A New Generation of International Adjudication

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The past half-century has witnessed the development of a substantial and highly diverse field of international adjudication. The field includes proceedings before a range of tribunals – including international courts (like the International Court of Justice), regional courts (like the Inter-American Court of Human Rights), international arbitral tribunals (like those constituted by the Permanent Court of Arbitration) and specialized international tribunals (like the World Trade Organization). The growth of international adjudication is rightly regarded as one of the most important developments in international law in recent decades.

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

Although they share this premise, commentators have vigorously debated the efficacy of international adjudication, reaching widely divergent conclusions. Proponents of a robust view of international law have argued that factors such as reciprocity, retaliation and reputational concerns typically lead states to comply with the decisions of international tribunals, notwithstanding their unenforceable character; these commentators regard adjudication as an effective and increasingly important aspect of the international legal system. On the other hand, sceptics have regarded international adjudication, and international law more generally, as a marginal aspect of international relations – contending that considerations of reciprocity and reputation are relatively insignificant to state decision-making, particularly where adjudicatory mechanisms are concerned.

Despite their differences, all sides of this debate proceed from an incomplete and inaccurate view of contemporary international adjudication. In particular, the debate ignores an important new category of international tribunals that has progressively developed over the past 40 years. As discussed in Part II below, this recent generation of international adjudication departs from traditional public international law models and involves international tribunals whose decisions are effectively enforceable against states and whose jurisdiction, although limited, is often effectively mandatory. Adjudicatory bodies structured on this model include arbitral tribunals in investment arbitrations under bilateral and multilateral investment treaties; arbitral tribunals established pursuant to international commercial arbitration agreements between states and private parties; modern claims settlement mechanisms, including the Iran-U.S. Claims Tribunal; dispute settlement bodies of the World Trade Organization; and national courts adjudicating decisions against foreign states under contemporary foreign sovereign immunity legislation.

Unlike traditional forms of international adjudication, these second generation tribunals do not merely “provide information” to states. Rather, these international tribunals render binding and enforceable decisions which can be (and are) used to coercively seize state assets

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in enforcement proceedings much like actions to enforce domestic judgments. Moreover, in many instances, the use of these types of tribunals is not optional, but is instead effectively compulsory, in order for states to participate meaningfully in contemporary international trade and investment relations.

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

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

Although a relatively recent development, second generation tribunals are fairly described as the most frequently-used forms of international adjudication. The caseloads of second generation tribunals have substantially out-paced those of traditional international tribunals for more than two decades (now exceeding them by some 100-fold in annual filings) and the usage of second generation tribunals continues to expand, while that of traditional first generation tribunals stagnates. Likewise, an analysis of treaties entered into over the past several decades shows that states have provided far more frequently for enforceable adjudication by second generation tribunals than for dispute resolution by traditional first generation tribunals (such as the ICJ, PCA or International Tribunal for the Law of the Sea). Thus, virtually no treaties concluded during the past 25 years include ICJ submission agreements (i.e., less than 1 treaty per year), while substantial numbers of such treaties include provisions for enforceable mechanisms of adjudication (i.e., nearly 50 treaties per year).

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

Second, the frequent use and success of second generation tribunals also has important implications for prescriptions regarding the design of future international tribunals. A number of commentators urge that future international tribunals should be designed to resemble traditional first generation tribunals, characterized by the attributes of “independent” national appellate courts – such as standing judicial panels, broad and compulsory jurisdiction and standard procedural rules; other commentators prescribe the
opposite model, of “dependent” tribunals, almost entirely subject to the parties’ control and lacking meaningful authority. The success and frequent use of second generation tribunals challenges these conventional prescriptions, suggesting that second generation tribunals provide an equally viable – and arguably significantly better – model for most forms of international adjudication.

Importantly, the design of second generation tribunals differs materially from that of either “independent” national courts or entirely “dependent” tribunals, instead exhibiting a blend of structural characteristics and procedures within more nuanced institutional designs. Second generation adjudication is generally modeled on international commercial arbitration procedures – with tribunals selected by the parties for specific cases, limited jurisdictional mandates and procedural rules tailored to particular parties and disputes; at the same time, second generation tribunals frequently incorporate a very limited form of appellate review, often by a somewhat more independent tribunal. The development of a detailed model for future international tribunals and consideration of additional fields, beyond ones involving international trade and investment, where such tribunals would be appropriate are beyond the scope of this article (and are the subjects of a separate, forthcoming article). The essential point for present purposes is that prescriptions for the design of future international adjudicatory bodies cannot continue to ignore either the success or the very different structures of second generation tribunals.

I. “The Proliferation of International Courts and Tribunals”

A wide variety of international courts and tribunals have developed during the past century. The emergence of these various methods of adjudicating international disputes has rightly been described as both a marked change from earlier eras and one of the most significant developments in international law during the 20th century. This phenomenon has prompted an extensive body of academic commentary, variously addressing the “proliferation of international courts and tribunals,” the growth of “supranational adjudication,” and the increasing resort to “international tribunals.”

The academic commentary has defined international adjudication broadly, as encompassing any form of adjudicatory or quasi-adjudicatory process in which states participate in resolving international disputes (including litigation, arbitration, conciliation, mediation and advisory reports). Representative is the Project on International Courts and Tribunals, which catalogues some 90 international judicial bodies, arbitral institutions and other quasi-


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

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

5 Buergenthal, supra note XX.


adjudicatory mechanisms. Other commentators define international adjudication equally expansively, referring to permanent international judicial bodies (like the ICJ or the International Tribunal of the Law of the Sea (“ITLOS”)), arbitral or other tribunals established to resolve specific disputes or categories of disputes (like the Iran-U.S. Claims Tribunal or individual Permanent Court of Arbitration (“PCA”) arbitral tribunals) and national courts hearing international disputes.

This definitional approach is unsurprising and correct. Different forms of international adjudicatory mechanisms, ranging from permanent courts to ad hoc arbitral tribunals to hybrid bodies, perform the same types of functions (dispute resolution, interpretation of legal rules, and review of government actions), involving the same sets of legal instruments and rules.

Not surprisingly, the same or very similar categories of disputes can be submitted to and resolved by two or more very different types of adjudicatory bodies. In assessing the field of international adjudication and the design of future international tribunals, it is appropriate (and necessary) to consider all of these different adjudicatory mechanisms, regardless of its particular form or structure.

Commentators on the field of international adjudication all share a common starting point – before then proceeding to widely divergent assessments of existing mechanisms for

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8 The Project on International Courts and Tribunals (“PICT”), established by New York University and the University of London, maintains a list of international tribunals and a data-base of developments in the field of international adjudication. See PICT, http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf. The PICT list includes both “international courts” (defined as permanent bodies of independent judges) and other international “tribunals” (also termed “other Disputes Settlement Bodies”). The PICT list, presented in chart form, includes the PCIJ, ICJ, ITLOS, WTO, ICC (and specialized criminal tribunals), and ECJ (and other regional judicial bodies), as well as arbitral tribunals constituted under the auspices of the PCA, NAFTA, ICSID, and Court of Arbitration for Sport and claims settlement tribunals (such as the Iran-U.S. Claims Tribunal and U.N. Compensation Commission).

9 Commentators typically define international adjudication as including “not only entities officially designated ‘courts,’ such as the [ICJ], but also less formal or permanent bodies established to resolve specific disputes or clusters of disputes. Examples include panels convened under the 1947 [GATT], dispute settlement procedures available under various environmental treaties, the underutilized [PCA], and ad hoc interstate arbitration tribunals.” Helfer & Slaughter, Supranational Adjudication, supra note XX, at 285 n.35. See also Keohane, Moravcsik & Slaughter, supra note XX, at 457 n.1; Ernst-Ulrich Petersmann, Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System, 31 N.Y.U. J. INT’L L. & Pol’y 753 (1999).

10 All of the various types of international tribunals, broadly defined, interpret and apply principles of international law, both public and private, to disputes involving one or more states or state entities. These tribunals also all perform familiar adjudicative functions of dispute resolution, review of the legality of government actions (against either contractual, treaty or other international legal rules) and enforcement. See Karen Alter, Delegating to International Courts: Self-Binding vs. Other-Binding Delegation, 71 LAW & CONTEMP. PROBS. 37, 41-42 (2008).

11 For example, interstate boundary disputes can be submitted, variously, to the ICJ, to ad hoc arbitral tribunals (both inter-state and commercial), to regional courts, to conciliation mechanisms and to national courts. Similarly, expropriation claims by or on behalf of foreign investors can be submitted, again variously, to the ICJ, to international commercial arbitration, to investment arbitration, to claims settlement tribunals or to national courts.
international adjudication and prescriptions for future tribunals. The conventional wisdom is that, in stark contrast to domestic courts in developed states, existing international tribunals lack both mandatory jurisdiction and authority to render enforceable decisions. Instead, commentators agree that contemporary international tribunals merely “provide information” to states, to enable them better to monitor and induce compliance with international obligations through the use of retaliation, reciprocity and reputational considerations and to influence domestic constituencies (including courts and advocacy groups).

On the one hand, from a perspective of deep scepticism about the efficacy of international adjudication, and international law more generally, Professors Posner and Yoo write:

International adjudication, however impressive in outward appearance, lacks an essential feature of adjudication that occurs within states: the absence of mandatory jurisdiction. … The founders of the [ICJ] sought to create a type of ‘mandatory’ jurisdiction by giving states the option to submit to any claims brought against them, or a subset of those claims, or claims associated with particular treaties. But states can, and frequently have, withdrawn from jurisdiction when it has served their interests – and unlike the domestic case, no one has found a way to prevent states from doing this.

On the other hand, commentators with fundamentally different views regarding international adjudication (notably, Professors Slaughter, Helfer and other proponents of international adjudication) nonetheless agree that “international dispute resolution tribunals are substantially less effective than most domestic courts,” in particular because “international tribunals lack a direct coercion mechanism to compel … appearance.”

The same unanimity of opinion prevails as to the unenforceable character of decisions by international tribunals. Posner and Yoo say:

when international courts issue judgments, they have no means to enforce them. … [D]omestic courts depend on enforcement by the executive branch or enforcement arm of the government; … there is no such international enforcement agency on which courts can depend… States may voluntarily comply with judgments, and they sometimes do. But they need not.

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12 Professors Scott and Stephan are a partial exception. They have distinguished “legalized, institutionally based, privately initiated mechanisms from traditional informal means of enforcement that remain subject to state control,” including investment and commercial arbitral tribunals, some claims settlement tribunals and some national courts in the “formal enforcement” category. SCOTT & STEPHAN, supra note XX, at 4-5, 127-146. See infra pp. --.

13 POSNER, GLOBAL LEGALISM, supra note XX; Posner & Yoo, Judicial Independence, supra note XX. See also George W. Downs & Michael A. Jones, Reputation, Compliance and International Law, 51 J. LEGAL STUD. S95 (2002).

14 POSNER, GLOBAL LEGALISM, supra note XX, at 33. See also Posner & Yoo, Judicial Independence, supra note XX, at 13-14.


16 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 285. The same authors conclude that contemporary international tribunals lack the “power to compel a party to a dispute to defend against the plaintiff’s complaint.” Id. at 283.

17 POSNER, GLOBAL LEGALISM, supra note XX, at 33. See also Posner & Yoo, Judicial Independence, supra note XX, at 13-14.
Despite their very different perspective, Slaughter and Helfer again agree: “International tribunals lack a direct coercion mechanism to compel … compliance,” and “[t]he mechanisms of coercion available to enforce international judgments are those generally available to states or groups of states to enforce international law against one another.”

Professor Guzman concludes, even more pointedly, that:

In the context of a domestic dispute, the failure of a losing party to comply with the ruling of a court … leads to sanctions – most typically a seizure of property or person. This threat of coercive enforcement is foundational to the functioning of domestic systems. In contrast, when a state loses before an international tribunal, no formal legal structure exists to enforce the ruling. The assets of the noncompliant state will not be seized, nobody will be arrested, and the state will not even lose its ability to file complaints.

Proceeding from these premises, the conventional wisdom is that the principal function of international adjudication is to “provide information” to the parties, which international tribunals are supposedly better able to do than the parties themselves. Thus, as Posner and Yoo put it,

international tribunals [are] practical devices for helping states resolve limited disputes when the states are otherwise inclined to settle them. The courts help resolve bargaining failures between states by providing (within limits) information in (within limits) an impartial fashion.

And, more starkly: “Adjudication itself only adds information.”

Guzman adopts a similar view, declaring that “[i]nternational tribunals are simply tools to produce a particular kind of information.” He concludes:

the tribunal simply announces the relevant legal rules and, in the context of those rules, its interpretation of events. Its sole contribution to the dispute is information concerning what happened, what law governs, and how the law applies to the facts. …. [T]ribunals serve to provide information.

Likewise, Slaughter and Helfer emphasize “the informational functions that international tribunals perform and their effect on a state’s reputation for honoring its promises to other nations,” while linking international tribunals’ effectiveness to their “ability to provide information to, and hence empower, domestic political actors.” In particular, they argue that “[i]ndependent tribunals act as trustees to enhance the credibility of international

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18 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 285-86.
20 POSNER, GLOBAL LEGALISM, supra note XX, at 129.
22 Guzman, International Tribunals, supra note XX, at 235.
23 Guzman, International Tribunals, supra note XX, at 179.
24 Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 934.
commitments in specific multilateral contexts,” by “raising the probability that violations of those commitments will be detected and accurately labeled as non-compliance.”

Despite agreement on the basic characteristics of contemporary international tribunals, the commentary on international adjudication goes on to focus – and then diverge widely – on the consequences to be drawn from these descriptions. The focus of academic debate is on the efficacy of international adjudication, given that the decisions of international tribunals are – it is said – non-mandatory and unenforceable. For skeptics about international law, like Posner and Yoo, international adjudication has been relatively unimportant with only a minimal role in international affairs: “[a]djudication today remains marginal to world affairs.” They describe states as having created a succession of tribunals, none of which they ultimately are willing to use or, if they are used, to obey.

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

These views of contemporary international adjudication inform prescriptions for future international tribunals. Thus, skeptics about international adjudication argue that states will use international tribunals only if those tribunals are both powerless and “dependent” on the parties (in the sense of being chosen by the parties for specific cases, subject to a high degree of control by the parties and lacking meaningful enforcement powers). In their view, “[i]nternational courts succeed best when they are subject to strict limitations – voluntary jurisdiction, limited jurisdiction, weak remedies and so forth.”

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26 Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 904.
27 POSNER, GLOBAL LEGALISM, supra note XX, at 150.
28 POSNER, GLOBAL LEGALISM, supra note XX, at 173. See also id. at 167 (“[T]he most plausible reason for the proliferation of courts [is that] states become unhappy with an existing international court and they work around it by depriving it of jurisdiction and establishing additional courts or adjudication mechanisms as needed.”).
29 Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 903.
30 Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 935.
31 Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 955.
32 Anne-Marie Slaughter, The Real New World Order, 76 FOREIGN AFFAIRS 183, 184 (1997).
33 Posner & Yoo, Judicial Independence, supra note XX, at 5-8, 72. Posner and Yoo define “independence” of international tribunals in the following terms: “A tribunal is independent when its members are institutionally separated from state parties – when they have fixed terms and salary protections, and the tribunal itself has, by agreement, compulsory rather than consensual jurisdiction.” Id. at 7.
34 POSNER, GLOBAL LEGALISM, supra note XX, at 173.
In direct contrast, proponents of international adjudication claim that international tribunals will be effective only if they are “independent” (with broad jurisdiction and standing panels of tenured judges), provide private parties with access to adjudicatory proceedings and are “embedded” in the domestic legal systems of participating states. They urge that international adjudicatory mechanisms should be structured “more like … court[s],” and, in particular, more like “independent” courts such as the European Court of Justice (“ECJ”) and the European Court of Human Rights (“ECHR”). To that end, they propose a catalogue of structural and other features, derived from the ECJ’s structure, as a model for designing future international tribunals (and restructuring existing international bodies).

In sum, there is broad disagreement among commentators about both the current state of international adjudication and about prescriptions for the design of future international tribunals. Skeptics claim that international adjudication has, and can have, only a very limited role in contemporary international affairs; they argue that future international tribunals should be “dependent” and relatively powerless, because states will supposedly only use ineffectual forms of adjudication. In contrast, proponents claim that international adjudication has significant effects on state behavior and that future international tribunals should be modeled on “independent” and relatively powerful national courts. Regardless of their conclusions, however, the shared premise of virtually all commentators is that, in contrast to national courts, international tribunals lack the power to issue enforceable decisions or to exercise compulsory jurisdiction – with debate then focusing on whether and how such unenforceable decisions nonetheless have effects on state behavior.

II. Two Generations of International Adjudication

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

35 Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 908; Keohane et al., supra note XX, at 458–459, 487–488.
36 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 365.
37 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 298–337.
38 Nonetheless, the “providing information” metaphor is flawed in important respects. The metaphor ignores the distinction between formally non-binding decisions (such as reports by commissions of inquiry or mediators) and formally binding decisions (such as those of many international courts and arbitral tribunals), implying that both have the same function and status. That is inaccurate. International instruments frequently provide that commissions of inquiry, mediations and conciliations are non-binding. See, e.g., 1907 Hague Convention for the Pacific Settlement of International Disputes, arts. 6 (“Good offices and mediation … have exclusively the character of advice, and never have binding force.”), 35 (“The Report of the Commission is limited to a statement of facts, and has in no way the character of an Award. It leaves to the parties entire freedom as to the effect to be given to the statement.”). In contrast, as discussed below, similar instruments provide that arbitral awards, id. art. 37; infra pp. --, and international court judgments, infra pp. --, are binding on the parties.
It is not correct, however, that all international tribunals conform to the description provided by the conventional wisdom: in reality, international adjudication is more complex and more interesting. Over the past four decades, states have developed an important new category of international adjudication – consisting of tribunals with characteristics that differ markedly from those of traditional international adjudicatory mechanisms. Although it is largely ignored by the commentary on international adjudication, this new generation of tribunals has precisely those essential characteristics denied by the conventional wisdom – the power to render enforceable decisions and to exercise what is effectively, although not formally, compulsory jurisdiction over defined categories of disputes.

