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The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review

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As this volume demonstrates, scholarly interest in international law's intersection with international politics is growing. Much international law scholarship excludes international courts from the conversation, dismissing as irrelevant or dysfunctional the international legal institutions that elaborate and help enforce the law. The proliferation, rising usage and growing political importance of international courts (ICs) around the world makes this standard disclaimer increasingly less viable. Many domains of international law—international economic law, human rights law, criminal law, administrative law, and even constitutional law—have become judicialized. The judicialization of international relations occurs when courts gain authority to define what the law means and where litigation becomes a useful way to reopen political agreements. Negotiations among actors become debates about what is legally permissible, and politics takes place in the shadow of courts with the lurking possibility of litigation shaping actor demands and political outcomes.

In an effort to broaden the debate about the role of international courts in the international legal system, this chapter draws from a study of the universe of operational international courts, examining ICs as a category of actors. Section I gives an overview the international judicial order as it exists today. Section II describes the four roles that states have delegated to international courts. The *enforcement role* has ICs assessing state compliance with international law. The *administrative review role* involves ICs reviewing the decisions of administrative actors in cases raised by private litigants. The *constitutional review role* has courts assessing the legal validity of legislative and government actions vis-à-vis higher order legal obligations. The *dispute settlement role* is perhaps the broadest judicial role, in that ICs have the general authority to issue binding interpretations in any dispute that is brought. After defining the four roles, I map these roles onto the universe of international courts in operation as of 2006, reporting the result of a coding of the statutes where the jurisdictions of the twenty-five international courts are defined.

Section III reflects on what the multiple roles of ICs tell us about two debates in the international law and international relations scholarship. I use the four roles to argue that courts can be either agents of states or trustees of law, depending on the judicial role. We might perhaps perceive of ICs as agents and states as principals in other-binding judicial roles, although it probably makes more sense to see international judicial oversight as a policy tool used by states to monitor others. But for self-binding judicial roles, such as constitutional review and enforcement, I stick to the argument that ICs are better conceived of as trustees of the law. I build on this distinction between self-binding and other-binding delegation to ICs to argue that especially where ICs are monitoring the behavior of other actors, compliance concerns recede in importance. I then apply the four-role typology to debates about IC design, arguing that the multiple roles of ICs helps us understand why most ICs today have design features that undermine states' ability to control which cases get litigated. Section IV concludes by

considering what the four roles of ICs mean for concerns about how delegation to international courts perhaps undermines domestic democracy.

I. The Twenty-First Century International Judicial Order

I am interested in how creating international judicial bodies affects international relations. My study approaches the international judiciary in holistic terms, allowing us to see common political dynamics at play across international legal bodies. I use the Project on International Court and Tribunal's definition of an international court,[1] focusing on permanent international courts because their permanence combines with the public nature of their rulings to potentially create a stronger shadow of the law that can affect international affairs and state decision-making, but I recognize that decisions of quasi legal and *ad hoc* bodies can also be authoritative and politically important. This section reports some of the basic descriptive findings from my study of twenty-five operational ICs.[2]

As of 2006, twenty-five permanent international courts were operational, meaning the statutes defining IC's jurisdictions had been ratified, judges appointed and the courts were ready to receive legal complaints.[3] Figure 1 identifies the twenty-five permanent ICs considered in this analysis, organized by the year the court became operational (in parenthesis).[4] Four of these legal bodies are global in reach—the International Court of Justice, International Tribunal of the Law of the Seas (ITLOS), the appellate body of the World Trade Organization, and the International Criminal Court. The rest are regional bodies located in Africa (9 ICs), Europe (6 ICs), Latin America (5 ICs) and Asia (1 IC). These bodies have jurisdiction to hear cases involving economic disputes (17 ICs), human rights issues (5 ICs), and war crimes (3 ICs) and/or the courts have a general jurisdiction that allows them to adjudicate any case involving any issue where plaintiffs have legal standing to invoke the court (9 ICs). A court can be listed more than once if its subject matter jurisdiction extends beyond a single category. I indicate a second listing by using the acronym only.

[1] http://www.pict-pcti.org/ last visited 20 September 2011.
[2] For a through explanation of the data sources and coding criteria, see Alter (forthcoming).
[3] Not all of these courts are particularly active, but I want my sample to include all ICs that can receive cases today. The figure does not include at least seven other formally constituted ICs that appear to be dormant, and six hybrid domestic/international criminal tribunals. For the full listing of active and inactive ICs see: http://www.pict-pcti.org/publications/synoptic_chart.html. This material is updated in Romano 2011.
[4] The founding dates of ICs are actually not easy to pinpoint, as there may be significant time gaps between when states agree to create an IC, when they ratify the necessary treaties and when the court is actually created. For example, the founding protocol for the Economic Community of West African States (ECOWAS) court was drafted in 1991, ratified in 1995, and became binding in 1996. Yet only in 2001 were judges appointed and rules of procedure created. For well-known ICs, I rely on the date that most people know as the founding date of an IC. For less known ICs, I use the date when the first set of judges assumed office.

Figure 1: Region and Subject Matter Distribution of Active ICs (year IC became operational)

