

**WHY STATES CREATE INTERNATIONAL TRIBUNALS:
A THEORY OF CONSTRAINED INDEPENDENCE**

Laurence R. Helfer*

INTRODUCTION	2
I. RATIONAL STATES, DELEGATION, AND THE PUZZLE OF INDEPENDENT INTERNATIONAL ADJUDICATION.....	4
II. DELEGATING AUTHORITY TO INDEPENDENT INTERNATIONAL TRIBUNALS SERVES THE INTERESTS OF STATES	5
A. <i>Delegation Enhances the Credibility of International Commitments</i>	7
B. <i>Triangulating the Interests of States and Independent Tribunals: Three Multilateral Examples</i>	11
1. <i>“Deep” International Agreements</i>	11
2. <i>Treaties that Regulate Public Goods or Commons Problems</i>	12
3. <i>Treaties that Create Rights or Benefits for Private Parties</i>	13
C. <i>Dependent Tribunals and Bilateralism</i>	13
III. A THEORY OF CONSTRAINED INDEPENDENCE FOR INTERNATIONAL TRIBUNALS	14
A. <i>Formal and structural ex ante control mechanisms</i>	18
B. <i>Political ex ante control mechanisms</i>	19
C. <i>Formal and structural ex post control mechanisms</i>	22
D. <i>Political ex post control mechanisms</i>	24
E. <i>Discursive constraints of the global community of law</i>	25
IV. CONCLUSION.....	27

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INTRODUCTION

The last two decades have seen an unprecedented expansion of international adjudication.¹ Consider the following four trends:²

First, states have created a slew of new international courts, tribunals, and quasi-judicial review bodies. Some of these new juridical entities have global reach; others are regional in scope. Some are true courts that hand down legally binding judgments; others issue only non-binding recommendations. Some hear only disputes between nation states; many others can receive and review complaints from private parties. Some enjoy capacious subject matter jurisdiction; others only narrow or technical competencies.³

In addition to creating new international tribunals, states are recognizing the jurisdiction of both new and existing international tribunals in increasing numbers. They are ratifying treaties with respect to which international judicial review is mandatory.⁴ And they are recognizing the jurisdiction of courts and tribunals even where their decision to do so is entirely optional and is not a condition of treaty membership.⁵

¹ See, e.g., Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 *Melb. J. Int'l L.* 453, 454 (2002) (“The establishment of new fora for third party dispute settlement is one of the more striking international legal developments in recent years.”).

² Evidence supporting each of these four trends appears in Laurence R. Helfer & Anne-Marie Slaughter, *Of States, Bargains, and Judges: A Response to Professors Posner and Yoo*, 93 *Cal. L. Rev.* ___ (forthcoming May 2005) [hereinafter Helfer & Slaughter, *States, Bargains, and Judges*]. Additional evidence, including a detailed discussion of dependent tribunals, appears in Eric Posner & John Yoo, *Judicial Independence and International Tribunals*, 93 *Cal. L. Rev.* ___ (forthcoming Jan. 2005).

³ See Cesare Romano, *The International Judicial in Context: A Synoptic Chart*, http://www.pict-pecti.org/publications/synoptic_chart/synoptic_chart2.pdf; Project on International Courts and Tribunals (PICT), *Research Matrix*, <http://www.pict-pecti.org/matrix/Matrix-main.html>.

⁴ The WTO’s dispute settlement system exemplifies this first trend. The WTO began its life on January 1, 1995 with 76 members. As of July 2004, membership had risen to 147, with 26 additional states seeking accession. Ratification of the ICC statute reveals a similar pattern. The state was opened for signature in June 1998. Sixty ratifications were required for the statute to enter into force. That number was achieved in April 2002 and as of July 2004, 94 states were parties to the statute, and an additional 45 had signed the treaty. In terms of regional tribunals, the European Court of Justice (ECJ) and European Court of First Instance (ECFI) have seen their jurisdictional reach expand as more states have joined the Treaty of Rome and the numerous amendments it has spawned.

⁵ The ECHR has perhaps the strongest record in this regard. At the time of the European Convention’s founding in 1953, recognition of the Court’s jurisdiction was optional. That practice changed with the adoption of Protocol 11, which overhauled the Convention’s judicial machinery to make jurisdiction compulsory and to grant individuals direct access to the Court in all cases. A similar trend is underway with respect to tribunals whose competence covers trade and economic law. Since 1992, for example, eight of the twelve members of the Commonwealth of Independent States have ratified the agreement establishing the Economic Court of the Commonwealth of Independent States (ECCIS). And in just over a year since African governments agreed in 2003 to create a new Court of Justice of the African Union, 31 states have signed and three have ratified a Protocol that specifies the court’s powers and responsibilities.

Third, international tribunals are also actively utilized by states and by private parties, a fact demonstrated by the growing number of decisions they issue. According to a recent study based on cases decided through 2002, “more than 80% of the total international judicial activity (14946 out of 18277 cases heard by international tribunals) occurred in the last 13 years alone.”⁶

Fourth and finally, most international tribunals are independent of the states that created them.⁷ Independence can be measured both formally and functionally. Formally, tribunals are independent when they are permanent bodies that exercise compulsory jurisdiction over the states that have ratified the treaty creating the tribunal, and are composed of judges appointed or elected for a term of years during which they are protected from removal except for cause.⁸ As a matter of practical judicial decision-making, independence denotes the willingness of judges to decide cases based on generally applicable legal principles rather than political expediency, even where this requires ruling against powerful states.⁹

This paper focuses on formal independence, by which I mean the institutional features of a tribunal that insulate—but do not, as I explain below, isolate—its members from political pressures by states. I argue that states can enhance the credibility of their commitments by delegating authority to international tribunals that are formally independent. Having delegated such authority, however, states face the risk that the members of independent tribunals will seek to expand their authority or recognize new legal norms, and thus to impose greater restrictions upon the national governments subject to its jurisdiction.

I offer a theory of “constrained independence” to explain how states counter this potential for overreaching without abandoning independent international adjudication altogether. In particular, I argue that states use formal, structural, political, and discursive control mechanisms, both before an independent tribunal is established and after it begins operating, to convey to its members the range of judicial outcomes that are politically tolerable. It is these more fine-grained control mechanisms that allow states to capture the credibility-enhancing benefits of

⁶ Karen Alter, *Delegation to International Courts: Four Varieties and their Implications for State-Court Relations*, paper prepared for the Project on Delegation to International Institutions, Sept. 19-20, at 4 (2003) [hereinafter Alter, *Delegation to International Courts*].

⁷ The antithesis of an independent tribunal is ad hoc arbitration, in which states must agree to submit their dispute to an arbitral panel after their dispute has arisen. Ad hoc arbitration is also dependent in the sense that states select the decision-makers who will hear their dispute (or at least agree on the rules for selecting those decision makers) and they do only for purposes of resolving a specific controversy.

⁸ See, e.g., Treaty of Rome, art. 223 (requiring that judges, who serve for a renewable term of six years, be “persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence”); Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 39(3), 40(1), (requiring that judges, who serve for a renewable term of nine years, be of “high moral character” and “either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence”). See also Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & Prac. Int’l Courts & Tribunals 27, 34 (2003) (“No tribunal provides for lifetime tenure, but all contain protections against removal except for cause.”).

⁹ Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 300, 312-13 (1997).

delegation to formally independent international tribunals while minimizing, although not eliminating, the potential for judicial excesses.

I. RATIONAL STATES, DELEGATION, AND THE PUZZLE OF INDEPENDENT INTERNATIONAL ADJUDICATION

Why are states creating new independent tribunals, recognizing the jurisdiction of existing independent tribunals, and adjudicating cases before such tribunals? Delegating authority to independent judicial decision makers would seem to be contrary to the interests of rational, interest-maximizing states. A state that makes such a delegation constrains its sovereignty by giving judges or tribunal members the authority to decide that its domestic laws and practices are inconsistent with its international law obligations.

The restrictions on states' freedom of action that flow from delegation to independent tribunals create a puzzle for scholars of international affairs. As Andrew Moravcsik has pointedly framed the question: "Why would any government, democratic or dictatorial, favor establishing an effective independent international authority, the sole purpose of which is to constrain its domestic sovereignty in such an unprecedentedly invasive and overtly nonmajoritarian manner?"¹⁰ This puzzle is magnified by the four empirical trends describe above, which reveal states that states are increasingly willing to create new independent tribunals and subject themselves to scrutiny by independent judges, tribunal members, and quasi-judicial decision makers.

One possible rationale for why states delegate authority to international dispute settlement bodies is found in the principal-agent literature. Viewed through the lens of principal-agent theory, international tribunals can be useful even to rational, sovereignty-maximizing states by providing information that reduces decision making costs for the states involved in a dispute. As Eric Posner and John Yoo have recently written:

[International] tribunals can benefit states that seek to cooperate with each other by providing relatively neutral information about the facts and law relevant to a particular dispute. This occurs in two settings. First, tribunals may play a role in producing valuable information to states involved in treaty disputes. States come into conflict when they take actions that violate, or appear to violate, treaties. Tribunals can help resolve such conflicts by discovering and revealing information about the meaning of the agreement and the nature of the allegedly infringing action. Second, when states come into conflict over conventions or customs governing the division of global resources, tribunals can discover facts, help develop new rules, or apply existing rules to new or unanticipated circumstances.¹¹

¹⁰ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217, 219 (2000).