As described below, states have developed what can be described as two basic models of international adjudication. In general terms, these two models have developed chronologically, with an earlier generation of standing international courts aspiring to broad jurisdiction over classic public international law disputes and a later generation of much more specialized tribunals, usually constituted on a case-by-case basis, exercising relatively narrow jurisdiction over particular categories of disputes. Importantly, while first generation tribunals never have the power to render enforceable decisions, second generation tribunals have almost always been granted, and subsequently exercised, precisely this authority.

First, building on the Hague Conventions for the Pacific Settlement of International Disputes and the Permanent Court of Arbitration (“PCA”), states established a number of standing international judicial bodies during the course of the 20th century. As discussed in Part II.A below, these tribunals were typically established in multilateral settings, often inspired by high political and religious ideals, with aspirations for universal compulsory jurisdiction over broad categories of traditional public international law disputes. The Permanent Court of International Justice (“PCIJ”), International Court of Justice (“ICJ”) and International Tribunal for the Law of the Sea (“ITLOS”) are prime examples of this model for international tribunals. Notably, none of these first generation tribunals is empowered to render enforceable decisions; at the same time, and despite other important accomplishments, none of these tribunals has enjoyed significant usage by states or commanded particularly impressive compliance with its decisions.

The agreement by states that a tribunal’s decision will be binding gives that decision a character that is fundamentally different from that of non-binding “information” provided by third parties; in addition to providing information, which a commission of inquiry or mediator does, a binding decision imposes a specific and agreed obligation to comply with the decision of a neutral third-party. A state’s refusal to comply with such a decision entails a further non-compliance with its international obligations, beyond its initial violation of its underlying obligations; moreover, this additional violation is generally unambiguous and unconditional (i.e., it is difficult for a state to explain its breach, for example, by reference to changed or extenuating circumstances or its counter-party’s conduct). As a consequence, non-compliance with a binding international decision generally entails materially increased costs beyond either breach of an underlying international obligation or a refusal to comply with a non-binding recommendation. See Guzman, International Tribunals, supra note XX, at 181-182. Referring to both binding and non-binding decisions as merely “providing information” ignores, and implicatedly rejects, this distinction and the special character of the “information” that is provided by a binding decision. These forms of international adjudication involved application of traditional rules of international law which formed the bulk of international law obligations prior to WWII. See Paul B. Stephan, The New International Law – Legitimacy, Accountability, Authority and Freedom in the New Global Order, 70 COLO. L. REV. 1555, 1563-68 (1999); Koh, Why Do Nations Obey International Law?, supra note XX, at 2607-2613.

A chronological account of first and second generation tribunals is broadly accurate. As discussed below, most first generation tribunals developed between 1900 and 1950 (including the PCA, PCIJ and ICJ); in contrast, second generation tribunals first began to develop in the 1960s and 1970s, following adoption of the restrictive theory of sovereign immunity and widespread ratification of the ICSID and New York Conventions. See infra pp. --. It is true that the model first reflected by traditional first generation tribunals has continued to be used in more recent years – as illustrated by the formation of the ITLOS (in the 1980s) and various regional courts (between 1990 and the present). See infra pp. --. It remains the case, however, that the development of second generation tribunals with the authority to render enforceable international decisions is a comparatively recent phenomenon which came after the development of most first generation international tribunals.
Second, beginning in the 1960s, states began to establish a new generation of international adjudicatory mechanisms. As discussed in Part II.B below, states did so by progressively concluding substantial numbers of bilateral treaties and contractual instruments providing for international arbitration of specified categories of disputes and by accepting, through state practice, the jurisdiction of national courts for significant categories of international disputes involving states or state entities. This new generation of adjudication was typically inspired by pragmatic, commercial considerations and includes arbitral tribunals constituted pursuant to bilateral investment treaties (“BITs”), the North American Free Trade Agreement (“NAFTA”) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”); international commercial arbitration agreements between states and private parties; the dispute resolution mechanisms of the World Trade Organization (“WTO”); and claims settlement tribunals such as the Iran-U.S. Claims Tribunal. Significantly, all of these tribunals have been empowered to render enforceable decisions and have frequently done so; at the same time, in contrast to traditional models of international adjudication, these second generation tribunals have enjoyed significant, and increasing, usage by states and other actors and relatively high compliance with their decisions.

A. The First Generation of International Adjudication

The first generation of international tribunals emerged at the outset of the 20th century, with the foundation of the PCA, followed by the PCIJ and ICJ. These tribunals were established with high, often utopian, ambitions – in particular, that mandatory adjudication of virtually all disputes between states would play a central role in ensuring a Kantian vision of world peace. These aspirations continued to be reflected, albeit much less ambitiously, in more recent international tribunals, including the ITLOS and the International Criminal Court (“ICC”).

The PCA, PCIJ and ICJ have made substantial contributions to the development of international law. Despite their founders’ aspirations, however, these first generation tribunals have been distinguished by their lack of authority – both formal and practical. In particular, none of these tribunals enjoys mandatory jurisdiction or is empowered to render enforceable decisions. Moreover, despite their achievements, states have infrequently resorted to these tribunals to resolve their disputes and their significance for international affairs has been limited.

1. Permanent Court of Arbitration

The modern era of international adjudication can be traced to the 1899 and 1907 Hague Peace Conferences and the PCA, which was established by those Conferences. In both its

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

42 See infra pp. --.

43 See infra pp. --.

44 There was, of course, a lengthy tradition of international adjudication prior to 1900. See JACkson H. RALSTon, INTernationaL aRbitraTIon froM aThens To locarno (1929); J.G. MERRUlls, INTernationaL DISpute sETTlement 1-126 (4th ed. 2005).
aspirations and its eventual form, the PCA exhibited what came to be the characteristic features of traditional first generation tribunals.

The PCA was a child of the 19th century peace movement and, more specifically, the 1899 Hague Peace Conference. The Conference was convened with the objective of facilitating world peace and disarmament; a central feature of its program was the use of adjudication to prevent conflicts between states, with proposals for an ambitious multilateral convention requiring arbitration of most international legal disputes. Under these proposals, contracting states would have been obligated to arbitrate virtually all disputes with other contracting states under a wide range of treaties (concerning, for example, communications, transport, navigation, intellectual property, inheritance, health and judicial cooperation), as well as all claims for monetary damages for wrongful state actions.

These proposals were unacceptable to most states. The delegates instead adopted the 1899 Hague Convention for the Pacific Settlement of International Disputes, which contained provisions for voluntary arbitration. In particular, the 1899 Convention encouraged – but did not require – contracting states to resolve their international disputes by arbitration. Thus, the Convention declared that “[i]n questions of a legal nature, and especially in the interpretation of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes.” But nothing in the Convention imposed any obligation that arbitration (or any other form of adjudication) be pursued in particular cases.

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

To encourage states to resort to arbitration, the 1899 Convention also established the grandly-titled – but essentially powerless – “Permanent Court of Arbitration.” In fact, the PCA was

47 See David D. Caron, War and International Adjudication: Reflections on the 1899 Peace Conference, 94 AM. J. INT’L L. 4 (2000); Best, supra note XX, at 630 (“Arbitration enthusiasts had hoped that the use of it would be obligatory. The Great Powers were not having that!”).
49 1899 Hague Convention, art. 18.
50 See 1899 Hague Convention, arts. 6, 14. See supra pp. – n. –.
neither “permanent,” nor a “court,” nor even responsible for conducting “arbitrations.” 51 The Convention established no standing tribunal, whether denominated a “court” or otherwise, and it contained no grant of mandatory jurisdiction, whether to the PCA or otherwise. Rather, the Convention established the PCA as a rudimentary form of arbitral institution, responsible for maintaining a list of arbitrators who might be appointed to tribunals in future cases (if states chose to agree to such arbitrations) 52 and offered skeletal procedural rules that could be applied in proceedings (again, if states agreed to such arbitrations). 53

Less than a decade after the 1899 Hague Conference, the contracting states reconvened, with adjudication central to their discussions. Again inspired by academic and religious peace activists, a number of delegations urged a system of compulsory adjudication, rather than the optional mechanisms of the 1899 Convention. 54 These proposals foundered on disagreements about the composition of the contemplated international court, 55 and the 1907 Conference made no significant changes to the treatment of international adjudication under the 1899 Convention. 56

PCA arbitral tribunals have issued a handful of well-reasoned awards, occasionally in disputes of some practical significance, which played a material role in the development of customary international law. 57 In general, however, the PCA enjoyed very modest usage and addressed few cases of international importance. 58 All told, during the first 70 years of the PCA’s existence, only 25 arbitrations were submitted to PCA tribunals, for a filing rate of 0.3 cases per year; 59 even fewer non-binding PCA conciliations or inquiries were conducted. 60 (By comparison, some 200 non-PCA interstate arbitrations were conducted between 1900 and 1970, often pursuant to ad hoc submission agreements or compromissory clauses in bilateral treaties. 61)

In an ironic turn-around, the PCA’s caseload has increased materially since 1995. Between 1995 and 2010, some 86 cases were conducted under PCA auspices (for an annual filing rate

51 1899 Hague Convention, arts. 21-29. See John Bassett Moore, The Organization of the Permanent Court of International Justice, 22 COLUM. L. REV. 497, 511 (1922); Manley O. Hudson, The Permanent Court of International Justice – An Indispensable First Step, 108 AM. ACAD. POL. & SOC. SCI. Annals 188, 189 (1923) (“It may well be said of the Permanent Court of Arbitration that it is not permanent, not a court, and is not an adequate tribunal for arbitration.”).
52 1899 Hague Convention, arts. 22-25.
53 The Convention contained (in articles 30 to 57) procedural rules addressing limited aspects of the arbitral process. The PCA was also responsible for providing limited services as a registry (the “International Bureau”). 1899 Hague Convention, arts. 22, 28. These services did not include many of the functions of more developed arbitral institutions, such as appointing arbitrators and hearing challenges to and removing arbitrators.
54 SCOTT, THE HAGUE PEACE CONFERENCES, supra note XX, at 330-343.
57 Leading examples include the Island of Palmas Case (The Netherlands v. United States), 2 R.I.A.A. 829 (1928), Pious Funds of the California Case, 9 R.I.A.A. 1 (1902), and North Atlantic Coast Fisheries Case, 11 R.I.A.A. 167 (1910).
58 “The great days of the Hague’s Court of Arbitration were over by 1914.” Best, supra note XX, at 630.
60 There have been only three recorded PCA conciliations. See ANNUAL REPORT OF THE PERMANENT COURT OF ARBITRATION 2009, Annex 4.
of roughly 6 cases per year – a 20-fold increase over historic figures).\textsuperscript{62} As discussed below, the substantial majority of these new filings are either international commercial or investment arbitrations (rather than classic interstate proceedings) – in both instances, involving second generation tribunals with the power to make enforceable awards.\textsuperscript{63} As we will see, this development, with a disused first generation tribunal only coming to enjoy significant usage through the adoption of second generation adjudicatory mechanisms, is representative of the development of international adjudication over the past century.

Also during the early 20\textsuperscript{th} century, states negotiated large numbers of bilateral\textsuperscript{64} and multilateral\textsuperscript{65} treaties providing for compulsory arbitration of defined, but generally broad, categories of disputes (along the lines of the proposals rejected in the Hague Conferences). Multilateral arbitration treaties included the 1924 Geneva Protocol for the Pacific Settlement of International Disputes and the 1928 Geneva General Act for the Pacific Settlement of International Disputes,\textsuperscript{66} both of which provided for the compulsory arbitration of a broad range of international disputes. In addition, several hundred bilateral arbitration treaties were entered into between 1900 and 1939, generally providing for compulsory arbitration of a wide range of disputes between the contracting states.\textsuperscript{67} In the words of one commentator, “the immense output of arbitration treaties has been such that today [i.e., 1928] they constitute a very dense forest, in which it is difficult to find one’s way.”\textsuperscript{68}

Nonetheless, most states remained skeptical of such treaties and declined to ratify them – or, if ratified, to use, them.\textsuperscript{69} Following World War II, the popularity of compulsory arbitration treaties declined precipitously; in the words of one author, they “were abandoned almost entirely.”\textsuperscript{70} Moreover, as with the PCA itself, usage of these treaties was very modest, with fewer than ten arbitrations being conducted pursuant to general compulsory arbitration treaties between 1920 and 1990.\textsuperscript{71}

As we will see, the ambitions and development of the PCA are representative of traditional forms of international adjudication. The Hague Conferences were accompanied by high

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\textsuperscript{63} PCA, Statistical Summary, supra note XX; Paul-Jean Le Cannu & Daniel Drabkin, Assessing the Role of the Permanent Court of Arbitration in the Peaceful Settlement of International Disputes, 27 L’OBSERVATEUR DES NATIONS UNIES 194 (2010) (pending cases in 2009 include 35 investment arbitrations, 14 commercial arbitrations, 2 environmental arbitrations and 3 inter- or intra-state arbitrations). See infra pp. --.

\textsuperscript{64} See Louis B. Sohn, The Function of International Arbitration Today, 108 RECUEIL DES COURS 1, 26-27, 33-34, 38-40 (1963) (citing compulsory bilateral arbitration treaties in 1920s and 1930s); HELEN MAY CORY, COMPULSORY ARBITRATION OF INTERNATIONAL DISPUTES 63-65, 136-144 (1932) (same).

\textsuperscript{65} See Sohn, International Arbitration Today, supra note XX, at 29-33; CORY, supra note XX, 145-152.


\textsuperscript{67} Between 1900 and 1914, an estimated 120 bilateral general arbitration treaties, providing for arbitration of a broad range of disputes between the two contracting states, were concluded. Sohn, International Arbitration Today, supra note XX, at 1, 26-27, 33-34, 38-40. Between 1914 and 1939, “hundreds” of additional bilateral arbitration treaties were also concluded. Hans von Mangoldt, Arbitration and Conciliation Treaties, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 28, 30 (1981).


\textsuperscript{69} von Mangoldt, Arbitration and Conciliation Treaties, supra note XX, at 31 (“In contrast to the astoundingly high number of general arbitration and conciliation treaties concluded since the beginning of this century, the frequency of their application to actual disputes is just as astoundingly low.”).

\textsuperscript{70} Sohn, International Arbitration Today, supra note XX, at 40.

\textsuperscript{71} ANNUAL REPORT OF THE PERMANENT COURT OF ARBITRATION 2009, Annex 2. See also STUYT, supra note XX.
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aspirations for a standing, independent international court with broad, multilateral compulsory jurisdiction over classic inter-state disputes – reflected in the inapt phrase, “Permanent Court of Arbitration.” As ultimately agreed, the Hague Conventions and subsequent general arbitration treaties remained multilateral, with aspirations for broad jurisdictional scope. At the same time, however, these treaties provided an almost entirely optional and ad hoc adjudicatory mechanism, that did not render enforceable (or even clearly binding) awards. In practice, states have generally declined to use these dispute resolution mechanisms, save for limited numbers of non-PCA arbitrations, typically involving post hoc submission agreements or narrow compromissory clauses in individual treaties. Despite this lack of success, in subsequent years, other forms of international adjudication pursued a broadly similar model, of standing tribunals with broad jurisdictional authority, typically with the same results as the PCA.

2. Permanent Court of International Justice

Following World War I, proponents of an international court continued their efforts – again, with the objective of founding a standing tribunal for peacefully resolving a wide range of international disputes.\(^\text{72}\) The proposed League of Nations became the focal point for these aspirations, with the formation of an international judicial organ being a central element of the League’s Covenant.

The League’s Covenant contemplated the establishment of a “Permanent Court of International Justice,” which was to have jurisdiction over a significant range of disputes between members of the League.\(^\text{73}\) In turn, the PCIJ’s Statute established a Court modeled on domestic appellate courts, with a tribunal of fifteen judges enjoying fixed terms and remuneration.\(^\text{74}\) The PCIJ was not, as the PCA was, merely a catalogue of names, who might be selected to sit on future tribunals; rather, the PCIJ was a standing court with a pre-defined membership of tenured judges, open to hear a potentially wide range of disputes between members of the League of Nations.\(^\text{75}\)

Despite these differences, the PCIJ bore important similarities to the PCA. During negotiation of the PCIJ Statute, proposals were tabled to grant the Court mandatory jurisdiction over all “legal” disputes between members of the League.\(^\text{76}\) As had occurred with similar proposals at the Hague Conferences, these proposals were rejected by the League’s Council.\(^\text{77}\) Instead, the PCIJ Statute limited the Court’s jurisdiction to those disputes that states agreed to submit to it.\(^\text{78}\) The PCIJ Statute also permitted states to declare

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\(^{72}\) The League’s founders regarded the PCIJ as a fulfilment of the work of the Hague Conferences. The purpose of the Court was sweeping, being to secure world peace by: “induc[ing] governments, instead of resorting to violence, to come before the tribunal which has now been established, which is continuously organized and always open to them, and submit[ting] their controversies to its final and peaceful decision.” John B. Moore, *The Organization of the Permanent Court of International Justice*, 22 COLUM. L. REV. 497, 511 (1922).

\(^{73}\) League of Nations Covenant, art. 14 (directing Council to “formulate and submit to the members of the League … plans for the establishment of a Permanent Court of International Justice”).


\(^{75}\) The PCIJ was also open to states which were eligible to join the League, but had not done so (in particular, the United States). PCIJ Statute, arts. 34-35.

