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**Delegating to International Courts:
Self-binding vs. Other-binding Delegation**

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Delegating to International Courts: Self-binding vs. Other-binding Delegation^{*}

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Abstract: Most scholars think of courts as a single category of adjudicative bodies or triadic dispute adjudication. But courts play a variety of roles in the domestic political system. Increasingly, the roles and tasks delegated to International Courts (ICs) mimic in form and content the roles and tasks delegated to courts in liberal democracies. Thus where initially ICs were created to be dispute adjudication bodies, now they are also delegated the roles of administrative review, enforcement, and even constitutional review. This paper overviews the variety of judicial roles delegated to courts, explaining how each role primarily binds other actors, binds states, or both. The paper shows that delegation to ICs is extensive, and growing. It highlights how delegating a role to international courts is fundamentally different than delegating the exact same task to domestic courts, assessing the implications for national sovereignty of delegating specific roles to ICs.

One often hears complaints that courts are undermining national sovereignty. Critics tend to associate a compromise of sovereignty with the claim that courts are exceeding their mandate or running amok. This paper explores the linkage between these two notions—sovereignty being compromised, and courts exceeding their mandate, by exploring the distinction between “self-binding” and “other-binding” delegation to courts. A central claim of this article is that a single lens to view delegation to courts distorts our understandings of the political role of judges. Courts play four distinct roles within political systems—dispute adjudication, administrative review, criminal enforcement and constitutional review. Some of these roles have legislative actors delegating decision-making authority to courts as an “other binding” means of social control; through delegation states primarily bind others actors (citizens, businesses, government employees, administrative agencies, police etc) to follow the interpretation and

^{*} I would like to thank Curtis Bradley, Sean Gailmard, Oona Hathaway, Larry Helfer, Judith Kelley, Jennifer Landside and Richard Steinberg for helpful comments on this paper.

application of legal rules by courts. In other roles, legislative bodies or states are binding themselves (“self-binding”), subjecting their decision-making authority to judicial oversight so as to enhance their own credibility as a “rule of law” political system. Self-binding delegations are by their very nature sovereignty compromising. Other binding delegations to courts are more frequent, and less likely to be sovereignty compromising. The situation of courts exceeding their mandate and thus compromising sovereignty applies but rarely—when a court transforms a given role, turning an other-binding authority into a self-binding role.

Part I defines more fully the difference between self and other binding delegation to courts and maps these differences onto the four different roles courts play in a political system. The discussion starts with delegation in the domestic context because I believe that international delegation borrows from the domestic model. The discussion identifies when and how delegating the exact same role to a court will impact national sovereignty differently at the domestic and international levels. The section also discusses how states try to limit the authority of courts in each role.

Part II examines the empirical record in delegating specific roles to specific international courts using as a data set delegation to all existing international courts, twenty in total.¹ The analysis helps explain an empirical puzzle in the trend of delegating authority to ICs. Since 1990 there has been a proliferation in the number of ICs,² and in IC usage so that eight-six percent of the total IC output of decisions, opinions and rulings (12,761 out of 14911) has come since 1990. These “new” ICs are not only recent creations; they are qualitatively different entities.³ Newer ICs are more likely to have compulsory jurisdiction and either private access or access for international non-state actors to initiate litigation, even though most observers agree that these features make ICs

¹ I adopt the definition of an IC created by the Project on International Courts and Tribunals. According to PICT, ICs are 1) permanent institutions, 2) composed of independent judges 3) that adjudicate disputes between two or more entities, one of which is a state or international organization. They 4) work on the basis of predetermined rules of procedure and 5) render decisions that are binding. My discussion does not include certain African courts where the courts do not yet exist in practice, and thus information is hard to find (see note 31). Thus if anything I am underreporting the trend of delegation to international legal bodies.

² Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 *New York University Journal of International Law and Politics* 709, Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem*, 31 *New York University Journal of International Law and Politics* 679, Benedict Kingsbury, Nico Krisch, Richard B. Stewart and Jonathan Weiner, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* 15, Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze*, 3 *Melbourne Journal of International Law* 453

³ Karen J. Alter, *Private Litigants and the New International Courts*, 39 *Comparative Political Studies* 22

more independent and more likely to be ruling on cases where a government is an unwilling participant.⁴ States have not become less concerned about national sovereignty since 1990. What is this change about? I argue that this trend towards creating and using ICs with compulsory jurisdiction and non-state actor access follows from the decision to use ICs in roles other than inter-state dispute resolution—namely for administrative review, enforcement and less frequently constitutional review. Most of these additional roles involve other-binding delegation wherein ICs are empowered to review the actions of international actors, or the decisions of national administrators tasked with implementing international rules. And it appears that numerically speaking, most of the increase in IC activity involves ICs playing “other binding” roles.⁵ This analysis explains why increasingly ICs have design features that make them highly independent, yet relatively few international legal rulings are controversial. It also helps to situate the more sovereignty compromising examples of delegation to ICs within the larger universe of delegation to ICs.

Part III concludes by addressing the implications of this analysis for debates about IC independence as it relates to sovereignty costs in delegating to ICs, including debates regarding Principal-Agent theories and about whether “dependent” international courts are more effective than independent ICs. The article urges a focus on judicial role to understand the extent to which sovereignty becomes compromised, rather than the design of the court. It also suggests that expectations attached to judicial roles, rather than concerns about judges being sanctioned, shape how judges think about deference to political bodies and how audiences react to judicial rulings that upset powerful actors.

⁴ Compulsory jurisdiction and private access limit the ability of states to block a case from proceeding to court. These features are emphasized in Curtis Bradley and Judith Kelley’s introduction to this volume as shaping the extent to which delegation to ICs is sovereignty compromising. These are the critical features of ICs discussed in the debate over IC independence between Eric Posner, John Yoo, Laurence Helfer and Anne-Marie Slaughter. Eric A. Posner and John C. Yoo, A Theory of International Adjudication, 93 California Law Review 1, Laurence Helfer and Anne-Marie Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, 93 California Law Review 899

⁵ The bulk of the over 12,000 rulings and decisions of ICs come from the European Court of Human Rights, the European Court of Justice, and the European Tribunal of First Instance—courts that are more often practicing administrative review than interstate or contract-based dispute resolution.

I. The Logic of Delegation to Courts--Dispute Adjudication, Administrative, Enforcement and Constitutional Roles

As Curtis Bradley and Judith Kelley note in their opening essay, delegation of authority inherently involves sovereignty costs. The heart of the issue is the magnitude of sovereignty costs. What is being delegated to courts is the power to interpret the legal rules. The sovereignty risk in ceding interpretive authority to courts is that judicial rulings can shift the meaning of law in ways that can be politically irreversible.⁶ This risk is not just hypothetical. Constitutional review involves nullifying laws passed by legislative bodies while administrative review involves rejecting decisions made by public actors. Thus if judicial actors play their intended roles, judges will at times disagree with, rule against, or render interpretations that run counter to what the makers and the enforcers of the law might have wanted, and what the democratic majority might prefer.

Although delegation to courts always risks that the judge will interpret the law in unanticipated and unwanted ways, the risk to national sovereignty associated with delegation to courts varies—not primarily in terms of the design of the court, rather by the role the court is asked to play. Self-binding delegation to courts involve high sovereignty costs because the defendant in the case will almost always be a state actor, and the legal review will involve asking whether legislative actors violated the law or exceeded their authority. Other-binding delegations to courts involve lower sovereignty costs because the defendants will primarily be private actors, or the court will mainly be monitoring to see that public actors faithfully adhere to the legislative will.

Delegation to courts brings benefits as well. Litigants can hope that a judge ruling in their favor will make it more likely that the loser in the case will change their behavior. Governments and legislatures can hope that judicial rulings in their favor increase their credibility, imparting a “rule of law” imprimatur on public actions. After defining these concepts more fully, this section identifies the logic of delegation in four judicial roles one finds in domestic legal systems, and how international delegation to courts differs from delegating the exact same role domestically.

⁶ As many have shown, the voting thresholds required to reverse legal interpretation are particularly challenging to surmount because reversing legal rulings means disempowering actors who prefer the legally created status quo, and if reversal is perceived as political interference in a legal domain, defenders of the rule of law will rally to the side of judges. Brian A. Marks, *A Model of Judicial Influence on Congressional Policy Making: Grove City College V. Bell* (1984) (1989), Karen J. Alter, *Who Are the Masters of the Treaty?: European Governments and the European Court of Justice*, 52 *International Organization* 125

A. Self-Binding and Other Binding Delegation

In all cases of delegation to courts, judges are delegated the decision-making authority to interpret and apply the law to the case at hand. The sovereignty risk associated with this delegation is primarily shaped by the judicial role (dispute adjudication, enforcement, administrative or constitutional review) because the role defines which actor is likely to be the defendant in the case, the nature of the decision or rule that is subject to review, and whether judges are more likely to defer to legislative will in their interpretations. A stylized historical narrative helps explain this difference.

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 adjudicative authority, the power to make a decision about a controversy or a dispute. Although sovereign actors were ceding interpretation of 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 with judges reviewing whether the King’s other agents (e.g. tax collectors, local rulers, state administrators etc), were faithfully following the sovereign’s laws. Neither type of delegation- adjudicative or monitoring and enforcing- bound the sovereign so long as the King himself was never subjected to the authority of the court.

With the advent of constitutional democracy came self-binding delegation, where branches of government agreed to limit their powers by binding themselves to the authority of others—including to the authority of courts.⁷ Also, the introduction of increasingly complex delegation chains complicates the above story. As states have sought to control more elements of the economy and society, governments have created many types of public actors, including administrative agencies, entire criminal justice systems, and executive agencies that sometimes have what amounts to delegated legislative authority. States have increasingly subjected the actions of these actors to judicial oversight. Do we call such oversight self-binding, or other binding? The distinction can be subtle, and the difference can be intentionally or unintentionally blurred as the political role of

⁷ Of course this binding is somewhat fictitious, since the self-binding could be undone through a new constitutional act. The metaphor Jon Elster uses is Ulysses who ties himself to the mast to avoid the temptation of the sirens.

judges and of public actors shifts. I consider other-binding contemporary delegation where judges oversee implementation of legal rules by public actors, so long as the legislative outputs or authority of a state is not being subjected to judicial review.

This article operationalizes this distinction by examining four roles courts play in political systems. The *dispute adjudication* role is analogous to the king's representative resolving disputes. It pertains when there is a disagreement in a contractual relationship where the disagreement is brought to a judge to resolve. The defendant in the case is a signatory to the contract and either the contract itself or the relation of the contract to a larger framework of rules is under review. The other roles are contemporary outgrowths of constitutional democracy. The *enforcement* role has a judge monitoring police and prosecutors as they use the state's coercive power. *Administrative review* has a judge checking the legal validity of the decisions, actions, and non-actions of public administrative actors, who themselves rely on delegated authority. *Constitutional review* checks whether the law created by legislatures, and/or interpreted and applied by governments, coheres with the constitution.

By its very nature, constitutional review authority has the highest sovereignty risk because by definition it involves judges reviewing the legality of laws and by definition judges are supposed to prioritize the constitution over the will of the legislature. The other types of delegation vary in the sovereignty risks involved, depending on whether a public actor is likely to be a plaintiff or a defendant, the scope of judicial review, and whether the court's jurisdiction is compulsory. These factors can vary for domestic and international delegation of the exact same judicial role, even when the international court's design identically mimics its domestic counterpart.

This section identifies jurisdictional elements of courts, identifying how we can recognize if a specific judicial role has been delegated to an IC. At the domestic level, the legislative origin of a judicial role may be hard to trace, and there may indeed be no explicit legislative grant delegating authority. But at the international level, however, judicial roles are defined in the founding treaties of ICs. This section identifies key jurisdictional features associated with specific judicial roles; whether or not a role requires compulsory jurisdiction or private access for non-state actors to initiate litigation; whether the role is other binding and/or self-binding, and how these categories differ internationally compared to domestically. Note that this discussion describes each judicial role as a Weberian ideal type, focusing on the *function for the state* that the court is serving in each role. Ideal types are useful in identifying essential characteristics and drawing distinctions, but by definition ideal types simplify and do not comport to reality.⁸

⁸ The concept of an "ideal type" was introduced by Max Weber, who defined ideal types as 'intellectual constructs developed by a synthesis of familiar arguments and views but exhibiting a

With respect to the analysis here, the ideal types both underemphasize and overemphasize variation one might find within a category.⁹ The ideal type approach is none-the-less useful because it allows one to compare across roles, revealing how the logic inherent in the delegation act varies by judicial role.