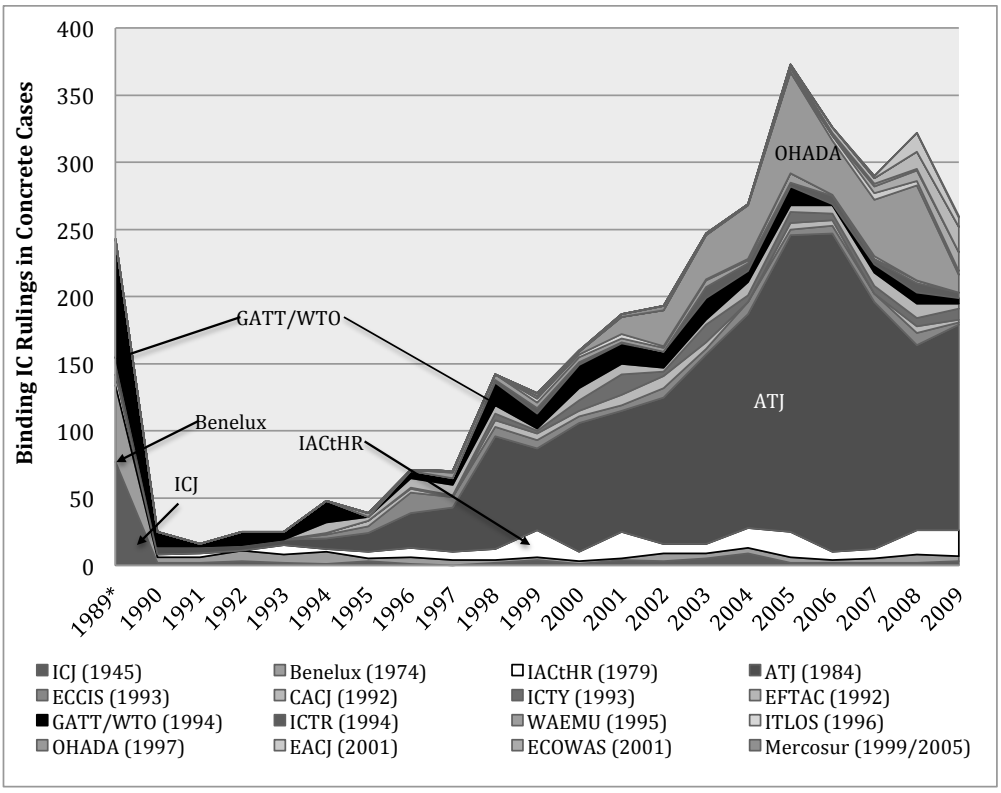
	Europe	Latin America	Africa	Asia	Pan-Regional
International Economic Courts 17 ICs	European Court of Justice (1952) Benelux court (1974) Economic Court of the Common-Wealth of Independent States (ECCIS) (1993) European Free Trade Area Court (1992)	Andean Tribunal of Justice (ATJ) (1984) Central American Court of Justice (CACJ) (1992) Caribbean Court of Justice (CCJ) (2001) Southern Common Market (MERCUSOR) (2004)	West African Economic and Monetary Union (WAEMU) (1995) Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA) (1997) Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998) Central African Monetary Community (CEMAC)(2000) Court of Justice of the East African Community (EACJ) (2001) Economic Community of West African States Court of Justice (ECOWAS CCJ) (2002) Southern African Development Community (SADC) (2005)	Association of Southeast Asian States (ASEAN) (2004)	World Trade Organization Appellate Body (1994)
International Human Rights Courts 5 ICs	European Court of Human Rights (1958)	Inter-American Court of Human Rights (1979) CCJ*	African Court of Peoples and Human Rights (ACtPHR) (2006) ECOWAS CCJ (2005) [SADC can hear national appeals that can involve human right issues; the EACJ envisions adding a human rights jurisdiction]		
International Criminal Tribunals 3 ICs	International Criminal Tribunal for Former Yugoslavia (ICTY) (1993)		International Criminal Tribunal for Rwanda (ICTR) (1994) [Special Court for Sierra Leone is a hybrid international criminal tribunal]		International Criminal Court (2002)
General Jurisdiction 8 ICs	BCJ	CACJ CCJ	WAEMU, CEMAC, EACJ, SADC		International Court of Justice (ICJ) (1945)
Specialized Jurisdiction 1 IC					International Law of the Sea Tribunal (ITLOS) (1996)
Total courts by region	6	5	9	1	4 Pan Regional

N=25					ICs

*CCJ's de facto human rights jurisdiction applies to countries that allow the CCJ to replace the Privy Council as the highest court of appeals.

The "new" ICs in the sample are not only recent creations; they are qualitatively different entities. I give the name "old style" ICs to international courts that lack compulsory jurisdiction. When an IC's jurisdiction is not compulsory, states can decide whether to submit to an IC authority on a case-by-case basis. "New style" ICs have compulsory jurisdiction and access for nonstate actors to initiate litigation, design features that make them far more likely to be activated and to issue judgments in cases in which states are unwilling participants. Of the twenty-five permanent ICs operational as of 2006, twenty-two (88%) have at least partial compulsory jurisdiction, seventeen (68%) allow international institutional actors to initiate binding litigation, and fifteen (60%) have provisions that allow private actors to initiate litigation. These design features explain in part why IC usage has also increased. By the end of 2009, international courts had issued over twenty-seven thousand binding legal rulings. Eighty-eight percent of the total IC output of decisions, opinions, and rulings were issued since the end of the Cold War (1989). Figure 2 below shows the increased usage of ICs since the end of the Cold War. The data includes binding rulings in concrete cases (excluding advisory decisions, interim rulings, appellate decisions and rulings in staff cases). The figure excludes the European Court of Justice (ECJ) and European Court of Human Rights (ECtHR) so as to better see the growth in litigation by all ICs. Before the end of the Cold War, there were five permanent ICs in addition to the ECJ and ECtHR—the International Court of Justice (created 1945), the BENELUX court (created 1974), the Inter-American Court of Justice (created 1979), and the Andean Tribunal of Justice (created 1984). While it lacked a permanent judicial body the WTO's precursor body (the dispute settlement system of the General Agreement on Tariffs and Trade (GATT)) also existed, and I include panel rulings from the GATT era in this count. The first column includes the sum of all international judicial rulings in these five international legal bodies through 1989. The rest of the figure includes litigation for each post-Cold war year from the twenty operational ICs for which I could find data. After the ECJ and ECtHR, the next most active courts are the Andean Tribunal of Justice (ATJ) (1786 rulings), the OHADA court (358 rulings) and IACtHR (193 rulings) and the WTO legal system (117 GATT era panel rulings, 158 WTO era panel rulings) issued by the end of 2009.

Figure 2: Growth in IC Decision-making through 2009 (ECJ & ECtHR excluded)



Binding rulings from the IC's founding through 1989. Source: (Alter, forthcoming)

If we take litigation as a sign of legal demand, we can see a growing number of litigants seizing ICs in an attempt to influence legal and political outcomes. But we can also see from the narrow bands on the graph that many of the ICs are not very active often despite having the same design as some of the more active ICs. Sometimes low levels of activity are easily explained. Some ICs have small memberships and some oversee a small set of binding rules. Low levels of litigation are also to be expected in the first years of an IC's existence. The level of activity and influence of Europe's Court of Justice and Court of Human Rights today make all other ICs pale in comparison; we forget that initially these two ICs were not all that different from today's new ICs. In their first twenty years the European Court of Justice issued only 884 and the European Court of Human Rights only 31 rulings. The lesson: establishing international judicial authority takes time even in the best of circumstances (Alter 2011*a*).

II. The Four Roles of International Courts: Enforcement, Administrative Review, Constitutional Review and Dispute Settlement

Most of us are familiar with a small handful of international legal bodies and their rulings. These examples loom large in our minds, often defining our understanding of international courts. In keeping with the holistic approach to studying ICs as actors, this section discusses the formal mandates of international courts. IC jurisdictions are defined in treaties, which can be amended over time. There are separate treaty provisions for each jurisdictional role defining which actors can raise cases, the types of remedies the IC can order, and in some cases

the scope of legal review that is allowed.[5] I begin by defining each role, offering examples from international legal systems around the world. While ICs can end up playing roles that they were never officially delegated, it is nonetheless helpful to understand what states have tasked ICs to do. The jurisdictional grants define the domains of international judges, sending important signals to litigants and thereby shaping the types of legal suits that are raised and the arguments of advocates. Also, the formal grants of jurisdiction represent relative safe zones for ICs, where the assertion of jurisdiction is least credibly contested and where defenders are most likely to rally in support of an IC ruling. Examining IC jurisdictions reveals that ICs have been delegated a broader set of tasks than many people realize.