\(^{76}\) The Advisory Committee of Jurists proposed that the PCIJ be granted mandatory jurisdiction over cases of a “legal nature” falling within four broad categories. *The Statute of the International Court of Justice: A Commentary* 593-594 (Andreas Zimmerman et al. eds., 2006).

\(^{77}\) *Id.* at 593.

\(^{78}\) PCIJ Statute, art. 36 (“The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force.”).
The enforceability of PCIJ judgments generally mirrored that of arbitral awards under the Hague Conventions. As with PCA awards, neither the League Covenant nor the PCIJ Statute provided an enforcement mechanism for PCIJ judgments. The Court’s Statute did provide, more explicitly than the Hague Conventions’ provisions regarding awards, that PCIJ judgments were “final and without appeal”—but it contained no mechanism giving effect to this provision.

The PCIJ rendered a number of carefully-reasoned and influential decisions, including in several significant disputes arising from the WWI peace arrangements. Nonetheless, despite its aspirations, the Court enjoyed only a modest caseload. Between 1922 and 1939 (when WWII led to a suspension of its activities) the PCIJ heard only 38 contentious cases and 28 requests for advisory opinions—a filing rate of roughly two contentious cases (and 3.5 cases in total) per year. In particular, the PCIJ’s irrelevance during the years before WWII was in painful contrast to the role of safeguarding world peace foreseen by the Court’s supporters. In one observer’s words, “the hope of the peace movement of the late 19th and early 20th centuries, that international adjudication was the substitute for war … was ill-founded and unduly idealistic.”

3. International Court of Justice

The aftermath of WWII saw the replacement of the PCIJ with the ICJ — identified by the U.N. Charter as the “principal judicial organ of the United Nations.” The ICJ replicated the PCIJ’s high aspirations: “the primary purpose of the International Court … lies in its function as one of the instruments for securing peace in so far as this aim can be achieved through law.” Similarly, the ICJ largely replicated the PCIJ’s institutional structure and jurisdictional competence – as well as its patterns of usage.

Like the PCIJ, the ICJ Statute adopted the model of a national appellate court and provided for a standing tribunal (of fifteen members), with fixed terms and remuneration. Also like the PCIJ, the ICJ was open to all states (but not individuals or corporate entities), and was envisaged as a world court with universal jurisdiction over any “legal” dispute among states. Nonetheless, the ICJ was not granted general compulsory jurisdiction over interstate disputes.
Instead, like the PCIJ, the Court’s jurisdiction was limited to disputes that states agreed to submit to it – for example, by compromissory clauses in bilateral or multilateral treaties.\footnote{89} The Court’s jurisdiction also included the so-called optional clause in Article 36(2) of the ICJ Statute, which aimed at vesting the ICJ with broad, effectively mandatory jurisdiction by providing for states to make general declarations accepting the Court’s compulsory jurisdiction over any dispute with another state that had similarly accepted the Court’s compulsory jurisdiction.\footnote{90}

Also paralleling the PCIJ, the ICJ Statute provides that ICJ judgments are “final and without enforcement mechanism for ICJ decisions. If an ICJ judgment is not complied with, a prevailing party may seek recourse from the Security Council under the U.N. Charter.\footnote{91} Nonetheless, neither the U.N. Charter nor the ICJ Statute provided an effective enforcement mechanism for ICJ decisions. If an ICJ judgment is not complied with, a prevailing party may seek recourse from the Security Council under the U.N. Charter.\footnote{92} As its drafters feared, however, that is a highly imperfect remedy which has not had meaningful practical effects: the Security Council has only once even arguably taken steps to enforce an ICJ judgment.\footnote{93}

Despite its limitations, the ICJ has played an important role in the development of international law, rendering a number of opinions addressing significant issues of international law.\footnote{94} Nonetheless, as both proponents and critics acknowledge, usage of the ICJ has been disappointing, even taking into account the limited number of entities able to commence ICJ proceedings (i.e., at most relevant times, a maximum of some 150 states).\footnote{95} In total, the ICJ has heard 123 contentious cases and 26 requests for advisory opinions in its 65 year history\footnote{96} – for an annual filing rate of slightly more than two cases (contentious and advisory) per year. Between 1945 and 1990, only 83 cases were filed with the Court (for an

\footnote{89} Article 36(1) of the Court’s Statute provides for ad hoc submissions of particular disputes to the Court or for submissions pursuant to compromissory clauses (covering future disputes) included in particular treaties. I.C.J. Statute, art. 36(1).

\footnote{90} I.C.J. Statute, arts. 35(1), 36(2).

\footnote{91} I.C.J. Statute, art. 60. \textit{See also} U.N. Charter, art. 94(1) (“Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.”).


\footnote{93} Among other difficulties, the Security Council’s limited jurisdictional mandate, political focus, busy schedule and the veto rights of the Council’s permanent members make enforcement of ICJ judgments via the Council both unlikely and unsatisfactory. \textit{The Statute of the International Court of Justice, supra note XX, at 1246; Reisman, supra note XX, at 14-16.}


\footnote{95} \textit{See} Simma, \textit{International Adjudication}, \textit{supra} note XX, at 49-51 (“the constitutional role of the World Court remains rather limited, and its genuine judicial function, the decision of disputes submitted to it unilaterally, is not working too well either”); Shigeru Oda, \textit{The Compulsory Jurisdiction of the International Court of Justice: A Myth?}, 49 INT’L & COMP. L.Q. 251, 260 (2000); Kooijmans, \textit{supra} note XX; \textit{LAUTERPACKT, supra} note XX, at 4 (“[I]t would be an exaggeration to assert that the Court has proved to be a significant instrument for maintaining international peace”).

\footnote{96} List of Cases Referred to the Court Since 1946 by Date of Introduction, I.C.J., \url{http://www.icj-cij.org/docket/index.php?p=1=3&pn=2} [hereinafter ICJ Case List].
average filing of less than two cases per year. Following the break-up of the Soviet Union, the Court enjoyed a modest increase in popularity, with 66 cases having been filed between 1991 and 2010 (roughly three cases per year).

Acceptance of the Court’s compulsory jurisdiction under Article 36(2) has also been unsatisfactory. Only 66 of the 192 U.N. members have accepted the ICJ’s compulsory jurisdiction under Article 36(2). Measured as a percentage of all U.N. members, this figure (30% acceptance) is an all-time low (compared with 60% acceptance by U.N. members in 1950 and 65% acceptance of the PCJI’s compulsory jurisdiction). Moreover, treaty-based submissions to ICJ jurisdiction are also infrequent and declining. Between 1946 and 1965, states entered into roughly 9.7 treaties per year providing for ICJ jurisdiction; that number fell to roughly 2.8 treaties per year between 1966 and 1985 and 1.3 per year between 1986 and 2004. The one exception to this involves the designation of the ICJ President as an appointing authority in interstate arbitrations (to select arbitrators, in cases where states are unable to agree upon an appointment), where recent treaty-making practice has seen frequent use of this appointment mechanism.

Compliance with ICJ judgments has also been mixed, particularly in compulsory jurisdiction cases. The United States has refused to comply with a number of the Court’s judgments and other states have done the same (France, Iceland, Albania, Libya and Iran). Similarly, a number of states have withdrawn their consents to ICJ jurisdiction (either compulsory or otherwise) in connection with pending, threatened or concluded cases before the Court; in other instances, the Court has declined jurisdiction where non-compliance appeared likely.

All told, it is impossible to conclude that the ICJ has played a significant role in international affairs over the course of its 65 year history. The Court’s principal achievements have been contributing to the elaboration of principles of customary international law and the
successful resolution of a number of boundary disputes (often involving the Court’s special agreement jurisdiction). Other areas of the ICJ’s jurisdiction, especially its compulsory jurisdiction under Article 36(2), have seen limited use, with equally limited practical effects.

4. International Tribunal on the Law of the Sea

The model of first generation tribunals continued to be followed in structuring the ITLOS, established pursuant to the 1994 U.N. Convention on the Law of the Sea (“UNCLOS”). The Tribunal is based on the model of the ICJ, with standing judges (serving fixed terms) and expansive jurisdiction over a comparatively wide range of international law issues. The ITLOS shares many of the other basic characteristics of the ICJ, PCIJ and PCA – in particular, lacking both compulsory jurisdiction and the power to render enforceable decisions. Like other first generation tribunals, the ITLOS has also seen minimal usage, while playing a minimal role in contemporary international affairs.

Like the ICJ, the ITLOS is a permanent court, whose twenty-one members enjoy fixed terms and remuneration. The Tribunal was conceived with broad jurisdictional competence, potentially extending to any questions arising between contracting states under the UNCLOS. In practice, however, the vast majority of states have declined to accept the ITLOS’s jurisdiction, instead opting for alternative means of dispute resolution.

The ITLOS’s jurisdiction is comparatively broad, extending to any dispute concerning the interpretation or application of the UNCLOS, as well as disputes concerning any “international agreement related to the purposes of the Convention” and principles of customary international law. ITLOS judgments are “final” and, pursuant to the ITLOS Statute, “shall be complied with by all the parties to the dispute.” Like the PCA, ICJ and

[107] See, e.g., Sovereignty Over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia), 2002 I.C.J. Rep. 625; Kasikili/Sedudu Island (Botswana/Namibia), 1999 I.C.J. Rep. 1045; Gabcikovo-Nagymaros Project (Hungary/Slovakia) 1997 I.C.J. Rep. 7. The only category of the ICJ’s caseload that has increased meaningfully during the past four decades is special agreement cases, submitting existing disputes to the Court. During the ICJ’s first 30 years, four special agreement cases were filed, with ten such cases being filed in the ICJ’s next 35 years. As others have noted, the ICJ’s special agreement jurisdiction, particularly when used by parties to select a Chamber of the Court, bears more resemblance to ad hoc interstate arbitration than to the ICJ’s contemplated mandatory jurisdiction. Posner, The Decline of the International Court of Justice, supra note XX, at 9-10.


[112] UNCLOS, art. 288(1), 288(2). See also UNCLOS, Annex VI, art. 21.

[113] UNCLOS, art. 293(1).

[114] ITLOS Statute, art. 33(1).
PCIJ, however, the UNCLOS and ITLOS Statute do not generally provide enforcement mechanisms for ITLOS decisions.\(^{115}\)

Article 287 of the Convention provides for states to file a declaration selecting among three options for the resolution of disputes under the UNCLOS: (i) the ITLOS, (ii) the ICJ, and (iii) arbitration.\(^{116}\) Relatively few of the UNCLOS contracting states have accepted the ITLOS’s jurisdiction pursuant to Article 287. As of September 2010, only 27 of the 161 contracting states had chosen the ITLOS as their preferred dispute resolution mechanism (and, of these, 12 ranked the ITLOS together with another form of dispute resolution).\(^{117}\)

Given these statistics, it is not surprising that the ITLOS has seen minimal usage. Since the Tribunal began functioning in 1998, only 17 cases have been filed with it (ten of which were claims for provisional relief seeking release of vessels).\(^{118}\) During its 12 years of existence, the ITLOS has issued only a single decision on the merits.\(^{119}\) Predictably, there are substantial doubts about the usefulness of the ITLOS and its future viability.\(^{120}\)

Like the ICJ and PCIJ, the ITLOS was established as a permanent judicial body, with aspirations to broad jurisdiction over a wide range of international law disputes, but lacking any means to issue enforceable decisions. Also like the ICJ and PCIJ, the ITLOS ultimately was not granted compulsory jurisdiction, and contracting states instead insisted upon retaining the option whether to accept or decline ITLOS jurisdiction – which they have generally declined. And finally, again like the PCA, ICJ and PCIJ, states have declined to use the ITLOS (producing a filing rate of (at best) one case per year) and the Tribunal has played no significant role in international affairs.

5. Regional Courts and Tribunals

A number of regional tribunals, established since WWII, share various of the characteristics of the PCA, PCIJ, ICJ and ITLOS – being modeled on the institutional structure of “independent” national appellate courts, while lacking the power to render enforceable decisions. None of these regional tribunals precisely parallels the institutional structures of

\(^{115}\) The only exception is the specialized Seabed Disputes Chamber, whose decisions are subject to enforcement in national courts, in the same manner as national court judgments. Seabed Disputes (concerning activities in the International Seabed Area) are subject to the mandatory jurisdiction of the Seabed Disputes Chamber of the ITLOS. UNCLOS, art. 189; ITLOS Statute, arts. 35-39. See CHURCHILL & LOWE, supra note XX, at 453-459. The Seabed Disputes Chamber consists of eleven members of the ITLOS; the judges who sit in “ad hoc chambers” in particular disputes, consisting of three judges selected by the parties from the Seabed Disputes Chamber (or, failing agreement, by the Chamber’s presiding judge). ITLOS Statute, arts. 35, 36(1). Judgments of the Chamber are (like other ITLOS judgments) “final” and “shall be complied with by all the parties to the dispute.” ITLOS Statute, arts. 33(1), 40(1). Additionally, however, Article 39 of the ITLOS Statute provides that decisions of the Chamber (unlike other ITLOS judgments) are directly enforceable in contracting states: “The decisions of the Chamber shall be enforceable in the territories of the States Parties in the same manner as judgments or orders of the highest court of the State Party in whose territory the enforcement is sought.” ITLOS Statute, art. 39.

\(^{116}\) UNCLOS, art. 287. “Arbitration” includes both arbitration under Annex VII and “special” arbitration under Annex VIII (for expert fact-finding on issues of fisheries, marine environment, marine-scientific research or navigation). Exceptionally, articles 187 and 292 of the UNCLOS provide for mandatory ITLOS jurisdiction for cases where vessels are detained in violation of the UNCLOS and over “seabed disputes” (arising under the UNCLOS regime for rights to the international seabed). UNCLOS, arts. 187, 292.


\(^{120}\) See, e.g., Oda, Dispute Settlement Prospects in the Law of the Sea, supra note XX, at 864 (“will prove to have been a great mistake”); Seymour, supra note XX.
the original first generation tribunals, and most differ in significant respects – frequently being parts of broader regional integration efforts. Nevertheless, these tribunals have featured in some commentary on international adjudication and warrant brief discussion. Notably, like classic first generation tribunals, very few of these tribunals have enjoyed more than modest usage or compliance, and many of them have been entirely unsuccessful.  

The African Court of Justice and Human Rights (“ACJHR”) is representative of many regional judicial institutions. Founded by the African Union in 2008, the ACJHR merged the African Court on Human and Peoples’ Rights (“ACHPR”) and African Court of Justice (“ACJ”) and is nominally the judicial organ of the African Union. Like the ACHPR and ACJ before it, the ACJHR formally possesses broad jurisdical competence over disputes between African Union member states. The ACJHR is a standing court of 16 judges, serving six year terms. Under the ACJHR Statute, judgments of the ACJHR are final and binding on the parties, but have no meaningful enforcement mechanism.

Although routinely included in lists of contemporary international tribunals, neither the ACJ, the ACHPR nor the ACJHR can be regarded as having attracted anything more than nominal support from member states or as having played any role in the adjudication of international disputes. Before being merged out of existence in 2008, neither the ACHPR nor the ACJ had commenced judicial activities or heard any cases. In turn, although established to replace the ACJ and ACPHR, the ACJHR also has not commenced meaningful judicial activities.

The Central American Court of Justice (“CACJ”) is not materially different. Established by the Organization of Central American States in 1991, the Court’s jurisdiction extends broadly to disputes among Central American contracting states and between contracting states and any national of any contracting state. Pursuant to its Statute, the CACJ was to

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121 As discussed below, in the context of the European Union, regional political and economic unions involve largely sui generis considerations, which make it difficult to use regional tribunals as evidence of or models for international adjudication. See infra pp. --.
122 The most important exceptions to this involve the European Court of Justice and the European Court of Human Rights, which are discussed separately below. See infra pp. --.
123 Protocol on the Statute of the African Court of Justice and Human Rights, arts. 2, 3, adopted in Sharm el Shiekh, Egypt, July 1, 2008 [hereinafter ACJHR Statute].
124 ACJHR Statute, art. 28.
125 ACJHR Statute, art. 3.
126 ACJHR Statute, art. 46. Articles 46(3) and (4) provide for reference to the African Union Assembly of cases where judgments are not complied with.
127 See Project on International Courts and Tribunals, http://www.pict-pcti.org; Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 912, Table 1 (identifying ACJ and ACHPR as courts required to be considered in addressing international adjudication).
128 In both instances, member states of the African Union were slow to ratify the courts’ respective constitutive instruments. Ironically, only when the ACHPR’s Protocol was eventually ratified, at least theoretically permitting the ACHPR to begin judicial functions, the African Union promptly merged the nascent court into the ACJ to produce the new ACHPR – which has not yet begun functioning. Gino J. Naldi, Aspects of the African Court of Justice and Human Rights, in COLLECTIVE SECURITY AND HUMAN RIGHTS IN AFRICA 321, 323 & n.9 (Ademola Abass & Mashood A. Baderin eds., 2007).
129 Until very recently, the ACJHR Protocol and Statute had not yet received the number of ratifications required to come into force. See Simon M. Weldehaianamot, Unlocking the African Court of Justice and Human Rights, 2 J. AFRICAN & INT’L L. 1, 5-6 (2009). Although the required number of ratifications have now been received, the Court’s case load is extremely limited.
130 A predecessor of the CACJ was founded in 1907, but was dissolved in 1918 (after hearing ten cases). See Sasha Maldonado Jordison, The Central American Court of Justice: Yesterday, Today, and Tomorrow?, 25 CONN. J. INT’L L. 183, 218 (2009). The Charter of the Organization of Central American States reestablished the CACJ in 1952, but no steps were taken to create a functioning Court until 1991. Id. at 208-209.
consist of a standing body of judges, serving ten year terms. Decisions of the CACJ are, by the terms of its Statute, final and not subject to appeal, but lack any enforcement mechanism.

