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The New International Courts: A Bird's Eye View

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Abstract: Delegation to ICs has increased rapidly since 1990, leading to a proliferation of international courts with a fundamentally different design. There are now 20 active ICs, plus eight more ICs that exist mostly on paper. "New style" international courts have compulsory jurisdiction, and often they have access for non-state actors to initiate litigation. Litigation rates for all ICs have increased since 1990. Delegation to ICs tends to cluster around three issue areas: economic issues, human rights and war crimes. And delegation to ICs is more common in Europe, Latin America and Africa. The paper documents these patterns, and develops a functional explanation of the change in IC design. ICs increasingly have compulsory jurisdiction and access for non-state actors because they are being delegated a broader variety of judicial roles. The paper identifies which ICs have been given which roles, and the design of different ICs in each role. It argues that the judicial roles shape the design of the courts, and the politics that follow from delegation to ICs. The analysis presents a reason to focus less on the design of ICs, and more on the roles delegated to ICs, to understand the different politics that follow from delegation to ICs.

There has been a revolution in the creation and use of international courts. In 1985 there were eight international courts that met PICT's definition of a permanent legal body, composed of independent judges, hearing legal cases in which one of the parties is a state actor or an International Organization (IO), deciding on the basis of predetermined rules and issuing binding legal rulings.[1] Today, there are twenty-eight international courts meeting PICT's definition. These "new" ICs are not only recent creations; they are qualitatively different entities. New style ICs have design features that make them far more likely to be activated, and to be ruling in cases in which states are unwilling participants. These design features explain in part why IC usage has also increased. At this point international courts have issued over twenty-nine thousand binding legal rulings where an IO or state actor was the defendant. Eighty-eight percent of the total IC output of decisions, opinions, and rulings (25,750 out of 29,094) have be issued since the

[1] This chapter develops arguments previously published in (Alter 2006: 50-64), which builds on the work of Cesare Romano, the person behind the Project on International Court and Tribunals (PICT). Romano has developed a synoptic chart that includes the universe of ICs and quasi judicial international legal bodies (Romano 1999), and a matrix of existing international courts, which allow one to see key design features of the courts. The general PICT website is: http://www.pict-pcti.org/. The chart can be found at: http://www.pict-pcti.org/publications/synoptic_chart.html. The Matrix is missing ICs that were created after 2004. See: http://www.pict-pcti.org/matrix/matrixintro.html. The PICT website has useful web pages for each IC, and a special web page for African courts. The African website is located at: http://www.aict-ctia.org/. Thanks to Ji Li for his data collection help.

end of the Cold War (1989). State concerns about national sovereignty have not lessened. What is this turn to creating and using ICs about?

This chapter presents a bird's-eye overview of the architecture of the international judicial system, allowing us to see a number of interesting patterns in delegating authority to ICs and thereby to answer a number of puzzles with respect to delegation to ICs. One puzzle is the question of what is driving the proliferation of ICs? Chapter 1 argued that two larger forces have contributed to the judicialization of international relations. The substantive expansion of international law has led to a body of international legal rules that create rights and duties that penetrate the state level. Meanwhile, the growing authority of multilateral institutions means that increasingly there is governance that does not depend on national legislative consent for its authority. States have increasingly turned to international courts as a response to these trends, in an effort to coordinate the interpretation of law across borders and to ensure that judicial actors can oversee the actions of powerful multilateral institutions. We see these trends in the pattern of delegation to ICs. The ICs with the widest access to initiate litigation, and with constitutional and administrative review authority are associated with common market agreements where supra-national institutions have extensive formal powers. Patterns of delegation suggest an additional factor that accounts for the proliferation of international courts: the regionalization of international politics.[2] Europe, Latin America and Africa lead the pack in creating international courts associated with regional agreements. Curiously, Asia has no active international courts.

One of the largest puzzles in the trend of delegating authority to ICs is related to the design of ICs today. Most of the recent creations are what I call "new-style" ICs, with compulsory jurisdiction and access for non-state actors to initiate disputes. Section II will explain why these design features enhance the independence of IC and increase the chance that delegation to ICs will give rise to the multilateral and transnational adjudication politics described in Chapter 1. Of the 28 ICs that have been created via a court treaty, twenty-three have at least partial compulsory jurisdiction (82%), nineteen (67%) allow international institutional actors to initiate binding litigation, and sixteen (57%) have provisions that allow private actors to initiate litigation.

[2] Romano also observed this trend. See: (Romano 1999). The World Trade Organization actually encourages regionalization since it allows regional economic regimes to grant preferential access to national markets, and it has arguably encouraged the proliferation of regional economic agreements (Mansfield and Reinhardt 2003). United States policy has also contributed to regionalization. See: (Katzenstein 2005)

Given the sovereignty compromise associated with these design, why do most of today's ICs include compulsory jurisdiction and access for non-state actors to initiate litigation? This chapter develops a functional argument to explain the design trend. The increased willingness to grant ICs compulsory jurisdiction and access for non-state actors follows from the decision to grant ICs a broader range of judicial roles. It is the judicial role that drives the design decision, and give rise to the varied state-IC politics we observe.

A third puzzle is why this extensive delegation, and the very large number of IC rulings, is not generating more media and scholarly attention. These trends garner little attention because so much of what ICs do is routine and uncontroversial. This delegation is uncontroversial in part because a lot of the delegation to ICs is either highly limited or other-binding delegation. The tendency to delegate to ICs to bind international actors explains why ICs increasingly have design features that make them highly independent yet why relatively few international legal rulings are controversial.

Section I documents the fundamental change in designing ICs, away from what I call "old style" international courts to "new style" international courts with compulsory jurisdiction and access for non-state actors. I explore issue area and geographic delegation trends, and data on usage of international courts that reveals significant variation in the activation of ICs. One especially intriguing finding is that a number of regional integration systems have explicitly copied Europe's international legal institutions, in part to emulate the success of these legal systems and in part because European officials provide inducements to regional organizations that incorporate their model. Section II presents in overview form an analysis of the different roles delegated to ICs. By examining the Court Treaties where the jurisdiction and design of ICs are articulated, I can identify which roles have been given to which courts and how the design of ICs varies by role. Section II then develops the functional argument of how each judicial role has its own minimum design criteria. I map the design of ICs by role, showing that the functional analysis explains a lot, though not all, of the variation IC designs. What a simple functional analysis can explain is not very puzzling. Scholars should thus focus their efforts on what the functional analysis *cannot* explain. Drawing on delegation patterns, I suggest potential explanations for the some of the extra variation one finds. Section III concludes by identifying questions about these patterns that require further investigation. This chapter creates broad categories of delegation. Subsequent chapters identify variation regarding the details of in how

authority is delegated to ICs including variations in political controls that are put into the fabric of the delegation contract.

I. A New Style of International Court: Patterns in Delegating Authority to ICs

This section documents general trends in delegating authority to ICs. There are two distinct delegation moments in which decisions about delegating the interpretation of law to ICs are made. The first moment comes when ICs are created through negotiation by diplomats who make choices in the abstract, based on their expectations of what the IC might be called upon to do. This original decision can be revisited via state amendments to the founding treaties of ICs. An entirely separate delegation moment involves the decision to bring a case to an IC to resolve. This second delegation decision is shaped by tactical calculations. Lawyers working for states and plaintiffs choose a strategy they think will promote their cause. Not only are the actors making the delegation decisions different across the two moments, but also the incentives of the actors are also different. Diplomats crafting the ICs authority try to make careful trade-offs between protecting state sovereignty and creating a legal system that can allow the court to play its different functional roles. Meanwhile the lawyers focused on winning a case will employ arguments that help their cause, even if the argument implicitly asks the IC to change the meaning of the law or expand the court's authority in ways that compromise state sovereignty.[3]

We can see a change over time at both delegation moments; states are increasingly creating new ICs, expanding the jurisdiction of ICs, and they are increasingly litigating cases in front of ICs. This chapter focuses primarily on the contractual delegation moments when IC designs are created and amended. Since the end of the Cold War, states have become increasingly willing to grant to ICs judicial oversight over more and more legal domains. Why was the end of the Cold War a conjunctural historical moment for delegating authority to ICs? Chapter 5 (International Enforcement Courts) explores this question more. For now, I note that the end of the Cold War disrupted traditional alliances. Former Soviet satellites rushed to join the international institutions of Western States (e.g. the European Convention of Human Rights and the European Union), and states that had relied on Soviet support had to seek new patrons. Around the world states embraced the trappings of liberal democracy—free markets, human rights, and open trading systems. These changes contributed to the creation of a slew of new ICs,

[3] For more on the different ethos of diplomats versus lawyers, see: (Weiler 2000)

reforms to existing ICs, and an expansion of membership in a number of international legal institutions. The trend of adding compulsory jurisdiction and private access to ICs, combined with the reality that more countries and international agreements now fall under the jurisdiction of ICs, helps explain the growing litigation involving international legal rules.

The tables in this chapter are generally organized chronologically so that we can see how delegation to ICs has evolved over time. This study focuses on ICs that meet the Project on International Court's and Tribunal's (PICT's) definition, so as to make my task more tractable. But as Chapter 1 explained, elements of PICT's definition are rather arbitrary, which means that legal bodies that are functional equivalents to permanent international courts are excluded from the analysis.[4] A focus on ICs also ignores domestic enforcement of international rules, even though the willingness of foreign courts to hear cases involving violations in other countries clearly contributes to the judicialization of international relations.[5] If I had included functional equivalents of ICs, and thus every legalized institution involved in interpreting and enforcing international legal rules, the trend I am describing would be significantly larger. Indeed this analysis probably only captures the tip of the international litigation iceberg. The arguments about how judicial roles generate different politics, and about how ICs influence political outcomes are extendable to any legalized institution undertaking adjudication involving international law, thus to specialized and temporary tribunals, ad hoc bodies, arbitral bodies and to domestic enforcement of international rules.[6]

A Shift from "Old Style" to "New Style" International Courts

Perhaps the most important trend in delegation to ICs is that today's ICs (and less permanent international legal bodies) are more likely to have compulsory jurisdiction, and more likely to allow non-state actors to initiate an international legal review. These design features fundamentally transform the politics of IC litigation. Eric Posner and John Yoo argue that ICs that lack compulsory jurisdiction are more dependent on states wanting to use them. This dependence, they argue, leads ICs to work harder to please governments, and especially the

[4] The most arbitrary aspect of the PICT definition is the requirement that the IC be a permanent body. See Chapter 1 Section II for a discussion of the benefits and liabilities of the PICT definition.
[5] (Sikkink and Lutz 2001; Benvenisti 2008)
[6] Romano's 2004 synoptic chart identifies 20 existing ICs, two nascent ICs, seven dormant ICs, seven proposed ICs, 8 extinct ICs, two aborted ICs, sixty-two existing quasi-judicial implementation control and dispute settlement bodies, ten nascent or dormant quasi-judicial implementation control and dispute settlement bodies, and 17 extinct quasi-judicial implementation control and dispute settlement bodies. Romano's original chart was updated in 2004. It will be updated again by the time this book is published.

governments of powerful states.[7] While much of Posner and Yoo's analysis is controversial,[8] most agree that ICs with compulsory jurisdiction are in fact more independent, for the reasons Posner and Yoo suggest. An additional feature of IC independence concerns the ability of non-state actors (supranational prosecutors or private litigants) to initiate legal disputes, since access for non-state actors further undercuts state's ability to control whether legal issues appear in front of ICs. Posner and Yoo's distinction between independent and dependent ICs is a useful starting place to investigate the architecture of the international judicial system.