¹¹ Posner & Yoo, *supra* note __, at __.

In this view of international adjudication, the members of the tribunal are the “agents” and the disputing states are the “principals.” The dilemma facing the principals is how to capture the informational benefits of international tribunals while ensuring that the judge-agents remain faithful to the preferences of the states-principals as set forth in a treaty, customary international law, or arbitration agreement. In the parlance of principal-agent theory, this is “the problem of agency slack.”¹²

To minimize slack, states should create tribunals that are “dependent.” According to Posner and Yoo, fully dependent tribunals have specific characteristics.¹³ They come into existence only after a dispute arises, only with the consent of the states concerned, and only for so long as the dispute itself exists. The jurisdiction dependent tribunals exercise is limited to the jurisdiction the parties confer upon it. And that jurisdiction is exercised by decision makers whom the parties themselves have chosen to resolve their dispute.¹⁴

In sum, principal-agent theory views “independence [as] a measure of a tribunal member’s vulnerability to the state that appoints him.”¹⁵ Aware of this vulnerability, dependent tribunals have a strong incentive to “render judgments that reflect the interests of the states at the time that they agree to submit the dispute to the tribunal.”¹⁶ By contrast, independent tribunals appear to “pose a danger to international cooperation” because they “render decisions that conflict with the interests of state parties” and “are more likely to allow moral ideals, ideological imperatives, or the interests of other states to influence their judgments.”¹⁷ Aware of this potential for overreaching, rational states seeking to preserve their sovereignty should refrain from delegating authority to independent tribunals over whom they exercise limited if any control.

II. DELEGATING AUTHORITY TO INDEPENDENT INTERNATIONAL TRIBUNALS SERVES THE INTERESTS OF STATES

The principal-agent theory of dependent international adjudication summarized above cannot be reconciled with an accurate assessment of the international legal landscape, in which an expanding number of independent tribunals are exercising jurisdiction over more states and deciding an increasing number of cases. If independent tribunals were behaving in the manner predicted by principal-agent theory, we should observe a decline in the number of such tribunals, in their caseloads, and in states’ willingness to submit themselves to judicial scrutiny.¹⁸ Since

¹² Id. at ___.

¹³ Posner and Yoo make clear that independence is a continuous variable and tribunals “can be more or less dependent.” Id. at ___.

¹⁴ Id. at ___.

¹⁵ Id. at ___.

¹⁶ Id. at 6. See also id. at ___ (“Because the arbitrator knows that he will have to deal with both states in the future, he does not want to risk alienating either of them, as this may create suspicion or provoke retaliation.”).

¹⁷ Id. at ___, ___.

¹⁸ As Cesare Romano has pointedly posed the question, “Why create an expensive standing court or tribunal to settle future disputes when it is possible to submit the issue to an ad hoc arbitral body?” Cesare P.R. Romano,

precisely the opposite trend is occurring, either states are acting wholly irrationally, or independent tribunals are serving states' interests in ways that a principal-agent theory fails to capture.¹⁹

In the sections that follow I offer a theory to explain these empirical trends. I first explain how delegation to independent tribunals enables states to enhance the credibility of their international law commitments. I then expand upon this settled theoretical framework, developing hypotheses that plausibly explain the conditions under which states delegate authority to independent rather than dependent tribunals. In particular, I argue that states choose independent judicial decision makers when they face specific types of multilateral cooperation problems for which non-legal mechanisms of credibility enhancement are unavailable.

Before proceeding, however, a caveat is in order. I do not contend that the independence or dependence of a tribunal is the only or even the most important factor in predicting whether that tribunal will be effective (in the sense of changing the behavior of the states subject to its jurisdiction) or will achieve a high rate of compliance with its judgments.²⁰ To the contrary, as I and a colleague have argued elsewhere, explaining the efficacy of international adjudication requires a multi-variable framework that examines factors within the control of member states that created the tribunal, factors within the control of the judges themselves, and factors beyond the control of either states or judges.²¹

The independence of a tribunal and its members is only one of those factors. But the issue of tribunal independence has increased in salience as commentators have transposed to the international arena their apprehensions about independent (and, implicitly, unelected and unaccountable) domestic courts. Because of the fresh attentions being devoted to the

International Justice and Developing Countries: A Quantitative Analysis, 1 L. & Prac. Int'l Courts & Trib. 367, 374 (2002).

¹⁹ According to Karen Alter, states that create international tribunals are delegating authority to judges to act not as agents, but as fiduciaries or trustees. Alter argues that the two types of delegation are significantly different. Whereas states select agents "because their values and objectives are similar to that of the principal[s]," they select fiduciaries on the basis of their reputation and because their "preferences and values are quite different from the principal[s]." Alter, *Agents or Trustees?*, *supra* note __, at 6-7.

²⁰ For a discussion of the distinctions between effectiveness and compliance, see Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 Case W. Res. J. Int'l L. 387, 391-97 (2000).

²¹ In *Toward a Theory of Effective Supranational Adjudication*, Anne Marie Slaughter and I distilled from four decades of commentary and analysis by judges, lawyers, and political scientists a checklist of thirteen factors that co-varied with effective supranational adjudication in Europe. Four of these factors were within the control of the states who created the tribunal (composition of the tribunal; its caseload and functional capacity; whether it possessed independent fact-finding capacity; and the formal authority of the instrument that the tribunal interprets); six factors were within the control of the judges themselves (awareness of audience; neutrality and demonstrated autonomy from political interests; incrementalism; quality of legal reasoning; judicial cross-fertilization and dialogue; and form of opinions); and three factors were beyond the control of either states or judges (nature of violations; autonomous domestic institutions committed to the rule of law and responsive to citizen interests; and the relative cultural and political homogeneity of states subject to a supranational tribunal). Helfer & Slaughter, *supra* note __, at 298-337.

independence of the international judiciary,²² it is useful to isolate the explanatory variable of independence for separate treatment, even acknowledging that it is only one aspect of a far more complex real world phenomenon.

A. *Delegation Enhances the Credibility of International Commitments*

Political scientists have long understood that delegating dispute settlement authority to independent decision makers can further rather than undermine government interests.²³

Although such delegations may at first seem counterintuitive, they are explained by the functions that international tribunals perform. In the relatively anarchic environment of interstate relations, independent tribunals provide a mechanism to enhance the credibility of the otherwise less than fully credible promises that governments make to one another.²⁴ By exercising their delegated authority to interpret those promises and to identify behavior that violates them, independent tribunals increase the likelihood that states will comply with their obligations in situations where compliance generates short term political losses but long term political gains.

To see why this is so, consider the perennial dilemma facing states that negotiate international agreements. These states know that if each party honors its treaty commitments, all will be better off as compared to a baseline of no cooperation. But each state also has a strong incentive to violate its commitments, provided that the others continue to cooperate. Such unilateral

²² See Burgh House Principles on the Independence of the International Judiciary (June 2004), http://www.pict-pcti.org/activities/ILA_study_grp.html; Cherie Booth & Philippe Sands, *Keep Politics out of the global courts: International judges must be independent and representative*, *The Guardian*, July 13, 2001, at 20.

²³ In the domestic realm, independent courts reduce policy ambiguities, stabilize policy outcomes, manage electoral uncertainty, and discipline other political actors. See Keith E. Whittington, *Legislative sanctions and the strategic environment of judicial review*, 1 J. INT'L CONST. L. 446, 451 (2003) (describing and evaluating these four rationales for why elected officials would “attach[] positive value to an independent court”). See also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 8-35 (1981) (discussing functions performed by independent courts in addition to settling disputes between two parties); Stephen Holmes, *Lineages of the Rule of Law*, in *DEMOCRACY AND THE RULE OF LAW* 19, 25-28 (José María Maravall & Adam Przeworski, eds. 2003) (offering historical analysis of why politicians would gain by delegating authority to independent judges).

Internationally, independent or autonomous institutions, including courts, can serve related functions. See Moravcsik, *supra* note __, at 231-33 (arguing that new and unstable European democracies sought to prevent future governments from backsliding away from democratic rule by delegating authority to an independent human rights tribunal and granting individuals the right to petition the tribunal directly). See also LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* 81-88 (2000) (arguing that ruling parties ratify international agreements to lock in commitments from which subsequent governments will have difficulty withdrawing); Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2057 (2003) (reviewing theories by which actors, including nation states, restrict their future freedom as a means of achieving welfare gains).

²⁴ See Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 Rev. Asian & Pac. Stud. 52, 59-60 (2003) [hereinafter Alter, *Do International Courts Enhance Compliance?*]. See also Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 Eur. Union Pol. 103, 104 (2001) (citing credibility enhancement as the reason why European Union member states delegate authority to the independent European Commission to initiate new legislation and monitor their compliance with existing EU law); Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 Wisc. L. Rev. 551, 563 (“enforcement benefits promisors; it enables them to make credible promises to perform”).

defections are plausible in many (although by no means all) international regimes because of the difficulty of monitoring compliance and the absence of strong enforcement mechanisms. When these incentives to defect exist, there is a significant risk that international cooperation will unravel, leaving all states worse off. By holding states fast to their promises, independent international tribunals reduce the likelihood of defections and thus help states to solve the “dilemmas of common interest”²⁵ that so often underlie problems of international cooperation.

