



2009

# Legitimacy and International Adjudicative Bodies

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## Recommended Citation

Legitimacy and International Adjudicative Bodies, 41 *Geo. Wash. Int'l L. Rev.* 107 (2009)

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# LEGITIMACY AND INTERNATIONAL ADJUDICATIVE BODIES

NIENKE GROSSMAN\*

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## I. INTRODUCTION

On May 1, 2007, Bolivia informed the World Bank of its decision to denounce the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Conven-

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tion).<sup>1</sup> On July 9, 2009, Ecuador followed suit.<sup>2</sup> Both Bolivia and Ecuador sought to divest the International Centre for the Settlement of Investment Disputes (ICSID), an investor-state dispute resolution forum, of jurisdiction to decide disputes involving them. Bolivia and Ecuador are the only states to denounce the ICSID Convention, but their denunciation comes at a time of much debate about ICSID's "legitimacy."<sup>3</sup> Attempting to avert a "legitimacy crisis," often without defining the term and assuming a common definition exists, various individuals have proposed a myriad of reforms, ranging from creating an appellate body to influencing the direction of ICSID's jurisprudence to rooting out perceived institutional bias.<sup>4</sup>

The lack of theoretical precision in discussing ICSID's legitimacy is not surprising. Scholars have not directly addressed the question of what makes an international adjudicative body legitimate. Although various authors have discussed the legitimacy of nonadjudicative international institutions, U.S. courts (particularly

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1. See Letter Denouncing the ICSID Convention from David Choquehuanca Céspedes, Foreign Affairs Minister, Republic of Bolivia, to Paul Wolfowitz, President, World Bank (May 1, 2007), reprinted in 46 I.L.M. 973 (2007) [hereinafter Bolivia Denunciation of ICSID Convention]; see also Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

2. See "Ecuador Submits a Notice Under Article 71 of the ICSID Convention," ICSID News Release (July 9, 2009), available at <http://icsid.worldbank.org/icsid/FrontServlet?requestType=casesRH&actionval=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&pageName=Announcement20>.

3. See, e.g., Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 *FORDHAM L. REV.* 1521 (2005); William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 *ASIAN J. WTO & INT'L HEALTH L. & POL'Y* 199 (2008); Ibronke T. Odumosu, *The Antinomies of the (Continued) Relevance of ICSID to the Third World*, 8 *SAN DIEGO INT'L L.J.* 345 (2007).

4. See, e.g., Franck, *supra* note 3, at 1524 (suggesting the creation of an "independent, permanent appellate body with the authority to review awards rendered under a variety of investment treaties" as a manner of enhancing legitimacy); *id.* at 1587-1610 (surveying a number of different suggestions for reform to investment arbitration tribunals to promote legitimacy); William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 *VA. J. INT'L L.* 307, 373 (2008) ("Operationalizing the margin of appreciation of investment arbitration would help preserve the legitimacy of ICSID panels by defining their supervisory function, while preserving the primary responsibility of states to develop policy responses within their legal obligations in extreme situations.").

the U.S. Supreme Court),<sup>5</sup> and international legal rules,<sup>6</sup> the literature lacks a systematic attempt to unpack this concept specifically for international adjudicative bodies.<sup>7</sup>

Attempting to define, identify, and analyze legitimacy challenges that international courts and tribunals face is useful to those seeking to expose and remedy their flaws and deepens our understanding of how these institutions should function. Perceptions of legitimacy may protect an institution from abolishment or fundamental alterations of its role.<sup>8</sup> Actors within the international system—individuals, states, or nongovernmental organizations—may wish to preserve the legitimacy of a particular institution because they are committed to the substantive norms or legal regime that the tribunal is charged with interpreting and upholding.

If adjudication is preferable to available alternatives, understanding what makes a court or tribunal legitimate becomes essential. The increasing delegation of international dispute settlement to adjudicative bodies, or the increasing “judicialization” of the international system, seems to indicate a preference for resolving disputes in the courtroom rather than on the battlefield or at the negotiating table.<sup>9</sup> Although international actors and scholars

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5. See, e.g., Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379 (1983); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005) (pointing out that, even in the context of U.S. constitutional debate, “[t]hose who appeal to legitimacy frequently fail to explain what they mean or the criteria that they employ”); James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC’Y REV. 469, 470 (1989) (noting the existence of “scholarly folklore” in the United States domestic context that the “special ability” of the United States Supreme Court “to legitimize government policies and actions” is “crucial to the political system because legitimacy engenders voluntary compliance with law by citizens”).

6. See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990) (focusing primarily on international rules but referencing international institutions in his definition of legitimacy); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 290 (1997) (measuring the “effectiveness of a supranational tribunal in terms of its ability to compel compliance with its judgments by convincing domestic government institutions, directly and through pressure from private litigants, to use their power on its behalf”).

7. See Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 596 n.3, 600 (1999) (noting that “[w]ork on the emerging problem of international legitimacy is only just beginning” and that there are “relatively few discussions of legitimacy by international lawyers”).