I give the name "old-style" ICs to international courts that lack compulsory jurisdiction. This is an old style, because it was how the very first ICs were designed. Writing in 1976s, Werner Levi argued that a defining feature of *Law and Politics in International Society* was that states' refused to grant ICs compulsory jurisdiction:

> The reluctance of states to have their disputes adjudicated finds expression, first, in limiting their obligation of submitting to judicial procedures, and second, in limiting the jurisdiction of the Court when they do submit to judicial procedures. States have consistently rejected the notion of a general and universal obligation of submitting all their disputes to an international court. They have almost as adamantly opposed agreements to submit their disputes to judicial decisions by international courts (the so-called "compulsory jurisdiction"). This was true, for example, in the case of arbitration in general of the international courts, of the Law of the Sea Conference (1958), the Conference on Diplomatic Intercourse and Immunities (1961), the Conference on Consular Relations (1963), the Conference on the Law of the Treaties (1968-1969), the Third Law of the Sea Conference (1975). Whenever "compulsory" jurisdiction was proposed it was rejected in favor of "optional procedures" by which states had the option of choosing which method for peaceful settlement or disputes they wanted to apply. The nearest to an obligation for judicial settlement is the "optional clause" in Article 36 of the Statute of the International Court of Justice and certain commitments of Western European States to the use of the European Court of Justice.[9]

Levi's quote reveals that in 1976, the "certain commitments of Western European States" stood out as exceptions to a general pattern of states not wanting to be bound by compulsory jurisdiction. Today, state commitment to compulsory jurisdiction is the norm and ICs are more likely to resemble European style courts than they are to resemble the ICJ.

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[7] (Posner and Yoo 2005) Most studies of judicial independence focus on appointment and reappointment procedures for judges, and whether or not judges are institutionally protected from personal and collective retribution if political actors are unhappy with their rulings. ICs do not vary in meaningful ways across these dimensions, which is one reason scholars have focused instead on other features of IC design.

[8] The controversial part of Posner and Yoo's analysis is their claim that dependent ICs will be more effective than independent ICs. It is surely true that where states can block legal proceedings, the only disputes that will be litigated are those where the state is willing to let the IC determine the legal outcome. For this reason alone, compliance with IC rulings is likely to be higher. But in making the more general argument that dependent ICs are more effective, Posner and Yoo are assuming that the only way for ICs to influence state behaviour is to operate in the world of Model 1, where ICs are arbiters picking the preference point that lies between two state litigants. For a more far reaching critique of Posner and Yoo's analysis, see: (Helfer and Slaughter 2005)

[9] (Levi 1976: 70-1)

"New style" ICs have compulsory jurisdiction, access for non-state actors to initiate disputes, and an implicit if not an explicit intention that the IC help enforce international agreements. This shift in design has the potential for a profound change in the role of ICs. Old-style ICs had a hard time engaging in anything but inter-state arbitration. In the inter-state arbitration model (Model 1), ICs constructed focal point interpretations by selecting a single interpretation of the law from among the among the small number of possible interpretations that would garner state support. In theory old style ICs could look beyond the case, and perhaps even engage in multilateral adjudication politics (Model 2) by shifting the meaning of the law beyond what the litigating states had agreed to or might want. But as a practical matter, the lack of compulsory jurisdiction severely limited the types of cases that ICs adjudicated. Only cases where both parties agreed to let the IC resolve the issue reached the IC for adjudication. Almost by definition, cases raising legal issues where parties vehemently disagreed and where an IC's interpretation might have broad and long term consequences would not reach an IC for resolution.[10]

Compulsory jurisdiction and access for international actors to initiate litigation opens the door to multilateral adjudication politics (Model 2). States and international prosecutorial type actors are able to raise controversial cases, providing ICs with the opportunities to shift the meaning of the law in ways that please other member states. Brazil, for example, was able to use the WTO dispute adjudication to establish that United States cotton subsidies distort the international prices of cotton, thereby creating an unfair trade advantage for American producers. The US would surely have blocked this case if it could have.[11] Compulsory jurisdiction can also open the door to transnational judicial politics (Model 3) when lawyers in the defendant state help the plaintiff states make their case. For example, American lawyers opposed to the death penalty aided Mexico in its ICJ case challenging the United States imposition of the death penalty in a case where the Mexican citizen was not given access to their consul.[12]

[10] There are notable exceptions. The United Nations General Assembly started requesting ICJ advisory opinions on controversial issues. These opinions are not legally binding, and their legal authority is often in dispute. States also have invoked the ICJ regarding treaties where its jurisdiction was compulsory, which resulted in important rulings, and in states withdrawing from the compulsory jurisdiction protocols for the ICJ.

[11] United States — Subsidies on Upland Cotton. WTO dispute DS267. Panel ruling 8 September 2004; Appellate body ruling 18 December 2007.

[12] Another example of this is that Nicaragua's case against the United States was organized by an American lawyer, and Nicaragua was represented by a former legal advisor to the Kennedy Administration. See: (Reichler 2001)

Private access further opens the door to transnational judicial politics (Model 3). Where ICs have private access, individuals and advocacy groups can use litigation as a political strategy to promote objectives they believe in.[13] Allowing non-state actors to initiate litigation makes ICs less dependent on states and prosecutors to raise cases. Moreover, cases backed by advocacy movements present ICs with ready made compliance constituencies who will work to see the IC ruling implemented. Thus private access actually makes it more likely that transnational judicial politics will emerge. Private access also leads to busier ICs, which some scholars expect will lead to more IC law-making.[14]

Most ICs, and nearly every IC created since 1990, are "new style" international courts. Table 2.1 provides a snapshot of all of the international courts meeting PICT's definition, 28 in all. The table categorizes the ICs by whether or not they are "old style" or "new style" international courts, organized within each category by the date in which the court became operational.[15] I number the courts that I use in the rest of the study, leaving the largely paper ICs on the table in a shaded box without a number. Table 2.1 shows a clear trend of establishing "new style" ICs. The only recent "old style" IC is the International Tribunal of the Law of the Sea (ITLOS). This tribunal, first envisioned in 1984, actually combines old and new styles. The dispute settlement system is very similar to that of the "old style" International Court of Justice. Meanwhile, the ITLOS court has compulsory jurisdiction for disputes involving the seizing of vessels. Private actors, with permission from their governments, are able to pursue these claims themselves. Also, the ITLOS Seabed Authority allows private actors to raise challenges to the decisions of the Seabed Authority, and it has compulsory jurisdiction for these cases.[16]

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[13] (Cichowski 2006)

[14] Robert Keohane, Andrew Moravcsik and Anne-Marie Slaughter expect ICs with private access to be both busier and more politically influential because "A steady flow of cases… allows a court to become an actor on the legal and political stage, raising its profile in the elementary sense that other litigants become aware of its existence and in the deeper sense that interpretation and application of a particular legal rule must be reckoned with as a part of what the law means in practice. Litigants who are likely to benefit from interpretation will have an incentive to bring additional cases to clarify and enforce it. Further, the interpretation or application is itself likely to raise additional questions that can only be answered through subsequent cases. Finally, a court gains political capital from a growing caseload by demonstrably performing a needed function…" (Keohane, Moravcsik, and Slaughter 2000: 482) For similar arguments, see also: (Stone Sweet 1999: 314-18; Helfer and Slaughter 1997).

[15] The date of establishment (the date the treaty creating the court was signed) is different than the date the IC was actually created. Usually IC only come into existence after a number of countries have ratified the founding treaty, which can take years. Here I focus on the date the IC was created, thus when sufficient state ratifications were in hand and resources were allocated to the IC.

[16] (Noyes 1998)

Table 2.1 is comprehensive, including a lot of additional information that I will break down going forward. Table 2.1 also reflects the latest design of ICs. I describe and explore the effects of design changes over time later in this section. The last line of the table reports the overall trends for the twenty active ICs in this study. Eighteen out of twenty (90%) include at least partial compulsory jurisdiction, sixteen out of twenty (80%) allow international actors to initiate binding litigation for certain types of issues, and twelve out of twenty (60%) allow private actors to initiate some types of litigation.[17] The litigation data reported here should be seen as ballpark figures that likely under-report litigation.[18] As of 2007 the twenty ICs in this study had issued at least 29,000 binding legal rulings.

[17] I have excluded from consideration private access when it only includes suits brought by employees if the IO.
[18] I relied on IC reports, where reports were available on-line, and excluded IO employee disputes. Otherwise, I counted decisions posted on the web. Not all cases or rulings are posted on the web, and even where rulings are posted, counts based on web analysis can differ from what ICs report. Giving a date to a ruling can also be hard because courts generally report cases based on the year the ruling was issued, but cases can be numbered and posted according to when the case was filed, and dating systems can change over time. Meanwhile, the less resourced the IC, and the older the data (e.g. when computers were less available) the less reliable the litigation data.

Table 2.1: All Existing ICs categorized by Old/New style (by date created)

International Courts	Geographic Region	Subject Matter Jurisdiction	Date Created	Compulsory Jurisdiction	International actor can initiate litigation	Private Actor can initiate litigation	Cases raised (where data available)	Total Cases (Founding-2007)
Old Style Courts								
1. International Court of Justice (ICJ)	All regions	Any inter-state issue + authority regarding the UN Charter + other international treaties where ICJ is designated as the final interpreter	1946	Optional Protocol for general jurisdiction. The ICJ has compulsory jurisdiction regarding some specific treaties.	The General Assembly can request non-binding rulings.		139 cases filed	125 decisions
Judicial Tribunal of the Organization of Arab Petroleum-Exporting Countries (OAPEC)	Middle East	Economic	1972	So qualified as to be meaningless.[1]			3 cases	
2. Inter-American Court of Human Rights (IACHR)	Latin America	Human Rights	1979	Optional Protocol	X		174 cases raised	152 decisions
3. International Tribunal for the Law of the Seas (ITLOS)	All regions	Law of the Sea convention (ITLOS III), plus oversight of the Seabed Authority created by ITLOS III.	1996	Optional Protocol + explicit authorization to bring disputes to 3 possible fora (exception, seabed authority & seizing of vessels)		Only for seabed authority & seizing of vessels is private access allowed	15 cases	14 decisions
New Style Courts								
4. European Court of Justice (ECJ) and its Tribunal of First Instance (TFI)	Europe	Trade and other issues governed by European Union Law	1952 (TFI-1988)	X	X	X	ECJ-15,068 cases raised TFI- 5,624 cases raised	7557 ECJ decisions 5624 TFI completed cases
5. European Court of Human Rights (ECHR)	Europe	Human Rights	1959	X	Pre-1998	X (as of 1998)	361,700 cases raised 1992-2007, 19,980 admitted for consideration	7,828 decided
6. Benelux Court (BCJ)	Europe	Economic. Preliminary rulings allows in civil and criminal affairs.	1974	X	X	Via national courts referrals	143 filed	140 decided

International Courts	Geographic Region	Subject Matter Jurisdiction	Date Created	Compulsory Jurisdiction	International actor can initiate litigation	Private Actor can initiate litigation	Cases raised (where data available)	Total Cases (Founding-2007)
7. Andean Tribunal Of Justice (ATJ)	Latin America	Trade	1984	X	X	X	1492 cases raised across procedures	1492 judgments
8. Economic Court of the Common- Wealth of Independent States (ECCIS)	Common-Wealth of Independent States	Trade	1992	X	X	X	Limited data	83 decisions
9. Central American Court of Justice (CACJ)	Central America	Any inter-state issue	1992	X (some exceptions)[2]	X	X	78 rulings	78 rulings
10. International Criminal Tribunal for the Former Yugoslavia (ICTY)	Europe	War Crimes	1993	X	X		161 Indicted	80 rulings (includes appeals)
11. European Free Trade Area Court (EFTAC)	Europe	Trade	1994	X	X	X	94 cases (some combined)	89 rulings
12. International Criminal Tribunal for Rwanda (ICTR)	Africa	War Crimes	1994	X	X		79 people arrested, 75 cases have progressed	61 completed cases
General Agreement on Tariffs and Trade (GATT)[3] 13. World Trade Organization Permanent Appellate Body (WTO)	All Regions	Economic	1953-1993 1994	- X	X		*About 295 disputes*	*101 rulings* 115 Panels reports adopted (2005) 92 AB decisions (2008)
Court of the West African Economic and Monetary Union (including its Court of Auditors) (WAEMU/UEMOA)	Africa	Economic Members are also part of ECOWAS system.	1995	X	X	X	NA	NA
14. Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)	Africa	Trade, Corporate and Foreign Investment Law	1997	X		X	2087 decisions from national courts & CCJA involving OHADA law	274 CCJA rulings
15. Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)	Africa	Trade	1998	X	X	X	Limited data	7 (data incomplete)

International Courts	Geographic Region	Subject Matter Jurisdiction	Date Created	Compulsory Jurisdiction	International actor can initiate litigation	Private Actor can initiate litigation	Cases raised (where data available)	Total Cases (Founding-2007)
Central African Economic and Monetary Community (CEMAC)	Africa	Economic	2000	X	X	X	NA	NA
16. Court of Justice of the East African Community (EACJ)	Africa	Economic	2001	X	X		8	8
17. Court of Justice of the Economic Community of West African States (ECOWAS)	Africa	Economic Human Rights	2002	X	X	X (2005)	3	3
18. International Criminal Court (ICC) [4]	All Regions	War Crimes	2004	X	X	X	5 cases in progress as of 2007	0
Association of Southeast Asian Nations (ASEAN) Dispute Resolution Mechanism	Asia	Economic Issues	2004	X			NA	NA
19. Southern Common Market (Mercosur)	Latin America	Economic Issues	2004	X	X		557 disputes arbitrated	5 Laudos of the permanent court
20. Caribbean Court of Justice (CCJ)	Latin America/ Caribbean	All issues, plus appeals of domestic civil & criminal law cases	2004	X	X	X	Limited data	17
Southern African Development Community (SADC)	Africa	Economic	2007	X	X	X	NA	NA
Court of the African Union (ACJ)	Africa	Economic	--	?	?	?	NA	NA
African People's Court of Human Rights (ACHR)	Africa	Human Rights	---	X		X (details not clear yet)	NA	NA
Totals from in each category (Active courts only)				18	16	12		29,094 total binding rulings issued

[1] There is an implicit compulsory jurisdiction, but only so long as the disputes do not infringe on the sovereignty of any of the countries concerned. Also, for cases involving firms, jurisdiction must be consented to by the state.