It might be argued, however, that this claim—that delegation of authority to international tribunals enhances the credibility of commitments—is circular in the following sense. Just as there is no coercive authority to enforce a state’s initial promise to cooperate, there is also no such authority to compel adherence to the judgments of a tribunal which interprets that promise. Seen from this perspective, independent international tribunals do nothing to enhance the credibility of commitments, since states can as easily disregard the tribunal’s rulings as they can ignore the obligations of the treaty that establishes it.²⁶

This argument misses the mark in several key respects. First, it ignores the informational functions that international tribunals perform and their effect on a state’s reputation for honoring its promises to other nations. Not all compliance disputes are clear cut. To the contrary, it is often difficult for a state to monitor the conduct of its treaty partners and to evaluate whether that conduct violates the treaty. These monitoring and evaluation costs reduce the risk that arguably nonconforming conduct will be detected or, if detected, will be accurately labeled as a breach. International tribunals reduce these monitoring and evaluation costs. They create a mandatory process²⁷ by which plausible rule violations are investigated and, at the conclusion of the case, they publicly identify the state that has violated its commitments. In short, tribunals increase the probability that violations of international obligations will be detected and correctly labeled as noncompliance.²⁸

²⁵ Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in INTERNATIONAL REGIMES 115, 120 (Stephen D. Krasner ed., 1983) (using a multi-player Prisoners’ Dilemma to explain “dilemmas of common interests,” which occur “when independent decision making leads to equilibrium outcomes that are Pareto-deficient—outcomes in which all actors prefer another given outcome to the equilibrium outcome”). In the case of coordination games, international tribunals provide information to states in the form of “focal points” that clarify textual ambiguities or “signals” that cause parties to update their beliefs about facts. Tom Ginsburg & Richard McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 Wm. & Mary L. Rev. 1229, 1263-76 (2004).

²⁶ See Scott & Stephan, *supra* note __, at 554-55 (“Agreements may fashion their own enforcement mechanisms, but these have no greater authority than the instrument that creates them.”).

²⁷ Mandatory either because a state has acceded to the tribunal’s jurisdiction when ratifying the treaty or because it does so later through an optional protocol or declaration. In either case, the state recognizes the tribunal’s mandatory authority prior to another state or private party filing a complaint against it.

²⁸ Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. Legal Stud. 303, 304 (2002); see also James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 Int’l Org. 137, 146 (2000) (“As official forums where complaints are filed and judged, dispute settlement mechanisms play an important role in monitoring treaty violations, helping to offset problems of information.”)

The higher probability of detecting and accurately labeling violations creates two sets of costs for a state considering violating its international commitments. First, it increases the likelihood that other states will impose sanctions as a penalty for breach. These sanctions may be authorized by the tribunal itself (as in the case of monetary awards issued by the ECHR) or by a multilateral process connected to it (as in the case of the WTO's Dispute Settlement Body).²⁹ Sanctions may also be imposed unilaterally through reductions in trade, aid, or other privileges previously granted by the adversely affected state.³⁰ Second, and perhaps more importantly, the higher probability of correctly identifying violations and branding violators increases the reputation costs of noncompliance.³¹ "Being identified as having violated international law is costly for a state because it leads to a loss of reputation in the eyes of both its counterparty and other states,"³² a loss that, in turn, makes it more difficult to enter into future agreements with other nations.

By increasing the probability of both material sanctions and reputational harm, international tribunals raise the cost of violations, thereby increasing compliance and enhancing the value of

²⁹ See Guzman, *The Cost of Credibility*, *supra* note __, at 305 (discussing sanctions authorized by the WTO Dispute Settlement Body); Christopher Zorn & Steven R. Van Winkle, *Explaining Compliance with the European Court of Human Rights* 8 (2000) (draft on file with author) (discussing ECHR's practice of awarding compensation to individuals whose rights have been violated).

³⁰ See ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES (1984).

³¹ See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Cal. L. Rev. 1823 (2002) (discussing the role of reputation in promoting state compliance with international agreements).

Note, however, that a state's desire to cultivate or preserve a reputation as a law abiding nation may be insufficient to enhance the credibility of its commitments in the absence of some independent international review mechanism. Recent work on the role of reputation in inducing compliance with international law suggests that states do not have a single, blanket reputation for compliance generally, but many reputations, which vary by issue area or even by specific treaty. See George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. Legal Stud. 95 (2002). The existence of multiple reputations creates significant uncertainty. States are aware that the benefits and costs of compliance vary across different types of agreements. But given the imperfect information endemic to international affairs, they are often unsure of whether or to what extent positive or negative reputations will "bleed" from one treaty regime into another. One way to reduce this uncertainty is by using an independent tribunal or quasi-judicial review body as a signal to indicate that states are serious about the commitments they have undertaken. By binding themselves to adjudicate a particular class of treaty disputes before independent decision makers, states make it more difficult to hide their defections and avoid the sanctions or reputational consequences that flow from noncompliance.

³² Guzman, *The Cost of Credibility*, *supra* note __, at 304-05. As Professors Schwartz and Sykes have recently observed:

One difficulty with reputational penalties, of course, is that they depend on the quality of information in the trading community about the behavior of violators. . . . This concern highlights the value of a central dispute authority to hear the merits of complaints, even if that authority has no power to authorize sanctions. By serving as a vehicle for transmitting information about violations throughout the trading system, central dispute resolution enhances the reputational costs of cheating.

Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the GATT/WTO System*, 31 J. Legal Stud. 179, 197 (2002).

the agreement for all parties.³³ States can thus foresee that shirking compliance will be more difficult when a tribunal can be called upon to monitor their conduct and interpret their promises than when it cannot. As a result, when states delegate authority to an international tribunal, the commitments they entrust to it will be viewed as more credible than commitments not subject to judicial scrutiny.³⁴

The circularity objection described above also fails to account for domestic politics. The informational and reputational consequences of establishing a tribunal operate principally on an interstate level. However, tribunals and the decisions they issue also make international law more salient for domestic interest groups and political actors. By clarifying the meaning of an agreement, finding facts, and determining whether a particular course of conduct is justified, tribunal rulings can mobilize compliance constituencies to press government officials in favor of adherence to treaty obligations as interpreted by the tribunal.³⁵ This effect is most pronounced where private parties may invoke the tribunal's jurisdiction directly, since no "political filter" exists to screen out cases that are legally meritorious but diplomatically or politically embarrassing.³⁶ But the effect can also operate in purely interstate adjudication, if the tribunal's rulings benefit domestic interest groups who are motivated to lobby governments in favor of compliance.³⁷ In either case, the domestic political costs of international adjudication make it more difficult for states to shirk compliance. Anticipating this result, states will view international agreements supervised by tribunals (especially supranational tribunals) as more credible than agreements that do not provide for judicial review.

International tribunals can only make commitments more credible, however, if they are independent. If a tribunal were dependent—that is, if it were susceptible to pressure to conform its decisions to state interests at the time a dispute arises—the credibility enhancement flowing

³³ Guzman, *The Cost of Credibility*, supra note __, at 326 ("If states can commit, ex ante, to resolving their disputes before an impartial tribunal, they increase the sanction associate with a violation—even if that sanction is only reputational—and therefore increase compliance."). Cf. Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When is Cooperation Counterproductive?*, 54 Int'l Org. 73, 87 (2000) (empirical analysis demonstrating that sanctions enforced by a international organization are far more effective than sanctions enforced only by coalitions of states, and stating that such institutionalized sanctioning schemes increase the reputation costs of shirking a promise to sanction and "sends a signal" to other states "that backsliding is not likely to occur").

³⁴ This is not to suggest that delegation to international tribunals is cost free, nor that the costs will always outweigh the benefits. See Guzman, *The Cost of Credibility*, supra note __, at 306, 309-15 (presenting a formal model demonstrating that international tribunals generate credibility and compliance gains, but that only under certain conditions will those gains outweigh the costs of delegating mandatory dispute settlement authority to international tribunals).

³⁵ See Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 Int'l Org. 661, 675 (2000); Karen Alter, *The European Union's Legal System and Domestic Policy: Spillover or Backlash?*, 54 Int'l Org. 489, 507-08 (2000).

³⁶ Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* 19-24 (Oct. 2004) (manuscript on file with author) (analyzing "political filters" which allow governments to bring only those enforcement actions that produce joint welfare gains).

³⁷ See Goldstein & Martin, supra note __, at 614-15 (discussing actions of domestic interest groups that favor or oppose compliance with rulings of WTO Dispute Settlement Body); Shaffer, supra note __, at 144-47 (discussing influence of private parties in WTO dispute settlement process and subsequent compliance with WTO rulings)

from the initial act of delegation would vanish. States would anticipate that the dependent tribunal would bow to these pressures and, as a result, that they could elude their international law obligations with relative ease. As a consequence, the long term benefits of interstate cooperation would quickly unravel.³⁸

B. *Triangulating the Interests of States and Independent Tribunals:
Three Multilateral Examples*

The foregoing analysis explains why states that are jealous of their sovereignty would choose to establish an international court, tribunal, or quasi-judicial review body whose members are independent. What is less well understood, however, is precisely how the interests of independent tribunals relate to the interests of the states that created them. As I explain below, states seeking to enhance the credibility of their commitments will be more likely to create an independent tribunal when they face three types of multilateral cooperation problems: (1) international agreements that require extensive modifications of existing national law and practices; (2) treaties that regulate public goods or commons problems; and (3) treaties that create rights or benefits for private parties.