8. See generally James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 460, 471 (1995) (“Legitimacy is institutional support (diffuse support)—willingness to support the continued functioning of the institution despite disagreement with its outputs.”).

9. See Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent*, 39 N.Y.U. J. INT’L L. & POL. 791, 797-98 & n.18 (2007); see generally Andrea Kupfer Schneider, *Not Quite a World Without*

have made progress over the last decade toward developing a theoretical framework on international courts and tribunals, “the inquiry lacks a broad theoretical foundation,”<sup>10</sup> and “the field is still in its infancy.”<sup>11</sup> Developing a common framework for analysis will allow more fruitful comparative studies of international courts and tribunals. This Article attempts to contribute to the scholarly discussion surrounding international adjudicative bodies by using legitimacy as an organizing principle.

This Article proposes a theory of legitimacy tailored to international courts and tribunals. Part II begins by defining an “international adjudicative body” as a dispute resolution mechanism—also called a court or tribunal—that decides disputes between litigants, at least one of whom is a state. The analysis is limited only to adjudicative bodies where states are involved as litigants because a different set of legitimacy-influencing factors may be present when only private parties are involved. Part II then lays out a theory of legitimacy specifically for international adjudicative bodies and distinguishes it from prior theoretical approaches, particularly those reliant on “legal legitimacy” alone. Borrowing in part from Daniel Bodansky and others, the Article defines a legitimate international adjudicative body as one whose authority is perceived as justified.<sup>12</sup>

Part II identifies the three factors that influence perceptions of justified authority, while Part III discusses them in depth. The factors are the fair and unbiased nature of the adjudicative body, commitment to the underlying normative regime that the body is interpreting and applying, and the body’s transparency and relationship with other democratic values. These three legitimacy-influencing factors are deduced or drawn from state practice as embodied in treaty provisions giving rise to or regulating six international adjudicative bodies, as well as legal and political-science literature on legitimacy, and logic. The purpose of this paper is not to provide empirical support for these hypotheses, but rather to propose a framework for thinking about legitimacy for future debate and possible empirical testing. Part IV briefly concludes the Article.

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*Trials: Why International Dispute Resolution Is Increasingly Judicialized*, 2006 J. DISP. RESOL. 119 (2006) (discussing the increasing judicialization of international public disputes).

10. David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT’L L. 401, 401 (2006).

11. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 432 (2003).

12. See Bodansky, *supra* note 7, at 600.

## II. DEFINING KEY TERMS

### A. *International Adjudicative Bodies*

For the purposes of this Article, an “international adjudicative body” is a dispute resolution mechanism that decides disputes between litigants, at least one of whom is a state. Although international adjudicative bodies traditionally decided disputes between states only, today individuals and corporations also participate as litigants.<sup>13</sup> This Article focuses specifically on courts and tribunals deciding disputes involving at least one state because different legitimacy-influencing factors come into play when only private parties are involved. For example, while closed and confidential proceedings may enhance legitimacy in a dispute involving only private actors, they may detract from legitimacy when states are involved.<sup>14</sup>

Like domestic dispute resolution fora, international ones may have a number of different functions.<sup>15</sup> For the purposes of this Article, however, they have one primary function—resolving disputes pending before them. Specifically, they must find facts, identify and interpret relevant legal rules or “law,” use secondary principles to fill legal gaps and ambiguities, and apply the relevant law to the facts at hand for the purposes of issuing a ruling.<sup>16</sup>

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13. For example, individuals and, in some cases, corporations have standing to raise claims against states in various international fora. *See, e.g.*, ICSID Convention, *supra* note 1, art. 25 (extending the Centre’s jurisdiction “to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State”); Treaty Establishing the European Community art. 230, Mar. 25, 1957, 2002 O.J. (C 325) 33 [hereinafter EC Treaty] (stating that, in specific circumstances, “[a]ny natural or legal person may . . . 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”).

14. *See* Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L ARB. 121, 134-38 (2003) (discussing confidentiality in the public and private arbitration contexts).

15. *See* Helfer & Slaughter, *supra* note 6, at 282 (asserting that, in the domestic context, a court’s functions may include “dispute resolution, ‘social control,’ lawmaking, articulating social and political ideas, protecting individual and minority rights, and securing social change”); Lon Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 380 (1978) (“[A]djudication is a form of social ordering institutionally committed to ‘rational’ decision.”); Caron, *supra* note 10, at 405-06 (suggesting that our understanding of the functions of and justifications for international courts and tribunals is enriched by political theory of domestic courts, as well as international relations theory).