In practice judicial roles may change, in some cases morphing a court considerably from its original design. The role designations inherent in the original delegation act likely shape the design of the legal body and at least originally the nature of the cases raised. Where litigants ask judges questions that push them outside of their original roles, where judges embrace these opportunities to expand legal doctrine, and where doctrinal shifts are accepted by legal and political communities, the court's role will morph. As judicial roles evolve, the roles become hats judges put on as they decide legal issues. When thrust in a role, the judge dons the role as they would a hat, and with it the logic associated with the role. As they change roles, they change hats. In this context, the ideal type role would provide a first cut "logic of appropriateness" which would set expectations as to what the judge should be doing in the case.¹⁰ Even if it the judge were disappointing powerful actors or compromising sovereignty, if judges stay close to the expected role-based logic, the ruling is less likely to be controversial, and it will be harder to pin on the court a charge that the court was "exceeding its authority."

B. Delegation of *Dispute Adjudication* Authority to Courts

Dispute adjudication in its ideal-typical form is private law adjudication. Two private parties subject to the law bring a dispute to a judge, who renders an interpretation that binds both parties. These disputes are usually conceptualized as arising from contractual disagreements--differences in opinions regarding duties and obligations owed--though the "contracts" are often informal and implicit.

"conceptual purity" that "cannot be found in reality." Max Weber, *Economy and Society* (1922) Quoted in Carl G. Hempel, *Aspects of Scientific Explanation, and Other Essays in the Philosophy of Science* (1965)

⁹ The categories underemphasize variation because within a single role (e.g. administrative review, constitutional review etc), different national designs and differences in the powers given to courts will be important in shaping *how* a court plays its role. For example, the political role of constitutional courts will vary based on whether constitutional courts have abstract judicial review authority, concrete judicial review power, or both. In addition, variation in how judges and legal cultures employ notions like standing, burden of proof, the standard of review, etc will lead to meaningful cross-national variation despite the similarity in role across systems. The categories over-emphasize variation across roles because in practice cases can involve multiple issues, leading a court to assume multiple roles within a single case. For an example of these differences, see: Alec Stone Sweet, *Governing with Judges* (2000)

¹⁰ On the logic of appropriateness, see: James March and Johan Olsen, *The Institutional Dynamics of International Political Orders*, in *Exploration and Contestation in the Study of World Politics* (Katzenstein, Keohane and Krasner 1999)

Shapiro identifies this judicial role as participating in social control.¹¹ In delegating to judges the authority to interpret the law, state actors are seizing the desires of the parties to have a judicial resolution of a dispute as an opportunity to bring their laws into the private realm, into neighborly disputes, business interactions, and even family decisions. In choosing the legal outcome, judges are choosing the state's desired resolution—that custody of a child goes first to blood relatives, that firms be accountable for their actions etc.

Dispute adjudication can involve a mix of public and private actors, yet still involve an other binding social control logic. States want their interlocutors to follow general contractual rules so that private actors will be willing to enter into trustful relationships like signing contracts, letting school buses bring their children to school etc. Where public contractors are held accountable in the same terms as private contractors, the social control logic is still at play—states are binding their interlocutors to follow a set of common rules.¹²

How do we know if an IC has dispute adjudication authority? Although it is easy to identify administrative review or enforcement authority, dispute adjudication is a catch-all category. Every “concrete” legal case has two parties who disagree (otherwise the parties would have settled out of court), leading to a judge interpreting and applying the law to render a ruling. Given its ubiquitous nature, judicial dispute adjudication authority has to be identified in terms of what it is not. International courts with dispute adjudication authority have a formal jurisdiction to “interpret the meaning of the law” in concrete cases brought before them. A judge stays entirely in a dispute adjudication role when there is no question about the legal validity of the law itself, or about the validity of a public actor's action executing the law. Dispute adjudication is also not enforcement where a public prosecutor is charging the defendant with violations of the law.

Within this definition, domestic delegation of dispute adjudication authority is primarily other-binding delegation, and thus minimally sovereignty compromising. Dispute adjudication does not require that a court's jurisdiction be compulsory. But since states are binding others--firms, citizens etc-- they usually have no qualms about making the judge's jurisdiction for this role compulsory. Because delegation of dispute adjudication authority is other-binding, the interest of both the state and the judge are aligned. Where there are questions about the law, the judge should be deferential to the legislative body that wrote the law.

¹¹ Martin Shapiro, *Courts: A Comparative Political Analysis* (1981) P. 17-20.

¹² This desire is so compelling that over time foreign sovereign immunity, a fundamental diplomatic courtesy, has been compromised. Policies like the Foreign Sovereign Immunity Act of 1976 have been passed to revoke sovereign immunity with respect to commercial interactions. The US act has reverberated through the international system creating new doctrines that limit sovereign immunity. See: Malcolm N. Shaw, *International Law* (2003) Foreign Sovereign Immunities Act of 1976, Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C. Sec. 1330, 1332(a), 1391(f) and 1601-1611.

Since both the judge and the state want the parties to follow the law as it becomes legally defined, it is no surprise that states lend their coercive mechanisms to the task of enforcing judicial decisions.

At the international level, however, delegation of the same type of authority can be self-binding because a state's public policies might themselves become the subject to international judicial interpretation. States have historically been more ambivalent when it comes to granting ICs compulsory jurisdiction in this role.¹³ Without compulsory jurisdiction, states can decide on a case-by-case basis whether they will submit to legalized dispute adjudication. Section II shows, however, that this trend has changed; increasingly dispute adjudication authority is coupled with compulsory jurisdiction which turns an IC's dispute adjudication role into a sort of decentralized enforcement role.¹⁴ But now compliance with such rulings will be more problematic because states have not had a chance to decide if they want the IC to issue a binding interpretation for a particular dispute, and because the interests of the state and of the IC are not aligned—the losing state is not per se going to want to lend coercive support to enforce a ruling against itself.¹⁵

C. Delegation of *Enforcement* Authority to Courts

Although it is commonly said that courts “enforce the law,” it is always states, with a monopoly on the legitimate use of force, which enforce the law by punishing those who violate the law. States can enforce the rules on their own, using their extensive coercive power to punish those who violate their rules. In a rule of law system, however, the task of overseeing the legitimate use of coercive power is delegated to judges. In this “enforcement” role, the judge essentially monitors the state's use of its coercive power, and thereby s/he helps convince the public that the state is not abusing its power.

For the enforcement role, a court is given jurisdiction over a body of law and a public prosecutor or enforcement body that charges a defendant with violating the law raises cases. If the prosecutor manages to convince the judge that the defendant violated the law, the judge may authorize a public actor to do

¹³ Werner Levi, *Law and Politics in the International Society* (1976) at p. 70-71.

¹⁴ The WTO system, for example, explicitly blurs the line into an enforcement role. The case starts as dispute resolution—both state parties pick panelists they prefer in the hopes of finding a middle ground resolution. But the case can end as enforcement, with a permanent Appellate Body determining the extent of the damage caused by the violating country's behavior, and authorizing the victim state to do what would be otherwise illegal—to construct a purposely discriminatory and trade diminishing barrier.

¹⁵ Although compliance is more problematic, it is not necessarily true that ICs are therefore less effective. Compliance is a poor indicator of effectiveness. See: Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 *Case Western Reserve Journal of International Law* 387

what would otherwise be illegal and illegitimate—to deny a person their liberty, to seize their property or to violate the law in retaliation. Since we cannot expect guilty parties to voluntarily submit themselves to judicial proceedings about their behavior, enforcement roles require that courts have compulsory jurisdiction.

At the domestic level, the judicial enforcement role is largely other-binding in the sense that defendants are likely to be private actors and judges are mainly being asked to hold police accountable to following the rules legislative actors set. But delegating this role to judges is also self-binding to the extent that states are subjecting their use of police powers to judicial oversight. States minimize the sovereignty implication of this self-binding dimension by controlling the prosecutor. In the criminal legal process, victims are not allowed to trigger legal proceedings. Criminal courts only rule on cases at the prosecutor's request. By making the prosecutorial office a political office, governments have a big say over which cases are brought to court for review.

At the international level, there are two very different types of judicial enforcement roles. Criminal enforcement mimics its domestic counterpart—there is a public prosecutor; the court has jurisdiction over an enumerated list of crimes; and convicted criminals face prison terms. There are clear examples where international criminal enforcement is delegated in an other binding way. Victor's justice war crimes trials, and ad hoc international tribunals set up by the Security Council are examples of "other binding" IC enforcement roles because the states delegating authority to the judges knew they would not themselves be subject to the court's jurisdiction. The ICC stands in sharp contrast. Its jurisdictional reach is not limited geographically or (in the future) temporally, and thus the self-binding nature of the delegation is accentuated. Like at the domestic level, the way to limit the sovereignty costs of delegation is through control of the prosecutor. Appointment of international commissions/prosecutors can be influenced by powerful states, and the Security Council can put a six-month stay on a prosecutorial investigation. Moreover, the international prosecutor will need resources (financial and informational) to investigate crimes and compile cases. By withholding resources, rich states can greatly undermine the functioning of the International Criminal Court system.

A second international enforcement role concerns law violations without violence, where the stigma "criminal" is intentionally not used. In the international context, one finds "infringement" mechanisms where an international commission triggers a legal proceeding and the judge determines if a state's behavior is incompatible with the requirements of the Treaty.

Both forms of delegated enforcement authority can be harder for a single state to control at the international level, compared to the domestic level. International prosecutorial bodies see it as their job to pursue legal violations.

Collectively, states are usually able to block prosecutions from proceeding.¹⁶ But a single state may be unable to block a prosecutor or commission from proceeding. Given the risk, international safeguards have been added to international delegations of enforcement authority. For criminal enforcement, an international prosecutor may not proceed with a case where a domestic court has already given serious consideration of the crime. Thus a state can escape ICC authority by prosecuting the crime in the domestic legal system. States manage international infringement authority by limiting the nature of the sanctions associated with legal violations. Sometimes international bodies can levy a fine or authorize financial retaliation against a state maintaining an illegal policy, and other times the legal ruling itself is meant to evoke social opprobrium by identifying an action as “illegal.” In both situations, review of infringements is prospective—illegal behavior only becomes seriously costly should a state persist in violating the law.

These political safeguards do not apply to the morphed role of decentralized judicial enforcement. As mentioned, when international dispute resolution is coupled with compulsory jurisdiction, dispute adjudication easily morphs into an enforcement role. This morphed role may actually be more sovereignty compromising than explicit delegations of enforcement authority. Prosecutors can be politically dissuaded from raising a case, and their burden of proof is higher. They must show beyond a reasonable doubt that a legal violation occurred. It can be harder to dissuade a plaintiff-state from raising a case than it is to dissuade an international prosecutor, and the plaintiff-state need only convince the judge that their interpretation of the law is correct, and thus their case may be harder to stymie. Thus compulsory dispute adjudication may, along with delegation to the ICC, represent the most sovereignty compromising examples of ICs with explicit and de facto enforcement roles.

D. Delegation of *Administrative Review* Authority to Courts

Administrative review is the main judicial means to hold the actors implementing legislative policies accountable. This delegation is other binding in that the actors who write the law (legislatures) are using judges to monitor the actors that implement the law (administrators, or “the government”).¹⁷ The core

¹⁶ The Security Council can block the ICC’s prosecutor from raising a case, but even without this formal block, it is unlikely that a prosecutor will pursue a case where there is significant political opposition to doing so. For infringement proceedings, commissions are highly susceptible to political pressure.