International Law Enforcement

Twenty of the twenty-five ICs (80%) operational as of 2006 have been formally empowered to oversee state compliance with international rules. The enforcement role involves ICs reviewing the actions of states, public bodies and in some cases individuals to see if they cohere with the requirements of international law. ICs primarily name a state practice as legal or illegal, and secondarily authorize remedies designed to compensate victims and create costs associated with illegal behavior. For example, the Court of the Economic Community of West African States found that Niger's government failed to protect Hadidjatou Mani from modern-day enslavement, and it awarded her $120,000 which the government immediately paid (Duffy, 2009). The court's contribution to this case was to name the family law practices upheld by national courts as creating the conditions of enslavement, and to specify a remedy.[6] ICs are not unique in primarily flagging noncompliance. Indeed no court actually enforces its rulings or the remedies judges create. Rather judges rely on their own authority to encourage compliance, and, if that fails, on the power of others to bring coercive pressure to bear. At the domestic level, one can assume that governments will provide support for the enforcement of domestic court rulings because national judges are helping to enforce state law, and because coercive power will be employed against individual subjects of the law and not the sovereign itself. With the expectation that states *will* enforce legal rulings, there is perhaps an assumption of coercion behind national legal rulings. Clearly this assumption does not hold internationally. For most people this difference, namely the lack of any international governmental apparatus to enforce IC rulings against states, makes international law unlike domestic law. But as others have pointed out, the situation of ICs is analogous to the constitutional and public law roles of courts in domestic realm (Goldsmith and Levinson 2009; Hathaway and Shapiro 2011).

As scholars have noted, there are many good reasons for states to commit to international judicial oversight. States might self-bind because they do not trust that future governments will stick to international agreements (Elster 2000). Especially where actors have little faith in national judicial checks, agreeing to international judicial oversight can send a helpful signal to foreign investors, international institutions, foreign governments and to the broader public that the government is seriously committed to respecting international covenants (Cooley and Spruyt 2009; Ikenberry 2001; Moravcsik 1997). Political leaders may also prefer that disinterested international judges, rather than actors in powerful Western countries or lawyers appointed jointly with private firms, review their compliance with international rules. At least some of these reasons should span time, yet delegating ICs an enforcement role is largely a post-Cold

[5] Figure 3 below reports on the result of coding the treaties where IC's jurisdictional mandates are defined.

[6] Hadidjatou Mani Koraou v. The Republic of Niger, ECOWAS Case No. ECW/CCJ/JUD/06/08 (Oct. 27, 2008).

War phenomenon. Indeed it is more accurate to say that for many years, states showed an aversion to committing to the compulsory authority of ICs preferring instead to require that states first consent before a case proceeded to court (Levi 1976: 70-1). Of the five enforcement systems in existence before the end of the Cold War, only the European Court of Justice had compulsory jurisdiction for its enforcement role. Since the end of the Cold War, however, states have enhanced the enforcement role of many ICs by making their jurisdiction compulsory, and allowing nonstate actors—supranational commissions, prosecutors, and private litigants—to initiate litigation that reviews state compliance with international law (Alter 2011*a*).

Today one finds international courts with enforcement authority in all substantive areas where ICs operate. Economic regimes are increasingly likely to include an enforcement role for ICs. Systems modeled on the World Trade Organization (WTO) (including the enforcement system for Mercosur and ASEAN) rely on other states to initiate litigation. Most of the other economic enforcement systems follow the model of the European Court of Justice, often allowing supranational commissions, private litigants or both to challenge state noncompliance with community rules (Alter 2012). Human rights systems have changed over time. The Inter-American and African Union systems still rely on politically attuned Commissions to vet which cases reach the court. The European Court of Human Rights and ECOWAS systems, by contrast, now allow private litigants to initiate litigation directly wherever national actions arguably violate international human rights statutes. International criminal courts rely on independent prosecutors to raise non-compliance cases. Unlike economic and human rights courts that review policies and actions undertaken under the color of state authority, international criminal courts target specific individuals, holding them accountable for committing war crimes and crimes against humanity.

International Administrative Review

ICs with administrative review authority hear challenges to the decisions of administrative actors in cases raised by individuals whom the administration's decisions affect.[7] Depending on the standard of review, the judge will be checking to make sure that the administrative decision is faithful to the law, that the administrative decision-maker followed prescribed procedures, and that the administrator had legally defensible reasons for its decision. As of 2006, there were 12 permanent ICs with administrative review authority (48% of ICs). One finds international administrative review jurisdiction primarily in international economic arenas where there are supranational regulatory rules and/or supranational administrators charged with implementing international regulatory rules.

The reason to delegate administrative review authority is to monitor the behavior of administrative actors, who themselves rely on delegated authority. At the international level administrative review has two forms. ICs can be authorized to hear challenges to the decisions of international organization (IO) administrators, like the European Commission or the International Seabed Authority, or charges that IO administrators failed to act where they were legally required to do so. This type of administrative review usually does not compromise national sovereignty; indeed it arguably keeps supranational administrators faithful to member state intent.

[7] Within the specialized world of ICs, the title of "administrative courts" is given to specialized bodies that hear labor disputes involving international employees. Instead, I am interested in international adjudicatory systems that replicate what occurs within domestic administrative review systems.

ICs can also review the decisions of national administrators who are charged with implementing international regulatory rules. For example, the ECJ, BCJ, and Andean courts regularly review national application of common regulatory rules. Where states creatively interpret international rules to promote national policy objectives, international administrative review may serve as a sort of international enforcement system for regulatory decision-making. But more often than not international administrative review is not seen as encroaching on national prerogatives. IC review helps to facilitate a uniform interpretation of transnational regulatory rules, providing guidance for domestic administrators and judges regarding new and complex technical legal issues. It provides a legal redress for private actors that fails as often if not more than it succeeds, thereby helping states defend their actions against firm claims of illegalities. For developing countries especially, but even in developed country contexts, it can be helpful to have an IC certify a domestic action as legal or shoulder the blame when a ruling disappoints firms. In the Andean context, the Andean Tribunal's clarification of ambiguous Andean intellectual property rules, its requirement that national administrations give reasons for their rulings, and its willingness to assert the supremacy of Andean rules has ended up improving national administrative decision-making regarding intellectual property issues, and it has helped national intellectual property administrators push back against the political efforts to compromise Andean patent requirements (Helfer, Alter, and Guerzovich 2009: 21-5).