16. V.S. Mani adopts a similar “operational” approach to international adjudicative bodies, describing their role “in conflict resolution . . . as principally three-fold. In the first place, it performs a relatively impartial fact-finding function in assessing and appreciating the evidential bases of the controverted claims. Second, it finds and expounds the relevant juridical norms in the context of the particular controversy before it. And finally, it

The decision makers serving on these bodies are adjudicators—often called judges or arbitrators—designated to hear and decide the disputes. Litigants may appoint adjudicators at the time a particular case arises, or parties to the treaty giving rise to the tribunal may elect the adjudicators. For example, the International Court of Justice's Statute (ICJ Statute) specifies that fifteen judges are elected by the U.N. General Assembly and Security Council for nine-year terms.<sup>17</sup> Ad hoc judges may be appointed by a state before the Court if there is no judge of that state's nationality on the bench.<sup>18</sup> Under ICSID's procedures, litigants appoint their arbitrators when litigation begins, and if the parties do not agree on the composition of the tribunal, ICSID's Chairman may designate individuals to serve on it.<sup>19</sup>

International adjudicative bodies are established either by treaty or by parties on an ad hoc basis. A treaty establishing a dispute resolution body, often called the body's "statute," usually specifies its functions, designates the law it may apply, and mandates specific procedures. For example, the ICJ Statute specifies that the ICJ must apply international conventions establishing rules expressly recognized by contesting states, international custom, general principles of law recognized by civilized nations, and "judicial decisions and the teachings of the most highly qualified publicists."<sup>20</sup> The ICJ Statute also delineates the circumstances under which the ICJ has power to hear a dispute between states.<sup>21</sup> International adjudicative bodies may also be limited to interpreting and applying law within a particular substantive area. For example, the jurisdiction of the Inter-American Court of Human Rights (IACHR) comprises "all cases concerning the interpretation and application of the provisions" of the American Convention on Human Rights, Pact of San José, so long as state parties have recognized such jurisdic-

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endeavours to resolve the dispute—or at least disposes it off from the juridical plane—by applying those norms to the facts and circumstances of the case." V.S. MANI, INTERNATIONAL ADJUDICATION: PROCEDURAL ASPECTS 1 (1980).

17. Statute of the International Court of Justice arts. 3(1), 4(1), 13(1), June 26, 1945, 59 Stat. 1055, T.S. No. 993 [hereinafter ICJ Statute].

18. *Id.* art. 31.

19. See ICSID Convention, *supra* note 1, arts. 37-38. ICSID maintains a "Panel of Arbitrators" consisting of a list of individuals named by states and by the ICSID Chairman as possible arbitrators, but at the time a specific tribunal is designated, states are not required to draw from the Panel. *Id.* arts. 12-13, 40. Nonetheless, the Chairman must draw from the Panel when he or she is called upon to constitute a tribunal. *Id.* arts. 38, 40; see also tbl. 2 *infra* Part III.A.2.i.

20. ICJ Statute, *supra* note 17, art. 38.

21. See *id.* art. 36.

tion.<sup>22</sup> David Caron calls these tribunals “community-originated institution[s] . . . created by a group of states to resolve disputes of concern to that community,” and they may or may not be used by members of the originating community.<sup>23</sup>

To establish ad hoc adjudicative bodies, parties usually prepare a *compromis* or agreement to arbitrate that lays out how the arbitration will take place, who the arbitrators will be, what the tribunal must decide, and which law it should apply. The *compromis* may even stipulate the facts upon which the tribunal should rely in deciding the dispute.<sup>24</sup> Caron labels ad hoc adjudicative bodies as “party-originated dispute resolution institution[s],” created by two parties to resolve a dispute between them, and before which only those two parties will be heard.<sup>25</sup>

A third group of tribunals is a hybrid of traditional treaty and ad hoc tribunals. What might be called “administrative” treaties establish mechanisms to facilitate the creation and function of ad hoc arbitral panels in a particular substantive area. For example, the ICSID Convention establishes a secretariat and methodology for choosing arbitrators, contemplates the creation of uniform procedural rules, and provides administrative support for disputes involving investors and states under bilateral investment treaties.<sup>26</sup> Tribunals that hear cases under the auspices of ICSID dissolve once the dispute between the litigating parties is decided.<sup>27</sup> The World Trade Organization (WTO) Dispute Resolution Body’s

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22. Organization of American States, American Convention on Human Rights art. 62, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter American Convention].

23. Caron, *supra* note 10, at 404.

24. For example, during the 20th Century, countries disputing territorial or maritime boundaries, especially in Latin America, prepared *compromises* establishing questions for resolution, and often, rules and procedures for ad hoc arbitrations. See, e.g., Protocol of Arbitration with Supplementary Act, Chile-Peru, arts. 1-2, July 20, 1922, 21 L.N.T.S. 141 (establishing which questions remained outstanding under an 1883 peace treaty for possible resolution by arbitration by the United States President); Arbitration Agreement, July 22, 1971, 21 R.I.A.A. 53, 64 (U.K.-Arg.-Chile 1977), available at [http://untreaty.un.org/cod/riaa/cases/vol\\_XXI/53-264.pdf](http://untreaty.un.org/cod/riaa/cases/vol_XXI/53-264.pdf) [hereinafter Arbitration Agreement, U.K.-Arg.-Chile] (designating arbitrators, and establishing questions to be addressed, and procedures for arbitration).

