO is similar, with the panel's and the Appellate Body's competence limited to interpretation of specified WTO agreements³⁸² and their interpretive discretion constrained by both the detailed character of the agreements and the formal prohibitions in the WTO DSU.³⁸³ These aspects of second-generation adjudication contrast markedly with the sweeping aspirations and broad compulsory jurisdiction of traditional first-generation tribunals, features that are also characteristic of independent national courts.³⁸⁴

A related aspect of the limited jurisdiction of second-generation tribunals is the remedies they may grant. The ICSID Convention limits the obligation of contracting states to enforce awards to the pecuniary aspects of such awards.³⁸⁵ Similarly, the enforcement of

380. See *supra* text accompanying notes 218–37. In the case of commercial-arbitration agreements, these provisions are typically included in commercial contracts and provide for arbitration of a defined category of future disputes—typically those “relating to” a particular contract. See 1 BORN, *supra* note 197, at 1090 (listing the “limited number of fairly standard formulae used in arbitration agreements to describe the scope of such provisions”). In the case of investment arbitrations, many proceedings are conducted pursuant to traditional arbitration clauses covering future disputes in investment agreements. NEWCOMBE & PARADELL, *supra* note 195, §§ 1.31–33 (“The traditional form of consent to arbitration between a foreign investor and a host state was through an arbitration clause in a contract . . .”); SCHREUER ET AL., *supra* note 220, at 356–62 (discussing the form and validity of concurrent arbitration clauses). Alternatively, the jurisdiction of tribunals is defined by the terms of a BIT, sometimes in conjunction with a further expression of state consent—in investment legislation or otherwise. See *supra* text accompanying notes 222–28.

381. See *supra* text accompanying notes 277, 281.

382. See DSU art. 3(2) (noting that the WTO's dispute-settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law”); MALCOLM N. SHAW, INTERNATIONAL LAW 1036 (6th ed. 2008) (explaining that the WTO has jurisdiction when “a member state considers that a measure adopted by another member state has deprived it of a benefit accruing to it directly or indirectly under the GATT or other covered agreements”); Trachtman, *supra* note 304, at 338, 342–43 (“The WTO dispute resolution system is clearly not a court of general jurisdiction, competent to apply all applicable international law.”); *supra* text accompanying notes 304, 313.

383. See DSU art. 3(2) (“Recommendations and rulings of the [DSB] cannot add to or diminish the rights and obligations provided in the covered agreements.”); *supra* notes 303–04 and accompanying text.

384. See *supra* text accompanying notes 51–52, 81, 97–99.

385. See *supra* text accompanying notes 241–42.

awards under BITs, NAFTA, and the New York Convention is either formally or effectively limited to monetary enforcement against a foreign state's assets.³⁸⁶ Enforcement of WTO decisions is also effectively monetary in character, taking place through the imposition of trade sanctions within specified financial limits.³⁸⁷ Again, this contrasts with the putatively broad remedial jurisdiction of the ICJ, the ITLOS, and other first-generation tribunals.³⁸⁸

The limited jurisdictional and remedial competence of second-generation tribunals contrasts with the calls for independent international tribunals modeled on either the ICJ or domestic appellate courts and exercising broad competence. Indeed, the success of second-generation adjudicatory mechanisms with limited, specifically defined jurisdictional mandates recommends exactly the opposite approach toward tribunals' competence. At the same time, the success of second-generation tribunals that have been authorized to issue enforceable decisions at the behest of private parties also contrasts with competing prescriptions that international tribunals should be weak, ineffective, and subject to state control.