The CACJ has been used infrequently. To date, only El Salvador, Honduras and Nicaragua have ratified the CACJ’s Protocol, with Guatemala, Costa Rica and Panama refusing. During its first ten years, 47 cases were filed with the Court, with 21 judgments being delivered. At the same time, the CACJ’s compliance record is poor, with several highly-publicized cases resulting in non-compliance or suspension of participation in the Court. Again, given this record, it is impossible to regard the CACJ as a successful example of international adjudication.

Other regional judicial bodies are generally no different from the ACJHR and CACJ. This includes the Benelux Court of Justice, the Economic Court of the Commonwealth of Independent States, the Court of Justice for the Common Market of Eastern and Southern Africa, the Court of Justice for the Arab Magreb Union and the Judicial Tribunal for the Organization of Arab Petroleum Exporting Countries. In most instances, these courts have heard either no or a de minimis number of disputes and play no role in international or regional affairs.

In a few cases, regional courts like the Court of Justice for the Andean Community (“CJAC”) have attracted a respectable degree of usage in connection with (largely unsuccessful) regional integration efforts. Notably, however, this has virtually always been in very limited and unusual circumstances, typically involving only one or a few states and “islands” of disputes limited to very limited subjects (such as specialized intellectual property issues). The only exception to this trend involves European institutions – specifically, the European Court of Justice (“ECJ”) and European Court of Human Rights (“ECHR”), which we discuss below.

Finally, the Inter-American Court of Human Rights (“IACHR”), established pursuant to the 1969 American Convention on Human Rights, has been more successful than most other regional courts. The Court has jurisdiction to hear cases filed by the Inter-American Commission on Human Rights (“Commission”), which in turn has jurisdiction to hear

132 Convention on the Statute of the Central American Court of Justice, arts. 8, 10, 44; Jordison, supra note XX, at 222-223.
133 Jordison, supra note XX, at 222.
134 Jordison, supra note XX, at 224-225; O’Keefe, supra note XX, at 251.
135 Jordison, supra note XX, at 223. See O’Keefe, supra note XX, at 253 (usage of CACJ “light”).
136 E.g., Jordison, supra note XX, at 228-231 (“Nicaragua Case”); O’Keefe, supra note XX, at 243, 254-55 (Honduras suspends participation in CACJ after non-compliance in Honduras/Nicaragua proceedings).
138 Importantly, the CJAC’s caseload consists almost entirely (97%) of a limited range of intellectual property issues (principally patent registrations), originating largely (approximately 66%) from one state (Colombia). The CJAC’s specific characteristics make it difficult to cite as a model of successful international adjudication. Rather, it is an example where an otherwise disused tribunal has been adapted to fill a very specific and limited purpose (in a limited number of states). The same observations apply to the Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (“OHADA”), where the substantial majority of the Court’s cases originate from the Ivory Coast. Dickerson, supra note XX, at 57-58.
petitions filed by individuals (or groups); the IACHR itself does not have jurisdiction to hear cases filed directly by individuals. Decisions of the IACHR are formally binding, but the Convention provides no enforcement mechanisms in cases of non-compliance.

Usage of the IACHR was initially modest but has been growing. In 2009, the Commission received some 1400 complaints (compared to 435 in 1997); the Commission in turn initiated some eleven cases before the IACHR (compared to two in 1997). Remedies ordered by the IACHR generally consist of two types: (a) monetary compensation for individuals deprived of their human rights; and/or (b) orders for trial and punishment of perpetrators of human rights violations and for changes in domestic law. In the absence of enforcement mechanisms, states have seldom complied with orders to punish perpetrators, change domestic laws or take similar steps, but they have generally paid monetary compensation to victims (often with substantial delays). Although precise figures vary, it is clear that a substantial number of the Court’s judgments are not fully complied with.

6. Regional Exceptionalism: The European Court of Justice

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

The ECJ was established by the Treaty of Rome, with jurisdiction directed towards interpretation of the Treaty in disputes between European Community (now, European Union

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140 American Convention on Human Rights, art. 61(1). In contrast, the Commission may entertain petitions filed by individuals. American Convention on Human Rights, art. 44.

141 American Convention on Human Rights, arts. 67, 68(1), (2). See PASQUALUCCI, supra note XX, at 8 (“the Court has no effective mechanism to enforce its judgments”).


143 Id. at Chapter III(4)(a). Since 2001, the Commission has filed roughly a dozen cases per year with the IACHR. Cavallaro & Brewer, supra note XX, at 780. Prior to 2001, the Court heard between one and four cases annually. Id. at 780-781. It remains the case that the Court is “an organ of extremely limited access for the vast majority of victims of human rights violations.” Id. at 782-783.

144 PASQUALUCCI, supra note XX, at 8-9, 17-18, 230-279, 281-285.

145 PASQUALUCCI, supra note XX, at 8-9. There have been a number of instances of outright defiance of IACHR judgments. See, e.g., Inter-American Commission on Human Rights (IACHR), Country Report: Democracy and Human Rights in Venezuela, Dec. 30, 2009, http://www.cidh.org/countryrep/Venezuela2009eng/VE09.TOC.eng.htm (Venezuela Supreme Court rejects IACHR judgment regarding biased judges); PASQUALUCCI, supra note XX, at 288-289 (Honduras refuses to comply with order to pay compensation and blocks OAS General Assembly consideration of issue).


147 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 290-298.
(“EU”), Member States or between Members States and EU organs. The Court is a permanent judicial body, with judges enjoying fixed terms (six years) and remuneration.

As initially adopted, the Treaty of Rome granted the ECJ comparatively limited authority, envisaged principally as involving actions brought by the EU Commission or Member States. Despite this, the ECJ progressively extended the scope of its jurisdiction, developing a body of decisions holding that the Treaty and other EU instruments had direct effects in Member State courts and could be invoked in national court proceedings by private parties. Over time, with the rapidly progressing integration of the EU, the Court effectively claimed broad competence over an extensive range of EU legal instruments. The formal enforceability of ECJ judgments remains unsettled, but there has been relatively good compliance by Member States with the Court’s judgments.

It is very doubtful that the ECJ’s evolution provides real guidance for most other forms of international adjudication. The Court was one element of a much broader institutional effort, which fulfilled powerful political commitments among relatively homogeneous states to deep European integration. Because these commitments lack parallels in most other international contexts, it is difficult to draw analogies between the success of the ECJ and that of other types of tribunals. Moreover, because of the success of European integration efforts, the ECJ is in most respects not an international tribunal, deciding disputes between parties of different nationalities, but is instead more akin to a national tribunal deciding disputes between parties of the same (European) nationality.

It is also significant that the ECJ was not granted the broad authority that it now exercises by the deliberate decision of the EU Member States, but instead incrementally acquired these powers through its own decisions during the ongoing process of European integration: “these powers the ECJ created for itself, despite the intention of members states.” The ECJ’s most significant powers did not derive from decisions by states about international adjudication, but rather from the ECJ’s ability to use broader political progress towards European integration as a basis for extending its own essentially domestic authority beyond

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149 Treaty of Rome, art. 167.
150 The classic account of the evolution of ECJ authority is Stein, supra note XX.
152 TREVOR HARTLEY, THE FOUNDATIONS OF EUROPEAN UNION LAW 321-345 (7th ed. 2010) (“Enforcing Union law has always been problematic. Since the Union institutions have no means of direct enforcement – there are no Union bailiffs, policemen or soldiers to arrest members of the national government – they must rely in the last resort on political pressure from other Member States.”)
153 Alan Dashwood & Robin White, Enforcement Actions Under Articles 169 and 170 EEC, in ARTICLE 177 EEC: EXPERIENCE AND PROBLEMS 366, 366-367 (Henry G. Schermers et al. eds., 1987); Helfer & Slaughter, Supranational Adjudication, supra note XX, at 292 (“Acceptance of these doctrines [developed by the ECJ] by national courts has given the judgments of the ECJ in cases referred to it under Article 177 roughly the same effect as judgments issued by domestic courts in the member states of the European Union.”).
155 Thus, the ECJ’s jurisdiction encompasses principally disputes between EU nationals and EU Member States (and not between non-EU nationals and EU Members States or EU nationals).
what Member States had initially intended. These sui generis attributes of the ECJ make it an unrepresentative model for hypotheses about international adjudication or the design of most other international tribunals.

B. The Second Generation of International Adjudication

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

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

1. Litigation Involving Foreign States in National Courts

The origins of the new generation of international adjudication can be traced to developments in the mid-20th century regarding foreign state immunity. Although non-controversial, these developments are largely ignored in commentary about international adjudication (which

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157 Even the Court’s explanation for its jurisdictional claims rejected traditional international law doctrine, instead relying on the European treaties’ asserted status as “constitutional” instruments within a new European political structure. See Stein, supra note XX, at 1 (“construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology”), 5-6, 11-12; Joseph H.H. Weiler & Joel P. Trachtman, European Constitutionalism and Its Discontents, 17 NW. J. INT'L L. & BUS. 354, 373-374 (1996/1997).

158 A broadly similar analysis applies to the European Court of Human Rights (“ECHR”). The ECHR is not an EU institution; it was created by the European Convention on Human Rights, under the auspices of the Council of Europe and includes a number of non-EU members, such as Turkey and Russia. Nonetheless, the ECHR plays a significant role in Europe’s integration, both for existing EU Member States and future candidates for membership. That role distinguishes the Court from adjudicatory tribunals in most other international settings. It is also significant that the ECHR has encountered most difficulties in compliance with states outside the EU (notably, Turkey, Russia, Ukraine, Moldova, Bulgaria and Romania). See 2009 Council of Europe Statistics on Execution of ECHR Judgments, http://www.coe.int/t/dghl/monitoring/exeuction/Reports/Stats/Statistiques_2009_EN.pdf; Dinah Shelton, The Boundaries of Human Rights Jurisdiction in Europe, 13 DUKE J. COMP. & INT’L L. 95, 142-147 (2003); Cavallaro & Brewer, supra note XX, at 772-775. This suggests that EU integration and regional homogeneity are the principal explanations for the ECHR’s adjudicatory mechanism. Finally, the ECHR’s case load overwhelmingly involves disputes between European states and their own nationals (not nationals of other states). The best analogy for that category of disputes is a national court (like the U.S. Supreme Court or German Supreme Court (Bundesverfassungsgericht), applying domestic constitutional protections to claims by local nationals or residents – not an international tribunal hearing claims by nationals of one state, asserting claims against a foreign state.
instead only considers litigation in national courts under human rights legislation such as the U.S. Alien Tort Statute.\textsuperscript{159} Despite this omission, these developments have played a central role in the evolution of contemporary modes of international adjudication.

Prior to WWII, most states adopted a policy of “absolute immunity,” affording foreign states and their property complete immunity from the jurisdiction of national courts.\textsuperscript{160} Although commercial interactions between states and private parties were common, disputes arising from these activities were not subject to the jurisdiction of national courts. If a private party wished to pursue claims against a foreign state with which it had done business, it was required to persuade its home state to espouse its claim against the foreign state – virtually always by means of diplomatic negotiations between the two states.\textsuperscript{161} These negotiations were heavily influenced by political, security and other considerations and, consequently, often produced anomalous and arbitrary results.\textsuperscript{162}

Equally familiar is the gradual development, during the first half of the 20th century, of a “restrictive theory” of sovereign immunity.\textsuperscript{163} This theory provided, in general terms, that a foreign state would enjoy immunity from the jurisdiction of national courts for its “sovereign” actions, but not for its “private” acts.\textsuperscript{164} Importantly, application of this theory had the effect of transferring disputes involving foreign states from the diplomatic arena to adjudicatory forums and, in particular, to litigation in national courts. In the words of one commentator, “[t]he embrace of the restrictive theory of the immunity of foreign states around the globe is representative of the ongoing legalization of international relations.”\textsuperscript{165}

The gradual replacement of the absolute theory of sovereign immunity by the restrictive theory was reflected in the enactment of foreign sovereign immunity legislation in most developed jurisdictions (including the United States, Europe and elsewhere).\textsuperscript{166} The purposes of these enactments included resolving disputes involving foreign states in accordance with generally-applicable legal rules in adjudicatory settings, rather than in politicized diplomatic

\textsuperscript{159} See Posner, Global Legalism, supra note XX, at 207-212 (Alien Tort Statute); Helfer & Slaughter, Supranational Adjudication, supra note XX, at 293-297 (human rights claims).


\textsuperscript{162} See infra notes --.

\textsuperscript{163} Badr, supra note XX, at 9-70, 79-139; Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations 4-14, 26-31 (2d ed. 2003); Sompong Sucharitkul, Immunities of Foreign States Before National Authorities, 149 Recueil des cours 89, 126-182, 185-186 (1976).

\textsuperscript{164} Badr, supra note XX, at 91; Trooboff, Foreign State Immunity, supra note XX, at 275-96.

\textsuperscript{165} Dellapenna, supra note XX, at 5.

and providing means for effective enforcement of national court judgments against states and their property.\footnote{168} By the 1980s, legislation adopting the restrictive theory of sovereign immunity had been enacted in most developed and many other states. In broad terms, this legislation provided national courts with jurisdiction over disputes involving commercial activities, real property, expropriatory actions and a limited number of other specified acts, as well as over disputes where states had waived their immunity (in particular, by an arbitration agreement).\footnote{169} The same statutes also provided for enforcement of national court judgments against the commercial assets of foreign states.\footnote{170} The gradual acceptance of the restrictive theory of sovereign immunity culminated in the U.N. Convention on Jurisdictional Immunities (adopted in 2004), which gives broad effect to the principle.\footnote{171} The shift from absolute to restrictive immunity had significant consequences for the adjudication of disputes involving foreign states. As already outlined, prior to the 1960s, claims by nationals of one state against foreign states were almost exclusively the subject of diplomatic negotiations or claims settlement mechanisms.\footnote{172} Adoption of the restrictive theory of immunity moved the overwhelming bulk of these claims into adjudication in national courts, in which private parties directly participated, producing a new and significant caseload.\footnote{173} Importantly, this new category of international adjudication subjected states to the mandatory jurisdiction of national courts. Foreign states are not given the option of consenting, or withholding consent, to litigation under the European Convention on State Immunity or FSIA. Rather, if a state fails to appear in proceedings, it is subject to default proceedings and

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\footnote{167}{The FSIA’s legislative history explained: “A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressure from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.” H.R. Report No. 94-1487, 94th Cong., 2d Sess. 7 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 9 (1976). See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before Subcomm. on Administrative Law and Governmental Relations of H. Comm. on the Judiciary, 94th Cong., 2d Sess. 31 (1976) (statement of Bruno A. Ristau, Chief Foreign Litigation Section: “[T]he bill is designed to depoliticize the area of sovereign immunity by placing the responsibility for determining questions of immunity in the courts.”).}
\footnote{168}{The FSIA, for example, was intended to “remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. [T]his bill seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. It would provide the judgment creditor some remedy if, after a reasonable period, a foreign state or its enterprise failed to satisfy a final judgment.” H.R. Report No. 94-1487, 94th Cong., 2d Sess. 8 (1976); S. Rep. No. 94-1310, 94th Cong., 2d Sess. 9 (1976).}
\footnote{169}{See, e.g., 28 U.S.C. § 1605; United Kingdom State Immunity Act 1978, §§ 2-11 (exceptions to immunity); Australia Foreign State Immunities Act 1985, sects. 10-22 (exceptions to immunity); Canada State Immunity Act 1982, §§ 4-8 (exceptions to immunity); South African Foreign States Immunities Act 87 of 1981, §§ 4-8 (exceptions to immunity); European Convention on State Immunity 1972, arts. 4-12, ETS No. 074, (exceptions to immunity). See also DELLAPENNA, supra note XX, at 323-486.}
\footnote{172}{See supra p. --. In some instances, interstate judicial proceedings or arbitrations addressed claims by nationals of one state against a foreign state. E.g., Mavrommatis Palestinian Concession Cases, 1925 P.C.I.J. Ser A, No. 5 (March 26); Factory at Chorzów (Germany v. Poland), 1927 P.C.I.J. Ser. A, No. 9. See infra pp. -- & notes --. At the same time, states also began to use foreign courts to pursue claims against private parties. See Koh, Transnational Public Law Litigation, supra note XX, at 2369-2371.}
\footnote{173}{Importantly, this new category of international adjudication subjected states to the mandatory jurisdiction of national courts. Foreign states are not given the option of consenting, or withholding consent, to litigation under the European Convention on State Immunity or FSIA. Rather, if a state fails to appear in proceedings, it is subject to default proceedings and

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a default judgment – much like a private litigant. Similarly, judgments issued against a foreign state or state entity are enforceable against the state’s commercial property (subject to specified procedures and exceptions). If a foreign state or state-related entity fails to pay a judgment, its commercial assets may be forcibly seized in substantially the same manner as against a private party.

On any view, litigation against foreign states under foreign sovereign immunity legislation has become a significant category of contemporary international adjudication. In terms of usage, it is fair to say that some 1,000 cases are pending at any given time in national courts involving claims against foreign states, while some 250 new cases are filed each year: electronic archives and other materials indicate that annual filings of new cases number in the hundreds in some jurisdictions, and in the dozens in others. They also indicate that these figures have been increasing over the past decade. In quantitative terms, the volume of international litigation involving foreign states in national courts exceeds, by a fairly wide margin, the total caseload of all of the first generation tribunals discussed above.