25. Caron, *supra* note 10, at 403-04.

26. See ICSID Convention, *supra* note 1, pmbi., arts. 1-3, 6, 12-16.

27. See Int’l Ctr. for Settlement of Inv. Disputes [ICSID], *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, in ICSID CONVENTION, REGULATIONS, AND RULES 99, 124-26 (Rules 50-52) (2006), available at [http://icsid.worldbank.org/ICSID/StaticFiles/basic/doc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basic/doc/CRR_English-final.pdf) [hereinafter ICSID Arbitration Rules]. ICSID ad hoc tribunals may be reconstituted after the rendering of an award, supplementary decision, or rectification, if the parties request interpretation or revision of the award and if each member of the original tribunal is willing to take part in these further proceedings. See *id.*



panel system functions in a similar manner—panels are formed to hear specific disputes, and the WTO Secretariat provides administrative support.<sup>28</sup> These tribunals exist within a superstructure, both in terms of procedure and substantive law. They cross-fertilize each other in ways that regular “party-originated dispute resolution institutions” with no substantive or procedural linkages do not, yet they are not “treaty tribunals” or “community-originated institutions” either, as they are generated by an administrative treaty and governed by treaties between the litigating parties.<sup>29</sup>

This Article’s definition of “international adjudicative body” includes what Laurence R. Helfer and Anne-Marie Slaughter call a “supranational” adjudicative body—a tribunal “established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties”<sup>30</sup> as well as state-to-state litigation. This definition does not include national courts that may exercise jurisdiction over disputes involving sovereign states and private litigants. Although these courts may play a significant role in the “international judicial system,”<sup>31</sup> offer interpretations of international treaties that are binding in national courts, and influence decisions of other domestic and international tribunals, they lie outside the scope of this Article because they are subject to a different set of structural and legal constraints. For example, their membership is made up of judges who are all of the same nationality, their decisions are habitually analyzed in light of domestic law and politics, and they usually have enforcement mechanisms.

This Article’s definition of “international adjudicative body” does not require that the parties bind themselves a priori to a court or tribunal’s rulings. Traditionally, states indicate in the treaty or *compromis* giving rise to a tribunal whether they will consider the tribunal’s ruling binding.<sup>32</sup> Such a commitment on the part of a state does not, however, determine whether a court or arbitral panel is an “international tribunal” as defined here. Rather, the

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28. See Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 1, 27, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

29. See generally CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF SPECIFIC INTERNATIONAL TRIBUNALS 2-3 (2009) (commenting on the “uniqueness” of ICSID and WTO tribunals).

30. Helfer & Slaughter, *supra* note 6, at 289.

31. See Martinez, *supra* note 11, at 436.

32. See, e.g., Arbitration Agreement, U.K.-Arg.-Chile, *supra* note 24, art. 14, at 70 (“The award shall be legally binding upon both the Parties . . .”). Nonetheless, Argentina repudiated the award.

characteristics described above—at least one state participant, a treaty or *compromis* giving rise to the dispute resolution mechanism, membership, and functions—determine whether an institution is an international adjudicative body. This Article’s analysis of legitimacy focuses on international civil tribunals, not criminal ones. While many of the same factors may influence legitimacy of these tribunals, a close analysis of similarities and differences lies beyond the scope of this Article.

### B. *Legitimacy*

At the highest level of abstraction, this Article proposes that a “legitimate” international adjudicative body is one *whose authority is perceived as justified*. A legitimate international court or tribunal must possess some “quality that leads people (or states) to accept [its] authority . . . because of a general sense that the authority is justified.”<sup>33</sup> Like other theories of legitimacy, this one “attempt[s] to specify what factors might serve as justifications.”<sup>34</sup> This Article proposes that an international court is legitimate when it is (1) fair and unbiased, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and infused with democratic norms.

This understanding of legitimacy of international adjudicative bodies goes beyond legal legitimacy. It is most similar to sociological legitimacy, and may include components of moral legitimacy. Richard H. Fallon, Jr. usefully distinguishes between these three kinds of legitimacy in the context of U.S. constitutional debates,<sup>35</sup> and they are helpful in the international context as well. While

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33. Bodansky, *supra* note 7, at 600. Bodansky’s article is not focused on international courts, but rather on the concept of legitimacy generally, and its specific applicability in the international environmental law realm. Nonetheless, his discussion of authority is applicable and useful in this context.

34. *Id.* at 601; *accord id.* at 612 (stating that authority may be legitimated by its origin or source, by “procedures considered to be fair,” or by the production of “desired outcomes”); Martti Koskenniemi, Book Review, 86 AM. J. INT’L L. 175, 178 (1992) (reviewing THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)) (proposing that legitimacy must also take account of “available notions of authentic human justice”); Jose E. Alvarez, *The Quest for Legitimacy: An Examination of The Power of Legitimacy Among Nations by Thomas M. Franck*, 24 N.Y.U. J. INT’L L. & POL. 199, 200-09 (1991) (reviewing THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990)) (discussing a number of different approaches to defining legitimacy); Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 264, 265 (Roger B. Porter et al. eds., 2001) (positing that the extent to which democratic values are reflected in an institution’s inputs and outputs determines legitimacy).