1. *“Deep” International Agreements*

The first type of multilateral cooperation problem encompasses what Downs, Rocke, and Barsoom call “deep” agreements, i.e. treaties that require significant changes in state behavior from the status quo.³⁹ These scholars argue that the deeper the agreement, the greater the resistance to compliance and the stronger the enforcement and sanctioning mechanisms required to achieve it. Assuming this claim to be true,⁴⁰ an international tribunal that states establish to aid enforcement by identifying violations or authorizing the sanctioning of violators must hold the parties fast to their initial agreement or risk defections that cause cooperation to unravel.

Seen from this vantage point, the correlation between the “deepening” of the trade regime from the GATT to the WTO (as shown by its lower trade barriers and expanding subject areas) and the enhancement of judicial independence (from GATT panels to the WTO Appellate Body) is not accidental but causative.⁴¹ It reflects an understanding by governments that greater judicial independence was necessary to deter the increased incentives for defection that greater depth

³⁸ See Alter, *Four Varieties of Delegation*, *supra* note __, at 10 (“an agent bound to follow the directions of the delegating politicians could not possibly enhance the credibility of their commitment.”) (quoting Majone, *supra* note __, at 110).

³⁹ George W. Downs, David M. Rocke and Peter N. Barsoom, *Is the Good News about Compliance Good News About Cooperation?*, 50 *Int’l Org.* 379 (1996).

⁴⁰ I put to one side for purposes of this discussion the debate between the “enforcement” and the “management” theories of compliance. Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in *Handbook of International Relations* 538 (Walter Carlsnaes et al. eds., 2002).

⁴¹ See Jackson, *supra* note __, at 180 (“the questions posed to the dispute settlement system often strike at the heart of the tension between the protection of nation-state sovereignty and the globalization of national economies, which require more expansive cooperative mechanisms in order to succeed internationally”).

engendered.⁴² Conversely, a correlation between the depth of a treaty and the independence of the tribunal that monitors it may explain why multilateral environmental agreements—many of which are “shallow” in the sense that they require governments to do little that more than their national environmental policies already require—do not provide for review of treaty disputes by an international tribunal, make such review entirely optional, or allow governments to settle any disputes through arbitration.⁴³ This hypothesis could be tested by determining the depth of a broad cross section of multilateral agreements and comparing the independence of the dispute settlement mechanisms they establish, controlling for type of jurisdiction, treaty membership, and other relevant causal variables.

2. *Treaties that Regulate Public Goods or Commons Problems*

Independent tribunals can also help states to resolve cooperation problems in which one state generates negative externalities that are not fully absorbed by other states. This type of problem structure can arise for treaties that regulate public goods or the global commons.⁴⁴ In these situations it is not only appropriate but necessary to consider the interests of non parties.

As an example, imagine a dispute between two states over the harvesting of a species of migratory fish, such as a dispute over fishing rights near the border of the states’ exclusive economic zones. A dependent tribunal would, by definition, feel pressure to reach a decision acceptable to the two disputing states. Because those states do not internalize the full effects of their behavior, however, such a conciliatory approach would undervalue the importance of restricting the use of a finite natural resource. Stated another way, a dependent tribunal would be compelled by political constraints to minimize the effects of the parties’ negative externalities upon the entire treaty membership, thereby undervaluing the treaty’s preservationist objectives.⁴⁵ By contrast, an independent tribunal—particularly one that can hear arguments by others states and non-state actors—could consider these objectives with far less fear of reprisal. This conjecture too is testable by comparing different types of public goods and commons treaties with the dispute settlement options states establish for them.

⁴² Downs, Rocke, and Barsoon assert that, for states will comply with deep agreements, “the punishment must hurt the transgressor state at least as much as that state could gain by the violation.” *Id.* at _____. International tribunals may not be competent to impose such punishments on their own. They may, as in the case of the WTO’s Dispute Settlement Understanding, assist other states or intergovernmental organizations to meet out such punishments by clarifying the law and identifying conduct that violates the parties’ obligations.

⁴³ See George W. Downs et. al, *The Transformational Model of International Regime Design: Triumph of Hope or Experience?*, 38 Colum. J. Transnat’l L. 465, 479-80, 482, 504-06 (2000) (surveying multilateral environmental agreements and noting that they contain relatively “shallow” obligations and eschew “coercive and adversarial mechanisms such as adjudication procedures and multilateral sanctions”).

⁴⁴ Of course, the depth and public goods/commons variables may point in opposite directions. For example, many environmental agreements are both shallow and involve regulation of the global commons. This may explain why relatively few treaties regulating the global environment create an international tribunals to review state conduct.

⁴⁵ See Tim Stephens, *The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case*, 19 Int’l J. Marine & Coastal L. 177, 188 (2004) (“Encouraging the parties to a dispute to reach a compromise may well produce more harmonious international relations but will not necessarily lead to optimal environmental outcomes. In many cases it may serve to restore (or enhance) comity but only at the expense of the protection and preservation of the environment.”).

3. *Treaties that Create Rights or Benefits for Private Parties*

The third type of cooperation problem that can more effectively be resolved by an independent tribunal concerns multilateral agreements for which private parties have stronger incentives to monitor and challenge violations than do states. These greater incentives may arise because the agreement expressly grants rights to private parties (as occurs, for example, in human rights and some investment treaties), or because those parties are the indirect beneficiaries of obligations between states (as is the case for many trade agreements). In these circumstances, authorizing an international tribunal to hear cases filed by private parties significantly increases the credibility of initial treaty bargains. It also promotes compliance with treaty commitments, since private litigants are also constituents of government officials and can pressure those officials to implement the tribunal's rulings in their favor.

Where a dependent tribunal hears cases by private parties, credibility enhancement and increased compliance is less likely. Dependent tribunals rely on states for their existence, not on private parties. It is states who create the tribunal, define its jurisdiction, appoint and reappoint its members, fund its operations, and decide whether it will continue to exist.⁴⁶ States make these decisions for independent tribunals too, of course, but their control is far less direct and immediate than in the case of dependent tribunals. Aware of these greater reserved powers, a decision maker serving on a dependent tribunal can anticipate a negative reaction from states if she consistently rules in favor of private parties, even assuming their claims are meritorious. An independent tribunal, by contrast, faces far fewer pressures "to pander to the governments at whose sufferance it exists."⁴⁷ The plausible relationship between independence and access by private parties suggests another empirically testable hypothesis: that the states which create independent tribunals also select private party access as a design feature to help the tribunals retain their independence over time.⁴⁸

C. *Dependent Tribunals and Bilateralism*

In contrast to multilateral cooperation problems, dependent tribunals may be as effective as their independent brethren in resolving certain types of bilateral disputes. The relevant distinction between multilateralism and bilateralism concerns the diminished need for a tribunal to enhance credibility in purely bilateral settings. Threats of tit-for-tat reciprocity, reprisals, and other self-help are standard modes of bilateral interaction. More importantly, the threat of such measures may be sufficient in and of themselves to induce compliance. Where such measures are in fact sufficient, states in bilateral relationships do not need an independent tribunal to enhance the

⁴⁶ See Synoptic Chart, *supra* note __, at 1 (listing tribunals that have become "extinct").

⁴⁷ Helfer & Slaughter, *supra* note __, at 313.

⁴⁸ Pressure to select private party access as a design choice is likely to come from domestic interests groups, particularly those who are the rights holders or indirect beneficiaries of the international obligations the tribunal will supervise.

credibility of their commitments, since those commitments are already credible at the time they are made.⁴⁹

Crucially, these compliance-inducing strategies remain available even after the parties to a bilateral agreement have submitted their dispute to dependent tribunal or arbitral body. Because the settlement of bilateral disputes operates in the shadow of these extrajudicial measures to promote compliance, it may be entirely appropriate for states to exert more stringent controls over a tribunal. Stated another way, dependent tribunals may be more effective at resolving certain categories of bilateral disputes precisely because they operate as an extension of non-legal, diplomatic methods of dispute resolution and compliance inducement.

This framing of dispute settlement as an extension of diplomacy does not, however, translate to multilateral settings. Not only is the need to enhance the credibility of commitments greater in such settings for the reasons described above, but unilateral strategies for inducing compliance are far less effective.⁵⁰

The foregoing analysis suggest why states continue to use ad hoc arbitration and other dependent forms of dispute resolution even while they are establishing new independent international tribunals and increasingly recognizing the jurisdiction of existing independent tribunals. The analysis also implies, however, that dependent tribunals can effectively resolve only a narrow category of disputes between states. The most pressing issues of interstate cooperation in the 21st century—including human rights, humanitarian law, trade, and environmental protection—require additional credibility enhancement mechanisms and thus cannot be resolved by dependent tribunals.

III. A THEORY OF CONSTRAINED INDEPENDENCE FOR INTERNATIONAL TRIBUNALS

Once states have made the initial decision to establish an independent international tribunal, they face a second order institutional design problem: calibrating the degree of control over the tribunal and the particular ways in which they will exercise that control. Unlike the more basic choice between dependence and independence, these more fine grained regulatory decisions limit the potential for overreaching even by tribunals whose selection and tenure rules give their judges a high degree of formal independence.