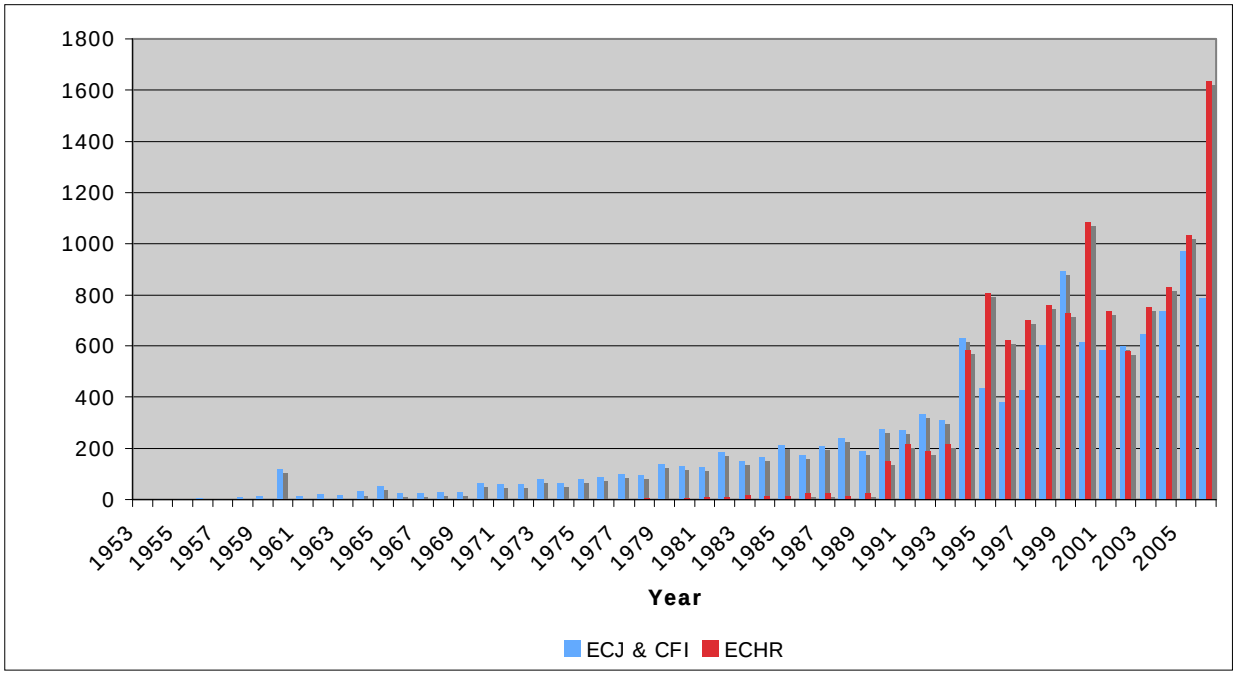
[2] As a general rule, consent to the CACJ contentious jurisdiction is implicit in the ratification of the Protocol of Tegucigalpa. However, consent must be explicitly given in the case of: a) territorial disputes (in which case consent to jurisdiction has to be given by both States party to the dispute); b) disputes between States member of the Central American Integration System and States which are not members; c) cases in which the Court sits as arbitral tribunal.

[3] GATT does not meet PICT's definition because there was no permanent court. GATT data is from Eric Reinhardt.

[4] There are a number of exceptional hybrid international criminal bodies created because the ICC's jurisdiction does not cover crimes committed in Sierre Leone, Cambodia, East Timor and Kosovo. These bodies are excluded from this count.

ICs are also increasingly active. Graph 2.1 shows the usage of the two most active ICs, the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), over time. Why are European courts so active? Part of the answer is that Europe's international courts have a large membership. The European Union now has twenty-seven member states, many of which are only beginning to learn about the rules and regulations that they now must implement, which lead to many references involving fairly routine legal questions. The other very active European IC is the European Court of Human Rights (ECJR), the final appellate body for 47 countries regarding human rights related issues. Also driving high ECJ litigation rates is the reality that much of Europe's economic regulation is set at the European level, which means that the European Court of Justice has authority over issues that in other contexts are decided domestically (such as disputes regarding agricultural subsidies, anti-trust decisions, dumping and countervailing duty assertions etc). The ECHR is extremely active in part because national legal systems have huge backlogs of legal cases that give rise to numerous complaints about how slow administration of justice creates violations of individual human rights. Article 6 cases, which include cases about the slow provision of justice, accounted for 72 percent of the ECHR's docket between 1960 and 2006, and 74% of the ECHR's findings of violations of the convention.[19]

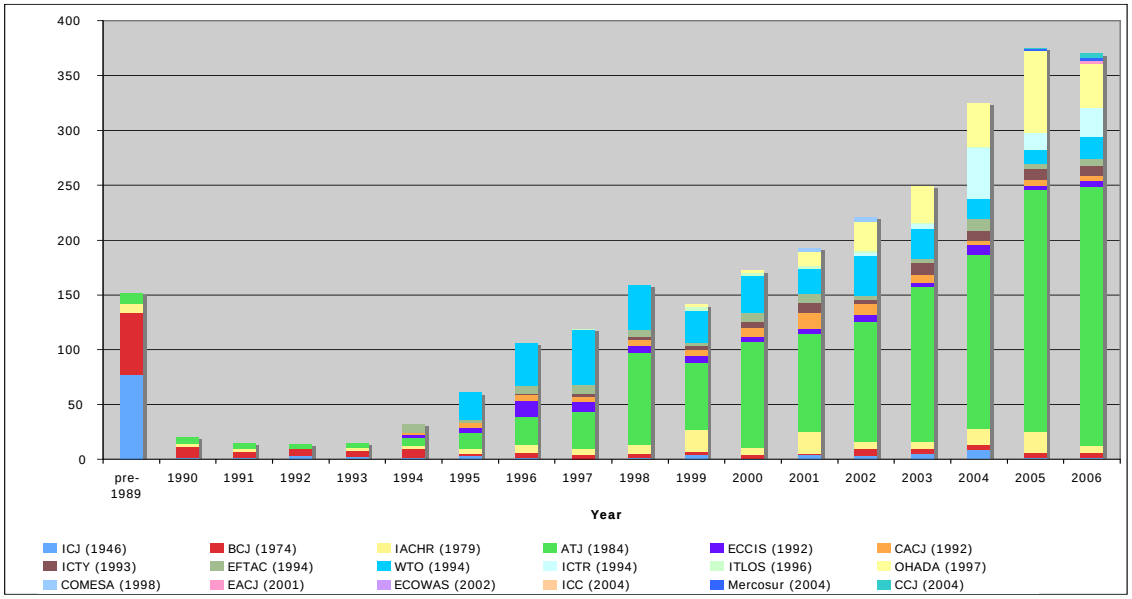
Graph 2.1 ECJ (including TFI) and ECHR decisions issued (Founding-2007)



[19] (Cichowski 2006: 63, 65)

While Europe's international courts are unusually active, all ICs have seen a growth in activity since the end of the Cold War. Graph 2.2 below shows increased usage of ICs over time. The first bar in the graph includes the sum of international judicial litigation before 1989. The rest of the table includes litigation by year across the eighteen active ICs (the ECJ and the ECHR are excluded). IC usage has increased in part as a function of more ICs existing, and thus as a result of the proliferation of enforceable international rules. But IC usage has also increased because these are new-style ICs. Graph 2.2 shows that after the ECJ and the ECHR, the next most active courts are the Andean Tribunal of Justice (ATJ) (1492 rulings), the WTO legal system (370 panel and appellate decisions), the OHADA court (274 rulings) and IACHR (152 rulings).[20]

Graph 2.2: Growth in IC Decision-making through 2006 (ECJ & ECHR excluded)



Exploring the link between IC design and IC activity

A number of scholars have hypothesized that wider access to ICs would contribute to greater IC effectiveness, in large part because wider access would provide the court with more opportunities to build its doctrine and to connect with individuals and sub-state actors who have a stake in seeing international rules respected.[21] Most claims about the importance of IC design are based on the European cases, where scholars realized that the ECJ's extraordinary experience

[20] See: (Helfer and Alter 2009; Alter and Helfer Manuscript in progress)
[21] For example, see note 14

had been facilitated by its preliminary ruling mechanism. This mechanism allows national court courts to stop legal proceedings to send a question to the ECJ. The ECJ's ruling is then applied by national courts, giving the ECJ a way to harness national courts as enforcers of European law.[22] While the ECHR lacks a preliminary ruling system, scholars observed that private access to the ECHR has radically transformed the role the court plays in European politics.[23] It does appear that new-style ICs are more active compared to old-style ICs, but to what extent can we say that IC design contributes to litigation rates?

There is prima facie support for linking the design of ICs with litigation rates.[24] Table 2.2 below identifies design changes, including only the most significant changes agreed to by states in amendments to the treaties that define the Court's authority. The WTO system changed from non-compulsory to compulsory jurisdiction. The ATJ, ECHR and ECOWAS widened access so that private actors could more easily pursue complaints. The ECJ added caseload capacity by creating a Tribunal of First Instance in 1988, and it added sanctioning capability in 1993. One interesting observation from the table below is that among the most active and controversial ICs, the trend over time has been to enhance the very features that contribute to these courts being active and controversial.

Table 2.2- ICs with Significant Design Changes Over Time

Court	Year Created	Year of IC Reform	Significant Design Changes
European Court of Justice (ECJ)	1952	1988, 1993 + Lisbon Treaty	Tribunal of First Instance (TFI), created in 1988 to relieve pressure on the ECJ, hears labor disputes and direct action cases against the European Commission. Its rulings can be appealed to the ECJ, thus the ECJ gained appellate jurisdiction in 1989. TFI jurisdiction extended in 1993, 1994, and 2004, allowing it to make references to the ECJ for certain questions. The Maastricht Treaty (1993) created a system for financial sanctions for non-compliance with ECJ rulings. Once ratified, the Lisbon Treaty will give the ECJ jurisdiction over some asylum and criminal cases.
World Trade Organization (WTO)	1953 (GATT)	1994	The *General Agreement on Tariffs and Trade* had a dispute settlement system where states could block the formation of a panel, and where unanimous consent was required for panel rulings to be adopted. The WTO system makes panel formation automatic and requires a unanimous vote to keep panel reports from being accepted. In other words, the WTO system has compulsory jurisdiction where the GATT system did not.