Litigation involving foreign sovereigns is not only frequent but also deals with significant legal issues. National courts adjudicate a wide range of important international matters, including commercial disputes (often involving very substantial contracts or projects), expropriations and human rights violations. More fundamentally, the availability of forums for the adjudication of claims against foreign states, pursuant to generally-applicable substantive rules, plays an essential role in contemporary international trade and finance. Without the assurance of such forums, often specified in contractual forum selection clauses,
private contractors, lenders and others would not enter into commercial relationships with foreign states (or would demand unacceptable terms).\textsuperscript{183} In terms of compliance, foreign states almost always participate in national court proceedings brought against them,\textsuperscript{184} and frequently satisfy adverse judgments. In cases where judgments are not voluntarily complied with, enforcement proceedings have been instituted and have not infrequently succeeded, albeit often with the kinds of delays that attend any litigation process.\textsuperscript{185} (Of course, when states refuse to comply with judgments against them, necessitating recourse to enforcement processes, that is no different from refusals by private litigants to comply with judgments, which also triggers the need for coercive enforcement.\textsuperscript{186})

2. International Commercial Arbitration Involving State Parties

In parallel with development of the restrictive theory of sovereign immunity, states began to agree in significant numbers of cases to resolution of commercial, financial and other disputes with private parties by international commercial arbitration. Historically, states and state-related entities had sometimes included arbitration clauses in commercial or investment contracts with foreign parties (e.g., concession agreements).\textsuperscript{187} During the 1960s and 1970s, however, the frequency with which states agreed to arbitrate disputes with private parties, as part of their commercial arrangements with those parties, significantly increased\textsuperscript{188}-- again moving a substantial category of disputes out of diplomatic negotiations, where they had historically been resolved, into adjudicatory proceedings involving private parties.

The increased use of arbitration in states’ commercial agreements coincided with a more general use of international arbitration by private parties following WWII and with the development of robust legal regimes for giving effect to the international arbitral process.\textsuperscript{189} In particular, the New York Convention (signed in 1958 and progressively ratified thereafter)

\textsuperscript{183} As one commentator more broadly concludes, litigation involving foreign states in U.S. courts “weav[es] the doctrinal tapestry that … help[es] shape geopolitical and economic relationships among America and its global partners.” Koh, Transnational Public Law Litigation, supra note XX, at 2395. See also Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the H. Comm. on the Judiciary, 94th Cong., 2d Sess. 27 (1976) (statement of Monroe Leigh, Legal Advisor, Department of State) (”[W]hen the foreign state enters the marketplace or when it acts as a private party, there is no justification in modern international law for allowing the foreign state to avoid the economic costs of the agreements which it may breach or the accidents which it may cause. The law should not permit the foreign state to shift these everyday burdens of the marketplace onto the shoulders of private parties.”).

\textsuperscript{184} DELLAPENNA, supra note XX, at 728-729 (limited instances of default by foreign states).

\textsuperscript{185} DELLAPENNA, supra note XX, at 729 n.111 (citing executions of default judgments against foreign states).

\textsuperscript{186} See infra pp. -- & note --.


established an effective enforcement mechanism for international arbitration agreements and awards. 190 By 1990, the Convention had 80 contracting states; it currently has 145 parties. 191 During the same period, states around the world enacted progressively more effective legislation for giving effect to the Convention and enforcing arbitration agreements and awards. 192

By the beginning of the 21st century, it was fair to say that international arbitration was the preferred means of dispute resolution for commercial and investment agreements between private parties and foreign states or state-related entities. 193 Save in unusual circumstances, parties to significant commercial contracts involving foreign states insisted on the resolution of disputes relating to the contract by arbitration, ordinarily in a neutral forum. 194 The rationale was to ensure impartial adjudication of disputes through the application of the terms of the parties’ agreement, objective legal principles and neutral procedural rules, rather than through contests of political, diplomatic or similar pressure.

Importantly, this new category of international adjudication produces enforceable decisions, which can be the basis for coercive execution against a state’s assets. Under the New York Convention, and implementing legislation in most states, arbitral proceedings may go forward, producing a binding award, in the absence of a defaulting party; 195 once it commits to international arbitration, a foreign state is bound to that commitment and the arbitral tribunal’s jurisdiction is effectively compulsory. Similarly, arbitral awards are presumptively subject to recognition and enforcement in the 145 states that are party to the Convention. 196 Additionally, foreign sovereign immunity legislation in most states provides for the enforcement of awards against a foreign state’s commercial property, 197 an outcome which occurs in practice when awards are not satisfied voluntarily. 198

Although arbitration agreements are a classic example of consensual jurisdiction, in practice foreign states are often effectively subject to a form of mandatory jurisdiction. For most

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192 See BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 111-144.
193 See Claudia Annacker & Robert T. Greig, State Immunity and Arbitration, 15(2) ICC INT’L CT. ARB. BULL. 70 (2004); CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶¶ 1.06-1.07 (2009) (“[s]ince the potential of [international commercial arbitration] was realized, the results have been dramatic”); NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 468-469 (5th ed. 2009).
194 See, e.g., PAUL D. FRIEDLAND, ARBITRATION CLAUSES IN INTERNATIONAL CONTRACTS 10, 51-57 (2d ed. 2007); BLACKABY ET AL., supra note XX, at 63 ¶ 1.190.
195 See BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 1865-1868, 2439-2440, 2753-2754.
196 See RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, supra note XX, at 3; BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 92-101, 2712-2725. The New York Convention provides a limited number of grounds for denial of recognition (including lack of jurisdiction, procedural unfairness and public policy). See New York Convention, art. V(1), (2); RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, supra note XX, at 241; BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 2730-2732, 2736-2872.
states and state-related entities, accepting international arbitration is a necessary condition to concluding significant international commercial and investment contracts: unless the state accepts international arbitration, it will not be able to conclude commercial arrangements, at least not with serious counter-parties.\(^{199}\) As a consequence, although consensual as a formal matter, accepting arbitration is in many circumstances effectively mandatory for states doing business with foreign private parties.

Although international commercial arbitration is seldom mentioned in commentary assessing international adjudication,\(^{200}\) arbitrations involving foreign states and state-related entities are a significant category of contemporary international dispute resolution. Although precise statistics do not exist, at least 300 international commercial arbitrations involving foreign states or state-related entities are filed each year;\(^{201}\) this figure appears to have been growing solidly over the past decade.\(^{202}\) (Of course, when international commercial arbitrations more generally are considered, annual filing rates run well in excess of 5,000 cases per year.\(^{203}\)

International commercial arbitral tribunals decide a wide range of significant disputes, both in terms of monetary amounts and the nature of disputed issues. Dozens of international arbitrations involving states are filed annually involving very large financial and commercial stakes.\(^ {204}\) More fundamentally, the availability of international arbitration as an effective means of resolving business disputes, particularly disputes involving states and state entities, is fundamental to the structure and success of contemporary international trade, finance and investment. Without a neutral, enforceable

\(^{199}\) See note – supra.

\(^{200}\) Slaughter and Helfer do not separately include either commercial or investment arbitration on their lists of international courts and tribunals, Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 926-927 (Tables 2(a) and 2(b), or in their discussions of international and supranational adjudication. See Helfer & Slaughter, Supranational Adjudication, supra note XX, at 282-289. Similarly, Posner and Yoo do not list forms of investment or commercial arbitration, Judicial Independence in International Tribunals, supra note XX, at 52-53, Tables 6, 7, referring only to the Permanent Court of Arbitration. See also Alter, supra note XX, at 57-60.

\(^{201}\) See Karl-Heinz Böckstiegel, Arbitration and State Enterprises: Surveys on the National and International State of Law and Practice 20 (1984) (33% of ICC arbitrations at the time involve state entities); Facts and Figures on ICC Arbitration—2009 Statistical Report, 21(1) ICC Int’l CT. ARB. BULL. 1 (2010) (e.g., 9.5% of ICC arbitrations involve state or state entity). Conservatively assuming some 3,000 international arbitrations involving state entities are filed each year. If a more realistic figure, of 5,000 cases per year, is used, then there are some 500 arbitrations filed per year involving states or state entities.

\(^{202}\) The number of international commercial arbitrations filed annually has substantially increased each year over the past several decades. See Born, International Commercial Arbitration, supra note XX, at 69 (chart).

\(^{203}\) See Born, International Commercial Arbitration, supra note XX, at 69.

\(^{204}\) See Michael D. Goldhaber, Arbitration Scorecard 2007: Top 50 Contract Disputes, Focus Europe, at 28-37 (Summer 2007) (listing 50 pending international commercial arbitrations with amounts in dispute in excess of $650 million, including 38 arbitration in excess of $1 billion); Michael T. Goldhaber, Arbitration Scorecard 2009: One Battleground Isn’t Enough, Focus Europe, at 28-39 (Summer 2009) (listing 59 contract and 33 investment arbitrations in which at least $1 billion was at stake and roughly 250 pending commercial arbitrations with amounts in dispute in excess of at least $500 million).

\(^{205}\) E.g., The Navy of the Republic of China (Taiwan) v. Thales S.A. (France), Award of May 3, 2010; EDF (Services) Ltd. v. Romania, ICSID Case No. ARB/05/13; Award of Oct. 8, 2009; Westinghouse v. The Republic of the Philippines, ICC Case No. 6401, 7(1) MEALEY’S INT’L ARB. REP. C-405 (1992).


means of dispute resolution, in which private parties directly participate, neither businesses nor many states and state entities would be prepared to conduct international commerce in its current form.

In terms of compliance, states that have concluded international commercial arbitration agreements virtually always participate in arbitral proceedings, and appear equally frequently to voluntarily satisfy awards that are made against them. In rare cases where awards are not voluntarily complied with, enforcement proceedings have been instituted and (not infrequently) have succeeded. Progressively developing from multitude of pragmatic business dealings, and given effect by a simple, but effective international enforcement regime, international commercial arbitration now indisputably plays an active and highly important role in contemporary international trade and finance.

3. International Arbitration under ICSID, BITs, NAFTA and Other Investment Regimes

Another example of second generation adjudication is investment arbitration, which has also progressively developed over the past four decades. Starting in the late 1950s, states began to conclude a network of bilateral and multilateral investment treaties; over time, these treaties came to provide for arbitration of a number of categories of significant investment disputes, with many of the characteristics of other second generation forms of international adjudication.

Central to the international investment arbitration regime is the ICSID Convention. Signed in 1965, the Convention now has 146 contracting states. The Convention established a basic legal framework for the arbitration of a specific category of disputes – namely, “investment disputes” – arising between a contracting state and foreign investors that are nationals of another contracting state. Arbitration under the ICSID Convention is only available where a contracting state and foreign investor have agreed to submit to ICSID arbitration.

At the same time that the ICSID Convention was negotiated, states began to enter into BITs (beginning with a 1959 treaty between Germany and Pakistan). BITs became increasingly common during the 1980s and 1990s, widely regarded as encouraging investment in

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208 See BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 2327; Michael Kerr, Concord and Conflict in International Arbitration, 13 ARB. INT’L 121, 127 (1997) (voluntary compliance plus successful court enforcement exceeds 98%).

210 See note – supra.


212 See International Centre for Settlement of Investment Disputes, Official Documents, List of Contracting States and Other Signatories of the Convention (ICSID/3), http://icsid.worldbank.org/ICSID/ICSIAD/DocumentsMain.jsp. As of December 27, 2010, a total of 157 states had signed the Convention, while only 146 had deposited their instruments of ratification. Several states (including Bolivia, Venezuela and Ecuador) have recently renounced, or indicated intentions to renounce, the ICSID Convention.


214 See SCHREUER ET AL., supra note XX, at 114, 141-144, 158-159.

215 ICSID Convention, art. 25(1). See SCHREUER ET AL., supra note XX, at 190-193.

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

Both developing and developed states pursued the negotiation of a multilateral investment protection convention at various points during the past several decades. These efforts foundered on disagreements between capital-exporting and capital-importing states, with differing views about appropriate levels of investor protection. Rather than adopting a multilateral solution, states instead adopted the existing network of numerous individual bilateral investment protection relationships – enabling methods of dispute resolution and levels of investment protection to be tailored to particular bilateral relationships.

A number of other multilateral treaties provide for the arbitration of international investment disputes in particular regions or industrial sectors. These include Chapter 11 of the NAFTA, the Energy Charter Treaty and the ASEAN Comprehensive Investment Agreement. Chapter 19 of the NAFTA provides a similar mechanism for specified trade disputes. In various forms, each of these agreements permits foreign investors to arbitrate investment disputes with host states, typically without a requirement for a pre-existing contractual arbitration agreement.

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217 UNCTAD, Bilateral Investment Treaties in the Mid-1990s, supra note XX, at iii (number of BITs increased from “385 at the end of the 1980s to 1857 at the end of the 1990s”).
219 See McLachlan et al., supra note XX, ¶¶ 1.24-1.30, 2.20; Newcombe & Paradel, supra note XX, at 156-157, 255-261, 332-336.
221 See Rainer Geiger, Towards a Multilateral Agreement on Investment, 31 CORNELL INT’L L.J. 467 (1998); Newcombe & Paradel, supra note XX, at 55.
226 NAFTA, arts. 1901-1905.
Virtually all forms of investment arbitration are conducted pursuant to procedures that parallel international commercial arbitration procedures. The arbitration provisions of the ICSID Convention, and the associated ICSID Arbitration Rules, are modeled closely on international commercial arbitration rules. Most BITs provide for arbitration either pursuant to the ICSID Convention (and the ICSID Rules), the UNCITRAL Rules, or the rules of a commercial arbitral institution. In practice, the procedures used in international commercial arbitration are the model for investment arbitration (including the number and selection of arbitrators, presentation of evidence, conduct of hearings and awards) – in part because of overlaps in the individuals and law firms that serve as arbitrators and counsel in both sets of proceedings.

Voluntary compliance with investment arbitration awards has generally been relatively good, particularly when compared with traditional first generation tribunals. In any event, in each of these investment regimes, commitments to arbitrate are binding (and can be pursued even against defaulting foreign states) and awards are enforceable against states and state-related entities. Thus, the ICSID Convention and ICSID Rules provide specifically for the possibility of default proceedings (where an arbitration continues notwithstanding the non-participation of a state respondent); similarly, the Convention provides that ICSID awards are final and binding on the parties to the arbitration. In addition, and importantly, the Convention contains separate provisions obligating all contracting states to enforce the pecuniary obligations imposed by such awards. Those latter obligations have been

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227 See Schreuer et al., supra note XX, at 6-8. The procedures in Chapter 11 arbitrations under NAFTA are similar. See Bjorklund et al., supra note XX, at 35-39. 228 See Dolzer & Stevens, supra note XX, at 121, 129-130; Thomas L. Brewer, International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment, 26 L. & POL’Y INT’L BUS. 633, 655-656 (1995). 229 A sui generis aspect of ICSID arbitration is its annulment procedure, which provides for the review (on very narrow grounds) of ICSID awards by an annulment committee. See Schreuer et al., supra note XX, at 1035-1042. Unlike ICSID arbitral tribunals, annulment committees are not selected by the parties, but by ICSID, and a separate annulment committee is formed for each case where annulment of an award is sought. 230 Although there is no systematic data, anecdotal evidence indicates that states have virtually always satisfied ICSID and BIT awards against them (albeit in some instances negotiating about the amount and terms of payment). Alan Alexandroff & Ian Laird in The Oxford Handbook of International Investment Law 1185 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008); August Reinisch, Enforcement of Investment Awards, in Arbitration Under International Investment Agreements -- A Guide to the Key Issues 697 (Katia Yannaca-Small ed., 2010) (“In the majority of that fraction of cases in which host States were found to have incurred liability, the awards seem to have been voluntarily complied with. Enforcement in national courts appears to be a rare phenomenon.”); Richard Happ, Enforcement of Investment Treaty Awards Against States, in Protection of Foreign Investment Through Modern Treaty Arbitration -- Diversity and Harmonisation 218, 230 (Anne K. Hoffmann ed., 2010). If there were significant instances of non-compliance, one would see reported enforcement actions in national courts. 231 ICSID Convention, art. 45(2); ICSID Arbitration Rules, Rule 42. 232 ICSID Convention, art. 53 (“The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.”); Schreuer et al., supra note XX, at 1099-1101. 233 ICSID Convention, art. 54 (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that State.”); Schreuer et al., supra note XX, at 1125-1130, 1134-1139.
implemented by legislation in many jurisdictions and national courts have made clear that they will enforce ICSID awards against states and their commercial property.

Likewise, most BITs provide that awards are subject to recognition and enforcement, including coercive enforcement against state property. BIT awards rendered pursuant to the ICSID Convention are subject to ICSID’s enforcement provisions, while non-ICSID BIT awards generally fall within the New York Convention and national implementing legislation. In both cases, effective enforcement is available. Similarly, the NAFTA provides that monetary awards under Chapter 11 have “binding force” on the parties to an arbitration and that NAFTA states will enforce such awards in their courts.

In addition to producing enforceable awards, investment arbitration regimes are effectively mandatory for many states. Although states are free in formal terms to conclude or not to conclude BITs (or individual investment agreements), most states face substantial pressure to enter into such agreements in order to attract foreign investment. Some states can resist that pressure, but the existence of nearly 3,000 BITs indicates that they rarely do so. Investment arbitration has played at best a minor role in most contemporary discussions of international adjudication, receiving only passing reference (or less). Despite this, the various forms of investment arbitration discussed above comprise a significant new category of international adjudication, involving disputes that historically had been resolved through force, diplomatic negotiations or other political means.

Like other second generation adjudicatory mechanisms, investment arbitration has seen robust growth. Over the past decade, roughly 24 new ICSID arbitrations have been filed each year (reflecting an increase from the 1990s when approximately four new arbitrations were

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234 See, e.g., 22 U.S.C. §1650a (“An award of an arbitral tribunal … shall create a right arising under a treaty of the United States. The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.”). See also SCHREUER ET AL., supra note XX, at 1143.