⁴⁹ See Alter, *Do International Courts Enhance Compliance?*, supra note __, at 64. The threat of reciprocity is rarely a complete deterrent to defection, however. For this reason, even the parties in a bilateral relationship may choose to submit their disputes to a tribunal with more independent features as a way to enhance the credibility of their commitments. This may explain why many bilateral friendship, commerce, and navigation agreements contain compromissory clauses conferring jurisdiction on the ICJ.

⁵⁰ As Kenneth Oye has explained using a game theoretic model, “as the number of players increases the feasibility of sanctioning defectors diminishes. Strategies of reciprocity become more difficult to implement without triggering a collapse of cooperation. In two-person games, Tit-for-Tat works well because the costs of defection are focused on only one other party.” Kenneth A. Oye, *Explaining Cooperation Under Anarchy: Hypotheses and Strategies*, in *Cooperation Under Anarchy* 1, 19-20 (1986). By contrast, where multiple parties are involved, defection imposes costs on all parties, and “the power of strategies of reciprocity is undermined.” *Id.* at 20.

A specific example helps to introduce this idea. Imagine that a regional group of states is negotiating a treaty to protect human rights. These states want to ensure that their commitments are credible, so they agree to set up a tribunal that possesses the core formal attributes of independence. In other words, they create a tribunal that is permanent, whose jurisdiction is compulsory, whose decision makers serve for fixed terms and can be removed only for cause, and that can receive complaints from the individual victims of human rights abuses. But these states also recognize that such a tribunal has the potential to expand its authority over time, to establish new legal norms, and to impose greater restrictions on governments.⁵¹ To address this risk, they want a tribunal that is formally independent but whose decision makers are constrained by the structural, political, discursive environment in which they are situated.⁵²

These constraints do not, however, create a system of judicial dependence in disguise. To the contrary, many of the regulatory mechanisms discussed below are difficult or costly to exercise, or achieve their objectives only partially or imperfectly. Some require the consent of other states, others generate opposition from domestic interest groups, and still others require a significant time or political capital to implement. These limitations on state control are design choices, not design flaws. They are part of a system of “constrained independence,” in which states task judges to behave as fiduciaries⁵³ (albeit fiduciaries with limited mandates) rather than as closely controlled agents.

Constrained independence maximizes the benefits of delegation to independent decision-makers while minimizing its costs. It allows states to enhance the credibility of their commitments while signaling to independent courts, tribunals, and quasi-judicial review bodies when they are approaching—or have exceeded—the politically palatable limits of their authority.

In addition to providing the means for states to influence the docket and jurisprudential output of international tribunals, these limited and more precise mechanisms of judicial control have a second important effect. They help to map out the contours of what Richard Steinberg has called the “strategic space”⁵⁴ within which international tribunals actually operate. This strategic space restricts the range of methodological, interpretative, and decisional choices available to independent judges. Many of these choices will be legally plausible; only a subset will also be politically tolerable.

⁵¹ See Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int’l Org. 457, 487 (2000) (“Compared with interstate dispute resolution, transnational dispute resolution offers greater potential for the widening and deepening of dispute resolution over time, for unintended consequences, and for progressive restrictions on the behavior of national governments.”).

⁵² As in the domestic setting, judicial independence for international courts does not mean that judges face no constraints on their behavior. Judges in the United States, for example, are appointed for life at a fixed salary. But they are influenced by the views of their brethren and of the bar, by the desire to preserve their political legitimacy as non-majoritarian institutions, by strong institutionalized professional norms, and by their hope of personal career advancement or of achieving a particular judicial legacy.

⁵³ See Alter, *Agents or Trustees?*, *supra* note ___, at 6-7.

⁵⁴ Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 Amer. J. Int’l L. 247, 249 (2004).

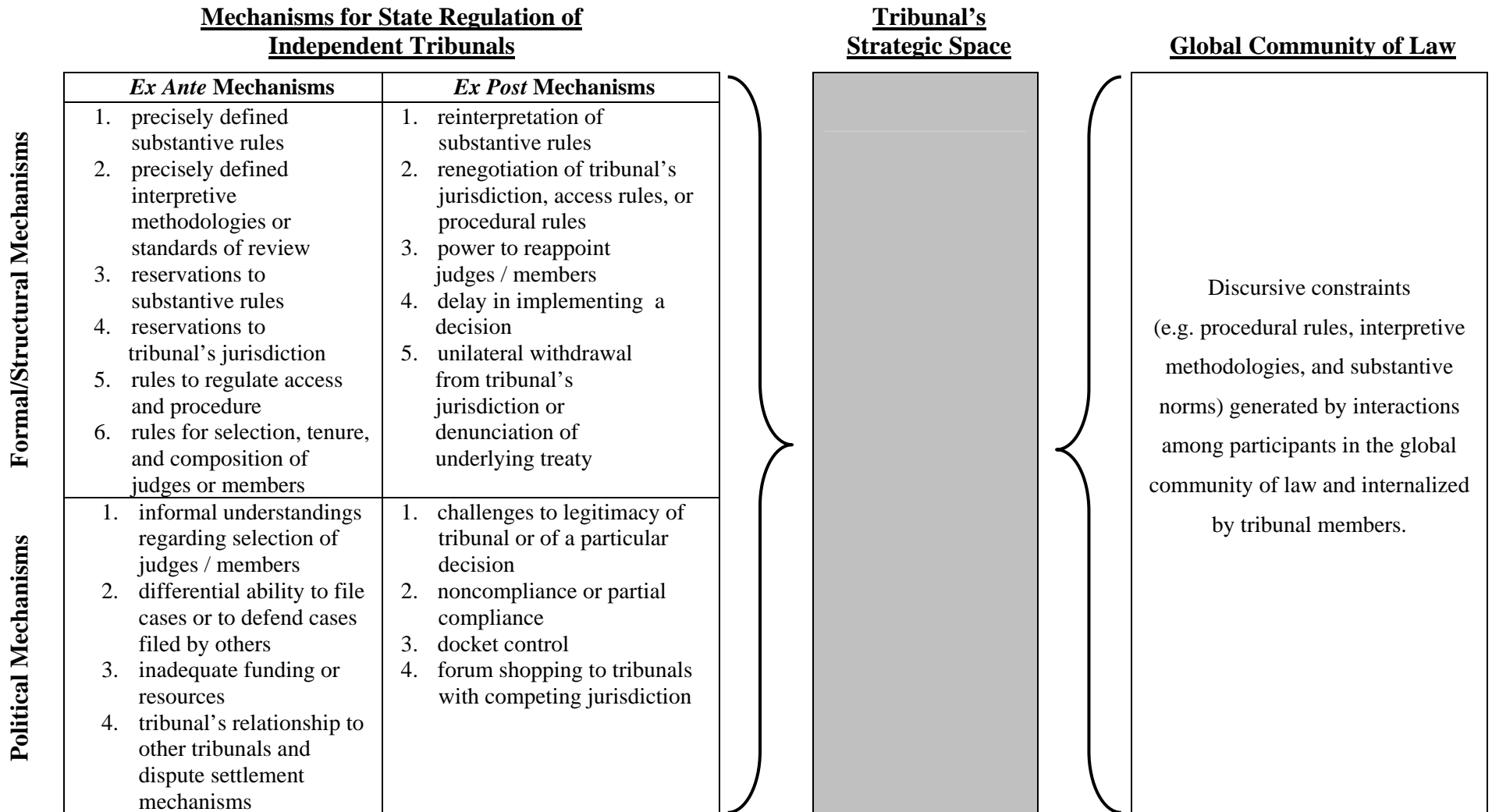
Judges are sensitive to these political limits on their authority. But they are also participants in a global “community of law,”⁵⁵ a community of domestic courts and international tribunals that helps to shield judges from overtly political influences. Triangulating these competing pressures, international judges will self-select those methodologies and interpretive tools that are *both* legally convincing to their brethren and that lie within broadly acceptable political parameters. In the process, they will internalize a set of discursive constraints that obviate, or at least reduce, the need for overt correction by the states subject to their jurisdiction. The participation of tribunal members in the global community of law is thus a key component of the system of constrained independence described below.

The following table illustrates the system of constrained independence for international tribunals. The left side of the table summarizes the specific control mechanisms that states use to regulate independent tribunals, grouping them into four ideal types.⁵⁶ The right side illustrates the discursive constraints of the global community of law. This community and the state control mechanisms together define the strategic space that an independent international tribunal occupies. The sections that follow describe each of the state regulatory tools in greater detail and provide real world examples. I then discuss how discursive constraints generated by the global community of law are internalized by international judges and tribunal members.

⁵⁵ See Helfer & Slaughter, *supra* note __, at 370 (defining “global community of law” as “a community of interests and ideals shielded by legal language and practice . . . in which the participants . . . understand themselves to be linked through their participation in, comprehension of, and responsibility for legal discourse.”).

⁵⁶ The discussion below draws inspiration from Michael Reisman’s foundational work on internal and external controls in international adjudication and arbitration. See W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 1-7 (1992). For a more recent discussion of checking mechanisms in international adjudication, see Helfer & Dinwoodie, *supra* note __, at 218-23.