[22] (Weiler 1991; Burley and Mattli 1993)
[23] (Helfer 2008). Slaughter and Helfer also developed a general theory based on European examples: (Helfer and Slaughter 1997)
[24] (Keohane, Moravcsik, and Slaughter 2000)

Andean Tribunal of Justice (ATJ)	1984	1996	The Cochabamba reforms allowed private actors to bring non-compliance suits to the attention of the Andean General Secretariat (GS), and to raise the suit directly in front of the ATJ if the litigant remained unsatisfied with the GS's pursuit of the case. With this change, the GS could overcome state reluctance to raise a suit, since the GS could tell the state that one way or another, the case would end up in front of the ATJ.
European Court of Human Rights (ECHR)	1959	1998	Protocol 11, which came into legal force in 1998, eliminated the role of the Commission in bringing cases to the ECHR. Since 1998 private actors are able to make direct appeals to the ECHR, after they have exhausted domestic remedies. Discussions are underway to adopt changes to deal with a crushing backlog of cases in front of the ECHR.
Inter-American Court of Human Rights	1979	2001	Before 2001, the Inter-American commissions decided on majority vote whether or not to refer a case to the IACHR, and there was a bias against referring cases. As of 2001 the Inter-American Commission submits to the court cases where it has found a violations.
Court of Justice of the Economic Community of West African States (ECOWAS)	2002	2005	The ECOWAS court, established by treaty in 1995 but only constituted in 2002, gained jurisdiction over human rights violations in 2005. Private actors were given direct access to the ECOWAS court to pursue human rights violations.

The change in design does correlate to some extent with rising litigation rates, but not entirely. If we return to Graph 2.1, we can see that litigation in the ECJ rose when the Tribunal of First Instance was created, increasing the capacity of the European legal system as well as the types of decisions that were subject to appeal. Overall, however, it is hard to see design changes as affecting ECJ litigation rates, especially if one considers that the EU enlarged to include more member states in 1973, 1981, 1985, 1995, 2004, and 2007. It is interesting to note that the addition of financial sanctions for non-compliance appears to have left a negligible mark on litigation rates.[25]

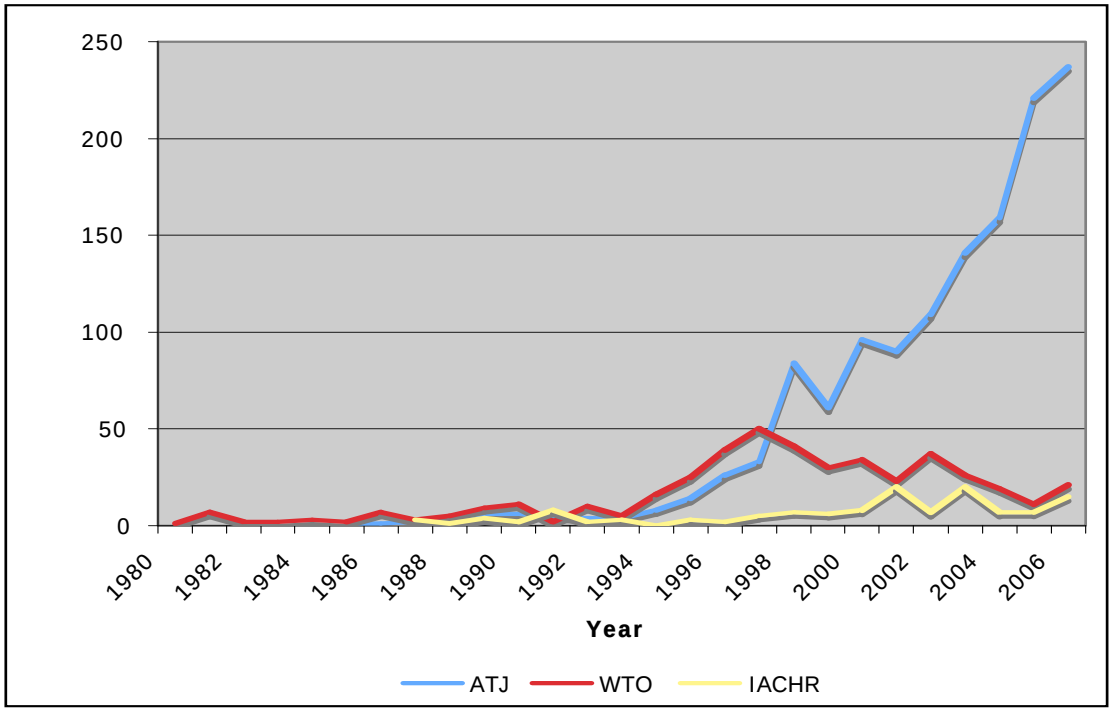
By contrast, rising ECHR litigation rates do seem to correlate with the change in the court's design. Table 2.2 shows that the ECHR's litigation rates begin to rise in the early 1990s, during the time when Protocol 11 was being ratified by member states. This rise arguably reflects the greater willingness of the Commission to refer cases to the ECHR, in anticipation of the day when private actors will on their own be able to pursue their claims in front of the ECHR. Litigation rates take off after 1998, well before the growth of ECHR membership.

Graph 2.4 below explores litigation rates for the other three ICs experiences significant design changes over time (ECOWAS data is too incomplete to chart). We can see a clear change

[25] On compliance with ECJ rulings, see: (Tallberg 2003; Börzel 2001, 2000)

in the litigation rates of the courts based on the change in the ICs design to include compulsory jurisdiction (WTO, in 1994) and more relaxed rules for access to the court (ATJ (1996), IACHR (2001), ECOWAS(2005)).

Graph 2.3: Litigation Rates over Time ATJ, GATT/WTO, IACHR



WTO data includes all panel decisions adopted plus appellate body reports. ATJ & IACHR data includes only IC rulings.

While one can find a correlation between IC decision and litigation rates, if design alone explained the higher litigation rates we would expect all new-style ICs to be fairly active. On the one hand, many of today's "new style" ICs are also recent creations so that it may well be too early to say how IC design matters. Still, it seems quite likely that other factors matter equally if not more. Indeed it is equally likely that the factors that led to the design changes also led to the greater IC activity. The change in the WTO system's design came with a larger shift within the WTO that included expanded membership, and an expansion of the area of law governed by common rules to include trade in intellectual property, and trade in services. Changes in the Andean legal system came at around the same time as common intellectual property legislation came into force. While the change in ATJ design did contribute to a rise in the number of noncompliance cases raised by the General Secretariat, the largest increase in the ATJ's docket

came as a result of the new intellectual property legislation.[26] For the ECOWAS court, the expansion of the court's jurisdiction to include human rights explains both why private access was extended and why the ECOWAS court became (somewhat) busier.

We can say at this point that compulsory jurisdiction appears to be a necessary component of higher IC activation rates, that private access seems to further increase the number of cases ICs hear. But neither of these design features is sufficient to create active and influential ICs. Meanwhile, these correlations do not control for other factors that might matter, such as increased legalization in the form of a larger number of binding and fairly precise legal rules.[27] I return to the factors shaping IC litigation in chapter 7.

Subject Matter Distribution of Delegation to ICs

Delegation to ICs generally clusters around three issues—economic issues (e.g. trade, foreign investment regulation, contract disputes, intellectual property), human rights, and war crimes. There are also a few ICs with an additional general jurisdiction to hear pretty much any inter-state dispute involving member states (though except for the ICJ, the IC's general jurisdiction is rarely if ever invoked). Table 2.2 below identifies active ICs by the subject matter they oversee, organized by the date the IC was created. A court can be listed more than once, if its jurisdiction extends beyond a single category (indicated by using the acronym only). This table also includes new ICs that at this point exist mostly on paper and quasi-judicial institutions, providing a glimpse of what might come as ICs come into operation.

[26] (Helfer and Alter 2009)
[27] Stone has tried to investigate the factors that influence ECJ litigation rates, but data limitations combined with colinearty make it hard to disentangle the relationship between trade, legislating, and litigation. (Stone Sweet 2004: 50-64).

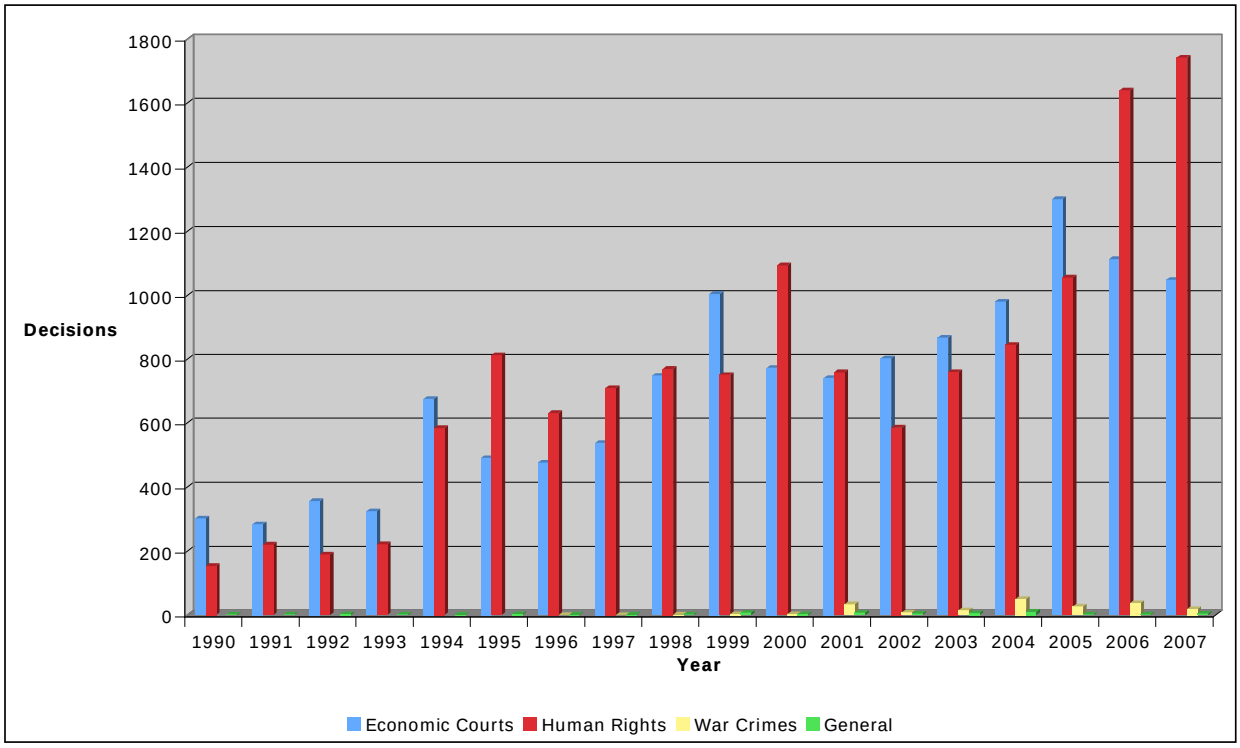
Table 2.3 Subject Matter Jurisdiction of International Courts (by year created)