35. See Fallon, *supra* note 5, at 1794-1801.

legal legitimacy relies on a reasonable or "correct" interpretation as a matter of law, moral legitimacy "is a function of moral justifiability or respect-worthiness."<sup>36</sup> Sociological legitimacy rests on the belief that "particular claims to authority deserve respect or obedience for reasons not restricted to self-interest" and traces to Max Weber.<sup>37</sup>

An international adjudicative body attains legal legitimacy when a state consents to utilize it for adjudication of a dispute or set of disputes, and the body limits its actions to that mandate.<sup>38</sup> A state may express its consent by ratification of a treaty or *compromis* designating a particular adjudicative forum, or by agreeing to join a confederation or community of states that requires adjudication by a particular tribunal in case of dispute as a condition of admission. The test for legal legitimacy is whether a court acted *ultra vires* or within its jurisdictional limits. Legal legitimacy explains neither why a state perceives a court as possessing justified authority (resulting in consent) nor why it continues to do so over time.

The legal legitimacy approach denies legitimacy's "agent-relative"<sup>39</sup> nature. As various international relations scholars recognize, states are neither the sole actors in the international realm nor unitary actors, and their preferences may be shaped by a number of constituencies.<sup>40</sup> These constituencies may include domestic political parties, voters, elites, domestic and international nongovernmental organizations (NGOs), and private parties. The decision to grant continuing consent depends on the perceptions of any given actor who might influence or determine state preferences. Consequently, the views of these various actors are relevant to legitimacy to the extent they are reflected in state preferences. Alternatively stated, state preferences, views, or beliefs are a proxy for the preferences of those who set or influence state policy. Legitimacy is agent-relative because different actors may have different perceptions—while some may believe an adjudicative body is legitimate, others might disagree.

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36. *Id.* at 1794-96.

37. *Id.* at 1795.

38. See Bodansky, *supra* note 7, at 605 ("Legal legitimacy is what connects an institution's continuing authority to its original basis in state consent. The authority of the International Court of Justice, for example, derives from its Statute, to which UN member states consented. And the Court's continuing authority depends on its acting in accordance with the Statute. If it went outside or against the Statute, then its actions would lack legitimacy.").

39. I thank Professor Richard Fallon for this terminology.

40. See Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181, 192-93 (1996).

The legal legitimacy approach also ignores the dynamic nature of legitimacy. Perceptions of legitimacy may change over time. Actors may alter their views on a court's legitimacy, before or when litigation is commenced, during dispute resolution, or after it issues a decision. Events subsequent to the granting of consent—particularly if a state consented in a treaty ratified many years before a concrete case arose—may affect perceptions of legitimacy. A state may even decide to withdraw its consent to adjudication by a tribunal. For example, the United States withdrew its consent to the ICJ's compulsory jurisdiction following an adverse decision in the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*,<sup>41</sup> and Bolivia withdrew its consent to adjudication through ICSID in May 2007.<sup>42</sup> Legal legitimacy does not explain the decision to withdraw or continue to consent to adjudication in a particular forum.

This Article's approach to legitimacy is more akin to the sociological legitimacy of Max Weber and Thomas Franck, although the inquiry is different. Sociological legitimacy looks to whether "the relevant public regards" a regime, institution, or decision as "justified," that is, whether "particular claims to authority deserve respect or obedience for reasons not restricted to self-interest."<sup>43</sup> Accordingly, Weber and Franck ask what draws citizens and states, respectively, to comply with law. Although Weber's focus is on legitimacy in the domestic context, his influence on subsequent scholarship calls for an examination of his perspective.<sup>44</sup> Franck's

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41. See Department Statement, U.S. Dep't of State, US Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice (Jan. 18, 1985), in DEP'T ST. BULL., Mar. 1985, at 64, and in 24 I.L.M. 246 (1985); Letter from George P. Shultz, U.S. Sec'y of State, to Dr. Javier Perez de Cuellar, U.N. Sec'y-General (Oct. 7, 1985), reprinted in 24 I.L.M. 1742 (1985) (terminating the United States' acceptance of compulsory jurisdiction of the International Court of Justice).

42. See Bolivia Denunciation of ICSID Convention, *supra* note 1.

43. Fallon, *supra* note 5, at 1795; accord Bodansky, *supra* note 7, at 601.

44. See, e.g., Hyde, *supra* note 5, at 380-82 (asserting that the most commonly-encountered definitions of legitimacy rely on a belief in a binding or obligatory quality and discussing Max Weber's conception of the term). Weber writes that "the concept of law will be defined as an order which depends upon an enforcement staff." MAX WEBER ON LAW IN ECONOMY AND SOCIETY 6 (Max Rheinstein ed., Edward Shils & Max Reinsteins trans., 1967). He notes:

Time and again international law has been said not to be 'law,' because it lacks a supra-national enforcement agency. Indeed, our definition of law, too, would not apply to an order which is guaranteed merely by the expectation of disapproval and reprisals on the part of those who are harmed by its violation, i.e., merely by convention and self-interest rather than by a staff of persons whose conduct is specially oriented toward the observation of the regulatory order.