International Constitutional Review

Constitutional review authority is the judicial authority to invalidate laws and government acts on the basis of a conflict with higher order legal obligations (Stone Sweet 2000: 21). In the international arena, the higher order laws are usually the founding treaties that "constitute" supranational political systems and they may also include basic rights protections of member states (Dunoff and Trachtman 2009). There are ten ICs with the formal authority to review the validity of international legislative enactments. Most of these ICs are located within common market systems, where there are supranational political bodies empowered to draft and agree to international policies that may be directly binding on member states.

Constitutional review vis-à-vis international acts is a very clear category. But some scholars see IC review of state acts as having a potential constitutional significance. International trade agreements may be elevated to a form of higher order law, which takes precedence over conflicting national laws and policies. Human rights law is often seen as a higher order legal obligation, so that the enforcement of international human rights agreements may be seen as largely analogous to constitutional review of state acts. And international criminal law can be seen as creating a higher order limit on what states are allowed to do as they exercise their monopoly on the legitimate use of force.

Such claims are controversial for a number of reasons. When ICs enforce what are arguably higher order international laws, they mainly authorize compensation for victims or authorize the punishment of individuals responsible for gross human rights violations. The contested domestic law or policy may even remain legally valid within the national system. While constitutional law scholars may see analogies between what ICs do and the award of compensation by Supreme Courts, most people expect constitutional courts to be able to nullify illegal state acts. ICs are, in fact, able to nullify illegal international acts. But IC rulings regarding domestic acts do not invalidate "illegal" national acts. Moreover, many states comply fully with IC rulings by paying compensation while still maintaining the contested practice.

ICs are also considered to be constitutional bodies because of their ability to develop law of constitutional import (Dunoff and Trachtman 2009). The emergence of what might be seen as morphed international constitutional roles with respect to state actions depends, however, on how domestic actors view international legal rulings. If governments or judges see ICs as authoritative, and the laws they apply as supreme, then ICs may be able to foster a culture of constitutional obedience where state acts condemned by ICs are seen as *ipso facto* invalid.[8] Like national constitutional courts, the IC will be unable to compel compliance with its rulings and thus it will rely on evolving public opinion and national mobilization to pressure political actors to respect its rulings (Epps 1998). But where national cultures of international law adherence emerge, national legislators and judges may voluntarily vacate state policies that run afoul of higher order international laws.[9]

International Dispute Settlement

International dispute settlement via courts is the archetypical role of ICs. Pretty much all international treaties include provisions for dispute settlement. Usually the parties can choose non-legalized dispute settlement (e.g. arbitration, mediation, good offices), but a specific body is named as final venue for settling disputes regarding the agreement (often the International Court of Justice or a regional court). Legalized dispute settlement differs from non-legalized forms in that a pre-determined set of judges decide cases based on standing law; the court's ruling will usually be publicly pronounced, binding, and available for non-parties to peruse; and public rulings at least potentially defines a legal precedent that can be used going forward. Most often dispute settlement is triggered by states. But there are some international agreements that allow firms to initiate international dispute settlement to claim rights that exist as part of international treaties.[10]

Most dispute settlement systems are part of an economic and general jurisdiction system. War crimes bodies and human rights bodies do not include dispute settlement provisions. The ICJ and the ITLOS also have interstate disputes settlement jurisdiction, and if states consent the ITLOS system can be invoked by private actors to resolve disputes regarding the seizing of vessels. Figure 3 below shows that most of the economic systems with dispute adjudication authority also have enforcement, administrative review and constitutional review authority. While the ICs have jurisdiction to hear any case that is validly brought, access rules clearly expect that most disputes will involve enforcement or challenges to the validity of community acts and thus the other roles of the IC. Dispute settlement in these institutions tends to be reduced to contract disputes with international institutions. Thus what might be seen as the paradigmatic role of ICs may actually be a secondary or tertiary role for the IC within its legal order. The exception to this argument is the Organization for the Harmonization of Business Law in Africa. This system envisions that private actors will appeal disputes involving the multilateral "Uniform Acts" which govern business transactions within member states.

International dispute settlement can either be non-compulsory—something that both parties must agree to for the case to advance—or compulsory. Where ICs have compulsory

[8] The term constitutional obedience comes from Phelan (2008).

[9] National judges may also serve as filters pushing back against international law encroachments so as to regulate the effects of global governance on domestic constitutional orders (Alter 2001; Benvenisti 2008; Maduro 2009).

[10] For example, virtually all recent bilateral investment treaties and investment chapters of regional trade agreements, such as the North American Free Trade Agreement, contain provisions authorizing private parties to trigger the establishment of *ad hoc* arbitral panels that review whether state actions are consistent with their treaty obligations (Franck 2007; Goldstein 2006).

jurisdiction, dispute settlement can become a tool used to enforce the agreement and thus the IC's dispute settlement role can morph into an enforcement role. Eighteen of the twenty-five operational ICs have been delegated dispute settlement authority (72%); of these thirteen were also delegated the authority to oversee state compliance with the law (e.g. enforcement authority). This overlap helps explain why most ICs with dispute settlement authority have compulsory jurisdiction for this role.

Mapping the Delegation of Judicial Roles Across ICs

Figure 3 reports on the coding of the formally delegated roles of today's operational ICs. The treaties where IC jurisdictions are defined allow more than one role to be delegated to a single court. X indicates that the IC has formally been delegated a given power, meaning that international treaties and protocols explicitly authorize the court to play a given role. I list ICs by their primary subject matter jurisdiction, but the Caribbean Court of Justice and the Court of Justice of the Economic Community of West African states also have human rights jurisdictions. I also note the cases where scholars see ICs having morphed roles. Judges can engage in judicial law-making in all four roles, but it is interesting to note that the places where scholars often suggest that IC's roles have expanded seem to be more the exception than the rule.

Figure 3: The Four Judicial Roles Delegated to ICs (within category by year IC created)