	Economic (Trade, Financial & Commercial disputes)	Human Rights	War Crimes	General
Active ICs N=20	European Court of Justice (ECJ) (1952) Benelux court (BCJ) (1974) Andean Tribunal of Justice (ATJ) (1984) Economic Court of the Common- Wealth of Independent States (ECCIS) (1992) Central American Court of Justice (CACJ) (1992) European Free Trade Area Court (EFTAC) (1994) World Trade Organization Appellate Body (WTO) (1994) Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA) (1997) Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998) Court of Justice of the East African Community (EACJ) (2001) Economic Community of West African States (ECOWAS) Court of Justice (2002) Caribbean Court of Justice (CCJ) (2004) Southern Common Market (MECUSOR) (2004)	European Court of Human Rights (1959) Inter-American Court of Human Rights (IACHR) (1979) CCJ has jurisdiction involving death penalty cases, but only for certain countries (2004) ECOWAS Court gained jurisdiction over human rights issues (2005) [EACJ envisions adding a human rights protocol]	International Criminal Tribunal for Former Yugoslavia (ICTY) (1993) International Criminal Tribunal for Rwanda (ICTR) (1994) International Criminal Court (1998)	International Court of Justice (ICJ) (1946) International Tribunal of the Law of the Sea (ITLOS)(1996) Can hear nearly any inter-state dispute among members BCJ (1974) CACJ (1990) EACJ (2001) CCJ (2004)
Total	13	4	3	6
Largely Paper Courts N=8	Organization of Arab Petroleum-Exporting Countries (OAPEC) (1972) The West African Economic and Monetary Union Court (WAEMU) (1995) Community of Central Africa Court of Justice (CEMAC) (2000) Association of Southeast Asian Nations (ASEAN) Tribunal of the Southern African Development Community (SADC) (2007) Court of Justice for the Arab Magreb Union (AMU) (not	African Court of Human and Peoples Rights (ACHR) (not yet operational)		

	yet operational) Court of Justice of the Economic Community of Central African States (ECCAS) (not yet operational) African Court of Justice (ACJ) Court of the African Union (not yet operational)			
Non-permanent bodies (partial list)	Permanent Court of Arbitration (1899) NAFTA (1992) International Centre for Settlement of Investment Disputes (1965) Arbitration and Mediation Center of the World Intellectual Property Organization (1994)	UN Human Rights Bodies	Crimes Panels of the District Court of Dili Regulation 64 Panels in Kosovo Court for Sierra Leone Extraordinary Chambers in the Courts of Cambodia	Courts set up for particular conflicts (e.g. Iran-US Claims tribunal, Eritrea-Ethiopian Claims Tribunal, Marshall etc)

When one overlays IC activity on subject matter litigated, it is clear that numerically speaking most international disputes that are litigated involve human rights and economic issues (See Graph 2.5). This finding mainly reflects both the number and age of economic courts and the extent of binding international economic legislation, and the high activity of the European Court of Human Rights. Meanwhile, the lack of international criminal rulings reflects the new nature of international criminal courts and the reality that these courts focus on only the most egregious perpetrators of war crimes.

Graph 2.4: IC Activity by subject matter of court



Regional Distribution of ICs

ICs are also regionally distributed. Table 2.4 shows that Europe and Latin America and Africa have roughly an equal number of ICs. If we added in the inactive ICs listed on table 2.1, Africa would lead the pack in term of the number of ICs. At the same time, most African ICs are either paper courts, or fairly inactive courts. Europe's ICs are the most active, followed by Latin

American Courts. Only the ECOWAS, OHADA and EACJ courts in Africa have meaningfully sized dockets.

Table 2.4 Regional Distribution of Active ICs (by year created)

Subject Matter	Europe	Latin America	Africa	Pan-Regional
Economic Courts	European Court of Justice (1952) Benelux court (1974) Economic Court of the Common- Wealth of Independent States (ECCIS) (1992)	Andean Tribunal of Justice (ATJ) (1984) Central American Court of Justice (CACJ) (1992) Caribbean Court of Justice (CCJ) (2001) Southern Common Market (MERCUSOR) (2004)	Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998) Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA) (1997) Court of Justice of the East African Community (EACJ) (2001) Economic Community of West African States (ECOWAS) Court of Justice (2002)	World Trade Organization Appellate Body (1994)
Human Rights Courts	European Court of Human Rights (1959)	Inter-American Court of Human Rights (1979)	ECOWAS Court (2005)	
Criminal Courts	International Criminal Tribunal for Former Yugoslavia (ICTY) (1993)		International Criminal Tribunal for Rwanda (ICTR) (1994)	International Criminal Court (2004)
General Jurisdiction	BCJ	CACJ CCJ		International Court of Justice (ICJ) (1946) International Law of the Sea Tribunal (ITLOS) (1996)
Total courts N=20	6	5	5	4

The data on Table 2.4 suggests that regionalization is contributing significantly to the trend of creating ICs. The WTO system actually makes regionalization more likely. The WTO system allows regional organizations to deviate from the WTO's general rule of extending most-favoured-nation status to all WTO member states.[28] Also, because states are already bound by the compulsory dispute settlement system of the WTO, adopting regional compulsory dispute

[28] (Barton et al. 2006: Chapter 6)

adjudication is less sovereignty compromising. Regional systems can be substitutes for WTO adjudication, with the added benefit that the precedent does not extend beyond the region.

Much, though not all, of this regionalization appears to emulate the European model of building common markets using supranational institutions, and delegating authority to ICs to help enforce the agreements and to police the actions of supranational actors. Borrowing legal transplants from Europe is hardly a new phenomenon. Indeed most domestic legal systems around the world are modelled on European systems.[29] Given the well-known success of Europe's international courts in facilitating larger objectives of the international systems in which they operate, it is not surprising that Europe's ICs loom large in the mind of the diplomats charged with designing international courts.[30] Table 2.3 draws from the universe of ICs defined in Table 2.1 those that have explicitly borrowed from the European model of an IC. There are 8 ICs (plus 2 proposed ICs) that have copied having a supra-national prosecutorial type actor pursue enforcement actions. There are 7 ICs (plus 1 proposed) where national courts can stop proceedings to send a preliminary ruling question to the IC. The copying of the European model is not limited to the design of the court. Often the framework agreements of the common market are adaptations of the European Economic Community's Treaty of Rome, and the courts themselves look to the ECJ to see how it handled similar legal issues. The European model also brings with it a direct link between domestic courts and international courts, which in theory should facilitate the penetration of supranational rules into domestic orders.[31] By contrast, the WTO model (adopted by NAFTA, MERCOSUR and ASEAN) relies on ad hoc panels that are formed based on the request of state parties.

Table 2.5 ICs Explicitly Modelled on European Courts (by year established)

International Court	Supranational Commission can raise non-compliance suits	System of National Court Referrals to ICs	Appellate review of national court rulings
Benelux court (BCJ) (1974)		X	
Inter-American Court of Human Rights (IACHR) (1979)	X		De facto
Andean Tribunal of Justice (ATJ) (1984)	X	X	
European Free Trade Area Court (EFTAC) (1994)	X	(Advisory Opinions Only)	

[29] On the practice of transplanting legal institutions, see: (Berkowitz, Pistor, and Richard 2003)
[30] (Alter 2009; Stone Sweet 2004)
[31] (Helfer and Slaughter 1997)

West African Economic and Monetary Union (WAEMU) (1995)	X	X	X
Common Market for East African States (COMESA) (1998)	X	X	
Central African Monetary Community (CEMAC)(2000)	X	X	
East African Community Court (EACJ) (2001)	X	X	By special protocol
Southern African Development Community (SADC) (2007)	X	X	
African Court of Justice (ACJ) (proposed)	X	X	
African Court of Human Rights (ACHR) (proposed)	X		De facto

What patterns are associated with adoption of the European model? Two of the 11 European emulators are themselves European courts. The BENELUX court covers agreements adopted by Belgium, Luxembourg and the Netherlands in areas not covered by EEC authority. The EFTA court copies the ECJ's design so that countries that are not part of the EEC can still raise cases that involve legislation governed by EEC-EFTA agreements. For the other nine European imitators, the pattern of emulation suggests that Europe's model is most likely to be embraced by poor countries. African regional organizations are most likely to borrow from Europe, meanwhile in Latin America only the ATJ has borrowed from Europe. Copying the European system has a number of benefits. The European model involves a greater state commitment to supranational oversight, which may be useful for attracting foreign investment. Also, aid from the EU makes embracing the European model attractive. The aid exists in multiple forms. The EU sends advisors, creates legal exchanges and organizes conferences among member states to help out fledgling regional institutions. European universities can also train lawyer in European integration law, and thus they can provide training for lawyers who will work with regional integration laws in Latin America or Africa.

Even where European institutions serve as models and guides, international legal institutions will be highly affected by the context in which they operate. Two recent studies have compared the politics of two of the ECJ emulators, the Andean Tribunal of Justice and the East African Court of Justice. In both communities private litigants have asked the community court to review state and IO policies that violate community rules. Both of these courts looked to the ECJ's doctrines of the direct effect and supremacy of European law as inspiration, suggesting that these doctrines also pertain within their community. But in both contexts litigants were often unable to elicit from the court integration oriented rulings that concretely helped their case

because the ICs stopped short of declaring null and void conflicting national laws, or legally requiring national courts to set aside conflicting laws. The different behaviour of ICs across contexts may be explained by IC concerns that national judges will apply the IC's ruling or the Community rule instead of national law. Both in terms of law-making hesitancy of the IC and the real ability to transform politics, these studies suggest that the spread of the European model does not necessarily bring with it the EU's legal politics.[32]

One should not overemphasize the importance of the European model. If we focus on the twenty active ICs involved in this study, there are four European courts and four additional emulators of the European model. Meanwhile there are 18 new style ICs, and thus many ICs are not based on the European model. Something else is accounting for the trend in designing new-style ICs. The next section considers how the expansion of judicial roles shapes the design of ICs.

There is one more noteworthy element of the geographic trend. Notwithstanding that Asia has a highly integrated regional economy, in comparison to Africa, Latin America, or Europe Asia has few regional economic regimes with formal legal dispute settlement mechanisms. The Association of Southeast Asian Nations (ASEAN) upgraded its dispute settlement system in 2004, mimicking the WTO design.[33] Meanwhile, the Asia-Pacific Economic Cooperation Agreement (APEC) (which is a combined venue for three separate economic blocs – Northeast Asia, Southeast Asia, Oceania with the US and Chile the only members from outside the region) still lacks a formal dispute settlement mechanism.[34]

Asia may lack active regional courts, but Asian countries are members of pan-regional ICs, and thus ASEAN countries are not excluded from the global trend of the judicialization of politics. Erik Voeten reviewed trends in a number of international legal systems to see if the general perception that Asian actors avoid international legal mechanisms bears any truth. Looking on data regarding Bilateral Investment Treaties, Voeten finds that Asian countries are

[32] (Alter and Helfer Manuscript in progress; van der Mei 2009)
[33] While the ASEAN system envisions creating an appellate body to review contested panel rulings, the ASEAN dispute settlement system is moribund. For now, the appellate body (when it is actually created) will be a list of officials who will be assigned to review contested panel decisions, with assignments made in rotation as cases arise. ASEAN Protocol on Enhanced Dispute Settlement Mechanism (http://www.aseansec.org/16754.htm)
[34] It is also true that all members belong to the WTO, which offers a substitute venue for disputes. Singapore did raise a dispute involving Malaysia in the WTO, though the case settled out of court . DISPUTE DS1 Malaysia — Prohibition of Imports of Polyethylene and Polypropylene. This was the WTO's first dispute. It settled in 1995. See: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds1_e.htm

not more reluctant to agree to compulsory arbitration clauses compared to other countries. Asian countries also did not stand out as avoiding the WTO dispute resolution system, or as avoiding international mechanisms designed to deal with territorial disputes. He concludes that the widespread belief that the Asian countries avoid legalized mechanisms is not supported by the systemic review of existing evidence. Voeten suggests that the larger difference in Asian countries embrace of regional systems maybe the underdevelopment of domestic administrative review systems within Asian states. These systems may be less developed than in other regions, but if his speculation is true, the trend is changing.[35] In a recent edited volume, scholars have documented a growing trend of administrative review in Asian countries. Tom Ginsburg argued that WTO membership was one factor contributing to the growing judicialization of politics in Asia:

> The GATT/WTO regime… has had a profound impact on Asian political economies. The shift from the GATT to the WTO had significant consequences for domestic regulatory organization. Article X of the GATT 1994 requires that "Laws, regulations, judicial decisions and administrative rulings of general application […] shall be published promptly…" and administered "in a uniform, impartial and reasonable manner", notably by independent administrative tribunals or procedures. Similar requirements for independent and transparent regulation are found in the newer agreements on services and intellectual property. It is thus clear that international commitments expand the scope of judicial oversight at a national level. While the WTO Agreements do not explicitly require institutional change in non-trade related sectors, in some countries, notably China, they seemed to trigger broader institutional reforms. China agreed to impartial and uniform implementation of its commitments and of trade-related laws; to substantial transparency and notice and comment procedures of those laws, regulations, and measures; and most dramatically, to set up and maintain impartial judicial review of all administrative action. The WTO became, in essence, an amendment to the Chinese constitution. Internal forces wished to "lock in" commitments before they could be whittled away at the local level, and third-party monitoring, locked in by international agreements, provided the mechanism.[36]

Given the global reach of the WTO system, the ICJ, the ICC, and international human rights law, countries do not need regional courts for international politics to be judicialized.[37] Nor is it clear that African politics are more judicialized just because there are number of regional courts. While regionalization may explain the increasing number of ICs today, regional ICs provide neither a necessary nor a sufficient explanation of the judicialization of politics within a region.