236 See McLACHLAN ET AL., supra note XX, at ¶¶ 3.34, 7.73; SCHREUER ET AL., supra note XX, at 1123.


238 NAFTA, art. 1136(4) (“Each Party shall provide for the enforcement of an award in its territory”); art. 1136(6) (“A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the InterAmerican Convention.”). See 107 Stat. 2057, 32 I.L.M. 289, 605 (1993). See also BJORKLUND ET AL., supra note XX, at 1136-41.

239 NEWCOMBE & PARADELL, supra note XX, at 63 (“there remains strong competitive pressure for developing states to enter into [international investment agreements] and thereby signal to foreign investors than an enabling environment for foreign investment exists”); Zachary Elkins, Andrew Guzman & Beth A. Simmons, Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000, 2008 ILL. L. REV. 265.

240 There are categories of states that have either not entered into BITs with one another (e.g., the United States with many European states), have not concluded BITs (e.g., Brazil) or have denounced BITs which they have concluded (e.g., Venezuela, Ecuador and Bolivia). See note -- supra.

241 See note – supra.
filed annually and the 1980s when two cases were filed annually).\(^242\) At the end of 2010, 123 ICSID arbitrations were pending (and a total of 330 ICSID arbitrations had been filed since 1972).\(^243\) ICSID arbitrations have also concerned matters of substantial public import. ICSID proceedings frequently involve very substantial monetary claims,\(^244\) matters of broad international importance (e.g., Argentina’s financial difficulties; Uruguay’s tobacco regulations)\(^245\) or important issues of international law or national regulatory competence.\(^246\)

In the case of the NAFTA, 40 investor-state arbitrations have been filed under Chapter 11 since 1994 (or 2.5 cases per year).\(^247\) NAFTA cases have involved both substantial monetary claims and significant questions regarding international law limitations on national regulatory authority.\(^248\) In the case of the Energy Charter, 23 arbitrations have been filed since the Charter came into force in 1998, again involving a range of substantial claims; of those cases, eighteen have been filed since 2005, reflecting strong recent growth.\(^249\)

It is more difficult to estimate the number of BIT arbitrations pursued outside the ICSID system, because BITs not infrequently provide for non-institutional arbitration. Nonetheless, observers estimate that more than 100 non-institutional BIT arbitrations have been filed since


\(^{244}\) Burke-White, supra note XX, at 199; Paul E. Mason & Mauricio Fomm Ferreira dos Santos, New Keys to Arbitration in Latin-America, 25 J. INT’L ARB. 31 (2008).


\(^{246}\) See U.S. Dep’t of State, NAFTA Investor-State Arbitrations, http://www.state.gov/s/l/c3439.htm (cases filed against the United States (sixteen), Canada (twelve), Mexico (twelve)).

\(^{247}\) See, e.g., The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award (ICSID June 26, 2003); Pope & Talbot v. Government of Canada, NAFTA, Award on the Merits of Phase 2 of Apr. 10, 2001 & Award in Respect of Damages of May 31, 2002; Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (ICSID Aug. 30, 2000).

1980. And, as with ICSID and NAFTA arbitrations, non-ICSID BIT cases have involved significant disputes, both as to amounts in dispute and legal/regulatory significance.

In sum, the number of investment arbitrations is both substantial (roughly 400 arbitrations since 1990) and growing robustly (roughly 40 new investment arbitrations now being filed each year). Investment arbitrations have also frequently involved very sizeable financial claims and significant legal and regulatory issues, not merely contractual or private law disputes. More generally, just as international commercial arbitration is an essential foundation for contemporary trade, investment arbitration is an essential foundation for contemporary international investment by virtue of its role in providing a neutral forum in which investment disputes may be objectively resolved. At the same time, awards in investment arbitrations have contributed to the development of an increasingly sophisticated body of international investment law, which provides a vitally-important legal regime for contemporary foreign investment.

There have been a variety of criticisms of investment arbitration over the past decade. Some of these complaints have been directed broadly at foreign investment and the basic premise of international investment protection. Other criticisms address specific features of investment arbitration, including asserted lack of transparency, insufficiently determinate legal standards, lack of opportunities for amicus curiae participation and

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251 See Michael D. Goldhaber, *Arbitration Scorecard 2009: One Battleground Isn’t Enough, Focus Europe*, at 28-39 (Summer 2009) (listing 59 contract and 33 investment treaty arbitrations in which at least $1 billion was at stake); Michael D. Goldhaber, *Arbitration Scorecard 2007, Focus Europe*, at 22-37 (Summer 2007) (listing 63 treaty disputes in which at least $1 billion was at stake). See, e.g., Yukos Universal Ltd. v. Russian Federation, PCA Case No. AA 227 (seeking $33 billion); BG Group Plc v. Argentina, Award of Dec. 24, 2007 (awarding $185 million) (award confirmed, Republic of Argentina v. BG Group, plc, Civ. A. No. 08-485 (D.D.C. Jan. 21, 2011); Occidental Exploration & Production Co. v. Ecuador, LCIA Case No. UN3467, Award of July 1, 2004 (awarding US $71 million).

252 Anne van Aaken, *Perils of Success? The Case of International Investment Protection*, 9 EUR. BUS. ORG. L. REV. 1, 129 (2008) (noting “danger … that investment tribunals may become world tribunals solving regulatory issues in many different regulatory domains of states, each decision carrying huge political importance…. One may say that this is already the case.”).


lack of appellate review.\textsuperscript{259} A number of steps have been taken by states in response to these critiques, including negotiating new BIT terms, issuing interpretative statements or revising institutional rules to provide more precise legal standards, greater transparency, and opportunities for \textit{amicus} participation.\textsuperscript{260} Despite a degree of continuing criticism, investment arbitration remains successful and robust: BITs continue to be ratified, including provisions for investor-state arbitration,\textsuperscript{261} only a few states have renounced existing BITs\textsuperscript{262} and investment arbitration case loads continue to increase.

4. Contemporary Claims Tribunals

Claims tribunals have been a feature of international adjudication since at least the 18\textsuperscript{th} century.\textsuperscript{263} Historically, claims by nationals of one state against a foreign state for violations of international law rights were not pursued by the individuals who had suffered injury, but were instead espoused by the claimant’s home state, sometimes in diplomatic negotiations and sometimes before claims tribunals established by treaty.\textsuperscript{264} During the past 40 years, new mechanisms have been developed on an ad hoc basis to deal with particular types of claims. The two most significant examples of recent international claims tribunals are the Iran-U.S. Claims Tribunal and the U.N. Compensation Commission. Both of these mechanisms introduced a right of private parties to pursue claims in proceedings which were modeled on international commercial arbitrations and produced enforceable awards;\textsuperscript{265} at the same time, both mechanisms functioned successfully and effectively resolved large numbers of disputes put to them.

a. Iran-U.S. Claims Tribunal

The Iran-U.S. Claims Tribunal was established in 1981 by the so-called “Algiers Accords,” as a mechanism for resolving various commercial claims between the United States, Iran and


\textsuperscript{258} See infra pp. --.

\textsuperscript{259} See, e.g., Agreement Between the Federal Republic of Germany and the Islamic Republic of Pakistan on the Encouragement and Reciprocal Protection of Investments, art. 10, Dec. 1, 2009. Since 2000, the rate at which new BITs are being concluded has fallen from that during the 1990s. See UNCTAD, \textit{The Entry into Force of Bilateral Investment Treaties (BITs)}, IIA Monitor No. 3, at 3, Table 1 (2006).


their respective nationals. The Accords provided for a nine-person tribunal, seated in the Hague, with jurisdiction to hear claims brought by U.S. or Iranian nationals arising from U.S.-Iran hostilities. The Tribunal’s competence included, as its principal focus, claims asserted by private parties; those claims could be pursued directly by companies or individuals, and did not need to be espoused by the claimant’s home state.

Three Tribunal members were appointed by Iran, three by the United States, and three from other states. Unusually for international arbitral proceedings, the Tribunal was “permanent,” in the sense that a standing body of decision-makers heard all cases falling within its mandate. The Tribunal conducted arbitral proceedings before three-person tribunals, pursuant to the UNCITRAL Rules, with procedures closely resembling those in commercial arbitrations.

The disputes submitted to the Tribunal were principally contractual disputes (under commercial agreements between U.S. companies and Iranian state entities) and claims for expropriation. The Tribunal disposed of a large number of claims, ultimately hearing more than 3,900 cases in roughly 20 years. Compliance with the Tribunal’s awards was almost perfect, owing to financial security arrangements in the Algiers Accords: all the Tribunal’s awards were satisfied, either from funds escrowed by Iran or otherwise. The Tribunal’s awards were published and provide frequently-cited authority on a range of international law issues (including expropriation, nationality, remedies and procedure). From almost any perspective, the Tribunal fulfilled its mandate effectively and played a significant role in resolution of the original (if not later) Iran-U.S. antagonisms.


The Algiers Accords provided: “An International Arbitral Tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States...” Iran-U.S. Claims Settlement Declaration, 1 Iran-United States C.T.R. 9.

Iran-U.S. Claims Settlement Declaration, 1 Iran-United States C.T.R. art. III(3); Case A/18, 5 Iran-U.S. C.T.R. 251, 261 (1984) (“most disputes ... involve a private party on one side and a Government or Government-controlled entity on the other”). See THE IRAN-UNITED STATES CLAIMS TRIBUNAL, supra note XX, at 59-65.

See Iran-U.S. Claims Settlement Declaration, 1 Iran-United States C.T.R. 2; THE IRAN-UNITED STATES CLAIMS TRIBUNAL, supra note XX, at 65-75.


The Tribunal issued some 500 awards (a number dealing with multiple cases).

The IRAN-UNITED STATES CLAIMS TRIBUNAL, supra note XX, at 299-311. Awards made by the Tribunal were subject to enforcement under the New York Convention. See, e.g., Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141 (2d Cir. 1992); Ministry of Defense of Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764 (9th Cir. 1992).

JOHN A. WESTBERG, INTERNATIONAL TRANSACTIONS AND CLAIMS INVOLVING GOVERNMENT PARTIES: CASE LAW OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 113-147 (expropriation), 228-252 (compensation for expropriation) (1991); THE IRAN-UNITED STATES CLAIMS TRIBUNAL, supra note XX, at 140-142, 334-336 (dual nationals); BROWER & BRUESCHKE, supra note XX, at 26-122, 288-322 (nationality), 125-260 (discussing cases regarding procedure), 369-471 (discussing cases regarding expropriation), 472-612 (remedies), 642-656 (contribution of Tribunal to international law).
b. U.N. Compensation Commission

The U.N. Compensation Commission ("UNCC") was established by the Security Council in 1991 with authority to award compensation for losses resulting from Iraq’s invasion of Kuwait. Security Council Resolutions 686 and 687 provided that Iraq "is liable under international law for any direct loss, damage, including environmental damages and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait," and granted the UNCC jurisdiction to resolve claims against Iraq by foreign nationals. Resolution 687 also created a fund (from Iraqi oil revenues) to pay amounts awarded by the UNCC.

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

The UNCC consisted of a Governing Council (of representatives of Security Council members) and 59 Commissioners (selected by the Governing Council), who sat in panels of three members to assess individual claims. The panels of Commissioners were charged with making recommendations to the Governing Council, which was empowered to render binding decisions on claims. The Commissioners proceeded in a comparatively summary fashion, generally issuing recommendations of compensation based on written submissions, without oral hearings. Proceedings before the Governing Council were even more summary in character, again without oral hearings or evidence.

In total, the UNCC received some 2.6 million claims for compensation in excess of $350 billion. The Commission completed its work expeditiously – with the claims review process being concluded in June 2005 (some four years after the UNCC was established). In total, the UNCC awarded compensation totaling more than $52 billion on some 1.5 million claims. The amounts awarded have either been paid (from Iraqi oil revenues) or waived. Despite complaints about "rough justice," the UNCC resolved a formidable number of claims, involving very large sums, efficiently and effectively – notwithstanding a politically-charged setting.

278 In some cases (e.g., claims of some 800,000 Egyptian workers in Iraq), a state espoused claims on behalf of a large number of similarly situated individuals.
279 Heiskanen, supra note XX, at 282; McGovern, supra note XX, at 185.
280 See McGovern, supra note XX, at 180, 187; Heiskanen, supra note XX, at 287.
283 Id.
284 Id.
6. World Trade Organization

The World Trade Organization (“WTO”) includes several important dispute resolution bodies, most notably WTO panels and the WTO Appellate Body.\textsuperscript{287} The adjudicatory mechanisms under the WTO’s 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) have evolved incrementally from much less formal, non-binding mechanisms of dispute resolution previously used under the GATT regime.\textsuperscript{288} Many, but not all, aspects of the DSU’s adjudicatory mechanisms differ significantly from those of traditional first generation tribunals and bear much closer resemblance to second generation mechanisms.

WTO panels and the Appellate Body are empowered to decide disputes arising under covered WTO agreements, which comprise an extensive body of trade regulation; in principle, neither body is authorized to decide disputes under (or to apply) other international law instruments.\textsuperscript{289} WTO panels are constituted in a manner broadly similar to that used to select tribunals in international investment and commercial arbitration. Parties to a dispute are generally free to agree upon the identities of members of the panel (typically three persons); if the parties do not reach agreement, the WTO’s Director General selects the panel.\textsuperscript{290}

The DSU prescribes a basic procedural framework, with an emphasis on efficiency, which individual panels have some flexibility to alter in consultation with the parties.\textsuperscript{291} As with commercial and investment arbitrations, default decisions may be issued in WTO proceedings (hence making default virtually unthinkable).\textsuperscript{292} Only states may participate in proceedings before WTO panels;\textsuperscript{293} in practice, private parties play a substantial behind-the-scenes role in case development and presentation.\textsuperscript{294}

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\textsuperscript{288} See PETERSMANN, supra note XX, at 66-131; Michael K. Young, Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats, 29 INT’L LAW 389 (1995).


\textsuperscript{291} WTO DSU, art. 8. Members of WTO panels are required to be independent. WTO DSU, art. 8(9). WTO panel members are selected from a list maintained by the WTO Dispute Settlement Board (“DSB”), consisting of experts in international trade law. WTO member states may suggest names for inclusion on the list, which will be added with the approval of the DSB. Id.

\textsuperscript{292} WTO DSU, arts. 7, 12 & App. 3.

\textsuperscript{293} WTO DSU, art. 6(1) (negative consensus required to block formation of WTO panel).


Absent a “negative consensus” against adoption of a report among all WTO members (including the party that prevailed), or an appeal against the report, panel reports are adopted promptly after they are issued. This approach altered the pre-1994 approach under the GATT, where a positive consensus (including the party that lost) was required to adopt a decision, making it virtually impossible for decisions to become binding. In contrast to many arbitral regimes, WTO panel reports may be appealed to the Appellate Body – a standing body of seven members serving fixed terms. The Appellate Body sits in three person tribunals, with members selected largely by rotation, to hear appeals “limited to issues of law covered in the panel report and legal interpretations developed by the panel.” Appellate Body decisions are automatically adopted, again unless blocked by a negative consensus of all WTO members (including the prevailing party).

In contrast to traditional international tribunals, the WTO dispute resolution mechanisms are compulsory: membership in the WTO requires acceptance of the DSU and the compulsory jurisdiction of WTO panels and the Appellate Body. Decisions by WTO panels or the Appellate Body may also be enforced with reasonable efficacy, albeit not in the same manner as many other second generation adjudicatory decisions. WTO decisions are not directly enforceable in national courts. Nonetheless, the WTO DSU provides a specific mechanism enabling a complainant state to impose otherwise impermissible trade sanctions against a state that has been held to have violated WTO rules and that fails to comply with the decision – but only up to a specified amount, equal to the harm to the complainant state from the state that has been held to have violated WTO rules and that fails to comply with the decision enabling a complainant state to impose otherwise impermissible trade sanctions against a

295 WTO DSU, art. 16.
296 WTO DSU, arts. 17(1), 2(3). See also MATSUSHITA ET AL., supra note XX, at 117. Members of the Appellate Body are selected by the DSB. As a practical matter, WTO member states (particularly larger states) have a substantial role in suggesting and approving those included on the Appellate Body. STEVE CHARNOVITZ, JUDICIAL INDEPENDENCE IN THE WORLD TRADE ORGANIZATION IN INTERNATIONAL ORGANIZATION AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 219, 236-238 (L. Boisson de Chazournes et al. eds., 2002).
297 WTO DSU, art. 17(6). See also MATSUSHITA ET AL., supra note XX, at 66.
298 WTO DSU, art. 17(14). See also WTO DSU, art. 22(6).
299 Marrakesh Agreement Establishing the World Trade Organization, art XII(1), April 15, 1994, 1867 U.N.T.S. 155. In contrast to the ICI and ITLOS, where accession to the U.N. Charter and UNCLOS does not subject a state to the compulsory jurisdiction of the ICI or ITLOS, accession to the WTO subjects a state to the DSU and the jurisdiction of WTO panels and the Appellate Body.
301 WTO DSU, art. 22(3). Disputes over sanctions imposed by a complainant state are resolved through a further dispute resolution mechanism. WTO DSU, arts. 22(6), 22(7).
WTO decisions have found violations of WTO rules, in effect permitting complainant states to monetize favorable decisions against any of a respondent state’s trade.304

Some 400 cases have been filed under the WTO DSU since 1995, for an average of roughly 27 cases filed per year.305 Annual filings at the WTO have varied, from highs in 1997 (50 cases filed) and 1998 (41), to lows in 2005 (11 cases), 2007 (13) and 2009 (14).306 Rulings have addressed a wide range of trade issues, with effects on important areas of domestic and international regulation (including biotechnology, civil aviation, environmental regulation, tax and antidumping).307 These decisions have not only resolved individual trade disputes with substantial commercial, political and regulatory consequences, but have contributed to the development of an extensive body of international trade law which serves a vitally-important function in the world trading system.308 Despite criticism, few would disagree that the WTO’s dispute resolution mechanisms now play a central and highly effective role in the regulation of international trade – much as international commercial and investment arbitration play vital roles in contemporary international commerce, finance and investment.