*Id.*

book *The Power of Legitimacy Among Nations* is arguably among the most important relatively recent contributions to legitimacy theory in the international context.<sup>45</sup> Weber seeks to determine what causes individuals to conform their behavior to a "legitimate order."<sup>46</sup> The question posed in Franck's book is: "Why do powerful nations obey powerless rules?"<sup>47</sup> This Article queries what circumstances influence the many different actors who shape state preferences to perceive a court or tribunal's authority as justified. What makes states decide to join and stay within a dispute resolution mechanism? This is a different question from what causes states to comply with a rule or decision and yields insights useful to those interested specifically in the establishment and functioning of international courts and tribunals.

Since the inquiries differ, so too do the answers. Both Weber and Franck emphasize obligation or compliance with rules or commands in their definitions of legitimacy. For Weber, individuals conform their conduct to a "legitimate order" when it is "valid" because it is viewed as "obligatory or exemplary."<sup>48</sup> An order may be considered legitimate based on (1) tradition, (2) "emotional faith," (3) "value-rational faith," and (4) "positive enactment of recognized *legality*."<sup>49</sup> What is traditionally legitimate is likely to continue to be viewed in the same light.<sup>50</sup> Emotional faith is relevant when something is "newly revealed" or "exemplary" and might occur through recognition of a legitimate prophet.<sup>51</sup> Value-rational faith, on the other hand, is "that which has been deduced as absolutely demanded," and natural law is a prime example.<sup>52</sup> Belief in legality is "the most common form of legitimacy," and arises either "because the enactment has been agreed upon by all those who are concerned," or through "imposition by a domina-

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45. Franck's book was widely reviewed. See, e.g., Alvarez, *supra* note 34; Koskenniemi, *supra* note 34.

46. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 44, at 3, 8-9. Anthony Kronman asserts that Weber's sociological inquiry into law is focused on "how the behaviour of individuals is causally influenced by their own normative commitments to the law and by their beliefs regarding the similar commitments of others . . ." ANTHONY T. KRONMAN, MAX WEBER 12 (1983).

47. FRANCK, *supra* note 6, at 3.

48. See MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 44, at 3; see also Hyde, *supra* note 5, at 380-82 (asserting that the most commonly-encountered definitions of legitimacy rely on a belief in a binding or obligatory quality and discussing Max Weber's conception of the term).

49. MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 44, at 8.

50. See *id.*

51. *Id.*

52. *Id.* at 8-9.

tion of human beings over human beings which is treated as legitimate and meets with acquiescence.”<sup>53</sup> Weber defines “domination” or “authority” as

the situation in which[ ] [t]he manifested will (*command*) of the ruler or rulers is meant to influence the conduct of one or more others (*the ruled*) and actually does influence it in such a way that their conduct to a socially relevant degree occurs as if the ruled had made the content of the command the maxim of their conduct for its very own sake. Looked upon from the other end, this situation will be called *obedience*.<sup>54</sup>

Anthony Kronman paraphrases Weber’s understanding of authority as the belief by the dominated in the “normatively binding quality of some principle to which the person exercising power makes—or may make—appeal.”<sup>55</sup> The ruler will appeal to principles of legitimation, which include tradition, legal-rational authority, and charisma—three of the four categories of legitimacy previously identified (tradition, legal rationality, and prophetic revelation, respectively).<sup>56</sup>

Franck’s definition of legitimacy in the international context has some similarities to Weber’s. First, he too links legitimacy to compliance or obedience. Franck defines legitimacy as “a property of a rule or rule-making institution which itself exerts a *pull toward compliance* on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>57</sup> Second, Franck’s idea that compliance can be derived from belief that a rule has come into being and operates as mandated by “generally accepted principles of right process,” is similar to Weber’s concept of legal rationality, in which “the validity of the rules that fix the limits of legitimate authority depends upon their form, their status as formally correct enactments, rather than their specific content.”<sup>58</sup> Although Franck mentions institutions and process in his definition of legitimacy and spends some time discussing them, his focus is on the qualities of rules that pull toward

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53. *Id.* Weber also describes “belief in legality” as “acquiescence in enactments which are formally correct and which have been made in the accustomed manner.” *Id.* at 9.

54. *Id.* at 328. Kronman points out that Weber defines authority in a number of different ways, but this definition of “domination” “expresses the essence of Weber’s concept of authority.” KRONMAN, *supra* note 46, at 38.

55. KRONMAN, *supra* note 46, at 39.

56. *See id.* at 43-50. Kronman points out that although Weber lists four sources of legitimacy at one point, he omits “value-rational faith” in subsequent discussion. *Id.* at 44 n.\*; *see also* MAX WEBER ON LAW IN ECONOMY AND SOCIETY, *supra* note 44, at 336-37.