[35] (Voeten 2009)
[36] (Ginsburg and Chen 2008: 9-10).
[37] Most international legal systems today require that litigants choose which international mechanism they use, making it impossible for litigants to raise a suit that has been adjudicated elsewhere.

II. A First Cut Functional Explanation of the Design of ICs

Section I identified a number of patterns in delegating authority to ICs. Left unanswered is why most ICs today are new-style ICs. This section develops a functional argument that starts from the premise that states want ICs to play certain judicial roles. Sometimes states want ICs to be able to review the validity of supranational legislation, other times states want ICs to be able to review the legality of IO administrative decisions. Sometimes states want ICs to help enforce international agreements, and other times states want ICs to mainly be available should member states disagree about the meaning of the international agreement. In order for courts to serve certain functional objectives, they need certain minimum design features. The functional argument's main claim is that states make decisions to give certain roles to ICs, and certain elements of IC design follows from the functional role delegated to the court. Subsequent chapters will explore *why* certain courts were delegated certain roles; for now I am interested only in the fact that specific roles have been delegated to specific courts. The discussion here focuses on the minimum design of courts that is required if the court is to play a given judicial role. Descriptions of each judicial role are in Chapter 1.

Coding Delegation of Judicial Roles to ICs

The key question becomes: How do we know what functions states delegated to the court? Answering this question is fairly easy. We look at the founding document, the delegation contract, which defines the terms of delegation of authority to the IC. Each IC is created by a treaty; either a separate treaty that defines the roles, appointment processes and jurisdiction of the IC, or a series of articles within a larger treaty that provides a skeletal structure for the court. I give the general name of "Court Treaty" to the formally adopted inter-state agreements that define the jurisdiction and basic design of international courts (See Appendix I for a list of the IC Court Treaties).[38] By examining the language in Court Treaties, I can identify explicit grants of judicial authority. I coded the current Court Treaties of my twenty active ICs, which incorporate amendments over time, looking for specific wording that grants jurisdiction to the IC. This technique ensures that I capture the powers delegated to the IC without imputing a role from the behaviour of the IC. Court Treaties are usually composed of a series of articles, with different jurisdictional powers delegated to ICs in different articles so that states are able to pick specific

[38] ICs often have separate documents laying out the rules of procedure. The designation of a "Court Treaty" refers to the grants of jurisdictional authority, not to rules of procedure.

design features for specific roles. More than one role can be delegated to a single court, and design features (e.g. whether the IC's jurisdiction is compulsory, which actors can raise a suit) can vary by role. For the most part, the coding definitions are straightforward. Courts either have been given constitutional, administrative or enforcement powers, or they have not.

The discussion that follows indicates the provisions in Court Treaties that I used to identify which role was delegated (Summarized in Table 2.7 below), and the functional minimal design requirements for each role. The designation of which courts were given which roles comes from the language of the Court Treaties, not from the design of the court. The "functional explanation of IC design" is tested by correlating the actual design of ICs for each role. Where IC design meets the minimum required for the role, its design is not very puzzling. Where IC design exceeds or falls short of the minimum design criteria, the deviation is (potentially) puzzling.

Table 2.6: Coding Delegation of Authority to Different ICs

Role	Court Treaty Language	Sample Treaty Provision
Dispute Settlement Authority to hear disputes among contracting parties.	General jurisdiction to "interpret the meaning of the law" or jurisdiction to resolve disputes.	ICJ Statute of the Court, art. 36 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
Enforcement Authority to declare state noncompliance with the law.	Authority to adjudicate breech of agreement, nullification or impairment of rights under the agreement, or compliance with the agreement	ATJ Treaty, art. 23 If the General Secretariat considers that a Member Country has failed to comply with its obligations under the provisions or Conventions comprising the legal system of the Andean Community, it shall submit its observations to that Member Country in writing. The Member Country must respond to those observations within a period set by the General Secretariat in keeping with the urgency of the case, which shall not exceed sixty days. Once the reply has been received or the term has expired, the General Secretariat shall issue an administrative ruling, which must include its reasoning, regarding the state of compliance with those obligations. If the General Secretariat decides that the Member Country has failed to comply with its obligations and it continues with the behavior that was the subject of the observations, the former shall request a decision from the Court as soon as possible. The Member Country affected by that noncompliance can join the General Secretariat in the action.

Administrative Review Authority to review of decisions of administrative actors to determine if the decision respects the confines of authority delegated to the administrative actor.	Jurisdiction in cases concerning the legality of any action, regulation, directive, or decision of a public actor, or the public actor's "failure to act."	EC Treaty, art. 230, 231, 232 The Court of Justice shall review the legality of … acts of the Council, of the Commission and of the ECB…It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers…Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former. (Article 231 states that 'If the action is well founded, the Court of Justice shall declare the act concerned to be void.' Article 232 allows "failure to act" suits on similar terms).
Constitutional Review Authority to invalidate acts of legislative and executive bodies on the basis of a conflict with a higher order legal requirement.	Jurisdiction to review the legality or validity of any legislative act, regulation, directive, of an IO and/or a state.	East African Community Treaty Article 28 (2): A Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action on the ground that it is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power. Article 30: Reference by Legal and Natural Persons Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty.

Minimum Design Requirements for Dispute Settlement *Authority*

While it is easy to see when a court has been given explicit administrative review authority, or enforcement authority, dispute settlement is a catch-all category. Every treaty includes a provision regarding dispute resolution, although not every treaty delegates dispute resolution authority to an IC). Moreover, every legal case can be seen as involving dispute resolution since every "concrete" legal case has two parties who disagree (otherwise the parties would have settled out of court), leading to a judge interpreting and applying the law to render a ruling. Given its ubiquitous nature, judicial dispute settlement authority has to be identified in terms of what it is not. International courts with dispute settlement authority have a formal jurisdiction to "interpret the meaning of the law" or "settle disputes" in concrete cases brought before them. A judge stays entirely in a dispute settlement role when it lacks the authority to speak to the validity of the national or international law, or about the validity of a public actor decision in executing the law.

Dispute settlement is the only judicial role lacking a minimum design requirement; dispute settlement mechanisms can work even if the process is not compulsory, the parties pick the judges, the decision is only declaratory, and the ruling is not at all based on preexisting rules. Indeed, arbitration, mediation, "good offices," and judicial proceedings are all different forms of dispute settlement, effective as long as the two parties believe that the dispute settlement mechanism is fair. In fact thirteen of the fifteen ICs with international dispute settlement bodies are given compulsory jurisdiction, suggesting either that dispute settlement authority is intended to serve as decentralized enforcement mechanisms for the treaty (3 of 15), or that the IC already has an enforcement authority (7 of 15 cases) in which case there is no reason to avoid extending compulsory jurisdiction to court's dispute adjudication role.

Minimum Design Requirements for Enforcement *Authority*

Enforcement courts have the explicit authority to rule on whether or not a state is in compliance with the treaty's legal obligations. Enforcement authority requires compulsory jurisdiction, otherwise guilty parties would simply block a case from proceeding. Some might see enforcement authority as requiring that there be punitive sanctions where violations are found. This is a controversial claim that is yet to be validated by research. Studies on why actors comply with the law find that fear of a sanction does motivate compliance but that it is not the only or even the most important factor shaping actor decisions to obey the law.[39] Meanwhile, studies that emphasize the centrality of sanctions also accept that sanctions can have many forms, including reputation effects, so long as there is some set of undefined "costs" associated with noncompliance.[40] Given the controversy, and given that many ICs are not given coercive remedies yet they still manage to influence state behavior, coercive sanctions cannot be seen as functionally required for an enforcement court.

There are 2 different approaches to international enforcement mechanisms, each of which involves a different design choice. For centralized enforcement systems, an international prosecutor will be the primary enforcer raising noncompliance suits. For decentralized enforcement systems, injured parties (states or private actors) will raise suits. States creating enforcement courts must chose one of these two options. Some systems adopt a centralized approach, which they then augment with decentralized enforcement.

[39] (Tyler 2006)
[40] (Downs 1998; Downs and Jones 2002)

The question remains as to whether granting a court dispute settlement authority is intended as a decentralized tool of enforcement, or as a mechanism to facilitate the settlement of disagreements between states. While a number of enforcement ICs also are authorized to settle disputes involving member states, the dispute settlement role is both broader and more vague. IC dispute settlers are authorized to rule on any disputes of a legal nature that states submit. The ICJ defines international legal disputes as " a disagreement on a question of law or fact, a conflict, a clash of legal views or of interests."[41] This definition can include enforcement cases, thus dispute settlement bodies with compulsory jurisdiction can become enforcement courts. But this definition does not need to include enforcement issues.

Minimum Design Requirements for Administrative Review Authority

Administrative review is designed to help legislative actors monitor how governmental agents, mostly regulatory agencies, exercise their delegated authority. It is a fire-alarm system of oversight where the subjects of administrative actions are able to contest administrative decisions that arrogate the authority that was delegated to the administrative actor.[42] The grant of administrative review authority is indicated by giving the court jurisdiction to hear cases regarding the legality of decisions of actors that rely on delegated authority. In these cases, the court has the authority to annul illegal administrative acts. Since non-action is also a policy choice of consequence, sometimes courts are also allowed to review or "failure to act" charges for administrative actors, with the legal remedy being a requirement that the administrative act issue a decision, and/or compensate the litigant for its inaction.

For administrative review to serve its purpose, the actors subject to administrative decision-making must be able to bring suits challenging arguably illegal decisions, and administrative actors must be unable to block the review from proceeding. Thus administrative review courts have compulsory jurisdiction and private access. Usually there is a legal standing requirement that private actors show that a decision has a direct personal impact.

Constitutional and administrative review are similar in that in both roles IC have the authority to nullify offending acts. Indeed some court treaties define administrative and constitutional review roles for ICs in the same provision, authorizing ICs to review both the

[41] See: http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1
[42] See Chapter 1 note 19 and (Weingast and Moran 1983)

validity of secondary IO legislation and the legally binding decisions of supranational administrators. But as Chapter 1 explained, these are distinct judicial roles. Administrative review is primarily other-binding, whereas constitutional review is primarily self-binding. Constitutional review nullifies a law that can only be resurrected via collective legislative action, whereas administrative review remands a decision back to an administrator to try anew. There are also design distinctions. Constitutional review authority can be extended to cases raised by private actors, but it does not have to be extended for constitutional review to exist. Meanwhile, administrative review *requires* private access. Administrative review also involves "failure to act" cases, whereas there is no legal requirement that states legislate. In terms of practice, we see that all ICs with constitutional review authority also have administrative review authority (seven ICs), but an additional four ICs have administrative review authority only.

When ICs have authority to review the decisions of supranational administrators, delegation of administrative review authority is clear. A number of ICs, however, also have the authority to issue preliminary rulings in cases that appear before national judges. Most of these national court cases involve the review of national administrators that are implementing common rules.

Minimum Functional Requirements for Constitutional Review Authority

As Chapter 1 explained, constitutional review authority intentionally subjugates sovereign actors to a set of higher order constitutional commitments. The commitments usually are aimed at protecting the system of checks and balances by locking in procedural rules of governing. Constitutional review is also often designed to protect the rights of sub-state actors (individuals, states, localities etc.) from supranational encroachment.

The functional expectation of constitutional review authority is reflected in granting the court jurisdiction to review the validity of laws. With this authority, the IC is asked to determine whether acts taken by international legislative actors are *ultra vires* (exceeding the authority of the bodies). A law could be *ultra-vires* because the legislative process through which the law was enacted violated some procedural requirement (e.g. consultation with parliaments for example) or because it violates fundamental elements of the constitution (e.g. human rights protections, separation of powers etc).