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As discussed above, academic commentary evaluating contemporary international adjudication has focused almost entirely on first generation tribunals (i.e., the PCA, PCIJ, ICJ and ITLOS) and selected European regional courts.309 Regardless of its perspective, this commentary seldom mentions, much less discusses in any detail, second generation tribunals (i.e., international commercial and investment arbitral tribunals; claims settlement

304 Steve Charnovitz, supra note XX, at 561-563. Professors Scott and Stephan contend that the WTO lacks authority “to impose self-executing sanction on wrongdoers.” SCOTT & STEPHAN, supra note XX, at 31-39, 112-114. That critique is misplaced: virtually no international adjudicatory decisions are “self-executing,” but instead require enforcement by the complainant (e.g., enforcement of a judgment or award in a separate enforcement action). The essential point is that, when a WTO decision is not complied with, specific, enforceable sanctions are available and reasonably effective; that is similar to the enforceability of arbitral enforcement action). The essential point is that, when a WTO decision is not complied with, specific, enforceable sanctions are available and reasonably effective: that is similar to the enforceability of arbitral awards and national court judgments, and dissimilar to the (un)-enforceability of ICJ, ITLOS and similar decisions. Scott and Stephan also suggest that the principal users of the WTO, the EU and United States, in practice use WTO dispute resolution only for symbolic disputes, employing diplomacy for matters of national significance. Id. at 123-127. In fact, the EU and United States have frequently submitted commercially significant disputes to WTO dispute resolution, including civil aviation, information technology, biotechnology (GMO and beef hormone regulation), and foreign taxation.


306 Id. at 84.


309 See, e.g., Helfer & Slaughter, Supranational Adjudication, supra note XX, at 284-90, 290-97; Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 910-15, Table 1; Posner & Yoo, Judicial Independence, supra note XX, at 8-12; Alvarez, supra note XX, at 405, 411-412 n.33 (noting existence of arbitration between “MNCs and states,” but not discussing it). The same commentary also considers some international civil litigation in national courts, particularly litigations involving human rights claims by private parties under the Alien Tort Statute in the United States. POSNER, GLOBAL LEGALISM, supra note XX, at 207-225 (describing Alien Tort Statute litigation); Helfer & Slaughter, Supranational Adjudication, supra note XX, at 290-97 (describing litigation under ECHR in national courts and ECJ); Koh, Transnational Public Law Litigation, supra note XX, at 2365, 2371.
mechanisms) or the capacity of this new generation of tribunals to render enforceable decisions.

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

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

The same view is shared by commentators from every academic perspective. Adopting a view of deep skepticism about international adjudication, Posner and Yoo write that “[s]tates may voluntarily comply with judgments, and they sometimes do. But they need not”; instead, states use international tribunals to “provide information” to the parties to a dispute. At the same time, from a very different perspective, proponents of international adjudication, like Slaughter, Helfer and Guzman, agree that contemporary international tribunals cannot render enforceable decisions: international tribunals “lack a direct coercion mechanism to compel … compliance” and “are simply tools to produce a particular kind of information.”

As we have seen, this conventional wisdom is mistaken. Although these accounts may accurately describe traditional forms of international dispute resolution, like the ICJ and ITLOS, they all ignore the most successful instances of contemporary international adjudication – the second generation tribunals that have developed over the past 40 years. Contrary to conventional accounts, commercial and investment arbitral tribunals, new types of claims settlement tribunals, WTO panels and national courts in litigations against foreign states, all have the authority to issue enforceable decisions and, in varying degrees, also possess effectively mandatory jurisdiction.

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

310 Kooijmans, supra note XX, at 407, 408. See supra pp. --.
311 Posner, GLOBAL LEGALISM, supra note XX, at 33. See also Posner & Yoo, Judicial Independence, supra note XX, at 13-14.
312 See supra pp. --; Posner, GLOBAL LEGALISM, supra note XX, at 129.
313 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 285-86. See supra pp. --; Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 903, 934.
314 Guzman, International Tribunals, supra note XX, at 235.
315 This enforcement mechanism is achievable and effective precisely because it does not have a centralized enforcement authority. Diffused responsibility for enforcement obviates the need for a centralized and politically controversial enforcement authority, while maximizing the enforceability of decisions. At the same time, the intrusion on an individual state’s sovereignty is minimized because, in practice, only assets outside a state’s territory will be subject to execution to satisfy monetary awards (rather than requiring states to take affirmative actions or executing against assets within a state’s territory).
generation adjudicatory mechanisms, with this power to render enforceable decisions, squarely contradicts the conventional wisdom about the characteristics of international adjudication.

It is of course true that not all arbitral awards or WTO decisions are immediately enforced (because states conceal their assets or use political and economic measures to resist enforcement). That is no different from the judgments of national courts against private parties, which also are sometimes not readily enforced. Even in developed legal systems, substantial numbers of judicial decisions that are not voluntarily complied with are not capable of full enforcement.\textsuperscript{316} Compliance rates in less efficient legal systems are correspondingly worse.\textsuperscript{317} Indeed, given the very limited grounds available for review of commercial and investor-state awards,\textsuperscript{318} these decisions are more enforceable than domestic court judgments in most countries; the same is true of WTO and claims settlement tribunal decisions.\textsuperscript{319}

III. The Significance of Second Generation International Adjudication

As we have seen, commentary on contemporary international adjudication has focused almost entirely on traditional first generation tribunals, thereby significantly distorting descriptions of the field. In addition, however, the omission of second generation tribunals from the academic debate also distorts both analysis of whether international adjudication is successful and prescriptions for future international tribunals.

First, the development of second generation tribunals contradicts the claims of skeptics about international adjudication and international law more generally. Contrary to these claims, international adjudication before second generation tribunals is widely-used and highly successful. Over the past 40 years, these tribunals have developed large and growing caseloads, substantially exceeding those of most other forms of international adjudication (including, in particular, traditional first generation tribunals). At the same time, second generation tribunals play vitally-important roles in contemporary international affairs, particularly international trade and investment, and their decisions provide a striking contemporary example of international law being successfully applied to constrain and alter the conduct of states.

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

\textsuperscript{316} See Collier & Lowe, supra note XX, at 5 (commenting that 80% of English judgments that are not voluntarily complied with are not fully enforced); Hans Smit, Enforcement of Judgments in the United States of America, 34 AM. J. COMP. L. SUPP. 225, 230 (1986) (“The problems judgment creditors encounter in enforcing their judgments have been extensively documented.”).

\textsuperscript{317} Of course, judicial systems in most states qualify as less efficient; in reality, many are corrupt, arbitrary and ineffective. See, e.g., Transparency Int’l, Global Corruption Report 2007: Corruption in Judicial Systems (2007).


\textsuperscript{319} See supra pp. --.
The design of second generation tribunals is materially different from either of these prescriptions. Second generation tribunals are modeled in large part on international commercial arbitral tribunals – with relatively “dependent” decision-makers selected by the parties for specific cases, limited jurisdictional mandates and tailored procedural rules; at the same time, second generation tribunals are authorized to make enforceable decisions – a uniquely effective and powerful remedy by the standards of international adjudication. As we have seen, tribunals with this structure have been the most popular, effective and successful forms of international adjudication in recent decades. Discussion of a comprehensive model for second generation tribunals is beyond the scope of this article (and is the subject of a separate, forthcoming article on the subject). The essential point for present purposes is that prescriptions for future international adjudicatory mechanisms cannot continue to ignore either the success or the structure of second generation tribunals.

A. Second Generation Tribunals: The Success of International Adjudication

The new generation of international tribunals that has developed over the past 40 years is critical to an accurate understanding of contemporary international adjudication. Not only do second generation tribunals render enforceable decisions, but they also represent a large, vibrant and successful category of international dispute resolution; indeed, by all appearances, they are more frequently used and more successful than traditional first generation tribunals.

1. Case Loads of Second Generation Tribunals

States have used second generation tribunals to resolve large numbers of international disputes. These disputes have thus far been limited to specifically defined subjects (i.e., trade, investment and related matters), but they have nonetheless resulted in very substantial case loads at many second generation tribunals.

As discussed above, some 300 international commercial arbitrations involving states or state entities are filed annually, while some 40 new investment arbitrations are filed each year pursuant to BITs, NAFTA and ICSID. Foreign sovereign immunity litigations in national courts have been almost as frequent (with roughly 250 litigations filed against foreign states per year). Taken together, these figures exceed the total number of PCA, ICJ, and ITLOS cases filed each year by some 70-fold. When the WTO (27 cases annually), Iran-U.S. Claims Tribunal (3,900 cases total) and UNCC (2.6 million claims) are added to the balance, the volume of second generation adjudication is even more significant and the quantitative difference between first and second generation adjudication even more marked: all told, and recognizing the rough character of statistics in the field, second generation tribunals currently hear substantially more than 100 times as many cases per year as do first generation tribunals.

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320 See supra pp. –
321 See supra pp. – and –.
322 See supra pp. – (roughly 0.5 PCA, 4 PCIJ, 2 ICJ and 1 ITLOS cases filed per year) and – (roughly 40 investment arbitrations and, conservatively, 300 commercial arbitrations involving state entities filed per year). The figures are not altered by inclusion of regional courts and tribunals, such as the CACJ and ACJHR. See supra pp. --.
323 See supra pp. – (3,800 Iran-U.S. Claims Tribunal cases, 2.6 million UNCC claims and 400 WTO cases).
Moreover, second generation tribunals include the most vibrant types of contemporary international adjudication. The total number of PCA, ICJ, and ITLOS cases has remained largely stagnant over the past several decades. In contrast, the number of cases arising from international investment and commercial arbitrations and litigations involving state entities has increased materially, both since 1990 and in more recent years.\footnote{See supra pp. –. WTO filings increased prior to 2000, and have since decreased somewhat. See supra pp. –.} Put simply, usage of second generation adjudicatory bodies is high and robustly increasing, while usage of the ICJ, ITLOS and PCA is relatively low and stagnating.


It is also useful to consider state practice over the past several decades in including dispute resolution provisions in treaties. These provisions evidence both existing state preferences and likely future case loads (as disputes arise under existing treaties and dispute resolution provisions). As with the existing case loads of international tribunals, recent dispute resolution provisions show that states are willing to use second generation tribunals and enforceable forms of adjudication in significant numbers of cases – and, again, much more frequently than traditional first generation forms of dispute resolution.

A review of treaties filed with the United Nations Secretariat for 1990, 1995, 2000, and 2005 provides a representative sample of state practice with regard to dispute resolution provisions in treaties and other international agreements.\footnote{United Nations Treaty Series Survey (on file with author).} As detailed in the chart at Annex 1, the texts of roughly 440 treaties are available, on average, for each of these years, for a total sample of 1755 treaties. Of these, an average of approximately 38% of all treaties (672 treaties) included some sort of dispute resolution provision (and, conversely, roughly 62% of all treaties contained no dispute resolution provision).

Of the treaties containing a dispute resolution provision, roughly 45% of these treaties included only provisions for negotiations, not involving any third party (305 “negotiation” treaties out of 672 treaties containing some sort of dispute resolution provisions). In effect, these treaties provide for little more than what general principles of international law already mandate – requiring the parties to negotiate in an effort to resolve differences arising from the treaty, but imposing no further obligations.\footnote{Thirteen treaties contained a specially-designed “specific” dispute resolution mechanism (often, involving some sort of non-binding third party adjudication, such as mediation), and another four treaties provide for submission of disputes to a regional court (e.g., ECJ, CACJ).} The remaining treaties contained some sort of binding dispute resolution mechanism (367 treaties, comprising roughly 20% of the 1755 reported treaties).

Out of the treaties with binding dispute resolution provisions, only five treaties contained a submission to the ICJ, ITLOS or similar body (out of a total of 1755 treaties studied).\footnote{These three ICJ treaties were a bilateral agreement between the United Nations High Commissioner for Refugees and Nicaragua concerning certain matters in Nicaragua, a multilateral agreement for controlling locusts in West Africa, and an interim agreement between Greece and Macedonia. Two additional treaties contained dispute resolution provisions referring to the ITLOS and PCA.} In contrast, 348 treaties (or some 94% of all treaties containing a binding dispute resolution provision) included some sort of arbitration clause.\footnote{Of these, only nine included PCA arbitration provisions (other than in BITs). See United Nations Treaty Series Survey (on file with author).} Of these 348 treaties providing for arbitration, 134 treaties were bilateral investment treaties, providing for enforceable decisions.
by investment arbitration mechanisms. An additional 61 treaties were bilateral air transport or services treaties concluded under the auspices of the International Civil Aviation Organization (many of which also provide for enforceable arbitration mechanisms). A few of the remaining 146 treaties with arbitration clauses contained other provisions for enforceable forms of arbitration (roughly a dozen), while the remainder provided only that awards would be “final,” “binding” or not subject to appeal, without any enforcement mechanism. In total, slightly more than 10% of all treaties contained express provisions for enforceable adjudication.

Although states devote substantial attention to designing dispute resolution provisions, in recent decades they have virtually never concluded treaties providing for resolution of disputes by the ICJ, ITLOS or other classic first generation tribunals; only five times in the 1755 treaties studied did states agree to submit disputes to the ICJ or a similar tribunal. Indeed, and ironically, a substantial number of treaties providing for interstate arbitration as a dispute resolution mechanism specify the President of the ICJ as the default appointing authority for arbitrators (179 treaties). Rather than using the ICJ to resolve disputes, states are instead frequently using the President of the ICJ as a means to ensure timely appointment of arbitral tribunals – a revealing indicator of states’ current attitudes towards effective forms of international adjudication.

In contrast, in the vast majority of cases where states agree to some form of binding third party adjudication (94%, and roughly 20% of all reported treaties), they select some form of arbitration. Moreover, in a substantial number of cases (roughly 10% of all reported treaties), states agree to arbitration mechanisms providing for enforceable awards (as in most BITs and many bilateral air transport treaties). This pattern of state practice both confirms the popularity of second generation tribunals, as reflected in the case loads of those tribunals, and suggests that usage of these tribunals will continue to be significant in the future.

3. Importance of Second Generation Tribunals to Contemporary International Affairs and Law

Second generation tribunals are also vitally important to contemporary regimes for international trade and investment and, more generally, the development and application of international law. As we have seen, international commercial and investment arbitrations,

329 See United Nations Treaty Series Survey (on file with author). See also Andrew T. Guzman, The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms, 31 J. LEGAL STUD. 303, 304-305 (2002) (of 100 treaties reviewed, 20 had dispute resolution provisions, of which 12 were BITs).

330 The ICAO dispute resolution mechanisms typically adopt an enforcement mechanism like that under the WTO, providing that, if a state fails to comply with an arbitral award, its counterparty is free to withhold benefits promised under the treaty to the state and its nationals. E.g., Air Transport Agreement, Austria-Italy, art. 7, Jan. 23, 1956, 393 U.N.T.S. 97 (“Each Contracting Party reserves the right to withhold an operating permit from an airline designated by the other Contracting Party … in any case where the airline fails to comply with … an arbitral award made in accordance with the provisions of article 8…”). See also Agreement between the Government of Canada and the Kingdom of the Netherlands in respect of Aruba on air transport, Feb. 16, 2005 (entered into force Dec. 19, 2005) (I-44657), art. XXIII,5; Air Services Agreement between the Government of the Kingdom of Denmark and the Macedonian Government, Mar. 20, 2000 (entered into force May 31, 2000) (I-37270), art. 18.5.


332 See United Nations Treaty Survey (on file with author). An additional seven treaties provide for concurrent appointing authorities between the ICJ and another entity (generally either the Secretary General of the UN or the Secretary General of the PCA).
As we have also seen, second generation tribunals also deal with significant issues of national regulatory authority and the constraints imposed on that authority by international law. Investment arbitration and WTO decisions rule on the compatibility of a wide range of domestic regulatory regimes with international standards (including prohibitions against expropriatory or inequitable conduct and WTO requirements regarding discriminatory treatment). Commercial arbitrations and national court litigations involving foreign states also frequently raise significant issues of international law, national regulatory policy and government conduct. In each case, the decisions of second generation tribunals have contributed to the development of significant and growing bodies of international law, which again are essential to contemporary international trade and investment regimes.

The vital role played by the decisions of second generation tribunals in international trade and investment compares favorably with the role of first generation tribunals in contemporary international affairs. As we have seen, states make only limited use of traditional first generation tribunals – both in drafting dispute resolution mechanisms for contemporary treaties and in actually using adjudicatory mechanisms. Moreover, outside the context of boundary disputes, even when states submit disputes to traditional international tribunals, the resulting decisions have frequently had limited practical effects – in part because they often involve largely symbolic matters, are ignored or otherwise. Proceedings before the ICJ like LaGrande, Serbia/NATO, Oil Platforms, Nicaragua Paramilitary Activities, and Georgia/Russia generate substantial media attention, but have limited impacts on the actual conduct of states; similarly, none of the ITLOS’s decisions has had any effect on the actual behavior of states (or private parties). Instead, it is in commercial arbitrations, WTO cases and BIT or ICSID proceedings that substantively important disputes over Latin American and Asian financial crises, Russia and Venezuela’s re-regulation of their energy sectors, European and U.S. civil aviation subsidies, and U.S. environmental regulations and the civil justice system have been decided. Similarly, it is increasingly in WTO, ICSID and Iran-U.S. Claims Tribunal decisions – not ICJ, ITLOS or PCA decisions – that one finds important contemporary international law principles dealing with issues of trade and investment (including expropriation and state responsibility).

333 See supra pp. --. The availability of this means of dispute resolution is critical to the willingness of parties to engage in international commercial transactions with state entities: if private parties and states do not have confidence that future disputes can be resolved fairly and efficiently, then they will not enter into international transactions.