¹⁷ This conceptualization of administrative review is consistent with the argument made by Barry Weingast and Mark Moran and Kal Raustiala. See: Barry R. Weingast and Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 *Journal of Political Economy* 765, Kal Raustiala, Police Patrols & Fire Alarms in the Naaec, 3 *Loyola of Los Angeles International and Comparative Law Review* 389

administrative review role tells judges to be deferential to the legislative body, and to defer to the will of the legislative body over that of the public administrator as they interpret and apply the law.

One can recognize a court with administrative review authority from its jurisdiction. Courts with the authority to hear cases regarding the legality of a government action, policy or regulation, or to hear “actions to annul” or “failure to act” charges regarding decisions or non-decisions of public implementers of the law, have administrative review powers. Administrative review courts have compulsory jurisdiction and private access so the actors impacted by government decision-making can challenge arbitrary decisions. Administrative court rulings generally do not substitute a specific judicial decision for the contested administrative decision, rather they remand the case back the administration so that it can try again to make a decision that will not be rejected by the court. Thus administrative review tends to be a fire alarm system of oversight, akin to what Bradley and Kelley’s category of delegation of oversight authority.

Administrative review differs from constitutional review in that judges are not ruling on the validity of the law itself, but rather whether a particular government decision or policy is congruent with the law, and/or whether the policy has been implemented in accordance with the law. Admittedly there is a fine line separating constitutional and administrative review, and in political systems where all courts feel free to practice constitutional review, the lines can become quite blurred. But the difference between administrative and constitutional review has also been made distinct in both domestic and international contexts.¹⁸

There can be great variation in the extent of administrative check created through administrative review. Some administrative review systems have a narrow standard of review, with courts only checking that proper procedure was followed, and/or that the decision was not “arbitrary and capricious” in its application to the litigant. This narrow standard of review tells courts to grant administrators significant deference in how they interpret and apply rules. Some standards of review are broad, with judges checking the facts and the interpretations of rules to see if the administrator made the correct decision. The broader the standard of review, and the harder it is to change laws underpinning administrative rules, the greater the sovereignty costs associated with administrative review authority.

¹⁸ In the United States, Italy, and to some extent Germany all courts feel empowered to reject laws that judges deem unconstitutional. In these systems, supreme constitutional courts primarily serve as appellate bodies. But many national systems maintain a strong distinction between administrative and constitutional review. These systems, like France, only allow constitutional courts to conduct constitutional review.

International administrative review is in large part the “other-binding” tool of divided government that one finds in the domestic realm. When ICs are only reviewing the decisions of international institutions—like the Seabed Authority, the Andean Secretariat, the General Secretary of Common Market of Eastern and Southern Africa (COMESA), or the European Commission—international delegation of administrative review authority is not sovereignty compromising even when coupled with private access so that the subjects of IO administrative decision making can challenge IO decisions. But international administrative review can also be sovereignty compromising. The main implementers of international regulatory law are states, not international organizations. There are examples of ICs explicitly granted review authority over domestic administrations. For example NAFTA chapter 19 panels (which are not permanent international courts) are by design intended to review whether American, Canadian and Mexican administrations and administrative courts have made the correct decision in subsidy and anti-dumping cases. The European Court of Justice was also from inception designed to review both Commission decisions and whether national administrators were implementing European Community policies on agriculture, social security for migrant workers, customs etc. correctly.¹⁹ Delegation in these contexts was meant to both help implementation of complex international rules, and reassure other states that countries would not practice favoritism or undermine the meaning of their commitments during implementation. Explicit grants of international administrative review authority tend to be coupled with private access, even though wider access rules can make delegation more sovereignty compromising because they limit state latitude in interpreting legal rules.

E. Delegation of *Constitutional* Review Authority

Although the rule of law requires that governments (like private actors) be held accountable to law, it does not require checks on law making power. Indeed philosophers like Thomas Hobbes and Jean Jacques Rousseau consider any check on sovereign power to be inherently problematic.²⁰ Political systems embodying this view include the United Kingdom, which has no constitution and no constitutional court, though it is certainly a “rule of law” country. Other

¹⁹ Indeed the ECJ’s innovated preliminary review mechanism was created for this purpose—to allow challenges to the implementation of European rules that were raised in domestic courts could be channeled to the ECJ for review. See: Pierre Pescatore, *Les Travaux Du <<Groupe Juridique>> Dans La Négociation Des Traités De Rome*, XXXIV *Studia Diplomatica* (Chronique de Politique Etrangère) 159

²⁰ Thomas Hobbes, *Leviathan*; or, the Matter, Forme and Power of a Commonwealth, Ecclesiasticall and Civil (1962), Jean-Jacques Rousseau and Henry John Tozer, *The Social Contract*, or, Principles of Political Right (1905)

philosophers (like John Locke)²¹ believe that sovereign power ends up being exercised better when it is subject to checks and balances. Those who believe in checks and balances create constitutional political systems with constitutional review mechanisms. Constitutional review authority entails the power to nullify laws and policies that contradict the constitution. As Jon Elster notes, committing to constitutional review is both self-binding pre-commitment on the part of the legislature, and an other-binding choice made to bind future legislative actors and units within the political system to the constitutional bargain.²²

Like administrative review and criminal enforcement authority, constitutional review authority can only work when the court's jurisdiction is compulsory. Unlike administrative review, constitutional review does not require private access. Indeed in France constitutional review exists without any right of private actors to instigate cases. Delegation of constitutional review authority is always sovereignty compromising. By design it shifts power away from those with majority control the political apparatus so as to provide a check against majority rule.²³

There are examples of intentional delegation of constitutional review authority to international courts (e.g. granting the IC the power to nullify laws). Like in the domestic realm, the delegation reveals an intent to limit what the international institutions can do in the future. The European Union, the Andean Pact, and the Common Market of Eastern and Southern Africa have political bodies that are, in essence, legislative bodies capable of creating rules, policies, and even laws that are directly binding on member states. The international courts in these political systems (the ACJ, COMESA court and the ECJ) were explicitly empowered to hear challenges to the collective decisions raised by member states or private actors. In these cases, raised either directly to the ACJ, ECJ or COMESA court or referred to the ACJ or ECJ from a national court, the IC determines whether acts taken by these legislative actors are *ultra vires* (exceeding the authority of the bodies). If a law were *ultra-vires*, it would be nullified. In this example, states are self-binding against their own potential desire to use an international body expansively. Since European laws can be created based on qualified majority voting, supranational constitutional review can also be a means for the minority to challenge decisions of the majority.²⁴

²¹ John Locke, *The Second Treatise on Government* (1957)

²² Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (2000)

²³ For more on the variety of constitutional delegations, see: Alec Stone Sweet, *Governing with Judges* (2000)

²⁴ Germany, for example, challenged the EU's Banana protocol which was passed despite its objections. See: Karen J. Alter and Sophie Meunier, *Banana Splits: Nested and Competing Regimes in the Transatlantic Banana Trade Dispute*, 13 *Journal of European Public Policy* 362.

In the above example, supranational constitutional review authority does not necessarily compromise national sovereignty, so long as the court is reviewing the validity of supra-national rules. But international courts have also assumed a sovereignty compromising constitutional authority to review the compatibility of national and international rules. Law scholars call the phenomenon the “constitutionalization” of an international treaty, by which they mean that the treaty is elevated to a sort of constitutional (supreme) status by the rulings of the court. The ECJ’s declaration of the supremacy of European law (mimicked by the ACJ) was such a constitutionalizing act because it gave the ECJ the de facto authority to render inapplicable national rules that conflict with European laws.²⁵ Some see the creation of the WTO, and the WTO appellate body’s jurisprudence, as constitutionalizing the WTO Treaty because it makes incompatible national laws too costly to maintain (though others disagree because countries can accept retaliation instead of changing conflicting laws.)²⁶ Design changes undertaken and under discussion regarding the European Court of Human Rights have, according to some scholars, increasingly turned the ECHR into a Supranational Constitutional Court that reviews the compatibility of national laws and practices with European human rights rules.²⁷

Constitutionalization of international treaties represent a case where a court expands its initial authority and compromises national sovereignty. Whether constitutionalizing acts of ICs have the intended effect depends mostly on the reaction of the country whose policy is condemned. In many countries, governments are bound to international law but there is no corresponding domestic rule or legislation to make international law, or IC rulings, binding within the national system, thus what is illegal internationally may still be legal domestically. If, however, national courts accept an international decision as authoritative within the domestic realm, the international legal ruling can have a constitutional affect in the domestic system.

²⁵ Eric Stein, Lawyers, Judges and the Making of a Transnational Constitution, 75 American Journal of International Law 1, Joseph Weiler, The Transformation of Europe, Yale Law Journal 100 2403. Equivalent ACJ ruling is *Andean Court of Justice Interpretaciones Prejudiciales* 1 IP 87 available at:

http://www.comunidadandina.org/canprocedimientosinternet/interpretacion_prejudicial.htm

²⁶ Ernst-Ulrich Petersmann, The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization, 6 European Journal of International Law 161, Jeffrey Dunoff, Constitutional Conceits: The Wto's 'Constitution' and the Discipline of International Law, 17 European Journal of International Law 647, John H. Jackson, The World Trade Organization: Constitution and Jurisprudence (1998)

²⁷ Laurence R. Helfer, Redesigning the European Court of Human Rights: From International Tribunal to Constitutional Court (2007)

F. The Fundamental Risk of Delegation to Courts

This section has defined four roles that courts play in the international political system. For some roles the authors of both the law and the delegation contract are binding others-- using courts to help ensure that other actors (police, national administrations, private actors) follow the rules they created. Other-binding delegation is based on efficiency logic—states are using the legal process to monitor compliance with the law, expending their coercive resources only when a legal ruling on its own is insufficient to induce compliance. *Self-binding delegation* is based on credibility enhancement logic. Where publics might be suspicious of self-serving interpretations of the law by public actors, governments and legislatures can gain credibility by entrusting the interpretation of the rules to independent courts.²⁸ But it is likely impossible to make a delegation wholly other binding. In making courts the keeper of “the law,” governments create a rival body with the authority to say what the law means, and in exchange governments perhaps get some credibility as being committed to a rule of law. The key distinction is whether delegation to courts will be *primarily* other binding in that it is mostly *other actors*—private actors, or state interlocutors-- that will be subject to the decisions of courts. Table 1 below summarizes which delegations to courts tend to be primarily self-binding or other-binding, examining the domestic context separately from the international context. The international column shows that delegation can be designed to be both other-binding and self-binding. It is an empirical question whether specific delegations to ICs end up more self-binding or other-binding.

If one compares the domestic and international columns of Table 1, it is clear that delegating the exact same tasks involves a greater sovereignty risk internationally than it does domestically. Here we see the limits of a domestic analogy and how diplomats making assumptions about ICs based on their knowledge of domestic courts may end up with unintended outcomes. But regardless of if a judicial role is primarily other-binding or mostly self-binding, delegation to courts involves a risk that judges will interpret the law differently than governments or legislative bodies might want, and a risk that judicial roles will morph over time. These risks are more problematic at the international level because international rules are very hard to rewrite, making legal rulings harder to reverse, and because any finding against a national law inevitably strikes at the heart of national sovereignty. Of course this is the whole point of international judicial review-- to make it more costly for a country to defend the legitimacy of policies labeled “illegal” by an authoritative international legal body.