Constitutional review requires compulsory jurisdiction, otherwise the actors that tried to circumvent the constitutional constraints would simply block the case from proceeding.

Delegation of constitutional review authority does not per se require private access. Indeed for many years the French Constitutional Council only had *abstract constitutional review authority*; the Council could be seized by sixty parliamentarians, the president of each chamber or the president of the country, and only before the law in question was actually promulgated.[43] Abstract judicial review is a binding form of constitutional review, but most people think that constitutional review authority is most meaningful when constitutional bodies have *concrete constitutional review* authority, meaning the ability to review the constitutionality of a law in concrete cases that arise. Without concrete judicial review, it is hard to ensure that constitutional laws are implemented in ways that remain constitutional. Concrete judicial review authority usually requires that private actors be allowed sue to ensure that their rights protected (after all, the threshold of requiring a state or a bloc of parliamentarians makes it hard for minority groups to seize the court so as to protect their rights). Table 2.8 will show that in practice, all international systems with constitutional review authority allow private actors to seize the IC for the purpose of constitutional review. States generally extended private access so as to make the IOs more accountable, and to increase the connection between individuals and the rather remote common market institutions. A side effect is that wide access increases the possibility that *ultra vires* collective policies will be challenged in court, and thus it extends capacity of ICs to monitor IO behavior.

The remedy of constitutional review is that *ultra-vires* parts of the law are nullified, and thereby rendered inapplicable. Sometimes ICs have the explicit authority to void or nullify laws. Where the remedy is unstated (as in the sample statute below), the remedy is implicit. It is hard to imagine an IO trying to enforce a law or decision that had been declared illegal by an IC, thus the sample provision below seems to be complete. But as Chapter 6 will show, IC declarations of international illegality do not necessarily have a domestic effect. Where ICs are empowered to rule on the legality of national acts, with no explicit remedy, there is ambiguity as to domestic effect of the IC ruling.

Design Variations across Judicial Roles

[43] (Stone 1992). Stone Sweet defines three types of constitutional review powers. *Abstract review* involves reviewing the constitutionality of laws before they are actually promulgated. *Concrete review* involves assessing whether the application of a law in a concrete case is constitutional. Finally there can be private appeals of whether a law violates a person's constitutionally protected rights. For more, see: (Stone Sweet 2000:41-9)

Table 2.7 summarizes the varied minimum design criteria for each role. Enforcement, administrative and constitutional review roles require compulsory jurisdiction, thus the rising trend of delegating these types of authority to ICs can explain part of the change in IC design. The rise in delegating administrative and constitutional review authority, and the decision to create centralized enforcement mechanisms, explains why nonstate actors (IO actors and private litigants) are increasingly given access to ICs to initiate litigation. The table also identifies typical enhancements for the IC in the role. Table 2.9 will reveal that many ICs exceed the minimum design required for the role. One reason that ICs exceed their minimum design is that the court has been delegated multiple roles, so that it makes not sense to limit the compulsory jurisdiction of the court for the dispute settlement role. Another reason to exceed the minimum is to signal a greater state intent to be bound by the authority of an IC.

Table 2.7: Minimum Design Criteria Across Judicial Roles

Role	Compulsory Jurisdiction	Access to initiate litigation	Remedies	Typical Enhancements (optional)
Dispute Settlement Authority to hear disputes among contracting parties.	Optional	State Access	Binding ruling.	
Enforcement Authority to declare state noncompliance with the law.	Required	State Access	Findings of noncompliance.	International prosecutorial actor to monitor and pursue noncompliance. Coercive sanctions.
Administrative Review Authority to review of decisions of administrative actors to determine if the decision respects the confines of authority delegated to the administrative actor.	Required	Private litigant access	Nullification of illegal administrative decisions; orders for action where administrators have failed to act.	Compensation for injuries incurred by administrative negligence.
Constitutional Review Authority to invalidate acts of legislative and executive bodies on the basis of a conflict with a higher order legal requirement.	Required	States + Supranational institutions	Nullification of unconstitutional statutes.	Private access to initiate litigation (e.g. concrete judicial review).

Judicial Role Morphing

Common law lawyers who have seen judges regularly span judicial roles, even in a single case, tend to be uncomfortable with the ideal typical categorization of judicial roles. Civil law

lawyers tend to more readily see the logic of differentiating judicial roles, as these judicial roles often reflect the formal organization of national civil law systems. Further confusing the issue is that a number of legal scholars see emerging international constitutional courts, which suggest that international legal mechanisms easily morph beyond their original design.

Judicial roles do not always or even generally morph, but it is probably in the most important and legally complicated cases where roles end up blurring. Morphed judicial roles can emerge when the IC accepts a litigant's invitation to expand its legal review, and when IC expansions become accepted by litigants and legal communities to the point the new role comes to be seen as part and parcel of the court's authority. When cases raise multiple questions, and when roles morph, the judicial roles become hats that judges put on as they address legal questions that fall under the categories of administrative review, enforcement or constitutional review.

A few types of role-morphing are more likely. Probably the most prevalent international judicial role morphing is that compulsory dispute settlement can morph into enforcement authority, with states invoking an IC as a tool to help enforce an international law. When a state charges that another state's policy violates international law, the IC dispute settlement ruling may resemble an enforcement case. Yet dispute settlement does not always become enforcement. The Gulf of Maine case, discussed in chapter 1, involved a genuine dispute over where the maritime border dividing the United States and Canada lay. The ICJ's *Avena* ruling addressed a lacunae in the law, namely the question of what happens in the event that consular rights are mistakenly denied to a plaintiff? Neither of these cases involved a hidden enforcement agenda.

Less prevalent, though still possible, is that an enforcement role can morph into a de facto constitutional review role if IC findings of non-compliance are seen as requiring that governments change their practices. Chapter 6, however, explains that in most national legal systems IC rulings do not have direct effects. Rather, international law resides in a domestic legal Neverland where international legal violations are not considered domestic legal violations. Only in Europe have domestic actors come to see an ECJ rulings as de facto nullifying conflicting national acts. Thus again we see that role morphing is the exception rather than the rule.

Lawyers often raise the concern that administrative review will blur into constitutional review, with ICs implicitly speaking to the validity of certain policies and interpretations of the

rules. Administrative review authority is more likely to blur into constitutional review in common law systems and where governments make policy through administrative decision-making. The vast majority of international administrative review cases involve ICs reviewing technical aspects of the administrative application of international regulations, with no larger policy implication at stake. While one could likely find a few examples from among the 29,000 IC decisions, challenges to administrative decisions regarding international rules probably present the least likely situation in which judicial roles will morph.

The most likely form of role morphing involves the enforcement of international human rights law. Most domestic legal systems see human rights obligations as higher level legal obligations, and in many countries domestic constitutions explicitly create prohibitions against violating individuals human rights. Yet, international human rights courts are clearly set up as enforcement bodies, not constitutional review bodies. While ICs may instruct governments to change policies, IC rulings do not nullify legal texts or render unconstitutional domestic practices that are found to violate international human rights obligations. I consider human rights courts in more detail as I discuss delegation of enforcement authority, and the emergence of morphed constitutional review roles.

The Empirical Record of Delegating the Four Roles to Different ICs

Table 2.8 reveals the result of coding the Court Treaties of the twenty active ICs, and thus the empirical record of states explicitly delegating different types of authority to ICs. This coding can be seen as presenting a baseline floor of what states expected the IC to be doing when it was created. The Xs in each column represents the universe of active ICs that have explicitly been delegated specific roles. Arrows suggest a morphed role. We can see that all ICs with administrative and constitutional review authority have been delegated more than one role, and that most of the ICs with dispute settlement authority (10 of 15) have also been delegated other roles. The ICs with the most delegated roles are ECJ clones; but not all ECJ clones were given constitutional review roles.

Table 2.8: The Four Judicial Roles Delegated to ICs (by year court was created)

International Courts (Date created)	Dispute Settlement Role	Enforcement Role	Administrative Review Role	Constitutional Review Role
International Court of Justice (ICJ) (1949)	X			
European Court of Justice (ECJ)/Tribunal of First Instance (TFI) (1952/1988)	X	X →	X →	X
European Court of Human Rights (ECHR) (1959)		X →	→	Morphed role?
Benelux Court (BCJ) (1974)	X		X	
Inter-American Court of Human Rights (IACHR) (1979)		X		
Andean Tribunal Of Justice (ATJ) (1984)	X	X	X	X
Economic Court of the Common- Wealth of Independent States (ECCIS) (1992)	X			
Central American Court of Justice (CACJ) (1992)	X	X	X	X
International Criminal Tribunal for the Former Yugoslavia (ICTY) (1993)		X		
International Criminal Tribunal for Rwanda (ICTR) (1994)		X		
European Free Trade Area Court (EFTAC) (1994)	X	X	X	
World Trade Organization Permanent Appellate Body (WTO) (1994)	X	X		
International Tribunal for the Law of the Seas (ITLOS) (1996)	X		X	
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA) (1996)	X	X	X	
Court of Justice for the Common Market of Eastern and Southern Africa (COMESA) (1998)	X	X	X	X
East African Community Court of Justice (EACJ) (2001)	X	X	X	X
Court of Justice of the Economic Community of West African States (ECOWAS) (2002)	X	Human Rights Only	X	X
International Criminal Court (ICC) (2004)		X		
Southern Common Market (Mercosur) (2004)	X	X		
Caribbean Court of Justice (CCJ) (2004)	X		X	X
Courts with an explicitly delegated role (percentage N=20)	15 (75%)	15 (75%)	11 (55%)	7 (35%)

*If we included courts where compulsory dispute settlement was intended as a tool of enforcement, 15 courts (75%) would have enforcement roles.

Matching Functional Roles and IC Design

Court Treaties allow for the design of ICs to vary by role. The functional argument provides a very good first cut explanation for the design of ICs. Table 2.9 below identifies the design of ICs with each functional role. Grey boxes highlight the minimum design criteria to make it easier to see if IC roles meet minimum design criteria. Access refers to whether non-state actors have standing to *initiate* a dispute. The claim of the functional argument is that the judicial role drives the design of the IC, and thus that we should not find it surprising if the grey boxes are marked with an X. White boxes with an X represent an enhanced legal system. The designs that exceed or fall short the minimum criteria call for additional explanation. The most likely enhancements were identified in table 2.7: centralized enforcement systems allow international actors to initiate litigation, and international constitutional review bodies often allow non-state actors to raise constitutional challenges to community actions.

The evidence in support of the functional argument comes via correlation. If function were not related to design, we would expect the rules for access and compulsory jurisdiction to be more randomly distributed, as opposed to clustered by role. Instead, for most courts the design of the IC matches or exceeds the minimum-design criteria for the functional role. The exceptions where design does not seem to correlate with function include the Inter-American court of Human Rights and the CCJ's constitutional role.