International Courts (Date created)	Dispute Settlement Role	Enforcement Role	Administrative Review Role	Constitutional Review Role
Economic systems				
European Court of Justice (ECJ)/Tribunal of First Instance (TFI) (1952/1988)	X	X	X	X and Morphed role?
Benelux Court (BCJ) (1974)	X		X	
Andean Tribunal Of Justice (ATJ) (1984)	X	X	X	X
Economic Court of the Common- Wealth of Independent States (ECCIS) (1993)	X			
Central American Court of Justice (CACJ) (1994)	X	X	X	X
European Free Trade Area Court (EFTAC) (1992)	X	X	X	
World Trade Organization Permanent Appellate Body (WTO) (1994)	X	X		Morphed role?
West African Economic and Monetary Union (WAEMU) (1994)	X	X	X	X
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA) (1997)	X	Morphed role?		
Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998)	X	X	X	X
Central African Monetary Community (CEMAC)(2000)	X	X	X	X
East African Community Court of Justice (EACJ) (2001)	X	X	X	X
Caribbean Court of Justice (CCJ) (2001)*	X		X	X
Court of Justice of the Economic Community of West African States (ECOWAS) (2001)*	X	X	X	X
Southern Common Market (Mercosur) (2002)	X	X		
Association of Southeast Asian Nations Dispute Settlement Mechanisms (ASEAN) (2004)	X	X		
Southern African Development Community (SADC) (2005)	X	X		X
Human rights*				
European Court of Human Rights (ECtHR) (1958)		X		Morphed role?
Inter-American Court of Human Rights (IACtHR) (1979)		X		Morphed role?
African Court of Peoples and Human Rights (ACtPHR) (2005)		X		
International Criminal Courts				
International Criminal Tribunal for the Former Yugoslavia (ICTY) (1993)		X		
International Criminal Tribunal for Rwanda (ICTR) (1994)		X		
International Criminal Court (ICC) (2002)		X		
General jurisdiction & Other**				
International Court of Justice (ICJ) (1945)	X			
International Tribunal for the Law of the Seas (ITLOS) (1996)	X		Seabed Authority	
Courts with an explicitly delegated role (percentage N=25)	19 (76%)	20 (80%)	12 (48%)	10 (43%)

* The ECOWAS court also has a human rights jurisdiction and the CCJ can hear appeals where countries have consented to let the CCJ replace the Privy Council.
**General jurisdiction covers any case states choose to bring. The jurisdiction of the International Tribunal for the Law of the Seas, however, will only cover disputes pertaining to the Law of the Seas.

We can see that most of the ICs with dispute settlement authority (15 of 19) have also been delegated other roles; most ICs in economic systems have been delegated multiple roles, whereas ICs in human rights and criminal law systems were *only* delegated an enforcement role; ICs with administrative and constitutional review authority have been delegated more than one

role and are mostly located in economic systems with supranational administrators and legislative actors; and nine of the ten ICs that have been delegated a constitutional review role also have an administrative review role.

III. The Theoretical Pay off from Considering ICs Multiple Roles

I am interested in the multiple roles ICs play because it allows us to appreciate the many different contributions ICs make to international politics. ICs do oversee state compliance with international agreements, but this is not all they do. Wherever there are common regulatory rules that are to be applied transnationally, policy-makers worry about rules being interpreted and applied differentially across borders. Wherever there are supranational administrators making binding decisions, lawyers and policy-makers worry about how to monitor the international actors to ensure basic competence and as a check against institutional capture. International systems of administrative review are designed to address these concerns. National legislatures and states in federal systems worry that their sovereign rights may be usurped when the executive operates through international institutions. Human rights advocates and national judges worry about unchecked international authority. International constitutional review helps to address these concerns. And dispute settlement does more than resolve legal ambiguities; it transfers private litigant complaints about broken promises to a venue where disinterested actors can investigate the charges and hopefully create some legal finality to the dispute. How do we translate these insights to theoretical debates about international courts and international politics?

This section uses the four IC roles to shine light on two different scholarly debates: 1) whether it makes sense to see ICs as agents of states or trustees of the law, and 2) whether certain legal designs contribute to IC independence, and thereby spur IC activism. Examining the multiple roles of ICs in some respects complicates these debates in that there is no longer a single answer to the question. But it also helps move beyond the disagreeing camps by showing the conditions under which the different arguments gain resonance.

ICs as Agents or Trustees?

Scholars disagree as to whether international courts should be seen as agents of states or trustees of the law they oversee. Those who see ICs as state's agents suggest that states are the primary actors shaping IC decision-making, using the threat of relegislation, sanction or noncompliance to decisively influence judicial decision-making (Carrubba, Gabel and Hankla 2008; Garrett, Kelemen, and Schulz 1998; Garrett and Weingast 1993; Stephan 2002). Those who see ICs as trustees stress the political autonomy that ICs have, arguing that ICs operate in a realm of rhetorical politics where state sanctioning tools are of little practical relevance (Alter 2008*a*; Stone Sweet 2002).[11] It is interesting to note that this is primarily an international relations debate, reflecting the state-centric perspective that dominates international relations scholarship (Hawkins, Nielson, Tierney, and Lake 2006). Judicial politics scholars are more likely to consider how a broad range of factors influence judicial outcomes, such as the party in power, the party that appointed the judge, the perspective of powerful interest groups, legal traditions etc. (Staton and Moore 2011). American politics and public administration scholars are also less likely to be committed to the idea that states are privileged principals, and more willing

[11] Trustee comes from the common law practice of trusts, where property is held on behalf of a beneficiary and overseen by a designated trustee who has a legal obligation to follow the rules of the trust and act in the best interest of the beneficiary. There are also scholars who give equal weight to law and political factors as they consider how international judges operate within a zone of discretion (Ginsburg 2005; Steinberg 2002, 2004).

to conceive of judges as monitors used by governments to watch over the behavior of others (Kelemen 2011; McCubbins, Noll, and Weingast 1989).

The multiple roles of ICs help us to nuance although perhaps not entirely resolve the disagreement. Courts can play both self-binding and other-binding roles. In other-binding judicial roles, courts may well be the agents of states. In self-binding roles, however, courts are trustees of the law. I use a stylized narrative from the domestic context to explain how courts can be both other-binding and self-binding institutions.

In earlier times and in smaller societies there was no delegation to judges; Chiefs and Kings both made law and served as the interpreters of the law. As territories grew, delegation of interpretive authority became unavoidable. Sovereign actors – those with the authority to make law – primarily delegated dispute settlement authority, the power to make a decision about a controversy or a dispute. While sovereign actors were ceding authority to interpret the law, they were not themselves subject to the interpretations of their judges, mainly because no judge would presume to know better than the Sovereign what the law meant. This delegation was other-binding: Sovereigns were subjecting others to judicial interpretations of the law. As the state apparatus grew, the role of judges grew. Cases still appeared as controversies judges were asked to resolve, but when the subject of cases became state actors, judges ended up in a monitoring and enforcing role, reviewing whether the Sovereign's other agents (e.g. tax collectors, local rulers, state administrators, etc.) were faithfully following the Sovereign's laws. Neither type of delegation – dispute settlement or monitoring and enforcing – bound the Sovereign so long as the Sovereign himself was never subjected to the authority of the court.

Thus far I have only considered delegation in an authoritarian context, where the supreme leader both makes and enforces the law. Constitutional democracy differs from authoritarian rule in that it is premised on the notion of a social contract between leaders and their people. From a social contract perspective, government acts legitimately only when citizens can select their rulers and when governments respect the rule of law. Developments in constitutional democracy led to self-binding delegation wherein branches of government agreed to limit their powers by binding themselves to the authority of others, including to the authority of courts.[12] When Sovereigns use courts to monitor their agents, as occurs in the administrative review role, delegation to courts remains primarily other-binding. When Sovereigns use courts to check their exercise of power, courts help ensure governmental respect of the social compact.