57. FRANCK, *supra* note 6, at 24 (emphasis added).

58. *Compare id.* at 19, with KRONMAN, *supra* note 46, at 45 (discussing Weber).

compliance, not the institutions or processes that promulgate them.<sup>59</sup>

Franck identifies four factors that influence legitimacy: determinacy, symbolic validation, coherence, and adherence.<sup>60</sup> Determinacy “denotes a rule’s clarity of meaning,” as well as “the extent to which the rule’s communicative power exerts its own dynamic pull toward compliance.”<sup>61</sup> Symbolic validation, ritual, and pedigree are defined as “the voluntarily acknowledged authenticity of a rule or a rule-maker, or, sometimes, the authenticity (validity) bestowed on a symbolic communication’s recipient,”<sup>62</sup> perhaps similar to Weber’s “traditional authority.” Coherence is linked to the consistent application of rules to similar situations<sup>63</sup> and “provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems.”<sup>64</sup> Finally, adherence is the “vertical nexus between a *primary rule of obligation* . . . and a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted, and applied.”<sup>65</sup>

Unlike Franck and Weber, this Article focuses specifically on international adjudicative bodies and what justifies their authority for actors who set or influence state preferences. What contributes to perceptions of justified authority differs from what characteristics of a rule pull toward compliance, although perceptions of authority will likely influence compliance with an international court’s decisions. Weber, too, recognizes that authority underlies legitimacy, but identifies a limited set of factors that give rise to authority and obligation in the domestic realm only. Like Weber, Bodansky looks to “justification of authority” in defining legiti-

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59. Franck’s second factor, “symbolic validation,” addresses process and institutions to some extent, but again, this is not the focus of his book. Further, he does not delve into the specifics of what kinds of processes or qualities of institutions provide symbolic validation. See generally FRANCK, *supra* note 6, at 91-110 (discussing symbolic validation, ritual, and pedigree).

60. *Id.* at 49.

61. *Id.* at 84. Nonetheless, as Franck explains, a rule’s clarity is not necessarily an indicator of its compliance pull, particularly when its clear command produces results “at variance with common sense.” *Id.* at 68.

62. *Id.* at 91.

63. See *id.* at 152-53.

64. *Id.* at 147-48.

65. *Id.* at 184. The idea behind adherence is that “a rule is more likely to obligate if it is made within the framework of an organized normative hierarchy, than if it is merely an *ad hoc* agreement between parties in a state of nature.” *Id.*

macy, and identifies a number of contributing factors, including origin or source, “procedures considered to be fair,” and production of “desired outcomes.”<sup>66</sup> None of these authors, however, attempt to identify the specific qualities of international courts that lead states and other international actors who influence state preferences to perceive a court as legitimate.

This Article proposes that three factors influence perceptions of justified authority, or legitimacy. The first is the perception that the tribunal is fair and unbiased—a perception linked to its procedures and decision-makers. This is consistent with the definition of authority put forth by Myres McDougal, Harold Lasswell, and other adherents of the New Haven School: “the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures.”<sup>67</sup> It is also similar to Weber’s references to “tradition” and “legality,” Franck’s reliance on “symbolic validation,” and Bodansky’s “procedures considered to be fair.” Perceptions of justified authority also arise from commitment to the underlying normative regime. When an international actor believes a court interprets and applies the law consistent with its own view of what the law is or should be, it is more likely to perceive the court as possessing justified authority. Moral legitimacy or the idea that “legitimacy is a function of moral justifiability”<sup>68</sup> comes into play when an international actor views an international adjudicative body as legitimate only if its outcomes are morally justified. Finally, transparency and other democratic institutional norms influence perceptions of justified authority. In the absence of these factors, international actors are less likely to perceive a tribunal as legiti-

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66. Bodansky, *supra* note 7, at 600-01, 612. He also analyzes democracy, public participation, and expertise as alternative bases for legitimacy in international environmental law. *See id.* at 612-23.

67. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 9 (1959); accord John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 666 (1968) (“‘Authority’ is used to signify community expectations about how decisions should be made and about which established community decision-makers should make them. Decisions made in conformance with community expectations about proper decision and proper decision-makers, as distinguished from decisions based on mere naked power, are said to be authoritative.”).

68. Fallon, *supra* note 5, at 1796; accord Koskeniemi, *supra* note 34, at 175, 178 (proposing that legitimacy must take account of “available notions of authentic human justice”). *But see* FRANCK, *supra* note 6, at 208-09 (arguing that justice should not be a basis for legitimacy in the international context because “justice can only be said to be done to persons, not to such collective entities as states” and because “the concepts of justice and legitimacy are related but conceptually distinct”).



mate. These three factors are defined and described in Part III, taking into account contributors to each source, causal links between them, and where present, “feedback loops” between legitimacy and each factor. Figure 1 depicts a general overview.<sup>69</sup>

An international court is legitimate when its authority is perceived as justified. This Article moves beyond the traditional legal legitimacy approach and acknowledges the multifarious and dynamic nature of legitimacy in the context of international adjudication. Although this approach is most similar to Weber and Franck’s sociological legitimacy theories, it focuses on why states grant (continuing) consent to adjudication in international courts, rather than what compels compliance with law. The approach taken here also considers what role morality may play within sociological legitimacy. In accordance with this theoretical framework, Part III discusses and describes the unique factors influencing legitimacy for international adjudicative bodies.