A second and related structural characteristic of second-generation tribunals concerns the selection of decisionmakers. Enforceable adjudicatory mechanisms have generally been accepted only when tribunals are selected for specific cases, with substantial involvement of the parties. This has typically resulted in tribunals that are, in the terminology of most commentators, relatively dependent on the parties to a dispute.³⁸⁹

Thus, in commercial arbitrations, there is no standing decisionmaking body; parties to disputes instead choose tribunals on

386. See *supra* text accompanying notes 204–07.

387. See *supra* text accompanying notes 317–20.

388. A related feature of second-generation tribunals is that they typically apply comparatively specific legal rules, rather than indeterminate standards. See Gary Born, *Designing Effective International Tribunals 1* (Sept. 27, 2011) (unpublished manuscript) (on file with the *Duke Law Journal*) (“States have generally rejected the ICJ’s optional clause jurisdiction . . . and have similarly declined to accept the ITLOS’s general jurisdiction.”); *supra* text accompanying notes 229–37, 301–09.

389. See Helfer & Slaughter, *supra* note 16, at 942–54 (“[S]tates . . . fine-tune their influence over the tribunal and its jurisprudential output using a diverse array of structural, political, and discursive controls.”); Posner & Yoo, *supra* note 7, at 7 (“[S]tates will be reluctant to use international tribunals unless they have control over the judges.”); cf. Helfer & Slaughter, *supra* note 6, at 300–01, 303–04, 312–14 (suggesting strategies for choosing jurists to attract claimants, stressing the importance of independent-factfinding capacity to a tribunal’s authority, and emphasizing “the link between a supranational tribunal’s authority and its neutrality” with respect to political interests).

an ad hoc basis, and jurisdiction is limited to particular cases. In practice, parties ordinarily agree upon the identities of the members of three-person tribunals, often with each party nominating a co-arbitrator and the two co-arbitrators selecting the presiding arbitrator—failing which, an appointing authority will do so.³⁹⁰ Similarly, in investment arbitrations, tribunals are selected on an ad hoc, case-by-case basis, through appointment procedures identical to those in commercial arbitrations.³⁹¹ WTO panels are selected on a broadly similar, case-by-case basis, with the parties free to agree upon the composition of the panels in particular cases, and the Dispute Settlement Body (DSB) selecting panels in the absence of party agreement.³⁹² All of these procedures differ materially from the ideal of independent standing judiciaries prescribed for international tribunals by many contemporary commentators.³⁹³

At the same time, however, various forms of second-generation adjudication also provide for limited forms of appellate review of first-instance decisions, often by tribunals with a measure of independence from the parties. This type of review exists in ICSID investment arbitrations,³⁹⁴ WTO proceedings,³⁹⁵ and NAFTA Chapter 19 proceedings.³⁹⁶ These mechanisms combine first-instance tribunals that are highly dependent in most respects with a review tribunal that exercises very limited jurisdiction and whose members enjoy a higher—but still limited—degree of independence. Again, this structure contrasts with both blanket calls for independent

390. See 1 BORN, *supra* note 197, at 17, 1399 (“[I]n most jurisdictions, a party’s failure to appoint an arbitrator in accordance with an *ad hoc* arbitration agreement permits its counterparty to apply for judicial appointment of the defaulting party’s co-arbitrator.”).

391. See *supra* text accompanying notes 235–37.

392. See *supra* note 305.

393. See *supra* text accompanying notes 374–76.

394. ICSID arbitral awards—but not non-ICSID, BIT, or NAFTA awards—are subject to annulment on very limited grounds by annulment committees, selected by ICSID—not the parties—from a standing list of potential committee members. See *supra* note 237.

395. Broadly paralleling the ICSID structure, WTO panel reports are subject to limited appellate review by the WTO Appellate Body—a standing body from which the members of appellate tribunals in particular cases are selected. Although less dependent than arbitral tribunals, the WTO Appellate Body is more dependent than most first-generation tribunals, including the ICJ and the ITLOS; among other things, WTO Appellate Body members are chosen for relatively short four-year terms and are eligible for reappointment, which is coveted. See *supra* note 312 and accompanying text.

396. An appellate mechanism is provided by NAFTA’s Extraordinary Challenge Committee, which can hear a limited range of challenges to NAFTA awards under Chapter 19. NAFTA, *supra* note 45, art. 1904(13), 32 I.L.M. at 688.

international tribunals and similar prescriptions for entirely dependent tribunals.