At the domestic level, it is especially easy to see how delegating different judicial roles binds the sovereign in different ways. Courts playing a *dispute settlement* role, hearing private litigant cases, mostly bind others by bringing state law into the resolution of private disputes. In *administrative review*, a judge checks the legal validity of the decisions, actions, and non-actions of public administrative actors, who themselves rely on delegated authority. Administrative actors may find themselves constrained, but that is the point of subjecting administrative authority to judicial oversight. Thus this role remains primarily other-binding, a tool of the legislatures to police the behavior of administrative actors. Self-binding occurs in the enforcement and constitutional review roles. In the *enforcement* role, a judge monitors police and prosecutors as they use the state's coercive power. Force can only be legitimately used against citizens when it is lawful. *Constitutional review* checks whether the law created by legislatures or interpreted and applied by executive branch actors, or both, cohere with the constitution. These last two roles are pretty much always self-binding and sovereignty compromising, but they

[12] Of course this binding is somewhat fictitious, since the self-binding could be undone through a new constitutional act (see Elster 2000).

also help to reinforce the legitimacy of the Sovereign's actions by suggesting that the Sovereign is respecting the social compact.

The international level is different than the domestic level in that ICs are often ruling on the actions of sovereign states and their agents. This means that we must amend the above discussion of how judicial roles implicate state autonomy. It is still the case that dispute settlement and administrative review roles primarily bind others while enforcement and constitutional review roles are primarily self-binding for governments. But circumstances can arise in each role that will lead ICs to be issuing interpretations that impinge on national autonomy. Figure 4 below captures how delegation to ICs has both self-binding and other binding dimensions. Because all boxes on the table above are filled, it may look like ICs are binding states as much as they are binding others. But this would only be true if the number of cases in each box were equal and thus if ICs spent as much time reviewing state compliance with international rules as they did fulfilling the many other-binding tasks they have been delegated.

The larger point is that even in the international realm, delegation to courts has both self-binding and other-binding dimensions, each of which is animated by a different logic and results in different politics (Alter 2008*a,b)*. Our preoccupation with national sovereignty often obscures from conversation the useful other-binding roles of ICs, and that self-binding is both intentional and often desirable.

Figure 4: Delegation to ICs Reflecting Other-binding and Self-binding Logics

	Other-binding situations	Self-binding situations
Dispute Settlement Jurisdiction to hear disputes among contracting parties.	Compulsory dispute settlement for transborder disputes between private litigants (e.g. OHADA cases). Compulsory dispute settlement between IOs and private contractors (found in many IOs).	Inter-state dispute settlement. When non-compulsory, states control which cases reach the IC. Compulsory dispute settlement easily morphs into the enforcement role.
Enforcement Jurisdiction to declare state noncompliance with the law.	*Ad hoc* criminal courts set up by the Security Council to prosecute war crimes in specific conflicts (ICTY and ICTR).	Most international enforcement authority (trade, human rights, war crimes).
Administrative Review Jurisdiction to review of decisions of administrative actors to ensure procedural regularity and respect for the confines of administrative authority.	Review of administrative decisions of IO actors (ITLOS, ECJ, ATJ and others).	Review of the national application of international rules (BCJ, ECJ, ATJ and others).
Constitutional Review Jurisdiction to invalidate *ultra-vires* acts of legislative and executive bodies on the basis of a conflict with a higher order legal requirement.	Review of the legality of IO actions (ECJ, ATJ and others).	Review of the legality of state actions (morphed judicial enforcement roles).

The fact that delegation to ICs can be both self- and other-binding has implications for the debate on how compliance concerns shape IC decision-making. In the many places where international legal bodies primarily bind others to follow the law, the interests of ICs and powerful state-principals are likely to align so that the debate about whether or not ICs must be concerned about sanctions or compliance with their rulings is largely irrelevant. For example, a coding of every preliminary ruling case sent to the Andean Tribunal of Justice revealed very few

cases where governments intervened to defend a government policy because most cases involved administrative review of decisions applying Andean intellectual property laws, which governments generally supported (Helfer and Alter 2009; Helfer, Alter, and Guerzovich 2009). Compliance is perhaps more of a concern in constitutional cases and international enforcement cases, although governments may also be happy to let ICs shoulder the blame of angering domestic groups. All of this is to say that compliance is not necessarily the concern that international relations scholars expect it to be, which means that threats of noncompliance are not necessarily the political resource that political scientists presume it to be. None of this speaks to whether ICs take into account the legal arguments of governments. But does it really make sense to presume that without compliance concerns and sanctioning threats judges would systematically ignore the insight, opinions and legal arguments of policymakers?

There is more at stake in this debate than whether or not ICs are controlled by states. The larger point of contention is whether international judges are able to build and exercise legal and political authority. If ICs are mere agents of states, providing useful information and constructing focal points but nonetheless beholden to the inflexible national interest concerns of governments, there will be very little that international law and international courts can do to influence international politics (Goldsmith and Posner 2005; Posner and Yoo 2005). But if international courts have sufficient autonomy to rule against powerful governments and by so doing seriously call into question the legality of government actions, then there is significant room for international law to be a tool to influence international organizations and governments (Brunnée and Toope 2010; Goodman and Jinks 2004), and for litigation to become a way through which legal understandings shift and political change occurs (Alter 2011*b*).

International Judicial Roles and IC Design

Related to the debate about whether ICs are agents of states is the question of how the design of international legal institutions affects IC independence. Eric Posner and John Yoo argue that ICs that lack compulsory jurisdiction are more dependent on states wanting to use them. This dependence, they argue, leads ICs to work harder to please governments, especially the governments of powerful states (Posner and Yoo 2005). While much of Posner and Yoo's analysis is controversial,[13] most agree that ICs with compulsory jurisdiction are in fact more independent, for the reasons Posner and Yoo suggest. At this point, however, most ICs have compulsory jurisdiction and they allow non-state actors to initiate litigation.[14] If Posner and Yoo are right that IC design determines IC dependence on states, and if we presume, as most international relations scholars do, that states prioritize their control of international actors, then we must wonder why states repeatedly consent to ICs with designs that compromise IC dependence on states?

[13] The controversial part of Posner and Yoo's analysis is their claim that dependent ICs will be more effective than independent ICs. It is surely true that where states can block legal proceedings, the only disputes that will be litigated are those where the state is willing to let the IC determine the legal outcome. For this reason alone, compliance with IC rulings is likely to be higher. Most scholars, however, do not see compliance as a useful measurement of IC effectiveness (Raustiala 2000; von Stein, this volume; Martin, this volume). Helfer and Slaughter (2005) offer a comprehensive critique of Posner and Yoo's arguments.