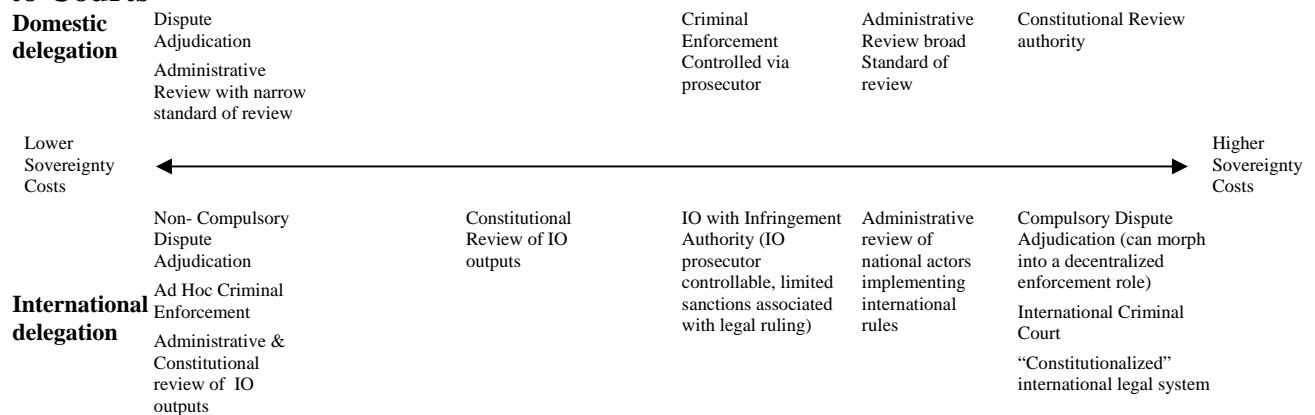
²⁸ The difference in these logics is explained further in: Karen J. Alter, Agent or Trustee: International Courts in Their Political Context, *European Journal of International Relations*

Table 1: The Four Judicial Roles Compared

Judicial Role	Functional Role	How we know it when we see it	Who is bound by delegation to domestic courts	Who is bound by delegation to international courts	Ways to limit the sovereignty costs of delegation.
Dispute Adjudication When combined with compulsory, jurisdiction, dispute adjudication becomes contract enforcement	Judge applies state's law to resolve a dispute between private actors, or between public and private actors, radiating state social control into private law disputes.	Jurisdiction to interpret the law in concrete cases raised before it. No explicit authority to review the validity of the law, or of public acts. Cases are raised by disputants, not by public prosecutor-type actors.	Primarily other-binding —legislative body binds public and private actors to judicial interpretation of rules set by the legislative body.	Self-binding in the sense that governments and in some cases legislatures are held accountable to their international commitments.	Non-compulsory dispute adjudication assures that parties cannot be brought to court unwillingly. States can also exempt certain state actions from review.
Criminal Enforcement Compulsory Jurisdiction Prosecutor initiates case	Judge ensures that public authorities have reasonable evidence and grounds for punishing those who violate the law, granting a legal imprimatur to state exercise of coercive authority.	Jurisdiction in cases brought by public prosecutors/ Commission regarding an enumerated list of crimes or a set of Treaty rules.	Primarily other-binding Legislator is creating oversight mechanisms for police forces.	Other-binding in the case of ad hoc criminal courts- the states creating ad hoc courts usually do not fall under the court's jurisdiction. Self-binding when all states fall under court's jurisdiction.	By controlling the prosecutor, and the flow of resources and information to the prosecutor, governments can influence the extent of judicial oversight. States can also attach weak sanctions to adverse IC rulings, to lesson the costs of losing an enforcement case.
Administrative Review Compulsory Jurisdiction Private actor initiates case	Judge oversees public administrators to ensure their decisions were made following proper procedure, consistent with the requirements of the law, and are not arbitrary or capricious.	Jurisdiction in cases concerning the legality of any public action (e.g. decisions of a public actor), or the public actor's "failure to act."	Other-binding Legislature is binding administrative agencies to follow their rules	Other-binding when states are binding IOs to follow international rules. Self-binding when ICs oversee domestic application of international rules.	A narrow standard of review (e.g. limiting review to procedural issues, or to the issue of whether the decision was arbitrary and capricious) will limit judicial oversight.
Constitutional Review Compulsory Jurisdiction Access rules vary	Judge helps check that legislative actors do not exceed their constitutional authority; holding governments and legislatures accountable to constitutional bargain.	Jurisdiction to review the validity of any legal rule of an IO, and/or of a national government.	Primarily Self-binding- Constitution creates absolute limits on legislative authority.	Other-binding where ICs assesses whether international acts are <i>ultra vires</i> . Self-binding where ICs can assess the compatibility of national rules with international rules. Legal impact of an IC ruling will be determined in large part by domestic system.	Limiting access for constitutional challenges will limit the opportunities courts have to rule a law or practice unconstitutional.

The discussion above identified a number of ways in which authors of the delegation contract can influence the likelihood that sovereignty will be compromised, meaning that states will find themselves bound by judicial interpretation. States can create restrictions on who can bring cases, on the types of legal arguments that can be raised and on whether and how sanctions are associated with a finding of a legal violation. Dispute adjudication can be non-compulsory, requiring both parties to consent before a case proceeds to court. Prosecutors can be tightly controlled to limit the extent of enforcement delegation. Although administrative delegation requires compulsory jurisdiction and private access, legislators can create broad or narrow standards of review, and broad or narrow rules of standing to bring a case. Access can be limited in constitutional review, thereby limiting the number and types of cases that can be raised. Finally, public actors can be exempted from certain types of legal challenges (e.g. sitting government officials can be exempt, or states can be exempt from cases involving national security etc.) The differences in sovereignty costs domestically and internationally are captured graphically in Diagram 1, which also highlights some of the abovementioned ways in which sovereignty costs are regulated. Note that the sovereignty costs are only “potential” costs-- usage of the court combined with the willingness of judges to assert their authority will determine the extent to which delegation actually becomes sovereignty compromising.

Diagram 1: Sovereignty Costs Associated With Role Choices in Delegation to Courts



This diagram contrasts to some extent with the diagram in the volume's introduction by Bradley and Kelley where the function of the judicial roles—the monitoring of administrative and enforcement roles, and the adjudication of a dispute adjudication role-- are seen as relatively sovereignty compromising compared to policy implementation or research and advice roles. The difference

is that I do not see binding others as per se sovereignty compromising—especially if the “other” being bound are international as opposed to domestic actors.

II. Delegation to International Courts: The Empirical Record²⁹

This section assesses the empirical record in delegating the four roles to ICs. Table two below lists the existing ICs that meet PICT’s definition of an international court, organized by the year they were established.³⁰ The table indicates whether the court has compulsory jurisdiction, whether private actors have access to initiate litigation, and the number of cases the court has litigated. Where courts existed before 1990, I break out the judicial activity since 1990. The PICT definition is stringent, requiring that a court be permanent to count as an IC. This table would be longer if I included quasi judicial bodies or legal bodies that are not permanent (like NAFTA). Also, missing from the table are seven African courts,³¹ which mimic in design their European counterparts but mostly exist on paper. If African courts were added in, and if we included legal bodies that functionally equivalent to permanent courts, the trends discussed below would mainly be reinforced; we’d see more delegation of administrative, enforcement and constitutional roles to international legal bodies, and more often than not these international judicial bodies would have compulsory jurisdiction and allow private actors to initiate litigation.

²⁹ This section draws on material previously published in Karen J. Alter, *Private Litigants and the New International Courts*, 39 *Comparative Political Studies* 22

³⁰ See note 1 for PICT’s definition. The year the treaty was signed is the year the court was established. Often courts were not created until a threshold number of states ratified the Court Treaty, thus there is a gap between the date of establishment and the date of creation.

³¹ Not included because of a lack of information are the: *Instance Judiciaire of the Arab Maghreb Union*; the *Court of Justice of the East African Community*, the *Court of Justice of the Central African Economic and Monetary Community*, the *African Court on Human and Peoples’ Rights*, the *African Court of Justice*, *Court of Justice of the Economic Community of West African States*, the *Tribunal of the Southern African Development Community*. For more on these courts see: <http://www.aict-ctia.org/>

TABLE 2: *INTERNATIONAL COURTS, BY DATE ESTABLISHED*

International Courts	Date Established/ Created	Compulsory Jurisdiction	Private Actor access	Total Cases (last year included in figures) ¹	Total cases since 1990 (primarily until 2004)
International Court of Justice (ICJ)	1945/1946	Optional Protocol ³²		104 contentions cases filed, 80 judgments, 23 Advisory opinions (2003)	30 Judgments, 45 new cases filed, 3 advisory opinions (2003)
European Court of Justice (ECJ)	1952/1952	X	X	2497 infringement cases by Commission, 5293 cases referred by national courts, 7528 direct actions (2004)	1580 infringement cases by Commission, 3048 cases referred by national courts (2003) ¹
European Court of Human Rights (ECHR)	1950/1959	X	X (as of 1998)	8810 cases deemed admissible, 4145 judgments (2003)	8140 cases deemed admissible, 3940 judgments (2003) ¹
Benelux Court (BCJ)	1965/1974	X	Via national courts*	**	
Inter-American Court of Human Rights (IACHR)	1969/1979	Optional Protocol	Commission is a gate keeper	104 judgments, 18 advisory opinions, 148 orders for provisional measures (2003)	95 judgments, 8 Advisory opinions, 146 orders for provisional measures (2003)
Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries (OAPEC)	1980/1980	So qualified as to be meaningless	By optional state consent	2 cases (1999)	**
Court of Justice of the Cartagena Agreement (Andean Pact) (ACJ)	1981/1984	X	X	31 nullifications, 108 infringement cases, 711 preliminary rulings (2004)	29 nullifications, 107 infringement cases, 700 preliminary rulings (2004)
International Tribunal for the Law of the Seas (ITLOS)	1982/1996	Limited compulsory jurisdiction + Optional Protocol	Seabed authority & seizing of vessels only	13 judgments (2004)	
European Court of First Instance (CFI)	1988/1988	X	X	2083 decisions from 3003 cases filed (figures exclude staff cases) (2004)	
Central American Court of Justice (CACJ)	1991/1992	X (some exceptions) ²	X	65 cases, 21 Advisory opinions, 30 rulings, 7 cases dismissed for lack of competence, 7 cases in progress (2004)	
European Free Trade Area Court (EFTAC)	1992/1995	X	Via national courts	59 opinions (2003)	
Economic Court of the Common- Wealth of Independent States (ECCIS)	1992/1993	X		65 cases leading to 72 decisions which include 54 advisory opinions, 9 on non-performance of state obligations, 2 labor disputes (2000) ³³	
Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)	1993/1998	X	X	3 judgments, 1 order (2003)	
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)	1993/1997	X	X	4 opinions, 27 rulings (2002)	
International Criminal Tribunal for the Former	1993/1993	X		75 public indictments, 18 completed cases, 11 judgments (2003)	

³² Courts that lack general compulsory jurisdiction usually have optional protocols which states can sign to commit to compulsory jurisdiction among signatory states.

³³ A new source of information has led to changes in these figures from my earlier publication.

Yugoslavia (ICTY)				
<i>General Agreement on Tariffs and Trade (GATT)</i> ²	1953- 1993	-		229 cases, 98 rulings from GATT era
World Trade Organization Appellate Body (WTO)	1994/1995	X		304 disputes formally initiated, 59 appellate rulings, 115 panel reports in WTO era (2003)
International Criminal Tribunal for Rwanda (ICTR)	1994/1995	X		58 cases in progress, 17 completed cases (2003)
International Criminal Court (ICC)	1998/2002	X		4 situations under investigation; six warrants for arrest issued (2007)
Caribbean Court of Justice (CCJ)	2001/2005	X		Began operation April 2005
International Criminal Tribunal for Sierra Leone (ICTSL)	2002/2002	X		11 indictments proceeding, 2 withdrawn due to death (2003)
Total International Judicial Activity				29279 admissible cases filed or under investigation, 12761 completed decisions, opinions or rulings
Complete Cases Only				14911 completed decisions, opinions or rulings
European Courts Only				11552 (77%) total decisions, opinions or rulings
				16926 admissible cases filed whether or not they result in rulings
				12761 completed decisions, opinions or rulings
				8621 (68%) total decisions, opinions or rulings

Republished from Alter 2006. Data since 1990 was added to this table. The data was compiled by author, based on the best information available on the PICT website, updated by visiting the websites of the international courts and consulting scholarship where available. I did not include labor law cases involving disputes with employees of IOs. Courts are constantly changing how they report usage, thus one can find discrepancies between most recent postings and the data collect here—in 2003. *= no cases **= data not available. ¹Figures exclude staff cases. ²The GATT system changed significantly, going from a quasi-legal body to meeting PICT's definition of an IC.