A third structural aspect of second-generation tribunals concerns the procedures they apply, particularly for factfinding. The procedural and factfinding regimes in international commercial and investment arbitrations have been designed to satisfy users' expectations—including those of state parties—and, at the same time, to provide mechanisms for addressing dissatisfaction, both systemically and in specific cases.³⁹⁷ Thus, most international arbitrations are conducted pursuant to institutional rules that provide a comparatively skeletal procedural framework,³⁹⁸ allowing the parties substantial freedom to participate in the design of procedures tailored to particular parties and disputes.³⁹⁹

The procedures in most second-generation tribunals have been designed to facilitate the effective presentation and evaluation of factual evidence. Both commercial and investment arbitrations typically involve substantial factfinding, including the examination of witnesses in direct and cross-examination, mandatory disclosure of documents, and evaluation of expert evidence.⁴⁰⁰ The same is true of the Iran-U.S. Claims Tribunal and WTO panels, which involve

397. See *supra* text accompanying notes 203, 235–37, 264–68. Similar procedures are used in the Iran-U.S. Claims Tribunal and WTO panel proceedings. See *supra* text accompanying notes 280, 305–06.

398. Examples include the UNCITRAL Rules and the rules of leading arbitral institutions. See 1 BORN, *supra* note 197, at 150–69 (outlining the rules of UNCITRAL and describing sixteen leading international-arbitration institutions).

399. See Kenneth S. Carlston, *Procedural Problems in International Arbitration*, 39 AM. J. INT'L L. 426, 448 (1945) (“Procedure is no unalterable course of conduct to which all tribunals must adhere. It should always be adapted to facilitate the course of the particular arbitration and to enable the economical accomplishment of its task within the time fixed.”); Laurent Lévy & Lucy Reed, *Managing Fact Evidence in International Arbitration*, 13 ICCA INT'L ARB. CONGRESS 633, 644 (2007) (“Adopting formal guidelines . . . is unnecessary and counterproductive. . . . [E]xtensive harmonization of procedural rules for witness testimony would not serve the interests of parties wishing to resort to international commercial arbitration . . .”).

400. See John R. Crook, *Fact-Finding in the Fog: Determining the Facts of Upheaval and Wars in Inter-State Disputes*, in THE FUTURE OF INVESTMENT ARBITRATION 313, 315–20 (Catherine A. Rogers & Roger P. Alford eds., 2009) (discussing the process of factfinding in investor-state arbitration). See generally Richard Mosk, *The Role of Facts in International Dispute Resolution*, 304 RECUEIL DES COURS 11 (2003) (discussing factfinding procedures in international adjudication and arbitration).

procedures broadly similar to those in commercial and investment arbitrations.⁴⁰¹

Again, the procedures in these second-generation settings differ materially from the procedures in traditional international adjudications, as well as in purely dependent tribunals. The procedures used in most first-generation tribunals are a standing set of generally applicable rules that are drawn up in a multilateral setting in which the need to satisfy a wide range of very different procedural expectations produces a lowest-common-denominator approach, and that are applied by large tribunals of a dozen or more senior jurists modeled on national appellate courts. Not surprisingly, these procedures are typically ineffective when used for factfinding. For example, “hearings” in the ICJ involve three hours of sitting per day, during which counsel read prepared submissions to a fifteen-person tribunal that virtually never asks questions.⁴⁰² Moreover, compelled disclosure from counterparties is essentially unknown,⁴⁰³ and witness testimony and examination is equally rare.⁴⁰⁴ Other first-

401. On the Iran-U.S. Claims Tribunal, see STEWART ABERCROMBIE BAKER & MARK DAVID DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 1–3 (1992); and Jamison M. Selby & David P. Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 INT’L LAW. 211 (1984). On the WTO, see Bashar H. Malkawi, *Arbitration and the World Trade Organization*, 24 J. INT’L ARB. 173, 176–78 (2007).