[14] Only three ICs out of twenty-five that lack compulsory jurisdiction—the International Court of Justice, the International Tribunal for the Law of the Seas, and the African Court of People and Human Rights. The Inter-American Court of Human Rights also relies on states opting in to its compulsory jurisdiction, but at this point twenty-four Latin American countries have opted in and withdrawal is extremely unlikely so that the Inter-American Court increasingly operates under the assumption that is jurisdiction is compulsory (Romano 2007: 820-1).

The four roles help us understand this IC design puzzle. The design of ICs can vary by judicial role. A functional analysis of IC design presumes that states would design ICs to play the roles they delegate to them so that certain judicial roles would bring with them certain IC designs. From a functional design perspective, we should not be surprised when ICs have the design features they need to credibly play their delegated roles. If the IC lacks the design elements needed for a given role, then one must wonder if states actually intend the IC to play the role. Where IC designs exceed the design features associated with a role, increasing access to the system and the remedies-associated roles, we might want to know more about when and why governments are enhancing the design of an IC. Figure 5 below identifies design features associated with each role. These features are explained more fully in the study from which this chapter is drawn (Alter, forthcoming). Any IC design that falls into the light grey column corresponds to functional features needed if an IC is to credibly play its designated role. The figure also identifies typical enhancements one finds in busier ICs that arguably help it play its role, and constraints that one often finds in less busy ICs, which usually reflect an effort to maintain control over the legal process. This discussion and coding of IC design is static, obscuring the fact that at least seven ICs, including the most active and politically relevant ICs today, have been reformed over time to remove constraints and add enhancements (Alter 2011*a*). Moreover, one should not equate the existence of enhancements and constraints with the functional effectiveness of such design features. The COMESA legal system has the widest formal access rules of any IC, but litigants never seem to invoke the COMESA system to challenge illegal polices. The ECOWAS system has mechanisms to add sanctions for noncompliance, but they have never been used. And in practice the formal requirement that the Dispute Settlement Body endorse WTO panel and appellate body decisions does not serve as a meaningful political check on WTO legal decision-making.

Figure 5: Design Features for Judicial Roles

Role	Basic functional design elements			Potential design enhancements	Potential political constraints
	Compulsory jurisdiction	Access to initiate litigation	Remedies		
.**Dispute Settlement** Jurisdiction to hear disputes among contracting parties.	**Optional**	**State access**	**Binding rulings**	Compulsory jurisdiction. Private actors authorized to sue governments. Financial remedies.	No compulsory jurisdiction.
Enforcement Jurisdiction to declare state noncompliance with the law.	**Required** Otherwise states would avoid oversight by blocking cases.	**State Access**	**Findings of noncompliance**	International prosecutorial actor to monitor and pursue noncompliance. Coercive sanctions.	No compulsory jurisdiction. Political controls on Prosecutors/ Commissions. Requirements of political assent before any remedy can be required.
Administrative Review Jurisdiction to review decisions of administrative actors to ensure procedural regularity and respect for the confines of administrative authority.	**Required** Otherwise administrative defendant can avoid oversight by blocking cases.	**Private access** to challenge decisions that affect them.	**Nullification** of illegal administrative decisions; orders for action where administrators have failed to act.	Compensation for injuries incurred by administrative negligence. Preliminary ruling mechanism so that private actors can raise challenges in local courts.	Requiring that governments bring cases on behalf of their citizens in lieu of allowing direct access to the court.
Constitutional Review Jurisdiction to invalidate acts of legislative and executive bodies on the basis of a conflict with a higher order legal requirement.	**Required** Otherwise legislative defendant can avoid oversight by blocking cases.	**States** and **Supranational institutions** All constituent units need to be able to challenge ultra-vires actions otherwise there is no real check against legislative actors doing as they please.	**Nullification** of unconstitutional statutes.	Private access to initiate litigation (e.g. concrete judicial review).	Only states can challenge legality of international acts.

The functional argument expects that ICs with enforcement, administrative and constitutional review powers will have compulsory jurisdiction, and that ICs with administrative review roles will also have private access. Figure 6 identifies the design of ICs within each judicial role, focusing on the features associated with "new style" ICs. Access refers to whether non-state actors have standing to *initiate* a dispute. Grey boxes highlight the functionally required design criteria. If judicial role drives the design of the IC, we should not find it surprising if the grey boxes are marked with an "X." White boxes with an "X" represent a design enhancement feature. The evidence in support of the functional argument comes via correlation. If function were not related to design, we would expect the rules for access and compulsory jurisdiction to be more randomly distributed, as opposed to clustered by role. Instead we can see that ICs with enforcement, administrative and constitutional review roles are more

likely to have the minimum design features of compulsory jurisdiction and access for non-state actors to initiate litigation. It thus seems plausible that the extension of multiple roles to ICs may account at least in part for the trend towards new-style ICs.

Of course nearly all ICs today have compulsory jurisdiction, and more than half allow non-state actors to initiate litigation. We might thus think that something else explains this trend. But we can also see greater variation in IC designs with respect to design features that are *not* functionally required. The grant of private access for dispute settlement and enforcement roles is far more limited. While many enforcement and constitutional review systems allow supranational actors to initiate litigation, few administrative review and dispute settlement systems permit these actors to initiate litigation. This suggests that IC design is being varied because of functional requirements, and not because of a greater or lesser desire to create active and independent ICs.

Figure 6: IC Design and Judicial Roles (organized alphabetically)

Judicial Role & Minimum Design Criteria	ICs with this role	Compulsory jurisdiction	State access	Private litigant access	Supra-national actor access
Dispute settlement Jurisdiction to hear disputes among contracting parties.	ASEAN	X	X	*	
	ATJ	X	X	*	
	CACJ	X	X	X	Community officials
	CCJ	X	X	Case by case	
	CEMAC	X	X	*	
	COMESA	X	X	*	
	EACJ	X	X	*	
	ECCIS	Unclear	X		
	ECJ	X	X	*	
	ECOWAS	X	X	*	The Commission
	EFTAC	X	X	Limited	
	ICJ	Optional protocol	X		Advisory opinions only
	ITLOS	Optional protocol	X		
	MERCOSUR	X	X		
	OHADA	X	Advisory opinions only	X	
	SADC	X	X	X	Community officials
	WTO	X	X		
	WAEMU	X	X		
Enforcement Jurisdiction to declare state noncompliance with the law. *Functional design criteria*: Compulsory Jurisdiction Human rights and war crimes system arguably require access for nonstate actors. *Enhancements:* Supranational Prosecutor or state initiation of litigation. Sometimes private litigant access to initiate litigation	ASEAN	X	X		
	ACtHPR	Optional Protocol	X		Commission
	ATJ	X	X	X	Secretariat
	CACJ	X	X	X	Community Institutions
	CEMAC	X	X	X	Any Community Organ
	COMESA	X	X	Via national courts	Secretary General
	EACJ	X	X	X	Secretary General
	ECtHR	X	X	X	
	ECJ	X	X	Via national courts	Commission
	ECOWAS	X	X	Human rights only	Executive Secretary
	EFTAC	X			Surveillance Authority
	IACtHR	Optional protocol	X		Commission
	ICC	X			Prosecutor
	ICTY	X			Prosecutor
	ICTR	X			Prosecutor
	MERCOSUR	X	X		
	SADC	X	X	X	
	WAEMU	X	X	Via national courts	Commission
	WTO	X	X		
Administrative Review Jurisdiction to review of decisions of administrative actors to ensure procedural regulatory and respect for the confines of administrative authority. *Functional design criteria:* Compulsory Jurisdiction Private Access	ATJ	X	X	X	
	BCJ	X	X	Via national courts	
	CACJ	X	X	X	Any community organ
	CCJ	X	X	X	
	CEMAC	X	X	X	Any community organ
	COMESA	X	X	X	
	EACJ	X		X	
	ECJ	X		X	
	ECOWAS	X	X	X	
	EFTAC	X	X	X	