Table 2 shows a proliferation in the number of ICs since 1990, and in international litigation. Although other issues, like security, can be litigated in front of the ICJ—a general jurisdiction court—the delegation pattern reveals the greatest comfort in delegating to ICs the interpretation of trade commitments and human rights issues, including war crimes. Table 2 also shows a change in the design of courts over time. European courts account for the majority of international legal outputs: 77 percent of the international judicial total output. This percentage has declined since 1990, with European cases accounting for 68% of all post-1990 IC legal outputs. Usually the usage rates by European courts are attributed in part to the design of European courts- European courts have compulsory jurisdiction, and private actors can initiated disputes.³⁴ Table 2 paints a picture of ICs increasingly resembling the European design model of compulsory jurisdiction and private access. Twelve ICs allow private parties to initiate legal suits against state actors. Six allow non-state actors—international

³⁴ Jose Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *Texas International Law Journal*, Laurence Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale Law Journal* 273

commissions or prosecutors—to initiate disputes against state actors. The last two columns of data support the notion that ICs with compulsory jurisdiction and non-state actor access hear more cases,³⁵ but it also shows that not all ICs with compulsory jurisdiction and private access ICs are equally active.

In fact, much of the design trend can be explained by the roles delegated to ICs. The appendix has a comprehensive table that identifies the delegated roles, the design features associated with the delegation, and limitations attached to each delegation. Table 3 below summarizes this information. I have limited my focus to the roles explicitly delegated to ICs, or added over time through amendments to the original delegation act. The appendix identifies the language in the treaty which led to a classification—for example, to be classified as having administrative review authority, a court needed explicit jurisdiction in cases regarding the “legality of any action, directive or decision” of a public administrative actor (which often included authority to hear appeals for non-action). I do not consider whether courts actually play their assigned role, or whether courts expand their roles through their jurisprudence. Note that most ICs have been delegated more than one role. Roles are usually defined in separate treaty articles, which allows the rules regarding compulsory jurisdiction and access to vary by role. For example, ITLOS has an inter-state dispute resolution role that lacks compulsory jurisdiction (with an exception for disputes regarding the seizing of vessels where its jurisdiction is compulsory). ITLOS also has an administrative review role with respect to the Seabed authority where its jurisdiction is compulsory, and private actors have access to raise cases.

TABLE 3: DELEGATION OF DIFFERENT ROLES TO ICs

Judicial Role	ICs with this Role (see Table 2 for full names of courts)	Percent of Total ICs explicitly delegated this role (n=20)
Dispute Adjudication General jurisdiction to “interpret the meaning of the law” or to “ensure that the law is respected,” jurisdiction to resolve disputes.	ACJ*, BCJ, CACJ*, CCJ, COMESA, ECCIS, ECJ, EFTAC, ICJ, ITLOS, OAPEEC, OHADA*, WTO	13/20 65%
Enforcement Jurisdiction regarding an enumerated list of crimes or jurisdiction to hear infringement suits against states. Cases generally are raised by a public prosecutorial type actor.	ACJ*, CACJ, COMESA, ECHR*, ECJ, EFTAC, IACHR, ICC, ICTY, ICTR, ICTSL	11/20 55%
Administrative Review Jurisdiction in cases concerning the “legality of any	ACJ*, BCJ*, CACJ*, CFI*, COMESA*, ECJ*, EFTAC*,	8/20

³⁵ Robert Keohane, Andrew Moravcsik and Anne-Marie Slaughter, Legalized Dispute Resolution: Interstate and Transnational, 54 International Organization 457

action, regulation, directive, or decision” of a public actor, or the public actor’s “failure to act.”	ITLOS*	40%
Constitutional Review Jurisdiction to review the validity of any legislative act, regulation, directive, of an IO.	ACJ*, CACJ*, COMESA*, ECJ* CCJ*? Post 1998 ECHR*?	4/20 20% (possibly 30%)

Courts in bold have compulsory jurisdiction associated with the role.

Courts with a * have private access is associated with the role.

A. International Delegation of Dispute Adjudication Authority

At first glance, delegation of dispute adjudication authority appears to be the most common form of delegation to ICs. But this appearance may mainly be a result of the “catch-all” nature of dispute adjudication—the fact that the other three roles need explicit definitions of jurisdiction or design elements to be classified in the role. Indeed if one labeled as “decentralized enforcement mechanisms” all dispute resolution mechanisms with compulsory jurisdiction, then enforcement would be the most prevalent role delegated to ICs (see the discussion of delegation of enforcement authority which follows).

The ICJ is the oldest IC on Table 2, and from inception it has served as a default international dispute adjudication body meaning that many treaties designate the ICJ as the dispute adjudication body rather than creating a new body for the specific treaty. The ICJ lacks compulsory jurisdiction, but there is an optional protocol where states can commit to compulsory jurisdiction,³⁶ and countries can decide *a la carte* to make the ICJ’s jurisdiction compulsory for specific treaties.³⁷ Thus the ICJ’s lack of compulsory jurisdiction is not per se a reason not to rely on the ICJ. But the ICJ is a general jurisdiction body, with judges that could come from all over the world. Although litigants have the option of appointing ad hoc judges for a specific case, if an agreement involves substance that requires specific expertise, and if an agreement pertains only to a handful of countries, the ICJ’s general design may make it unattractive. Indeed all of the other ICs with dispute adjudication roles cover more specific issues, and/or include only a small group of states, suggesting that these courts were created with the intent that they have a narrower more specialized jurisdiction than the ICJ.

It appears that increasingly states are abandoning the ICJ model of non-compulsory dispute adjudication. The new ITLOS court and the OAPC court

³⁶ 62 states (out of 191 UN members) have agreed to the ICJ’s compulsory jurisdiction though 13 limit their assent to issues other than cases arising from belligerent action.

³⁷ This is how the United States came to withdraw twice from the ICJ’s compulsory jurisdiction—first from the ICJ’s general compulsory jurisdiction, and second with respect to the Vienna Convention on Consular Relations.

lack compulsory jurisdiction, but every other dispute adjudication body has been given compulsory jurisdiction. Why have states agreed to a more sovereignty compromising delegation of international dispute adjudication authority? An analysis of which ICs have compulsory jurisdiction suggests an answer. States appear to make dispute adjudication compulsory primarily in economic agreements: seven of the ICs with compulsory authority are part of trade unions³⁸ and two others primarily handle corporate investment disputes.³⁹ Of course not all economic agreements have international disputes resolution mechanisms, let alone mechanisms with compulsory jurisdiction. Analyzing trade agreements, James McCall Smith finds that trade unions are more likely to be associated with compulsory dispute adjudication compared to free trade zones. McCall Smith reasons that the desire to capture the benefits of trade is driving decisions about the type of dispute adjudication mechanism chosen.⁴⁰ Indeed the concentration of dispute resolution mechanisms with compulsory jurisdiction in economic agreements suggests that states especially want economic commitments to be enforceable. Having these agreements enforced through inter-state dispute resolution, as opposed private actors or an international commission litigation, helps ensure that only cases the member parties really care about get litigated. Where dispute resolution agreements allow for suspending trade access as remedy (ACJ and WTO), reciprocity becomes the main force for compliance.

Only 3 out of the 13 ICs with dispute resolution authority also allow private access for this role. These cases appear to be designed to allow relatively small disputes to be handled outside of diplomatic channels. The Common Court of Justice and Arbitration for the Organization of the Harmonization of Corporate Law (OHADA) is mainly an appeals body for national rulings applying common corporate laws and regulations; allowing private actors to appeal national court rulings creates a non-diplomatic outlet to handle investor disputes.⁴¹ The International Tribunal for the Law of the Sea (ITLOS) generally lacks compulsory jurisdiction, but it has compulsory jurisdiction for disputes involving the seizing of vessels,⁴² and for contractual disputes between private actors and the Seabed Authority, perhaps so these issues do not become diplomatic controversies. The

³⁸ World Trade Organization's Appellate body, Andean Community, European Union, European Free Trade Area, East and South African Common Market, Caribbean Community, Benelux Community

³⁹ Economic Court of the Commonwealth of Independent States, and the Court for the Harmonization of Corporate Law in Africa.

⁴⁰ James McCall Smith, *The Politics of Dispute Settlement Design*, 54 *International Organization* 137

⁴¹ The NAFTA agreement has similar provisions for investor disputes. NAFTA is not on Table 1 because its legal bodies are not permanent.

⁴² The owner of the boat may bring the suit, but the plaintiff's government must first consent for the case to go forward.

exception to both arguments above is the Central American Court of Justice (CACJ). It is a general jurisdiction court pertaining to the countries of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua; its jurisdiction is compulsory and private actors can raise cases.

Although dispute adjudication may be a prevalent role delegated to ICs, it is not per se the most important or frequently activated international judicial role. It is hard to assess what percentage of each court's docket actually involves dispute adjudication. The most active ICs with this role—the ECJ, the ACJ—break down the type of legal case into cases referred, creating categories of preliminary rulings cases (e.g. cases referred by national courts), infringement suits raised by the Commission/Secretariat, nullification suits (administrative review of IO outputs), and direct actions (cases raised directly in front of the IC). It is interesting to note that there appear to be very few strait up inter-state dispute adjudication cases in these two bodies. This is not really surprising. Dispute adjudication cases may instead reach the IC as infringement suits, with states asking the Commission or Secretariat to pursue the issue instead of themselves raising a case. The other dispute adjudication courts are rarely used—with the notable exception of the WTO.⁴³

B. International Delegation of Enforcement Authority

The enforcement role involves public prosecutors raising criminal or infringement suits against states or their agents (e.g. government administrative actors, or government officials). Fifty-five percent of ICs (11 of 20) have been delegated explicit enforcement roles. Delegation of enforcement roles are found in the three central areas one finds IC authority—international criminal law, trade law, and human rights law. The first part of this article argued that compulsory dispute adjudication can easily morph into a decentralized enforcement role, where aggrieved states rather than central prosecutors raise suits to enforce the international agreement. If one added to the above list of courts ICs with compulsory dispute adjudication authority but no international prosecutor to help enforce the agreement (e.g. the WTO,⁴⁴ ECCIS,⁴⁵ BCJ and CCJ), the number of

⁴³ The lack of large dispute adjudication case loads—with the notable exception of the WTO—may reflect a bias in the data. If most international disputes are dealt with through alternative dispute resolution bodies—via arbitration, diplomacy, or legalized dispute resolution undertaken by courts that are not permanent or that deal with private actor disputes only—my reliance on PICT's categorization may actually hide where the action occurs. This bias may exist, but none-the-less the data suggests that most international adjudication by ICs does not involve inter-state dispute adjudication.

⁴⁴ See note 14.

⁴⁵ The ECCIS enforcement role is specific; Article 32 of the Charter of CIS allows the Economic Court to help “ensure the observation of economic obligations.” This has been interpreted by the

ICs that have been created with some enforcement role in mind would expand to 75% of all ICs.

At the international level, delegation of enforcement authority in principle can become self-binding, and thus bring sovereignty risks. But a deeper look at the record of delegation shows that 8 of the 11 delegations were designed to minimize risk. For two ICs, delegation of enforcement authority was coupled with political controls mechanisms: IAHCR countries can opt out of the court's compulsory jurisdiction and pressure the Commission not to pursue a case; for the COMESA court a Council of States must first sign off before an infringement suit can be brought. Three of the delegations of enforcement powers are other binding delegations to ad hoc criminal courts (Yugoslavia, Rwanda and Sierra Leone Tribunals). Another three delegations couple enforcement authority with fairly weak sanctioning systems so as to minimize the cost of a legal loss- CACJ, COMESA, and EFTAC courts can find a violation but not authorize sanctions.