402. Cecily Rose, *Questioning the Silence of the Bench: Reflections on Oral Proceedings at the International Court of Justice*, 18 J. TRANSNAT’L L. & POL’Y 47, 49 (2008) (“During the [ICJ] hearings, the Registrar and the fifteen judges of the ICJ . . . sit in almost total silence in black robes behind a long bench. . . . [R]epresentatives . . . address the bench virtually uninterrupted for several hours, usually by reading, verbatim, a prepared text distributed in advance to the judges.”); see also Alain Pellet, *Remarks on Proceedings Before the International Court of Justice*, 5 LAW & PRAC. INT’L CTS. & TRIBUNALS 163, 181 (2006) (“‘Procedurally speaking,’ the [ICJ] is not aging well.” (footnote omitted)). *But see* 3 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005*, at 1297, 1304 (4th ed. 2006) (“Although the Court does not usually interfere in the manner in which a case is pleaded, the faculty to put questions . . . is regularly used.”). See generally ANNA RIDDELL & BRENDAN PLANT, *EVIDENCE BEFORE THE INTERNATIONAL COURT OF JUSTICE* 308–11 (2009) (providing reasons for the lack of testimonial evidence in the ICJ).

403. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 336 (2002) (“[T]he ICJ has no procedures by which one party can compel the disclosure of evidence by the other, because compelled disclosure is inconsistent with the nature of sovereignty.”); Crook, *supra* note 400, at 326 (“Tribunals in inter-state cases rarely encourage or require states to disclose documents or evidence to the other party . . .”).

404. See Crook, *supra* note 400, at 327 (“There have been few cases in which the [ICJ] has heard oral testimony”); Phillip C. Jessup, *Foreword to DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS*, at vii, x (rev. ed. 1975) (“Most of the evidence received by the [ICJ] is documentary”); cf. 3 ROSENNE, *supra* note 402, at 1312–13 (summarizing the process of obtaining witness testimony in several cases); Rosalyn Higgins, *The*

generation tribunals also provide minimal opportunities for effective factfinding.⁴⁰⁵

In all of these respects, second-generation tribunals share a number of vital institutional characteristics and procedures that differ substantially from both their independent first-generation counterparts and from prescriptions for purely dependent tribunals. Given the striking success of second-generation tribunals, it is both appropriate and necessary to consider whether these characteristics provide attractive, effective models for future forms of international adjudication.

Addressing this question raises issues that are beyond the scope of this Article and that are the subjects of a forthcoming companion piece.⁴⁰⁶ Among other things, the subject requires more detailed consideration of the structures and procedures that states have used for existing second-generation tribunals; the particular settings in which such tribunals have successfully been used; and the questions whether second-generation structures could be used in new settings, and, if so, which ones. As discussed, second-generation tribunals have been used only in relatively specific contexts, principally concerning trade and investment, and have been subject to significant structural conditions. It may be that second-generation structures are ill suited for other settings or, conversely, that they can be applied much more

Desirability of Third-Party Adjudication: Conventional Wisdom or Continuing Truth?, in INTERNATIONAL ORGANIZATIONS: LAW IN MOVEMENT 37, 42–46 (J.E.S. Fawcett & Rosalyn Higgins eds., 1974) (“The evidence seems to be that, so far as fact-finding is essential to the weighing of any legal claims, fact-finding commissions are likely to be more effective than a judicial body.”).