TABLE 1
The System of Constrained Independence of International Tribunals



A. *Formal and structural ex ante control mechanisms*

Precision in drafting commitments is perhaps the most obvious formal control mechanisms that states can exercise *ex ante*. Clearly defined substantive rules impose real constraints. They encourage early settlement of disputes, obviating the need for judicial interpretation in the first instance. And they inhibit the creation of expansive jurisprudence by requiring judges to provide a persuasive justification for departing from a shared textual meaning.

As scholars such as Joel Trachtman have demonstrated, however, writing comprehensive international agreements may entail substantial costs.⁵⁷ Where the costs of completing a contract is high, negotiators may adopt an alternative approach. They may tolerate some textual ambiguity, in effect agreeing to disagree over the scope of their substantive obligations, but specify which interpretive methodologies the tribunal may employ (as in Article 3.2 of the WTO Dispute Settlement Understanding)⁵⁸ or the degree of deference it must give to national decision makers (as in the Article 17.6 of the WTO Antidumping Agreement⁵⁹ and the national emergency clauses of human rights conventions⁶⁰).

These drafting devices are a subject for negotiation among governments. But what of states that are unable to convince their treaty partners to adopt their preferred textual restriction or that join a treaty regime after negotiations have concluded? For these countries, unilaterally carving out a set of issues from the dispute settlement process may be a logical response. Such carve outs take the form of reservations, either to the substantive treaty that the tribunal is interpreting or to a declaration recognizing the tribunal's jurisdiction.

Both types of reservations constrain a tribunal from venturing into areas demarcated as off limits by the state itself. And both are common practice in international law (although both can also be prohibited where states agree to do so).⁶¹ Examples of the former are too numerous to mention.⁶² Examples of the latter are also common, and include (1)

⁵⁷ Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 Harv. Int'l L.J. 333 (1999).

⁵⁸ Article 3.2 instructs WTO jurists to "clarify the existing provisions of" the WTO agreements "in accordance with customary rules of interpretation of public international law," but not to "add to or diminish the rights and obligations" those agreements contain.

⁵⁹ Under article. 17.6(ii) of the Antidumping Agreement, where a WTO dispute settlement panel "finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the [member's] measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations." [cite]

⁶⁰ See, e.g., American Convention, art. 27 (authorizing states, "in time of war, public danger, or other emergency that threatens [their] independence or security," to derogate from specific provisions of the Convention, but only "to the extent and for the period of time strictly required by the exigencies of the situation"); European Convention, art. 15 (similar restriction); ICCPR, art. 4(1) (similar restriction).

⁶¹ Where reservations are prohibited, each state must choose whether or not it will accept the complete package treaty commitments.

⁶² For an early empirical approach to measuring the prevalence of treaty reservations, see John King Gamble, Jr., *Reservations to Multilateral Treaties: A Macroscopic View of State Practice*, 74 AMER. J. INT'L L. 372 (1980).

reservations to declarations recognizing the ICJ's compulsory jurisdiction that exempt from the Court's scrutiny disputes within a state's domestic jurisdiction, (2) restrictions on declarations filed with ITLOS limiting the tribunal's jurisdiction to specified maritime subjects, and (3) reservations to the ICCPR's First Optional Protocol specifying temporal limits which petitions the UNHRC may receive from individuals.⁶³

A third set of structural *ex ante* controls relates to the details of the tribunal's operation. These encompass the rules for selection, composition, and tenure of judges. But they also include detailed rules regulating access to the tribunal, the scope of its procedures, its fact finding powers, the type and form of its decisions, the remedies it awards, and even such fundamental issues as whether its decisions are legally binding or not.

The use of these formal and structural control devices, whether singly or in combination, impose meaningful constraints on judicial activism. They do not, however, guarantee that a tribunal will scrupulously adhere to the restrictions states have imposed on it. International law's interpretive methodologies are elastic and allow decision makers a fair degree of interpretive discretion. This elasticity has enabled some tribunals to push textual or structural boundaries by using teleological or purposive approaches that reify a treaty's broad aims rather than its textual details.⁶⁴ But the move away from text is not always in favor of expanding a tribunal's authority. To the contrary, judges have also deferred to the governments whose actions they review even where their textual mandate suggests a more assertive role.⁶⁵

B. *Political ex ante control mechanisms*

States also regulate international tribunals through political means. Some of these measures operate in the shadows; others are the product of distributions of power and resources within particular treaty regimes. Whatever their origins, these tools of political influence may be as if not more effective to calibrate the authority conferred on international decision makers and control their potential for overreaching.

Consider the procedures by which international judges and tribunal members are appointed. Often, these appointment rules differ radically from the formal appointment rules specified in the agreement establishing the court or tribunal. The Appellate Body

⁶³ For the text of these reservations, see International Court of Justice, Declarations Recognizing as Compulsory the Jurisdiction of the Court, <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>; Oceans and Law of the Sea: Settlement of disputes mechanism, http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm; Declarations and Reservations to the First Optional Protocol; http://www.unhcr.ch/html/menu3/b/treaty6_asp.htm.

⁶⁴ See Helfer & Slaughter, *supra* note __, at 345-57 (discussing UNHRC); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 Colum. L. Rev. 628, 638, 663-64 (1999) (discussing the ECJ).

⁶⁵ See HOWARD CHARLES YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996) (describing how ECHR has used this doctrine to defer to the decisions of European governments concerning human rights).

provides a notable example.⁶⁶ The WTO Agreement provides that the seven members of the Appellate Body are to be selected by a consensus decision of the WTO Dispute Settlement Body.⁶⁷ In practice, the initial phase of the appointments process is carried out by a Selection Committee over which powerful WTO members exert significant influence. “The European Communities and the United States have enjoyed ‘special privileges’ at this stage of the process, enabling them to object to some candidates, which has amounted to a veto power.”⁶⁸ This unilateral veto has been “used routinely by powerful members to ensure that the candidates selected to serve on the Appellate Body are not exceedingly activist, biased, or expansive lawmakers.”⁶⁹

Uneven distributions of power among states circumscribe international adjudication in another way. Differences in material resources sends an informal signal to tribunal members as to which states are most likely to resist hard edged restrictions on governmental authority or fresh accretions of judicial power.

In the WTO, for example, the United States and the EC are the most powerful state actors by virtue of their large economies and their active use of WTO dispute settlement.⁷⁰ According to Richard Steinberg, “judicial lawmaking that consistently results in the loss of dispute settlement cases by a powerful member (as both a complainant and a respondent) would not be sustainable politically, for it would constitute a shift in property rights that would likely engender a political reaction.”⁷¹ Yet there is little risk of such a reaction in the face of dispute settlement losses by poorer developing countries. Although the percentage of these countries involved in WTO dispute settlement proceedings has increased from its level under the GATT, significant structural and material factors

⁶⁶ There is evidence of similar actions in the selection procedures for other international tribunals. *See* Keohane et al., *supra* note __, at 471 (“It was widely rumored . . . that the German government sought to rein in the ECJ by appointing a much less activist judge in the 1980s than previous German candidates, but hard evidence is virtually impossible to find.”); JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 348 (2003) (“Despite the Convention’s requirements, governments may intentionally . . . undermine the Court by nominating judges who lack high-level expertise. Sometimes nominations have reflected cronyism rather than qualifications.”) (footnote omitted).

⁶⁷ WTO Agreement, art. IX.

⁶⁸ Steinberg, *Judicial Lawmaking*, *supra* note __, at 264.

⁶⁹ *Id.* PASQUALUCCI, *supra* note __, at 348-49 (“Politics have sometimes influenced the election [of judges to the court]; certain nations have reportedly voted in block to elect a candidate despite weak qualifications.”).

⁷⁰ Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development*, 91 *Am. J. Int’l L.* 231, 232 (1997) (“richer countries tend to be more powerful in trade negotiations than poorer countries since, in the international trade context, ‘power’ may be seen as a function of relative market size”); Shaffer, *supra* note __, at 6 (noting that the United States or EC was a party in 75 percent of WTO complaints filed, and in 84 percent of complaints that resulted in judicial decisions).

⁷¹ Steinberg, *supra* note __, at 268-69. Based on an empirical review of the first eight years of the WTO case law, Steinberg finds little support for such concern. *Id.* at 269-72.

continue to impede their meaningful participation.⁷² This suggests that control mechanisms may have ancillary distributional consequences.

A third political check that states use to control international tribunals *ex ante* (as well as *ex post*) relates to funding. The attempt to underfund the ICTY is a prominent example.⁷³ Other tribunals have experienced similar financial pressures. To take only one recent example, in 2001 the Inter-American Commission on Human Rights adopted new rules of procedure that are expected to significantly increase its own caseload and that of the Court.⁷⁴ Whether OAS member states are willing to provide the resources necessary to support the enhanced judicial activity engendered by these wider access rules is unclear, however. If they do not, “the lack of monetary contributions by the member states could seriously impede the Court [and Commission] from fulfilling [their] role of deciding human rights cases in the region.”⁷⁵

A final, less obvious political check arises from the status of a newly created tribunal in relationship to other tribunals that states have created to hear similar types of disputes. The proliferation of international courts, tribunals, and quasi-judicial review bodies has been well documented. Until recently, their competition for cases had been less comprehensively explored.⁷⁶ However, where more than one judicial body have jurisdiction over a dispute, states and private parties can “forum shop” for the tribunal they believe will be the most sympathetic to their case.⁷⁷

Forum shopping may lead to expansive assertions of authority, as when a tribunal carves out a particular area of expertise as a way to attract new cases.⁷⁸ But the existence of multiple venues for dispute settlement creates competition among tribunals that curbs

⁷² Compare Romano, *International Justice and Developing Countries*, *supra* note ___, at 385-97 (documenting evidence of increased participation by developing countries) with Gregory C. Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Litigates? Who Decides*, 7 *J. Int'l Econ. L.* 459, 472-73 (2004) (discussing structural and material impediments restricting access of developing countries to WTO dispute settlement system).