The exceptions to these statements include the ECJ, ECHR, ACJ and the ICC. In each of these cases, the submission to IC authority gradually developed over time through a series of sequential changes, with each change involving greater sovereignty costs. The ECJ's enforcement mechanism was originally combined with a "toothless" sanctioning system.⁴⁶ When national courts started enforcing ECJ rulings, Europe found itself to de facto have an uneven enforcement mechanism—countries with more robust national judiciaries were held accountable to European law, and were more likely to follow ECJ decisions, compared to countries with weaker national judiciaries. In 1998 European states added a European level sanctioning mechanism to address this imbalance. Although any European state can be fined for non-compliance, the change was made mainly to confront the chronic non-compliers.⁴⁷ To date there have been very few fines levied, and there is little to suggest that this change has significantly affected compliance levels with ECJ rulings mainly because national courts tend to enforce ECJ rulings directly.⁴⁸

The ECHR has never had large sanctioning capabilities—its rulings primarily carry social stigmas.⁴⁹ The ECHR was originally designed to be

ECCIS court as an enforcement role that pertains to any rule that gives rise to "tangible benefits" for a party. For more see: <http://www.worldcourts.com/eccis/eng/jurisdiction.htm>

⁴⁶ Federico Mancini and David Keeling, *Democracy and the European Court of Justice*, 57 *Modern Law Review* 175

⁴⁷ Jonas Tallberg, *European Governance and Supranational Institutions: Making States Comply* (2003)

⁴⁸ Tanja Börzel, *Non-Compliance in the European Union: Pathology or Statistical Artifact*, 8 *Journal of European Public Policy* 803

⁴⁹ ECHR can award compensation to victims, but not punitive damages. Thus the fine is rarely sufficient to serve as a deterrent. On ECHR fines, see: Dinah Shelton, *Remedies in International Human Rights Law* (2000)

politically controllable; ECHR's Commission was set up both to investigate charges of human rights abuses, and as a gatekeeper to ensure that frivolous cases did not reach the court. Although at first reticent to refer matters to the court,⁵⁰ over time the Commission became willing to refer more cases. By 1998 the Commission was no longer gate-keeping—it referred nearly every plausible case to the ECHR. At that point, the Commission mainly created an extra step in the process. Thus states decided to abolish the Commission as a first step to reaching the ECHR. Eventually membership in the Council of Europe, and submission to the ECHR's authority, became a signal that a government is committed to following a liberal democratic path (and thereby is a candidate for accession to the European Union).⁵¹ Thus now European states willingly submit to the ECHR's authority so that they can obtain the benefit of being part of the European liberal democratic club.

The ACJ was created in 1981; it took until 1996 for the Junta to be authorized by member states to bring an infringement suit against a state. In 1996, the Andean Pact adopted a number of changes to make the institution more accessible, including allowing private actors to raise infringement suits directly with the ACJ should the General Secretariat refuse to raise a suit.⁵² This change made it harder for states to keep the General Secretariat from pursuing infringements, and it meant that the ACJ's sanctioning system was finally usable. As of June 2007, there have been sixty one formal infringement rulings by the ACJ, and thirty authorizations of retaliation.⁵³

In contrast to the evolutionary development of Europe's courts and the ECJ, the ICC began as true departure for international criminal justice. Historically, international criminal justice was victor's justice—other binding delegation wherein the losers of the war were held accountable for their violations despite the victors having committed similar crimes.⁵⁴ Ad hoc international criminal tribunals were other binding delegations in the sense that the actors

⁵⁰ The ECHR's early case load was as follows: 1959-69 10 decisions; 1970--1979 26 decisions 1980-1984 58 decisions; 1985-89- 111 decisions. Data from: A.H. Robertson and J. G. Merrills, *Human Rights in Europe* (1994) P. 310

⁵¹ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *International Organization* 217

⁵² Protocol of Cochabamba (10 March 1996).

<http://www.comunidadandina.org/normativa/tratprot/cochabamba.htm>

⁵³ These represent the cases not settled out of court; there have been 201 reasoned opinions during the same time period (not all of which find infringements) and thus at least 140 cases settled out of court. Retaliatory sanctions in the Andean context are similar to the World Trade Organization—a state is allowed to suspend concessions against another state up to the authorized amount. Thus non-compliance can only be sanctioned where states are interested in retaliating. *Comunidad Andina, Informe De La Secretaria General De La Comunidad Andina 2006-2007* (2007) (On file with the author)

⁵⁴ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000)

supporting legal redress knew that they would not themselves be subject to international criminal justice efforts. The ad hoc courts were none-the-less path breaking delegations because they introduced a new model, one where all sides were held accountable for their crimes.⁵⁵ Once the “all sides equally accountable” model was adopted, it was not clear why only certain atrocities could have legal remedies (e.g. crimes committed during the Yugoslavia, Rwanda, and Sierra Leone crises), although other crimes escaped punishment. The ICC is meant to generalize the “all sides accountable model,” and it has met with stiff resistance by some because the ICC self-binds states.

One could look at the gradual strengthening of certain international enforcement mechanisms and argue that there is a trend towards creating and using international enforcement mechanisms. Indeed the enforcement roles of the GATT system, the Andean Community, the European Union, and the European Human Rights system were all beefed up over time to increase the opportunity and capacity of these ICs to hold states accountable to their legal obligations.⁵⁶ And in the 1990s many states took the biggest plunge of all, committed to the ICC’s general jurisdiction over all war crimes. But if commitment to international legal enforcement is a sign of linear progress, one must note how lumpy and unequal the commitment often is. Enforcement mechanisms are the strongest for the issues the West cares most about—trade, and mass human rights atrocities. Outside of Europe, delegation of enforcement authority tends to bind the weak more than it binds the powerful. For example, the WTO’s and ACJ’s sanctioning system of allowing winning states to retaliate against states maintaining illegal trade barriers allows the rich to essentially buy their way out of compliance by accepting retaliation rather than complying.⁵⁷ The ICC allows states to escape its authority by prosecuting their own violators—which Western states are likely to do.

Although powerful actors have escape mechanisms to deal with IC enforcement authority, it is noteworthy that wherever countries have pre-committed to an IC’s enforcement authority (explicitly or as general compulsory

⁵⁵ The International Tribunal for the Former Yugoslavia is perhaps the clearest case of this model, though the principle that all sides are accountable certainly holds for the ICTY’s Rwandan and Sierra Leone counterparts.

⁵⁶ The GATT’s dispute adjudication authority started as non-compulsory. After the US started unilaterally “enforcing” GATT rules, GATT states decided a more usable enforcement mechanism would be preferable. So when WTO was created (1994), its dispute resolution mechanism was made compulsory. See the discussion of the European Union, European Court of Human Rights and the Andean Community in this section.

⁵⁷ Karen J. Alter, *Resolving or Exacerbating Disputes? The Wto's New Dispute Resolution System*, 79 *International Affairs* 783, Joost Pauwelyn, *Enforcement and Countermeasures in the Wto: Rules Are Rules-- toward a More Collective Approach*, 94 *American Journal of International Law* 335

dispute adjudication), powerful and weak states have the willingly participated in legal suit that are raised. This fact stands in contrast to the ICJ where some countries have refused to participate in proceedings (in cases where the ICJ's jurisdiction was compulsory) forcing the ICJ to continue the case with no defendant present.

C. International Delegation of Administrative Review Authority

Forty percent of ICs have been delegated explicit administrative review authority (8/20) as indicated by the IC having the authority to review the legality of any action, regulation, directive or decision of a public actor, and the authority to also question failures to act. The OHADA court was categorized as a dispute resolution body since it does not have the explicit authority to hear challenge regarding the legality of a public decision, but it will primarily hear appeals of national court rulings where the case involves a challenge to a public decision regarding a private firm.⁵⁸ If one adds in this courts, then 45 percent of ICs play an administrative review role.

Most of the ICs with administrative review authority are embedded in economic agreements (the exception to this rule is the ITLOS Seabed authority). All eight cases with explicit delegation of administrative review authorities have a supra-national administrators with the power to issue binding decisions. Thus the delegation of administrative review authority appears to be a direct attempt to extend to the international level the sort of legal protections found within domestic administrative states, and it appears to be primarily other-binding delegation (true for the ACJ, BCJ, CACJ, CFI, COMESA, ECJ, EFTAC, and ITLOS contexts). Sometimes, however, there is a self-binding dimension to this delegation too- found for the ECCIS, OHADA, ACJ and ECJ. In these cases, domestic actors end up applying international agreements, which has led to a concern that rules will be unevenly applied. This concern led to a decision to submit national administration of the specific international agreements to international supervision.

Administrative review requires compulsory jurisdiction and private access, so as to allow those affected by administrative rulings to challenge them. All of the ICs with administrative review authority (both the 8 ICS with explicit administrative delegations, and the 2 with implicit administrative review delegations) have compulsory jurisdiction and private access for this role. Thus administrative review powers can account for ten of the twelve ICs that have private access and compulsory jurisdiction.

⁵⁸ Note that there are other ways in which an IC can end up engaged in administrative review. Dispute resolution cases, for example, can end up asking essentially administrative review questions. ICs can exercise this review, but their rulings will not per se nullify the questionable administrative decision, nor will they be reviewing 'failures to act.'

All ICs on this list play roles other than administrative review—be it dispute resolution, constitutional review, and/or enforcement roles. But it is noteworthy that the fewest caveats are placed on ICs in an administrative review role compared to other roles. One sees a lack of caveats in terms of access rules—administrative review and labor disputes roles⁵⁹ tend to be one of the few places where private actors are allowed direct access to the IC.⁶⁰ One also sees a lack of caveats in that legal standing is rarely denied (this is in contrast to constitutional review for the ACJ and ECJ where private actors must show that the law in question directly effects them).⁶¹

The busiest courts—the ACJ, the ECJ, and the CFI—find themselves busiest with respect to administrative review cases—be they reviews of supra-national administrative rulings or reviews of national efforts to implement supra-national regulations. This means that numerically speaking, administrative review cases account for the lion’s share of all international litigation (all CFI cases, all ECJ direct action cases, most ECJ preliminary ruling cases, and virtually all ACJ preliminary ruling case⁶²—thus roughly 10,353 of the existing 14,886 cases brought to all ICs). If one adds in the reality that 72% of ECHR rulings involve “access to justice” claims—charges that the national administration of justice is either too slow or insufficiently respectful of plaintiff’s due process rights⁶³—it becomes clear that numerically speaking, most international litigation involves reviewing the actions of public implementers of rules and policies. Although international review of national administrative actions can compromise national

⁵⁹ A number of ICs have authority to adjudicate disputes between IOs and their employees.

⁶⁰ The exception to this is the ITLOS body. Access is wide to the Seabed authority in this role, but the types of challenges are circumscribed:

Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures. Its jurisdiction in this regard shall be confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention. (UNCLOS article 187)

⁶¹ There is no need to require heavy handed remedies—administrative review rulings primarily remand an action back to the administrative actor, nullifying the existing decision and requiring them to issue a new one.

⁶² Andean Court cases seem to be mostly about intellectual property (well over 90% of the cases). Laurence Helfer, Karen Alter, and Maria Flo Guerzovich have a project underway examining this activity.

⁶³ Rachel Cichowski, Courts, Rights and Democratic Participation, 39 Comparative Political Studies 50 At p. 65.

autonomy, administrative review is mostly other binding and thus not deeply sovereignty compromising. In any event, where review is limited to the actions of IOs, no national sovereignty is compromised.