334 See supra pp. --.

335 See supra pp. --.

336 See supra pp. --. National court litigation involving foreign states also resolves disputes over international human rights norms. See, e.g., Koh, Transnational Public Law Litigation, supra note XX, at 2347; Posner, GLOBAL LEGALISM, supra note XX, at 207-225.

337 See supra note --.
Finally, second generation tribunals provide many of the best examples of international law being successfully applied over the past 40 years. International investment arbitration tribunals have adjudicated, generally successfully, a wide range of disputes involving alleged abuses of state authority during recent decades; at the same time, the existence of effective adjudicatory mechanisms for investment protections has had significant effects on state behavior. Similarly, international commercial arbitration tribunals have successfully resolved countless substantial disputes between states (and state entities) and private parties during the same time period and provide an effective mechanism for holding states to their commercial (and other) commitments. For its part, the WTO has adjudicated, again generally successfully, a number of significant trade disputes, while influencing state behavior in instances where adjudication has not ensued. Likewise, the Iran-U.S. Claims Tribunal and the UNCC resolved significant disputes in difficult political circumstances. In each of these cases, second generation tribunals have played vital roles in effectively applying contemporary international law and directly affecting state conduct.

B. Implications of Second Generation Tribunals for International Adjudication

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

1. Efficacy and Importance of International Adjudication

The success of second generation tribunals directly contradicts central claims by skeptics about the efficacy and value of international adjudication (and, more broadly, international law). It is wrong to conclude, as Posner, Yoo and others do, that the proliferation of international courts is a sign of the weakness of the international system, not its strength. … States set up courts and then find they cannot control them. Rather than submitting to their jurisdiction, they set up even more courts or more arbitration panels – ones that they think they can control.

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

338 See examples cited supra note --.
339 See, e.g., Benedict Kingsbury & Stephan W. Schill, Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law, in YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 5 (Albert Jan van den Berg ed., 2009) (“States, and their legal advisors, would be rash not to consider the arbitral jurisprudence on a specific issue in deciding how to deal with a particular foreign investment. Regard to investment treaty awards is evident also in changes in State practice as States come to draft new investment treaties or revise existing ones.”). See also UNCTAD, Dispute Settlement: Investor-State (2003), available at http://www.unctad.org/en/docs/iteiit30_en.pdf. (“[T]he willingness to accept internationalized dispute settlement on the part of the host country may well be motivated by a desire to show commitment to the creation of a good investment climate. This may be of considerable importance where that country has historically followed a restrictive policy on foreign investment and wishes to change that policy for the future”).
340 See examples cited supra note --.
341 See examples cited supra note --.
342 See, e.g., Guzman, International Justice, supra note XX, at 225-226.
343 See supra pp. --.
344 Posner & Yoo, Judicial Independence, supra note XX, at 173. See also id. at 167.
345 POSNER, GLOBAL LEGALISM, supra note XX, at 150.
On the contrary, the development of second generation tribunals has entailed states devoting substantial effort to creating new forms of international adjudication that are more effective (not less effective) – including forms of enforceable, effectively compulsory adjudication. It has also involved states then using (not ignoring) those dispute resolution mechanisms in very substantial numbers of cases, particularly when compared with other forms of international adjudication – again, notwithstanding the fact that these mechanisms produce enforceable results. Moreover, in many instances (i.e., investment and commercial arbitration; foreign sovereign immunity litigation; claims settlement tribunals), states have created adjudicatory mechanisms which private parties – not just states – can use, thus taking the ability to determine whether or not to use these mechanisms out of state control.

None of this conforms to the image of ineffective, marginal international adjudication, ignored by states, which is central to skeptics’ evaluations of the field. Instead, states have created an almost entirely new generation of tribunals, vesting them with the power to issue peculiarly effective, enforceable decisions, at the behest of private parties, and then made frequent use of those tribunals. That is exactly the opposite of what Posner, Yoo and other critics’ analyses predict. The frequent use and efficacy of these second generation tribunals provides compelling evidence of the success of international adjudication and, more generally, of international law itself.

2. Models for Future International Tribunals

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

Despite this, most commentary has not regarded second generation tribunals as worthwhile models for future international adjudicatory bodies. On the one hand, proponents of international adjudication have argued that there is a “growing global consensus that adjudicatory bodies outside the nation state should be independent.” These commentators have gone on to urge that international adjudicatory bodies be structured “more like … court[s]” – particularly, more like “independent” appellate courts such as the ECJ. On the other hand, skeptics about international adjudication take the opposite tack, arguing that “[i]nternational courts succeed best when they are subject to strict limitations – voluntary jurisdiction, limited jurisdiction, weak remedies and so forth.”

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

As we have seen, virtually all first generation tribunals have enjoyed very limited success, while the ECJ is a regional European exception with limited relevance in other international

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346 Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 914; supra pp. --.
347 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 365; supra pp. --.
348 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 276. See also id. at 387.
349 POSNER, GLOBAL LEGALISM, supra note XX, at 173.
settings. While the model of traditional first generation adjudication may have useful applications in some circumstances (e.g., some regional integration efforts), the structure and design of second generation tribunals offers at least equally – and likely materially more – promising prospects as models for most future international adjudicatory bodies.

Conversely, the success of second generation tribunals also argues against prescriptions for entirely “dependent” adjudicatory mechanisms, wholly subject to the (state) parties’ control and lacking any enforcement authority. As we have seen, second generation tribunals have flourished notwithstanding – indeed, because of – their power to render enforceable decisions, including at the behest of private parties. Moreover, as discussed below, although the structures and procedures of second generation tribunals have numerous elements of “dependence,” they also have important aspects of “independence.” While the model of purely “dependent” tribunals may be useful in some circumstances, the structure of second generation tribunals appears to offer a more promising model for many future international tribunals.

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

First, as we have seen, the jurisdiction of international commercial and investment arbitration tribunals is defined narrowly and with considerable specificity by the arbitration provisions of either a commercial agreement, a bilateral treaty or otherwise. Claims settlement tribunals exercise comparably limited, determinate jurisdiction. The WTO is similar, with panel and Appellate Body competence limited to interpretation of specified WTO agreements and

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350 See supra pp. --. As we have seen, although states have created significant numbers of nominally independent tribunals modelled on national appellate courts (such as the PCIJ, ICJ, ITLOS and many regional courts), they have in practice made limited use of these tribunals. See supra pp. – describing limited usage of PCIJ, ICJ, ITLOS and other first generation tribunals.

351 See supra pp. --.

352 See supra pp. --.

353 See supra pp. --, --, and --. In the case of commercial arbitration agreements, these provisions are typically included in commercial contracts and provide for arbitration of a defined category of future disputes – typically those “relating to” a particular contract. See BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 1090-1098. In the case of investment arbitrations, many proceedings are conducted pursuant to traditional arbitration clauses (covering future disputes) in investment agreements. SCHREUER ET AL., supra note XX, at 356-362; NEWCOMBE & PARADELL, supra note XX, at 44-49. Alternatively, the jurisdiction of tribunals is defined by the terms of a BIT, sometimes in conjunction with a further expression of state consent (in investment legislation or otherwise).

354 See supra pp. --.

355 See WTO DSU, art. 3.2; supra pp. --. See also Trachtman, supra note XX, at 338, 342-343 (“The WTO dispute resolution system is clearly not a court of general jurisdiction, competent to apply all applicable international law”); Shaw, supra note XX, at 1081.
interpretative discretion constrained by both the detailed character of the agreements and formal prohibitions in the WTO DSU. These aspects of second generation adjudication contrast markedly with the aspirations of traditional first generation tribunals – to broad compulsory jurisdiction, like that contemplated under Article 36(2) of the ICJ Statute and characteristic of “independent” national courts.

A related aspect of the limited jurisdiction of second generation tribunals is the remedies they may grant. The ICSID Convention limits the obligation of contracting states to enforce awards to the “pecuniary” aspects of such awards. Similarly, enforcement of awards under BITs, NAFTA and the New York Convention is either formally or effectively limited to monetary enforcement against a foreign state’s assets. Enforcement of WTO decisions is also effectively monetary in character, taking place through the imposition of trade sanctions within specified financial limits. Again, this contrasts with the putatively broad remedial jurisdiction of the ICJ, the ITLOS and other first generation tribunals.

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

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

Thus, in commercial arbitrations, there is no standing decision-making body; parties to disputes instead choose tribunals on an ad hoc basis, with jurisdiction limited to particular cases. In practice, parties ordinarily agree upon the identities of the members of three person tribunals, often with each party nominating a co-arbitrator and the two co-arbitrators selecting the presiding arbitrator (failing which, an appointing authority will do so). Similarly, in investment arbitrations, tribunals are selected on an ad hoc, case-by-case basis, with appointment procedures identical to those in commercial arbitrations. WTO panels are broadly similar, being selected on a case-by-case basis, with the parties free to agree upon the composition of panels in particular cases (and with the DSB selecting panels in the absence

356 See supra pp. --; WTO DSU, art. 3.2.
357 See supra pp. --.
358 See supra pp. --.
359 See supra pp. --.
360 See supra pp. --.
361 See supra pp. --.

A related feature of second generation tribunals is that they typically apply comparatively specific legal rules, rather than indeterminate standards. See supra pp. --; Born, Facilitating Effective International Adjudication (forthcoming 2011).

362 Helfer & Slaughter, Supranational Adjudication, supra note XX, at 300-301, 303-304, 312-314; Posner & Yoo, Judicial Independence, supra note XX, at 7, 22-27; Helfer & Slaughter, Response to Posner and Yoo, supra note XX, at 908, 942-954.
363 See supra pp. --; BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 17-20, 1399-1408.
364 See supra pp. --.
of party agreement). 365 All of this differs materially from the ideal of “independent” standing judiciaries prescribed for international tribunals by many contemporary commentators. 366

At the same time, however, various forms of second generation adjudication also provide for limited forms of appellate review of first instance decisions, often by tribunals with a measure of “independence” from the parties. This type of review exists in ICSID investment arbitrations, WTO proceedings 368 and NAFTA Chapter 19 proceedings. 369 These mechanisms combine first instance tribunals that are highly “dependent” in most respects with a review tribunal, exercising very limited jurisdiction, whose members enjoy a higher (but still limited) degree of “independence.” Again, this contrasts with both blanket calls for “independent” international tribunals and similar prescriptions for entirely “dependent” tribunals.

A third structural aspect of second generation tribunals concerns the procedures they apply, especially for fact-finding. The procedural and fact-finding regimes in international commercial and investment arbitrations have been designed to satisfy users’ expectations – including those of state parties – while also including mechanisms for addressing dissatisfaction, both systemically and in specific cases. 370 Thus, most international arbitrations are conducted pursuant to institutional rules which provide a comparatively skeletal procedural framework, allowing the parties substantial freedom to participate in the design of procedures tailored to particular parties and disputes. 372

The procedures in most second generation tribunals have been designed to facilitate effective fact-finding. Both commercial and investment arbitrations typically involve substantial fact-finding, including examination of witnesses, disclosure of documents and evaluation of expert evidence. 373 The same is true of the Iran-U.S. Claims Tribunal and WTO panels,

365 See supra pp. --.
366 See supra pp. --.
367 ICSID arbitral awards (but not non-ICSID BIT or NAFTA awards) are subject to annulment on very limited grounds by annulment committees, selected by ICSID (not the parties) from a standing list of potential committee members. See supra pp. --.
368 Broadly paralleling the ICSID structure, WTO panel reports are subject to limited appellate review by the WTO Appellate Body – a standing body from which the members of appellate tribunals in particular cases are selected. Although less “dependent” than arbitral tribunals, the WTO Appellate Body is more dependent than most first generation tribunals, including the ICJ and the ITLOS; among other things, WTO Appellate Body members are chosen for relatively short terms (four years) and are eligible for reappointment (which is coveted). See supra pp. --.
369 An appellate mechanism is provided by NAFTA’s Extraordinary Challenge Committee, which can hear a limited range of challenges to NAFTA awards under Chapter 19. NAFTA, art. 1904(14).
370 See supra pp. --. Similar procedures are used in the Iran-U.S. Claims Tribunal and WTO panel proceedings. See supra pp. --.
371 Examples include the UNCITRAL Rules and the rules of leading arbitral institutions. See BORN, INTERNATIONAL COMMERCIAL ARBITRATION, supra note XX, at 150-169, 175-176.
372 See Kenneth S. Carlston, Procedural Problems in International Arbitration, 39 AM. J. INT'L L. 426, 448 (1945) (“Procedure is no unalterable course of conduct to which all tribunals must adhere. It should always be adapted to facilitate the course of the particular arbitration and to enable the economical accomplishment of its task within the time fixed.”); Laurent Lévy & Lucy Reed, Managing Fact Evidence in International Arbitration, in INTERNATIONAL ARBITRATION 2006: BACK TO BASICS? 633, 644 (Albert Jan van den Berg ed., 2006).
which involve procedures broadly similar to those in commercial and investment arbitrations. 374

Again, the procedures in these second generation settings differ materially from procedures in traditional international adjudications, as well as in purely “dependent” tribunals. The procedures used in most first generation tribunals are a standing set of generally-applicable rules, drawn up in a multilateral setting where the need to satisfy a wide range of very different procedural expectations produces a lowest-common-denominator approach, that are applied by large tribunals modeled on national appellate courts. Not surprisingly, these procedures are typically ineffective when used for fact-finding (which, ironically, parallels the procedures of dependent tribunals lacking independent fact-finding capabilities). For example, “hearings” in the ICJ involve three hours of sitting per day, during which counsel read prepared submissions to a fifteen-person tribunal that seldom asks questions.\(^{375}\) Moreover, compelled disclosure from counter-parties is essentially unknown,\(^{376}\) and witness testimony and examination is almost equally rare.\(^{377}\) Other first generation tribunals also provide minimal opportunities for effective fact-finding.\(^{378}\)

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


\(^{376}\) Crook, Fact-Finding in the Fog, supra note XX, at 326 (“Tribunals in inter-state cases rarely encourage or require states to disclose documents or evidence to the other party’’); Thomas M. Franck, Fairness in International Law and Institutions 336 (1997) (“the ICJ has no procedures by which one party can compel the disclosure of evidence by the other, because compelled disclosure is inconsistent with the nature of sovereignty’’).


\(^{378}\) Traditional inter-state arbitrations were historically conducted pursuant to procedures that closely resembled PCII and ICJ proceedings (albeit with less unwieldy tribunals), and that permitted little scope for development of factual matters. James Crawford, Advocacy Before the International Court of Justice and Other International Tribunals in State-to-State Cases, in The Art of Advocacy in International Arbitration 11, 12-13 (R. Deak Bishop & Edward Kehoe eds., 2004). The ITLOS’s procedural rules (and the composition of the Tribunal, consisting of twenty-one members) closely parallel those of the ICJ and, if the Tribunal is ever used to any appreciable extent, would likely produce comparable procedures. See supra pp. --; ITLOS Statute, arts. 2 (21 members), 13 (11 member quorum). Similarly, regional courts (like the ACJHR and CACJ) are also relatively large tribunals, again structured like appellate courts, which offer few opportunities for effective fact-finding. See supra pp. --.
Addressing this question raises issues which are beyond the scope of this article (and are the subjects of a forthcoming companion piece379). Among other things, the subject requires analysis of the reasons that states have accepted second generation forms of adjudication, including both the benefits and costs that these forms of adjudication create for states. It also requires more detailed consideration of the structures and procedures that states have used for existing second generation tribunals, the particular settings in which such tribunals have successfully been used and whether second generation structures could be used in new settings (and, if so, which ones). As we have seen, second generation tribunals have only been used in relatively specific contexts, principally concerning trade and investment, and have been subject to significant structural conditions. It may be that second generation structures are ill-suited for other settings or, conversely, that they can be applied much more widely.

The essential point for present purposes, however, is that consideration of models for international adjudication cannot properly be limited to traditional first generation tribunals, based on “independent” national appellate courts, or to prescriptions for purely “dependent” tribunals. Instead, models for future international tribunals should also look to the distinctive and very different structures and procedures of second generation tribunals. It is these tribunals that have achieved the most frequent usage and successful application of international law in the past 40 years and it makes no sense for their model to continue to be ignored in discussions of contemporary international adjudication.

IV. Conclusion

The past 40 years have seen the development of a new generation of international tribunals – best represented by international commercial and investment arbitration tribunals. Unlike traditional public international law tribunals, these second generation tribunals issue enforceable decisions and exercise what is effectively compulsory jurisdiction. They have also been the most frequently used and, in many respects, most successful forms of international adjudication in recent decades. Among other things, second generation tribunals have played vital roles in international trade, finance and investment, have contributed to the development of important fields of international law and have provided leading contemporary examples of international law working in practice.

The success and frequent usage of second generation tribunals has important implications for analysis of international adjudication. It contradicts claims that international adjudication is marginal and unimportant in contemporary international affairs and that states do not use international tribunals, particularly tribunals that are effective. In fact, second generation tribunals have been widely and successfully used, in part precisely because they issue effective and enforceable decisions. At the same time, the widespread usage and success of second generation tribunals also contradicts prescriptions that future international tribunals be modeled on “independent” first generation tribunals or national courts, or, alternatively, on entirely “dependent” tribunals. In fact, successful second generation tribunals exhibit a blend of structural characteristics that contradict blanket prescriptions for “independence” and counsel for more tailored, nuanced institutional designs than existing prescriptions contemplate.

379 See Born, Facilitating Effective International Adjudication (forthcoming 2011).
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<th></th>
<th>1990</th>
<th>1995</th>
<th>2000</th>
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<td><strong>e)</strong> As Percentage of DRP Treaties (d/b × 100)</td>
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<td><strong>k)</strong> Number of other treaties with Arbitration DRP</td>
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