⁷³ David Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 *Crim. L. Forum* 401-22 (1994).

⁷⁴ See Dinah Shelton, *New Rules of Procedure for the Inter-American Commission on Human Rights*, 22 *Hum. Rts. L.J.* 169 (2001).

⁷⁵ Ismene Zarifis, *News From the Inter-American System: Inter-American Commission on Human Rights: New Rules of Procedure*, 9 *Hum. Rts. Br.* 31, 31-32 (2001), <http://www.wcl.american.edu/hrbrief/hrbrief091.pdf>.

⁷⁶ For the most recent and comprehensive contribution, see YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

⁷⁷ See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 *U. Pa. L. Rev.* 285, 288-89 (1999).

⁷⁸ See Anne F. Bayefsky, *The U.N. Human Rights Regime: Is It Effective? Remarks at the American Society of International Law Proceedings*, in *Proceedings of the 91st Annual Meeting*, Apr. 9-12, 1997, at 469 (stating that “word is spreading that the Committee . . . will decide for itself in deportation cases whether there are substantial grounds for believing that the author of the communication would be in danger of being subjected to torture if returned to the country of origin,” resulting in a “marked increase in the number of individuals” approaching the Committee after their asylum claims have failed).

such expansions. The force of this constraint will depend on whether states or private parties are claimants, the competence of the alternative forum, and the ease with which disputants may move from one venue to another. These are not merely hypothetical constraints. A judge on ITLOS has noted the stiff competition his court faces from the ad hoc arbitral tribunal that states established as an alternative dispute settlement forum for law of the sea issues.⁷⁹ This competition is likely to increase as a result of recent conflicting rulings interpreting the concurrent jurisdiction of ITLOS and the tribunal.⁸⁰

C. *Formal and structural ex post control mechanisms*

If, notwithstanding the *ex ante* controls described above, a tribunal issues a decision or series of decisions that one or more states finds objectionable, there are several ways in which states can signal their displeasure. Reinterpreting the substantive obligations of the treaty that the tribunal oversees is one obvious choice.⁸¹ Formal amendment of the treaty is also possible. But states often make renegotiation difficult, creating cumbersome and time consuming procedural hurdles that preserve existing treaty bargains but also make the “legislative” overruling of an international tribunal harder.⁸²

Perhaps the most pointed threat that states can direct against an independent tribunal is to rewrite jurisdictional, access, or procedural rules to cabin its authority. Scholars are divided over the potency of these tactics. Some have argued that such threats are credible, at least where the restriction is supported by the treaty regime’s most powerful states.⁸³ Others are more dubious, reasoning that the hurdles outlined above are

⁷⁹ Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 1 N.Y.U. J. Int’l L. & Pol. 809, 817 (1999).

⁸⁰ See Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 Harv. Int’l L.J. 541 (2002); Leah Sturtz, *Southern Bluefin Tuna Case: Australia And New Zealand v. Japan*, 28 Ecology L.Q. 455 (2001).

⁸¹ The three NAFTA parties, acting as the NAFTA Free Trade Commission, chose this approach in late 2001. The Commission issued a statement “to clarify and reaffirm the meaning of” a provision of NAFTA Chapter 11 which guarantees that foreign investors will receive “fair and equitable treatment” from the host state. The Commission acted after an investor-state dispute settlement panel had expansively interpreted that phrase. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, July 31 2001, <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>. Significantly, a later chapter 11 panel considered itself bound to follow the Commission’s statement. See David A. Gantz, *International Decisions: Pope & Talbot, Inc. v. Canada, NAFTA Chapter 11 Arbitration Tribunal, 2000-2002*, 97 Amer. J. Int’l L. 937, 945-47 (2003).

⁸² These hurdles include a requirement that any amendment be approved by all or a supermajority of member states, or a requirement that any changes to the text must be formally ratified by each state before they can take effect. See Helfer & Dinwoodie, *supra* note __, at 219. But see Bernhard Boockmann & Paul W. Thurner, *Flexibility Provisions in Multilateral Environmental Treaties*, Discussion Paper No. 02-44 (2002) (documenting a wide range of flexibility arrangements for states seeking to revise environmental protection treaties), available at <ftp://ftp.zew.de/pub/zew-docs/dp/dp0244.pdf>.

⁸³ Steinberg, *supra* note __, at 264-65.

sufficiently high to block most jurisdiction-stripping initiatives.⁸⁴ The existing empirical record is mixed and open to conflicting interpretations.⁸⁵

The textual modifications described above allow states to fine tune their response to putative overreaching by an independent tribunal. In contrast, the power of reelection is a more indirect and less subtle method of control.⁸⁶ Most tribunals permit their members to serve a second term, and it is widely believed that judges wish to be reelected.⁸⁷ According to some observers, the specter of reelection materially effects judicial behavior. From the judges' vantage point, of course, such influence is to be derided.⁸⁸ From a political perspective, however, it provides a measure of accountability for jurists who serve on tribunals that are otherwise highly independent.

All of the foregoing *ex post* control mechanisms require some degree of cooperation among states. Unilateral responses are also available. Perhaps the most famous of these existed in the GATT, where a defending state could prevent the adoption of an adverse panel report.

A different unilateral response involves adopting a strategy of exit.⁸⁹ Even if a single state is unable to convince its treaty partners to rein in a wayward tribunal, it need not acquiesce in further judicial review. To the contrary, international law generally permits a state to remove itself from a tribunal's jurisdiction, either by withdrawing a declaration recognizing its compulsory jurisdiction (as has occasionally occurred for the ICJ and,

⁸⁴ Karen Alter, *Agents or Trustees? International Courts in their Political Context* 29-32 (July 2004) [hereinafter Alter, *Agents or Trustees?*].

⁸⁵ Powerful countries such as the United States have advanced proposals to modify the WTO Dispute Settlement Understanding, but their fate remains uncertain pending the conclusion of the Doha Round. Steinberg, *supra* note __, at 265-66. Proposals to curb the ECJ's jurisdiction are more frequent (and have occasionally succeeded), although the extent to which they are responses to overreaching by the court is less certain. Compare Geoffrey Garrett, R. Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998) with Alter, *Agents or Trustees?*, *supra* note __, at 12 & at 29 n.13.

⁸⁶ Reelection rules are established at the tribunal's founding, but states can change them in response to a tribunal's performance over time. Judges of the ECHR were initially elected for nine year renewable terms. With the adoption of Protocol 11, the renewable term was reduced to six years. Newly drafted Protocol 14 would again increase the term to nine years, but would not permit judges to be reelected. Notably, the intent of this change is "to reinforce [the judges'] independence and impartiality."

⁸⁷ See Shelton, *supra* note __, at 37; Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 Harv. Int'l L. J. 271, 279 (2003). *But see* Alter, *Agents or Trustees?*, *supra* note __, at 16 (arguing that "judges tend to care more about their legacy as an [international court] judge than they do for the professional future").

⁸⁸ Judge Fitzmaurice, for example, has written of the "sinister implications" of the reelection of judges to the ICJ. G. Fitzmaurice, *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, Special Report in *Livre du Centenaire* at 279 (IDI, 1973), quoted in Shelton, *supra* note __, at 38.

⁸⁹ See Laurence R. Helfer, *Exit, Escape, and Commitment in International Agreements: Introducing a Theoretical and Empirical Research Agenda*, ms. May 2004.

more recently, ITLOS) or by denouncing the treaty that confers such jurisdiction (as has happened with the First Optional Protocol to the ICCPR).⁹⁰

Some international agreements deter this exit strategy by requiring a disaffected state to denounce the entire treaty, not merely its jurisdictional provisions. Whether a state undertakes this more consequential exit option depends upon “(1) the mix of obligations and institutions a treaty contains; (2) the costs to a state’s reputation and to the credibility of its commitment to comply with other treaties; and (3) the willingness of a state to eschew exit in exchange for a greater voice in shaping the regime’s future.”⁹¹ This calculus suggests that withdrawals from package deal agreements such as the WTO are unlikely, whereas withdrawals from treaties with more limited subject matters, such as human rights agreements, are more plausible.⁹²

D. *Political ex post control mechanisms*

States use a variety of political mechanisms to control judicial overreaching by independent tribunals that are already in operation. Perhaps the most common of these involves questioning the tribunal’s reasoning, identifying errors it has committed, or highlighting its abuses of authority. That governments attach importance to such “delegitimizing” strategies⁹³ is suggest by the pains they take to denounce objectionable decisions even when they are purely hortatory.⁹⁴ The modes through which such challenges are conveyed range from statements addressed to the general public or to communities of interested observers, to criticisms expressed at meetings of intergovernmental organizations, and, more troublingly, to direct or mediated interventions with individual judges.⁹⁵

A second *ex post* political control is noncompliance with the tribunal’s decisions. The responses range from outright recalcitrance and defiance at one extreme to partial or delayed compliance at the other. Given the frequency with which governments are believed to shirk compliance with international as compared to domestic law, noncompliance, standing alone, may not be understood as a sanction by jurists or by observers. It may, however, be viewed in this way when used to augment challenges to a

⁹⁰ See Helfer, *Overlegalizing*, supra note __, at 1880-81 (describing denunciation of First Optional Protocol to ICCPR by Jamaica, Guyana, and Trinidad & Tobago); Keohane et al., supra note __, at 480; Gillian Triggs & Dean Bialek, *Current Legal Developments: Australia Withdraws from the Compulsory Jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea*, 17 Int’l J. Marine & Coastal L. 423, 423 (2002).