D. International Delegation of Constitutional Review Authority

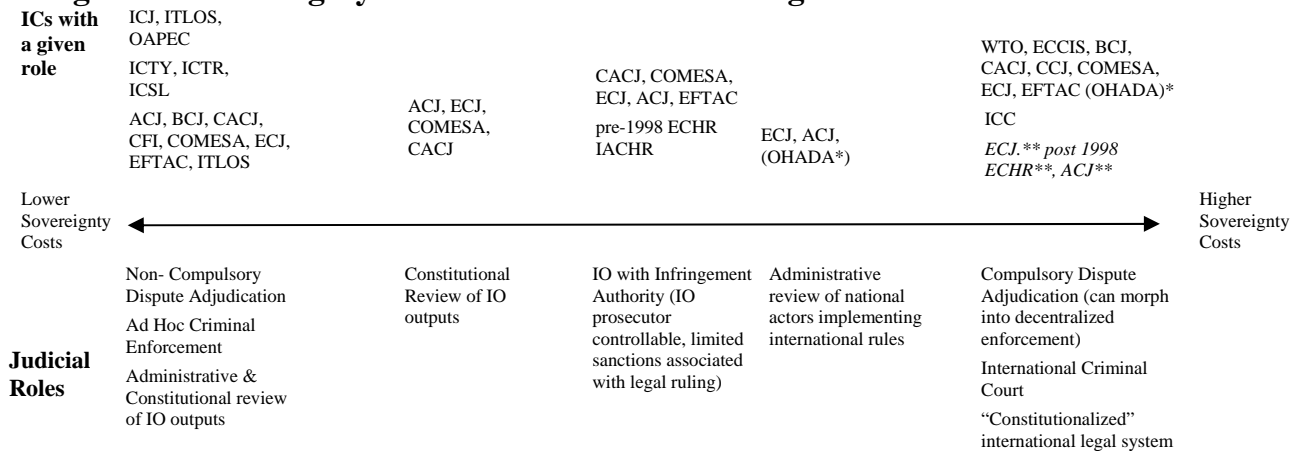
This analysis considers only explicit delegations of authority to ICs, and thus not the actions of ICs to expand or constitutionalize their authority. Four ICs (20% of all ICs) have been granted explicit authority to review the legality of legislative acts. In all of the cases, the subject of review is designed to be IO outputs—and thus the delegation is primarily other-binding. This review role fits with Bradley and Kelley’s delegation of “oversight authority”—providing states a means to oversee the actions of the international organization. The ICs with explicit constitutional review authority are primarily common market bodies—the ACJ, COMESA, and the ECJ. (The CACJ also has constitutional review authority.) All of these institutions have supranational political bodies that can exercise delegated legislative authority in that they can promulgate rules that are legally binding within domestic systems. The granting of international constitutional review authority subjects this rule making power to constitutional review—which in most cases will involve reviewing the legality of actions of supranational legislative bodies. The circumscribed nature of this constitutional review delegation perhaps explains there are relatively few caveats limiting access to or IC authority in this role—all ICs with this delegated role have compulsory jurisdiction and private access.

The two other potential ICs in this category include the CCJ—the role of which will be determined when the supranational Secretariat’s and Council’s powers are determined—and the ECHR which some observers see as so completely changed from its initial enforcement design as to now fit in this category.

In sum, Table 2 presents a stark paper trend of creating ICs with both private access and compulsory jurisdiction. Deeper investigation of this trend reveals that wide access is mostly for “other-binding” roles—administrative review, and constitutional review of IO outputs. Diagram 2 below maps actual delegations of IC authority onto the categories in Diagram 1, to capture which actual delegations are sovereignty compromising. Remember that ICs can be delegated more than one role. The most extensive delegations of authority- in terms of the different roles ICs are given, and the sovereignty compromising nature of the design of ICs--appear in economic agreements. It is interesting to note that delegation to ICs where the sovereignty costs are highest are among the most active ICs. So one cannot conclude that sovereignty compromising delegation is symbolic. It is also true, however, that not all rulings emerging from

active courts compromise sovereignty, which may be why the sovereignty costs are more politically palatable.

Diagram 2: Sovereignty Costs Associated With Delegation to ICs



International delegation

* OHADA'S role is mainly limited to appeals of national court rulings applying common rules.

**The changes over time in the role and design of the ECJ, ECHR and ACJ puts them in this category, not the original delegation of authority.

There is strong evidence that states have tried to limit the sovereignty compromising nature of delegation to ICs. But the fundamental risk of delegation to ICs remains. The original delegations of authority to the ECJ and ECHR were not so sovereignty compromising. But the ECHR, along with the ECJ, have ended up exercising their powers in ways that are deeply compromising of national sovereignty, a reality that factored into state decisions to later alter the delegation contract to reinforce the supra-national court's de facto roles.⁶⁴ It was not so much the original grant of authority that created this outcome, but rather the bold assertiveness of the ICs as they exercised their authority. Indeed the ACJ has the exact same structure as the ECJ—with the same delegated roles and even wider private access to trigger litigation—yet it has not exercised its authority in as sovereignty compromising of a way.⁶⁵ Meanwhile the WTO's appellate body only was granted a dispute adjudication role, and it lacks private access, but it has ended up ruling in ways that do compromise national sovereignty while similarly

⁶⁴ Karen J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (2001), Jonas Tallberg, *European Governance and Supranational Institutions: Making States Comply* (2003), Laurence R. Helfer, *Redesigning the European Court of Human Rights: From International Tribunal to Constitutional Court* (2007)

⁶⁵ Karen J. Alter, *Exporting the European Court of Justice Model: The Experience of the Andean Common Market Court of Justice* (2007)

designed bodies (ECCIS, EFTAC, BCJ, CACJ, COMESA) have not.⁶⁶ All of this suggests that the substance of the legal suits, which is itself an artifact of the role the court has, matters more in determining the extent to which sovereignty in fact ends up being compromised than the fact of delegation or the design of the IC.

III. Conclusion- The Sovereignty Costs of Delegation to International Courts

The analysis in this article has aimed to correct the impression of what delegation to ICs is about. Many scholars and practitioners assume that ICs primarily play an inter-state dispute adjudication role, along the lines of the International Court of Justice.⁶⁷ Eric Posner and John Yoo go so far as to suggest that non-compulsory dispute adjudication is the only role ICs can play effectively.⁶⁸ Although dispute adjudication is a prevalent role delegated to ICs, it is not the only role and increasingly dispute adjudication is combined with compulsory jurisdiction, making ICs more about enforcement—precisely what Posner and Yoo dislike. In terms of IC dockets, inter-state dispute adjudication clearly is *not* the most prevalent role ICs play.

This analysis raises theoretical challenges for existing theories of IC independence as it relates to compromising national sovereignty. In Principal-Agent (P-A) literature ICs are presumed to be Agents of the states that create them, and independence is assessed in terms of the rules that shape the Principal's ability to change the delegation contract. P-A theory expects that the harder it is to sanction an agent through recontracting, the more independent the Agent, and the greater Agent slippage.⁶⁹ The problem with this theory, as applied to ICs, is immediately apparent. The rules for sanctioning ICs through recontracting are largely uniform—international judges are appointed for short terms (4-8 years); changing international rules and/or the original delegation contract to punish judges tends to be hard (requiring unanimity or super-majorities); cutting budgets

⁶⁶ Claude Barfield, *Free Trade, Sovereignty, Democracy* (2001), Claude Barfield, *Wto Dispute Settlement System in Need of Change*, 37 *Intereconomics* 131, Karen J. Alter, *Resolving or Exacerbating Disputes? The Wto's New Dispute Resolution System*, 79 *International Affairs* 783

⁶⁷ Eric A. Posner and John C. Yoo, *A Theory of International Adjudication*, 93 *California Law Review* 1, Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *William and Mary Law Review* 1229, Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 *University of Illinois Law Review* 1045

⁶⁸ Eric A. Posner and John C. Yoo, *A Theory of International Adjudication*, 93 *California Law Review* 1

⁶⁹ Darren Hawkins, David Lake, Dan Nielson and Mike Tierney, *States, International Organizations and Principal-Agent Theory* (Chapter 1), in *Delegation under Anarchy: Principals, Agents and International Organizations* 2006)

slows the administration of justice but does not affect judicial autonomy. Given the vast similarity the sanctioning mechanisms for ICs, it is clear that recontracting rules cannot explain variation in the extent of charges of IC slippage.⁷⁰ The failure of P-A theory to explain the variation in IC slippage highlights a problem with the assumptions of P-A theory; it is not true that the more independent ICs, the more likely judges are to deviate from the wishes of the Principal. Rather, judicial roles significantly define how judges approach their interpretive task. In some IC roles, courts are not really Agents of the states but rather courts themselves are mechanisms states use to oversee the behavior of others (IOs, or signatories to the agreement). In other roles, ICs are designed to challenge illegal state practices. ICs would lose their legitimacy as legal actors if they shied from their given role because of political pressure, which is why it can be more appealing for international judges to face a political sanction than criticism or non-compliance through transparently political behavior.

Legal literature does not focus on state ability to “sanction” judges through recontracting, but shares the assumption that independence is associated with slippage. Posner, Yoo and to some extent Bradley and Kelley expect whether or not international courts have compulsory jurisdiction, and whether private actors are allowed to initiate disputes, to shape IC independence and thus the sovereignty costs of delegation to ICs.⁷¹ Posner and Yoo expect compliance with IC rulings to be less likely when a state is an unwilling litigant, and thus they expect ICs with compulsory jurisdiction to be less effective overall in inducing compliance with the law.⁷² Table 2 shows a trend of creating ICs with compulsory jurisdiction and private access, thus in creating highly independent ICs. There is more controversy surrounding ICs today than in the past, but given that there are more ICs, and given the sixty eight percent rise in IC activity, the rise in controversy is not surprising. It hard to say that the design trend itself has led to an increase in ICs being charged with “running amok.” Indeed a number of ICs with compulsory jurisdiction and private access do not seem to generate controversy (for example, the ACJ, COMESA, CACJ, OHADA)—and not simply because these systems are not used. Meanwhile, ICs without these design features do seem to engender controversy—such as the ICJ, which lacks compulsory jurisdiction and private access, and the WTO and ICC which lack private access. The reason is the same as above—certain roles are inherently other-binding (and thus not sovereignty compromising) and in certain roles judges

⁷⁰ Karen J. Alter, *Delegation to International Courts and the Limits of Recontracting Power*, in *Delegation and Agency in International Organizations* (Hawkins, Lake, Nielson and Tierney 2006)

⁷¹ Eric A. Posner and John C. Yoo, *A Theory of International Adjudication*, 93 *California Law Review* 1

⁷² Their argument has been ably critiqued. See: Laurence Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *Yale Law Journal* 273

are more likely to be deferential to legislative intent, thereby avoiding compromising sovereignty or engendering controversy.

Nor does the extent to which sovereignty is compromised correspond entirely with the legal effect or sanctioning power of a court. Part of the PICT definition of an IC included that IC rulings were legally binding—thus all ICs considered in this analysis can issue binding rulings.⁷³ There are variations in enforcement mechanisms for IC rulings, but these variations do not seem to account either for variation in sovereignty risks or in respect for IC rulings. There are two reasons sanctioning power is not key. First, in all cases, courts rely primarily on voluntary compliance by the parties—indeed Martin Shapiro argues that *all courts*, from weak to strong, seek the consent of their parties, crafting rulings that offer each side the chance to claim partial victory.⁷⁴ Indeed most actors follow IC rulings simply because the IC is the authoritative body charged with interpreting the law. Second, the stronger the enforcement mechanism, the less likely it is to actually be used. For example, International Court of Justice rulings can be backed up by the use of force, but the Security Council has never authorized such a back up, because doing so would be a drastic step of great political significance. Indeed international legal systems with sanctioning mechanisms—like the systems of the World Trade Organization and European Court of Justice rarely invoke the sanctioning mechanisms, nor is it clear that the mere possibility of appealing to sanctions systematically increases compliance with legal rulings.⁷⁵ These reasons are why international lawyers like Louis Henkin, Abraham Chayes, Harold Koh and Thomas Frank emphasize the legitimacy of legal rulings over the strong direct sanctions, such as the use of force or criminal punishment. Chayes goes so far as stating that efforts to improve compliance by adding sanctions are a “waste of time”.⁷⁶

⁷³ All 20 ICs analyzed in this article can issue binding legal rulings; only a handful of the ICs even have the authority to issue non-binding advisory opinions (ICJ, ECCIS, EFTAC) and where the authority exists advisory opinions are rare because litigants prefer binding decisions.