Additional evidence for the functional arguments comes from examining variation in the design of each individual court. If design were not following function, then design choices should be constant within a single IC. The clearest example of design variation concerns the ITLOS court, which has compulsory jurisdiction and private access for the administrative review role, but lacks compulsory jurisdiction and private access for its dispute settlement role. We can see that ICs that allow private access for administrative and constitutional review do not necessarily extend private access to enforcement or dispute settlement roles.[44]

Table 2.8 IC Design and Judicial Roles

Judicial Role & Minimum Design Criteria	ICs with this Role	Compulsory Jurisdiction	State Access	Private access	Supra-National Actor Access
Dispute settlement	ATJ	X	X	*	
No Minimum Design Criteria	BCJ	X	X	Via national courts	
	CACJ	X	X	X	Community officials

[44] With the narrow exception of disputes raised by employees or firms that have entered into a business contract with the institution

	CCJ	X	X	Case by case	
	COMESA	X	X	*	
	EACJ	X	X	*	
	ECCIS	Unclear	X		
	ECJ	X	X	*	Community officials
	ECOWAS	X	X		Supranational Authority
	EFTAC	X	X	Limited	Surveillance Authority
	ICJ	Optional protocol	X		*Advisory opinions only*
	ITLOS	Optional protocol	X		
	MERCOSUR	X	X		
	OHADA	X	*Advisory opinions only*	X	
	WTO	X	X		
Enforcement	ATJ	X	X	X	Secretariat
Minimum Design Criteria	CACJ	X	X	X	Community Institutions
Compulsory Jurisdiction	COMESA	X	X	Via national courts	Secretary General
Centralized: Supranational Prosecutor access	EACJ	X	X	X	Secretary General
or	ECHR	X	X	X	(Commission Eliminated)
Decentralized: State or private litigant access	ECJ	X	X	Via national courts	Commission
	ECOWAS	X	X	Human rights only	Executive Secretary
	EFTAC	X			Surveillance Authority
	IACHR	Optional protocol	X		Commission
	ICC	X			Prosecutor
	ICTY	X			Prosecutor
	ICTR	X			Prosecutor
	MERCOSUR	X	X		
	OHADA	X		Via national courts	
	WTO	X	X		
Administrative Review	ATJ	X	X	X	
Minimum Design Criteria	BCJ	X	X	Via national courts	
Compulsory Jurisdiction	CACJ	X	X	X	
Private Access	CCJ	X	X	X	
	COMESA	X	X	X	
	EACJ	X		X	
	ECJ	X		X	
	ECOWAS	X	X	X	
	EFTAC	X	X	X	
	ITLOS	X	X	X	
	OHADA	X		X	
Constitutional Review	ATJ	X	X	X	X
Minimum Design Criteria	CACJ	X	X	X	X
Compulsory Jurisdiction	COMESA	X	X	X	
	CCJ	Optional Protocol		X	X
	EACJ	X	X	X	*Advisory opinions only*
	ECJ	X	X	X	X
	ECOWAS	X	X		X
	Post 1998 ECHR?	X	X	X	

Grey indicates the design is functionally required for the role. White boxes with an X exceed the minimum design requirement for the role. I note advisory opinions, but these are generally excluded from this analysis. *= private access pertains only to IO employees and firms that have disputes regarding goods and services supplied to the IO.

Explaining the rise of uncontroversial "new style" ICs

The functional argument helps us to identify what are and are not genuine puzzles. Any design choice that is explained by the functional argument, for example, is not very puzzling. The introduction to this chapter started with a puzzle. Most scholars see compulsory jurisdiction and private access as undermining state control of ICs, and as more likely to lead to active, activist ICs. Yet the trend is clearly towards creating new style ICs with compulsory jurisdiction and access for non-state actors to initiate disputes. The functional argument accounts for the trend. Table 2.1 identified three active ICs that are primarily "old style" courts (ICJ, ITLOS, IACHR).[45] Meanwhile, table 2.1 identified seventeen active "new style" ICs. New style ICs tend to have compulsory jurisdiction so that the IC can play an administrative review, constitutional review, or enforcement role. New style ICs with administrative review roles will by necessity allow private litigants to initiate a dispute.

The functional argument also explains why the design of the IC is not per se correlated with activist ICs or compromises of state authority. Chapter one introduced the idea in some of judicial roles, legislative actors delegate decision-making authority to courts as an "other-binding" means of social control; through delegation, states primarily bind others actors (citizens, businesses, government employees, administrative agencies, police, et cetera) to follow the interpretation and application of legal rules by courts. Administrative review is primarily an other-binding role, even when ICs are reviewing domestic application of common rules (e.g. Benelux, OHADA, ECJ, Andean Pact, EFTAC, COMESA, EACJ). At the international level, delegation of constitutional review authority also primarily binds supra-national organizations to follow collective rules. We can understand the decision to give ICs compulsory jurisdiction and to allow non-state actors to initiate litigation both by the functional need of the role and the political reality that delegation is primarily binding international actors. We can also understand why so many of the ICs with compulsory jurisdiction and private access have fairly empty dockets. Both administrative review and constitutional review only become relevant when there are common rules that supranational bodies help implement and enforce. Absent these laws, and

[45] The ITLOS court is only partly an "old style" court, because it has compulsory jurisdiction and private access for cases involving the seabed authority, and for cases involving the seizing of vessels (although the flag state must authorize the private actor to pursue the case).

absent strong enforcement by supranational actors, litigants have no real reason to activate an IC. The lack of common rules and decisions to challenge explains both why ICs with compulsory jurisdiction and private access are not necessarily busier than ICs that lack compulsory jurisdiction and access for non-state actors to initiate litigation.

Some of the delegation to ICs, however, is self-binding. The enforcement role, for example, remains self-binding. If states want ICs to help enforce the law, compulsory jurisdiction and compromising national sovereignty are part of the package. Yet there are ways to limit the extent to which sovereignty is compromised. Many international relations scholars look at the tools state principals have to control IC agents.[46] These tools, however, require collective state action, and they are usually too blunt to shape IC decision-making.[47] The next four chapters will consider in greater detail how states have delegated authority to ICs. Chapter 5 will explore the many less visible ways that states couple delegation of enforcement authority with political controls and barriers designed to protect national sovereignty.

What the Functional Argument cannot explain

A number of design choices are not explained by a simple functional explanation. A handful of courts fall short of the expected minimum design of the court, and quite a number of courts exceed the minimum design expected. Meanwhile, the functional argument does not really explain why the role was delegated in the first place, and it tells us nothing about the factors that lead each role to be activated. We must look at the history of the specific institutions to understand how specific courts came to be given powers that increase the extent to which states are held accountable to the law. But the pattern of delegation suggests some potential answers to the puzzle of which courts fall short or exceed the minimum design requirements for a given role.

Less than the expected minimum design

There are three cases where the ICs do not meet the minimum functional design criteria for the role. To be an enforcement court, IACHR should have compulsory jurisdiction. The failure to grant the IACHR court compulsory jurisdiction is usually explained by state sovereignty concerns. Indeed where governments do not sign up for the IACHR's compulsory

[46] For example, see: (Vaubel 2006; Hawkins et al. 2006; Stephan 2002; Garrett and Weingast 1993)
[47] (Alter 2006)

jurisdiction, one must wonder if the commitment to follow international human rights standards is very sincere. For the United States, one might conclude that governments expect domestic judicial oversight to be a sufficient check on state authority.[48] For other countries, like Peru which attempted to withdraw from the IACHR's compulsory jurisdiction, we might conclude that the failure to accept the IACHR's compulsory jurisdiction is proof that the country's commitment to human rights is not very deep.

The other courts that fall short of the minimum design criteria are the CCJ and the COMESA court with respect to the constitutional role. For the CCJ, the common market is not fully defined, and thus it is not clear if the CCJ will have constitutional review authority with respect to common market provisions. Meanwhile, countries can choose to have the CCJ replace the British Privy Council as the final appellate body for national legal issues. Thus the existence of constitutional review is not optional, rather what is optional is whether it is the CCJ or the Privy Council will exercise this final appellate authority. Delegating constitutional review authority to the CCJ is, in fact, self-binding for the states that sign on. But since Caribbean states already fall under the authority of the Privy Council, through delegation of constitutional authority to the CCJ states mainly gain a constitutional review body that is geographically closer and that has Caribbean judges rather then members of the British House of Lords reviewing Caribbean judicial decisions.

The COMESA treaty seemingly copies the European design, but it includes a number checks to protect national sovereignty. For example, the COMESA treaty requires that a Bureau of the Council authorize the Secretary General to bring a non-compliance case to the Court.[49] The General Secretary is not allowed to use appeals to the COMESA court as part of inter-institutional politics. Instead, only member states and private litigants can raise challenges to collective agreements.

More than expected design

The functional argument cannot, however, explain why the a number of economic systems have opted for compulsory jurisdiction, and why the OHADA system allows private access. The strengthening of the WTO dispute settlement system probably contributed a

[48] (Moravcsik 2005)
[49] Article 25 of the COMESA Treaty.

cascading pressure for enhanced legalization of regional legal mechanisms. The WTO dispute settlement system was strengthened in 1994 as a way to stop the United States from unilaterally enforcing WTO law via its Section 301 provision of the Trade Act of 1974.[50] For states already falling under the umbrella authority of the WTO, adopting more stringent regional dispute settlement systems involved no new compromise of national sovereignty. Indeed regional systems could create an alternative for states that might be tempted to bring local disputes to a the global economic body. As discussed earlier, some states chose to go beyond the WTO model, embracing the European model of regionalization that includes common economic rules, a supranational monitor and enforcer, and a preliminary ruling mechanism that allows national courts to refer cases involving community rules to the community court. The European style legal system funnels most inter-state disputes into enforcement cases, or the administrative review cases, in which case there is little sovereignty cost to extending compulsory jurisdiction to the dispute settlement role. There is also little need to ever invoke the dispute settlement mechanisms of the legal system.

We still have the question of why so many countries are making such significant commitments for international legal oversight. For developing countries, committing to supranational legal oversight can reassure foreign investors. The ECCIS system seems designed to reassure investors in the Former Soviet Union, where the judiciary continues to be politically penetrated. The OHADA provides a rather unique way to reassure investors. Countries that joined OHADA adopted a common set of business laws, and all had a dearth of experience adjudicating business related disputes under what these new laws. The OHADA system is designed to help improve national court application of business law by helping national courts interpret complex rules, and by provide a means for litigants to challenge national court decisions that misapply or misconstrue the business laws in place in OHADA member states. OHADA states submit to international oversight, including appellate review of national legal rulings, both to gain technical help and to create a mechanism that might reassure to foreign investors that laws will be applied correctly. The European model arguably provides another tool to reassure worried investors.

[50] (Barton et al. 2006: 68-71)

III. Conclusions: Some Answers, More Questions

This chapter mainly documents trends in delegating authority to ICs. The only trend the chapter explained was the trend towards creating "new style" ICs. A straightforward functional argument provides a good first cut explanation of why the design of ICs vary, and why ICs with more "independent" designs do not necessarily end up compromising national sovereignty in ways that critics fear.

Functional arguments are alluringly dangerous. Functional arguments provide post-hoc reasons that make an outcome understandable, but they do not actually explain the choices that led to outcome. On the one hand, when states simultaneously create supranational administrators and delegate to an IC administrative review authority, one can perhaps see the second choice as following from the first. But we need to look to the historical record to be sure. Examining the historical record often reveals that functional objectives actually *do not explain* the choices made. The chapter on enforcement courts makes the functionalist fallacy—the notion that the function of an institution explains its origin-- abundantly clear. States have only reluctantly delegated enforcement authority to ICs, often choosing delegation as a least bad alternative to the status quo. And often international enforcement courts are intentionally hobbled so as to protect national sovereignty.

All I have done at this point is document the roles states have delegated to ICs. I have not explained why certain ICs do not seem to be playing the functional roles that states clearly delegated to them, and why others seem to have gone beyond the roles delegated to them. The litigation data presented here is also potentially misleading; it is at best suggestive. On the one hand, litigants wouldn't bother to raise cases if litigation were not useful. Thus, the data reveals a rising utility in seizing ICs. But not all IC decisions will influence international politics. The large number of unknown IC rulings suggests that many of these cases are routine, that ICs are helping national actors interpret and apply common rules exactly in the way states intended when they created the IC. The aggregate nature of IC data, combined with limited regional traditions of scholarly review of IC decisions, obscures the extent to which this litigation involves cases that in fact help define economic policy and/or limit state discretion. Indeed we really have very little sense of what most economic litigation is about, or about how international economic litigation contributes to supporting the rule of law regarding international economic issues. Even the data on human rights cases can be misleading. The ECHR is very active, but over seventy percent of

its case load come from prisoners who have ample time on their hands, and both legitimate and petty claims about their rights being violated.[51] The ECHR routinely condemns the very long time it takes for cases to proceed through national legal systems, a reality that national officials openly lament, but these ECHR rulings affect neither domestic politics nor international relations because most governments find they lack sufficient resources to provide for a swift review legal offenses or prisoner complaints.

Ultimately neither litigation nor delegation patterns can tell us where or when ICs become influential political actors. We must go beyond functional arguments to capture the dynamics that shape whether and how courts come to play the roles delegated to them. The next four chapters focus on the different judicial roles of ICs, explaining why certain ICs were delegated specific roles. The chapters also explore the politics of state-IC relations as courts assume their delegated roles, and as ICs claim roles that were not explicitly given to them.

[51] (Cichowski 2006: 65)