⁹¹ Helfer, *Overlegalizing*, supra note __, at 1887.

⁹² Compare Steinberg, supra note __, at 267 (characterizing the threat of the United States leaving the WTO in reaction to judicial lawmaking as having “limited credibility”) with Helfer, *Overlegalizing*, supra note __, at 1980 (discussing withdrawal from human rights agreements by three Caribbean countries).

⁹³ Steinberg, supra note __, at 266.

⁹⁴ For a recent example, see Benjamin Netanyahu, *Why Israel Needs a Fence*, N.Y. Times (July 13, 2004).

⁹⁵ See Steinberg, supra note __, at 266 (“Senior secretariat officials have met with and advised members of the Appellate Body to show restraint, when those officials perceived that the Appellate Body was leaning toward an activist stance.”).

tribunal's legitimacy. As a practical matter, the efficacy of noncompliance as a judicial control mechanism is likely to vary with the state's success in linking these two strategies. Where the material or reputation costs of noncompliance are well established or fairly automatic, it will be more difficult to pin the fault on the tribunal rather than on the noncomplying state. Conversely, a noisy act of noncompliance by a powerful state that occurs early in a tribunal's life may devastate its legitimacy.

A third *ex post* political checking mechanism involves starving a tribunal by eliminating or reducing its diet of cases. This can be accomplished through docket control (for example, by limiting the number or types of cases filed with the tribunal, or by settling disputes before the tribunal issues its decision) or by siphoning cases away from one tribunal and submitting them to another tribunal with overlapping jurisdiction. The degree to which a state can employ these measures may depend upon whether the tribunal is authorized to review only interstate disputes or also complaints filed by private parties. For interstate tribunals, docket control can be as simple as deciding whether or not to file a dispute in one forum or another, or to resolve it through negotiation or other non-judicial means. Controlling the case load of supranational tribunals is a far more difficult proposition. Inherent in the vary nature of supranational jurisdiction is a loss of state control over which cases a tribunal hears, relegating states to the other control mechanisms described above.

E. Discursive constraints of the global community of law

In addition to controls that states impose upon tribunals, other constraints arise from the very act of international judging and are internalized by courts, tribunals, and review bodies that participate in a "global community of law."⁹⁶ Such a community creates a sense of transnational judicial solidarity among judges that helps to shield their rulings from overtly political influences. This shielding function does not, however, give judges a blanket license to conform legal rules to their own moral or ideological values.⁹⁷ To the contrary, a community of law imposes constraints on decision makers that are equally important and equally real.

⁹⁶ As stated in *Toward A Theory of Effective Supranational Adjudication*, a global community of law is "a community of interests and ideals shielded by legal language and practice. It is a community in which the participants . . . understand themselves to be linked through their participation in, comprehension of, and responsibility for legal discourse." Helfer & Slaughter, *supra* note __, at 370. In its fully developed form, such a community has three distinct elements. First, it is a web of relations among subnational and supranational legal actors, including national courts, international tribunals, government officials, intergovernmental organizations, and domestic interest groups, each of whom can interact directly with the others. Second, those interactions should be consistent with the incentives of the participants, allowing self-interested behavior to complement normative aspirations in shaping the contours of the community. The third attribute of a community of law "is the self-awareness of all participants that they are operating in a nominally apolitical context. They should understand themselves to be linked by a common training and set of basic normative commitments to the autonomy and integrity of the legal process." *Id.* at 367-70.

⁹⁷ *Cf. id.* at 371 (stating that global community of law creates a space "that is insulated, but not isolated, from politics, economics, and society").

With regard to the act of judicial decision-making in particular, a web of relationships built upon the forms and function of law validates certain forms of legal analysis and strategic decision-making while discouraging others, fleshing out the outer contours of constrained independence (see Table 1). Jurists who venture beyond these discursive parameters risk significant damage to their standing in the eyes of other actors in the community.⁹⁸ This concern for reputation causes international judges to internalize norms of self-restraint that reduce the potential for overreaching and the need for *ex post* correction by states.

Part of this self-restraint is manifested in court-made procedural rules and methodological approaches that restrict opportunities for expansive lawmaking by tribunals. These doctrines include “screening devices to avoid deciding certain cases on their merits, incrementalist decision making strategies, and identification of subjects ill-suited for international adjudication.”⁹⁹ When employing these methodologies to limit their own authority, international jurists often acknowledge the virtues of deferring to domestic actors and of considering the broader political climate in which national governments will receive their decisions.¹⁰⁰

Judicial self-restraint has a substantive dimension as well, as the death row phenomenon aptly illustrates.¹⁰¹ The content of the death row phenomenon has been shaped by an exceptionally widespread and robust dialogue among international tribunals and national courts in many regions of the world.¹⁰² The majority of courts and tribunals have held that the phenomenon raises serious constitutional or human rights concerns. But not all.

The UNHRC has repeatedly rejected the claim that detention on death row, no matter how prolonged, amounts to degrading treatment or punishment under the ICCPR.¹⁰³ Significantly, the UNHRC grounded its approach in both principled legal analysis and political pragmatism. Legally, the Committee recognized that a ruling recognizing the death row phenomenon could cause governments to speed up executions, a result contrary to the treaty’s express goal of encouraging all states toward abolition of the death penalty. Politically, the Committee understood that adopting a more rights-protective interpretation, particularly one strongly endorsed by European countries and

⁹⁸ See Alter, *Agents or Trustees?*, supra note __, at 25 (“the appointment [to an international tribunal] is a high status appointment, where reputation matters greatly”).

⁹⁹ Helfer & Dinwoodie, supra note __, at 222.

¹⁰⁰ See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 Am. J. Int’l L. 193, 211-13 (1996); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIP Agreement: The Case for a European Human Rights Analogy*, 39 Harv. Int’l L.J. 357, 399-401 (1998). Considering the political context of their decisions allows international tribunals to mitigate the risk of noncompliance by states. Alter, *Agents or Trustees?*, supra note __, at 41.

¹⁰¹ The death row phenomenon arises from the physical and psychological hardships experienced by defendants subjected to prolonged incarceration while awaiting execution of a capital sentence.

¹⁰² See Developments in the Law—*International Criminal Law, The International Judicial Dialogue: When Domestic Constitutional Courts Join the Conversation*, 114 Harv. L. Rev. 2049, 2052–59 (2001).

¹⁰³ See *Johnson v. Jamaica*, U.N. GAOR, Hum. Rts. Comm., 56th Sess., Annex, U.N. Doc. CCPR/C/56/D/588/1994 (1996). For an analysis, see Helfer, *Forum Shopping*, supra note __, at 328-29.

tribunals,¹⁰⁴ would create a serious risk of noncompliance by its more diverse constituency of member states.¹⁰⁵ The Committee did not opt out of the global legal community; it carefully considered and distinguished the reasoning of other tribunals. But it ultimately adopted a more circumspect approach, one that was both defensible to the global community of law and sensitive to the political limits of its authority.

IV. CONCLUSION

States are creating more independent international tribunals, submitting themselves to the jurisdiction of such tribunals, and litigating disputes before such tribunals in increasing numbers. These developments appear to be inconsistent with the claim that states are rational actors, jealous of their sovereignty and dubious of delegating authority to international institutions they cannot tightly control.

This Article offers a theory of constrained independence to explain these empirical trends. It argues that states establish independent international tribunals to enhance the credibility of their commitment to particular international regimes, making it more likely that they will secure the benefits of those regimes. Having delegated authority to formally independent decision makers, states limit the potential for judicial overreaching using fine grained structural, political, and discursive controls that they can manipulate *ex ante* and *ex post*. Judicial excesses are also cabined by the pressures of professional and personal socialization of membership in a global community of law. Together, these pressures map out a strategic space for international tribunals beyond which even independent judicial decision makers are unlikely to venture.

¹⁰⁴ See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

¹⁰⁵ As former UNHRC member [now ICJ Judge] Rosalyn Higgins has written, “what may be an appropriate and sensitive interpretation for the Western European democracies is not necessarily so for a global system embracing highly diverse political and economic systems.” Rosalyn Higgins, *The United Nations: Still a Force for Peace*, 52 Mod. L. Rev. 1, 7-8 (1989). See also Helfer, *Forum Shopping*, *supra* note __, at 329 (“Were the Committee to adopt the ECHR’s more rigorous approach, it would be setting a standard of protection so far out of touch with domestic laws that many States might be unwilling to follow it.”).