	ITLOS	X	X	X	
	WAEMU	X	X	Via national courts	
Judicial Role & Minimum Design Criteria	ICs with this Role	Compulsory Jurisdiction	State Access	Private litigant access	Supra-National Actor Access
Constitutional Review Jurisdiction to invalidate acts of legislative and executive bodies on the basis of a conflict with a higher order legal requirement. *Functional design criteria*: Compulsory Jurisdiction Access for participants in the supranational legislative process. *Enhancements:* Private Access	ATJ	X	X	X	General Secretariat
	CACJ	X	X	X	Any community organ
	CCJ	Optional Protocol		X	
	CEMAC	X	X	X	Any community organ
	COMESA	X	X	X	
	EACJ	X	X	X	Advisory opinions only
	ECJ	X	X	X	Any community organ
	ECOWAS	X	X		Any community organ
	SADC	X	X	X	Any community organ
	WAEMU	X	X	X	Any community organ

Grey indicates the design is functionally required for the role. White boxes with an "X" exceed the functional design requirement. I note advisory opinions, but these are generally excluded from this analysis.

*= Private access pertains only to IO employees and firms that have disputes regarding goods and services supplied to the IO.

The coding raises many questions, but it does confirm the functional argument. The only exceptions where design does not seem to correlate with function are the Inter-American and African Court of Human Rights where political constraints still hinder the body's enforcement capacities, and the CCJ's constitutional role, which is quirky because the CCJ's constitutional role is designed to replace the role of the Commonwealth Privy Council. But we also find many enhancements, which suggests that the functional analysis under-explains the design trend.

Why does it matter if function shapes IC design? Many scholars have hypothesized how the design of ICs affects legal outcomes. Posner and Yoo (2005: 6-7) expect compulsory jurisdiction and private access to lead to more judicial activism and less state support for a legal system, whereas Keohane, Moravcsik and Slaughter (2000) expect international legal systems where nonstate actors can influence the selection, access and implementation of dispute settlement to generate more litigation, greater compliance with IC rulings, and the deepening and widening of legalization. Stone Sweet (1999) also expects that where interested parties are able to instigate litigation the result will be more judicial lawmaking and Helfer and Slaughter (1997) expect that private access will increase the effectiveness of international legal mechanisms. If IC design is an artifact of judicial role, however, then the link between IC design and legal outcome may not be as direct as scholars have hypothesized. For example, one finds compulsory jurisdiction and private access associated with international administrative review system and in all but one international constitutional review system. But my best sense of the data is that one does not find accusations of activist judges in all or even most ICs with administrative and constitutional review authority.

It could be that the theories are more applicable to IC enforcement roles. Scholars often want to see every review of state action as a form of enforcement. Such a perspective subsumes the notion that governments often choose to use courts to monitor actors within their own states (Kelemen 2011), eliminating entirely the category of other-binding delegation and reinforcing the idea that government and ICs are mostly in an antagonistic relationship. Still, we do not find that IC design shapes judicial law-making in the way that the theories expect. Reviewing the universe of operational ICs reveals that courts with similar designs – like the COMESA, CEMAC, CACJ, ATJ, SADC courts which share the design of the ECJ and the ECtHR, and the MERCOSUR and ASEAN system that share the design of the WTO – do not share a record for legal activity or judicial law-making. Other factors could be important in shaping judicial law-making (Ginsburg 2005; Steinberg 2002). The larger point is that IC design may be mostly an artifact of judicial role, and for this reason less shaping of legal and political outcomes than scholars anticipate.

IV. International Courts and Democratic Politics

Scholars tend to approach the subject of international adjudication with a single example in mind – either a single role, single case or a single legal regime. This contribution has attempted to broaden our perspective on the role of international courts and international politics by broadly comparing the different roles that ICs have been delegated and in fact are playing around the world today. The multiple roles of ICs reveal that ICs do not exist solely to compromise national sovereignty. Delegation to ICs does undermine any individual government's ability to define what international agreements require, and it creates a rival actor – the IC – that is authorized to define the meaning of international law in concrete cases. But ICs also can be protective of state sovereignty. In their administrative and constitutional review roles, ICs provide checks on the exercise of supranational authority. Administrative review can also

help states to defend themselves against private actors that charge them with bias or political interference in the application of law.

The multiple roles of ICs also help nuance conversations about what makes ICs agents of states, and about whether delegation to ICs undermines domestic democracy. If ICs were pure agents of nation-states, then ICs would be unlikely to deviate from what governments want which might be protective of domestic democracy.[15] But I argued that ICs can also act as trustees of the law in certain circumstances. As trustees of the law, ICs can help to ensure that supranational governance and supranational administrators do not exceed the social contract of the international institution. IC trustees can also, however, interpret the law in ways that the consenting nation-states never intended and that democratic majorities might dislike (Alter 2008*a*). We need to remember that constitutional review and enforcement roles are intended to create checks on sovereign power. The point of international war crimes and human rights statutes is to bar punishing noncombatants no matter how politically popular such actions may be. But where international legal institutions help transnational legal interests trump domestic interests, international law and IC trustees may be seen as a threat to democracy. In this light, domestic constitutional provisions that limit the legal status of international law and IC rulings may be the remedy needed to protect national democracy.

I have focused here on the roles states have delegated to ICs, not on whether and under what conditions ICs end up playing their designated roles. The focus on mandate helps us define a baseline from which we can then explore what leads ICs to inhabit a delegated role. We should investigate further how enhancements help and constraints hinder an IC's ability to play its delegated roles. We should also investigate why ICs with similar designs are invoked more or less frequently than we might expect, and thus how context and features woven into the fabric of the law shape IC activation.

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[15] Delegation could still strengthen executive power to the detriment of legislative power, however, and encroach on the prerogatives of states in federal systems.

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