405. Traditional interstate arbitrations were historically conducted pursuant to procedures that closely resembled PCIJ and ICJ proceedings, albeit with less unwieldy tribunals that provided little room for the development of factual matters. See James Crawford, *Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases*, in THE ART OF ADVOCACY IN INTERNATIONAL ARBITRATION 11, 12–13 (R. Doak Bishop ed., 2004) (“Since new evidence . . . is generally inadmissible after the close of written pleadings, the notion of ‘development’ generally takes the form of recapitulation, emphasis and argument in the alternative.”). The ITLOS’s procedural rules and the composition of the tribunal, which consists of twenty-one members, closely parallel those of the ICJ and, if the tribunal is ever used to any appreciable extent, would likely produce comparable procedures. See UNCLOS, *supra* note 116, annex VI, art. 2, 1833 U.N.T.S. at 561 (“The Tribunal shall be composed of a body of 21 independent members”); *id.* annex VI, art. 13, 1833 U.N.T.S. at 564 (“[A] quorum of 11 elected members shall be required to constitute the Tribunal.”); *supra* text accompanying notes 116–26. Similarly, regional courts, such as the ACJHR and CACJ, are also relatively large tribunals, again structured like appellate courts, which offer few opportunities for effective factfinding. See *supra* text accompanying notes 129–47.

406. Born, *supra* note 388.

widely. It may also be that different tribunals, with different institutional designs, are appropriate in different settings.

The essential point for present purposes, however, is that the consideration of models for international adjudication cannot properly be limited to traditional first-generation tribunals, based on independent national appellate courts, or limited to prescriptions for purely dependent tribunals. Instead, models for future international tribunals should also look to the carefully designed, distinctive structures and procedures of second-generation tribunals. It is these tribunals that have achieved the most frequent usage and the most successful application of international law in the late twentieth and early twenty-first centuries, and it makes no sense for their model to continue to be ignored in discussions of contemporary international adjudication.

CONCLUSION

The past forty years have seen the development of a new generation of international tribunals, best represented by international commercial- and investment-arbitration tribunals. Unlike traditional public-international-law tribunals, these second-generation tribunals issue enforceable decisions and exercise what is effectively compulsory jurisdiction. They have also been the most frequently used and, in many respects, most successful form of international adjudication in recent decades. Among other things, second-generation tribunals have played vital roles in international trade, finance, and investment; have contributed to the development of important fields of international law; and have provided leading contemporary examples of international law working in practice.

The success and frequent usage of second-generation tribunals have important implications for analysis of international adjudication. They contradict claims that international adjudication is marginal and unimportant in contemporary international affairs and that states do not use international tribunals, particularly tribunals that are effective. In fact, second-generation tribunals have been widely and successfully used, in part precisely because they issue effective and enforceable decisions.

At the same time, the widespread usage and success of second-generation tribunals also contradict prescriptions that future international tribunals be modeled on independent first-generation tribunals, national courts, or, alternatively, on entirely dependent

tribunals. Instead, successful second-generation tribunals exhibit a blend of structural characteristics that contradict blanket prescriptions for independence and that instead counsel in favor of more tailored, nuanced institutional designs of future international tribunals than existing prescriptions contemplate.

APPENDIX

Dispute-Resolution Provisions in Treaties and International Agreements (1990, 1995, 2000, 2005)							
		1990	1995	2000	2005	Total	Avg.
a)	Total Number of Registered Treaties with Text Available (“Available Treaties”)	564	647	324	220	1755	439
b)	Number of Treaties with a Dispute-Resolution Provision (DRP)	151	241	175	105	672	168
c)	As a Percentage of Available Treaties (b/a × 100)	27%	37%	54%	48%	38%	
d)	“Negotiation” DRP: Number of Treaties	56	88	98	63	305	76
e)	As a Percentage of DRP Treaties (d/b × 100)	37%	37%	56%	60%	45%	
f)	“Specific Mechanism” DRP: Number of Treaties	5	5	2	1	13	3
g)	“ICJ Jurisdiction” DRP: Number of Treaties	1	1	1	0	3	1
h)	“Arbitration” DRP: Number of Treaties	89	144	73	42	348	87
i)	Number of BITs with an Arbitration DRP	33	64	24	13	134	34
j)	Number of ICAO Treaties with an Arbitration DRP	19	24	15	3	61	15
k)	Number of Other Treaties with an Arbitration DRP	37	56	34	26	153	38
l)	Regional Court DRP (ECJ, CACJ, etc.): Number of Treaties	0	3	1	0	4	1