⁷⁴ Martin Shapiro, *Courts: A Comparative Political Analysis* (1981)

⁷⁵ [Eric Reinhardt and Marc Busch have found that states are most likely to make concessions before a WTO ruling is issued, so that it is in fact the hardest cases where compliance is least likely that end up in court. There are certainly examples where countries continued non-compliance up until the day that retaliatory sanctions would kick in, but in systems where enforcement mechanisms were added \(such as the ECJ\), there is little evidence that general compliance improved once sanctions for non-compliance became possible.](#) Marc L Busch and Eric Reinhardt, Bargaining in the Shadow of the Law: Early Settlement in Gatt/Wto Disputes, 24 *Fordham International Law Journal* 148, Tanja Börzel, Non-Compliance in the European Union: Pathology or Statistical Artifact, 8 *Journal of European Public Policy* 803, Jonas Tallberg, European Governance and Supranational Institutions: Making States Comply (2003)

⁷⁶ Louis Henkin, *How Nations Behave* (1961), Abram Chayes and Antonia Handler Chayes, *The New Sovereignty* (1995), Harold Hong Koh, *Why Do Nations Obey International Law?*, 106 *Yale Law Journal* 2599, Thomas M. Franck, *The Power of Legitimacy among Nations* (1990)

Rather than focusing on contract design, this article examined the roles delegated to courts showing how contract design largely follows from the judicial roles delegated to courts. ICs with explicit enforcement and constitutional roles require compulsory jurisdiction for these roles. ICs with explicit administrative roles also require private access. Indeed one finds that ICs granted constitutional, administrative, and enforcement roles were also granted compulsory jurisdiction (with the exception of the IACHR), and in the case of administrative and constitutional roles, they were granted private access. Because the administrative and constitutional roles are primarily other binding, little *national* sovereignty is being compromised through delegation—which is why compulsory jurisdiction and private access do not per se translate into a compromise of national sovereignty.

The assumptions about IC independence create misperceptions, which are then fed by a bias in the American scholarship on ICs. Most scholars follow the political controversy—writing about rulings because the decision upset expectations or the desire of powerful actors, especially the US or European states. The assumption is that controversial rulings are the most significant IC rulings. But really, the preferences of state actors rather than the legal or policy significance of a ruling determine whether an IC ruling is controversial. American politicians have reacted strongly to WTO rulings even where the WTO rulings represented reasonable interpretations of the law, and the cost of the ruling was fairly insignificant in dollar and political terms. Meanwhile, when the ECJ extended the reach of European gender equality provisions, ruling that the German constitutional ban on women in combat support roles violates European law, there was relatively little political controversy. The ECJ's ruling led Germany to change its constitution, and created fundamental changes within the German military—an institution extremely close to the heart of national sovereignty. But neither the ECJ ruling or the constitutional change was controversial because many Germans supported increasing the role of women in the military.⁷⁷ In this case, as in many others, the international court facilitated a domestic political change that many desired.

If instead of following controversy, scholars followed the litigants, they would be writing more about ICs involvement in private-public dispute adjudication, enforcement and administrative review, and about how most of these rulings are exactly what states hoped for when they delegated authority to ICs. If scholars focused more on IC jurisprudence in its various judicial roles, and the political impact of the jurisprudence, we'd have a greater sense of when and

⁷⁷ Tanja Kreil v. Bundesrepublik Deutschland, Case C-285/98, 2000 E.C.R. I-69. Gerhard Kuemmel, *Changing State Institutions: The German Military and the Integration of Women* (2003)

how ICs facilitate state compliance with international rules—which really is the only way to ascertain how effective an international legal system actually is.

Finally, this analysis reveals the limits of focusing on design features to explain political behavior. This study can tell us what roles were explicitly delegated to ICs, but not what roles ICs come to play. It can tell us which roles, and thus which courts, are more likely to end up compromising national sovereignty, but not which ICs actually do end up compromising national sovereignty. In the end, the cases that are raised, and the audacity of judges in exercising their authority (or extending their authority) will ultimately determine when and to what extent national sovereignty becomes compromised by delegation to ICs.

Fearing that sovereignty will be compromised, conservative commentators condemn nearly all delegations to international courts. This analysis reveals the extent to which fearful critics like Robert Bork, Jack Goldsmith, Eric Posner, John Yoo and Jeremy Rabkin are offering as examples just a small sliver of what ICs actually do.⁷⁸ The point is not to eliminate self-binding delegation while retaining all other-binding forms of delegation--- indeed eliminating all risk would be impossible. Before we discard the baby with the bathwater, we would be better off considering the benefits and costs of delegation to ICs as a package deal. Delegation to ICs provides many benefits. In the vast majority of cases, ICs are doing exactly what member states asked them to do—reviewing administrative decision making, ensuring international institutions do not exceed their power, and enforcing international agreements so that states can capture the benefits of the treaties. In a small minority of cases, national sovereignty is compromised—often by design, but also in surprising ways. People will come out differently in weighing this balance. For some, simply the idea that an international actor can tell a national actor what to do is intolerable. But it is worth pointing out direction of the trend. The empirical record shows an increasingly to create and use ICs, suggesting that most states are quite comfortable with the balance of costs to benefits as it stands.

⁷⁸ Robert H. Bork, *Coercing Virtue : The Worldwide Rule of Judges* (2003), Jeremy A. Rabkin, *Law without Nations? : Why Constitutional Government Requires Sovereign States* (2005), Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (2005), Eric A. Posner and John C. Yoo, *A Theory of International Adjudication*, 93 *California Law Review* 1

APPENDIX 1: *DELEGATION TO ICs AND ACCESS RULES BY ROLE- AS DEFINED BY THE COURT'S DELEGATION CONTRACT**

(After first assigned role, only court's acronym is used, making it easy to see which courts have multiple roles)

Judicial Role	ICs with role	Compulsory Jurisdiction	Private Access	Notes
Dispute Adjudication General jurisdiction to “interpret the meaning of the law” or to “ensure that the law is respected,” jurisdiction to resolve disputes. Note that PICT’s definition of an IC requires an IC to be permanent, and to hear cases involving IOs or states. <i>ICJ Statute of the Court, art. 36</i> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.	International Court of Justice (ICJ)			There is an optional protocol where signatories agree to accept compulsory jurisdiction. The ICJ can also be designated the interpreter of treaties, and there can be compulsory jurisdiction for specific treaties only.
	International Tribunal for the Law of the Seas (ITLOS)	Limited	Limited	Compulsory jurisdiction & private access exists only in cases involving the seizing of vessels, and the plaintiff’s government must consent to the case being raised. Seabed authority can adjudicate disagreements between private actors for issues related to the rules of the Seabed authority.
	World Trade Organization Permanent Appellate Body (WTO)	X		Provisions of the “Understanding on Rules and Procedures Governing the Settlement of Disputes” suggest that the aim of dispute settlement “to preserve the rights and obligations of Members under the covered agreements”—and thus in part enforcement
	European Free Trade Area Court (EFTAC)	X	Limited	EFTAC can review questions sent to it by national courts based on cases raised by private actors, but its opinions are not binding in these cases (e.g. they are advisory).
	European Court of Justice (ECJ)	X	De Facto	Private individuals can raise cases in national courts, which then get referred to the ECJ for resolution. In practice, states rely on the Commission to pursue issues that concern them.
	Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries (OAPEC)	Limited	Limited	There is an implicit compulsory jurisdiction, but only so long as the disputes do not infringe on the sovereignty of any of the countries concerned. States have the option of consenting to jurisdiction in a suit raised by a private actor.
	Caribbean Court of Justice (CCJ)	X	Limited	CCJ is authorized to decide on case a by case basis if the needs of “justice” require allowing private access for the case.
	Economic Court of the Common- Wealth of Independent States (ECCIS)	X		
	Central American Court of Justice (CACJ)	X	X	
	Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)	X	X	OHADA- Private actors can directly appeal national court rulings to OHADA court. For
	Court of Justice for the	X	Limited	Private actor access is limited to contracts between private actors and COMESA

* Role classifications are based on analysis of the court’s jurisdiction as defined in the IC’s founding treaties. Sample language from treaties is provided in the table above. Treaty drafters usually break down the types of legal issues and the associated access rules into separate treaty articles, thus it is easy to identify where a single court plays more than one role, and to associate access rules with each role. I do not consider whether an IC can play a role via an “advisory opinion” since such opinions are not binding, nor do I consider IC roles with respect to employees of the IO.

	Common Market of Eastern and Southern Africa (COMESA)			institutions.
	Benelux Court (BCJ)	X		
	Andean Court of Justice (ACJ)	X	X Since 1996	1996 reforms allow individuals to raise challenges to national policies at the Andean court. In practice, states rely on the Commission to pursue issues that concern them.
Enforcement Jurisdiction regarding an enumerated list of crimes or jurisdiction to hear infringement suits against states. Cases generally are raised by a public prosecutorial type actor. <i>ICC Rome Statute, art. 5 -</i> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: The crime of genocide; Crimes against humanity; War crimes; The crime of aggression.	International Criminal Court (ICC)	X		Prosecutor raises cases. A state, or the Security Council can refer a matter to the Prosecutor, but the prosecutor can also initiate investigations on his own.
	International Criminal Tribunal for the Former Yugoslavia (ICTY)	X		(same as above)
	International Criminal Tribunal for Rwanda (ICTR)	X		(same as above)
	International Criminal Tribunal for Sierra Leone (ICTSL)	X		(same as above)
	EFTAC	X		
	ECJ	X		Commission raises infringement suits.
	ACJ	X	X	Secretary General raises infringement suits. 1996 reforms allow individuals to raise infringement suits against national governments.
	COMESA	Limited		The Secretary General raises infringement charges. A Council of States must agree to have the matter referred to the Court.
	CACJ	X	X	There is no designated supra-national prosecutor. The court has general authority to hear infringement suits brought by any actor with standing, including states, private actors, and community institutions.
	Inter-American Court of Human Rights (IACHR)			A Commission raises a suit. States can sign an optional protocol consenting to compulsory jurisdiction.
	European Court of Human Rights (ECHR)	X	X (Since 1998)	Pre- 1998 only a Commission could raise cases. In 1998 the Commission was eliminated and direct access for private actors was allowed (Protocol 11), substantially altering the role the ECHR de facto plays. At first countries could opt in to Protocol 11 if they chose.
Administrative Review Jurisdiction in cases concerning the “legality of any action, regulation, directive, or decision” of a public actor, or the public actor’s “failure to act.” <i>EC Treaty, art. 230</i> The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB...It shall for this purpose have	ITLOS-Seabed Authority	X	X	Court is not allowed to review the validity of Seabed policies. Its review is confined to deciding claims that the application of Seabed Authority rules or procedures would be in conflict with the obligations of the parties to the dispute, claims concerning excess of jurisdiction or misuse of power.
	ECJ & CFI (Court of First Instance)	X	X	
	EFTAC	X	X	
	ACJ	X	X	
	COMESA	X	X	
	BCJ	X	X	

jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. (Article 232 allows “failure to act” suits on similar terms)	CACJ	X	X	
Constitutional Review Jurisdiction to review the validity of any legislative act, regulation, directive, of an IO. <u>Court of Justice of the Cartagena Agreement (ACJ) Treaty, Article 17:</u> It is the responsibility of the Court to declare the nullity of Decisions of the Andean Council of Foreign Ministers and the Andean Community Commission, Resolutions of the General Secretariat, and the Agreements referred to in Article 1, paragraph e), if enacted or agreed upon in violation of the provisions comprising the legal system of the Andean Community, and even for the deviation of power, when requested by a Member Country, the Andean Council of Foreign Ministers, the Commission of the Andean Community, the General Secretariat, or natural or artificial persons whose rights or interests are affected as provided for in Article 19 of this Treaty.	COMESA	X	X	Designed primarily for challenging COMESA policy.
	ECJ	X	X	Originally designed to challenge European policy only—while there is direct access for this role the ECJ has interpreted the access requirement very narrowly. The treaty was “constitutionalized” by the ECJ’s declaration of EC law supremacy so that now private actors can raise what are essentially constitutional challenges within national courts, which refer the issue to the ECJ
	ACJ	X	X	In 1996 ACJ authority was expanded to allow direct challenges to Andean policies, and to national policies that violate Andean rules.
	CACJ	X	X	Designed primarily for challenging CACJ policies.
	Post 1998 ECHR?	X	X	With 1998 ECHR changes, does it now play essentially a constitutional role?
	CCJ?	X	X	The role of the CCJ in the common market is yet to be defined.