### III. LEGITIMACY-INFLUENCING FACTORS

The three legitimacy-influencing factors identified are deduced or drawn from state practice as embodied in treaty provisions giving rise to or regulating international tribunals—what states actually require before consenting to a court’s jurisdiction—as well as legal and political-science literature on legitimacy, and logic. By “what states require,” and “state preferences” or “beliefs,” this Article refers to the preferences of actors who influence or set state policy. Insights concerning state practice are drawn from a survey of six international adjudicative bodies that vary based on a number of factors, including whether they are regional or global, subject specific (for example, human rights court or trade court, as opposed to “general” jurisdiction), and whether they are comprised of permanent courts or a series of ad hoc arbitral panels. The courts surveyed are the European Court of Justice (ECJ),<sup>70</sup> the Inter-American Court of Human Rights (IACHR), the International Centre for the Settlement of Investment Disputes (ICSID), the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), the Permanent Court of Arbitration (PCA), and the World Trade Organization Dispute Settlement

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69. See *infra* Part V fig. 1.

70. The European Court of Justice (ECJ) is the only court surveyed which may also hear cases not directly involving at least one state. EC Treaty, *supra* note 13, art. 230. Like the other international adjudicative bodies listed, however, its establishment required the assent of a group of states.

Body (WTO DSB).<sup>71</sup> This diversity of courts and tribunals was chosen to attempt to discern whether some core set of legitimacy-enhancing provisions is present across all of them and to consider how they might differ from each other. It is important to note that it is not the purpose of this Article to provide empirical support for hypotheses about legitimacy-influencing factors, but rather to propose a theoretical framework for thinking about legitimacy for future debate and empirical testing.

#### A. *Fair and Unbiased Nature*

Parties must perceive a tribunal as fair and unbiased before they will agree to submit their disputes to it. It is difficult to imagine a circumstance in which a state (that is, those who shape or influence state policy) or other litigant would freely consent to adjudication by a tribunal it considers inherently biased. Consenting to adjudication would potentially subject a disfavored party to adverse rulings, reproach from the international community for violating international law, sanctions in tribunals where they are available, litigation costs, and political reprieves at home.<sup>72</sup> Even parties who might consider themselves institutionally favored likely share an interest in unbiased tribunals because in the long-run, disfavored parties may prefer opting out of the dispute resolution mechanism rather than expose themselves repeatedly to rulings that they violated international law.

A review of the constitutive treaties and rules of procedure of a number of international tribunals strongly suggests that international actors are unlikely to view a tribunal as legitimate unless it contains a core set of provisions guaranteeing (1) fair process; (2) impartial, competent, and independent individual adjudicators;

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71. My survey is limited to the European Court of Justice's Statute and Rules of Procedure, and not the other courts in the European system, such as the Court of First Instance. Similarly, I look at the ICSID Convention and the Arbitration Rules, but not the Conciliation or Additional Facility Rules which may also be used in the ICSID framework. I examine the Statute and Rules of Procedure applicable to the International Tribunal for the Law of the Sea, not Annex VII or other dispute resolution mechanisms mentioned in UNCLOS. I look at the WTO's Panels and Appellate Body (Understanding on Rules and Procedures Governing the Settlement of Disputes, Working Procedures for Panels and Working Procedures for the Appellate Body). I, too, examine the Inter-American Court of Human Rights' Statute and Rules of Procedure. Finally, with regard to the PCA, I examined the Optional Rules applicable in State-to-State arbitrations only. The survey and all tables were complete as of May 2008. Any amendments that may have been made subsequently to the statutes or rules are not included.

72. See Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 304 (2002) (arguing that when a state loses a case, its reputation is hurt among other states and its counterparty).

(3) impartial and independent benches and panels; and (4) unbiased secretariats and registries.<sup>73</sup> These provisions may serve as “[c]ues” that “validate symbolically” a tribunal.<sup>74</sup> “Cues” with “historic, social, political or metaphysical reality . . . reinforce the perception that . . . a rule [or institution] is entitled to respect because its pedigree has been certified by those whose own pedigree is itself established, and in accordance with the requisite procedures and standards.”<sup>75</sup> In the language of the New Haven School, this set of provisions about process and decision makers may comprise part of “the structure of expectation”<sup>76</sup> that underpins authority. A body’s legitimacy may diminish if international actors perceive bias in outcome—one class of litigants wins more often than another class of litigants where that class is or should be legally irrelevant. Transparency, which is discussed in depth in Part III.C, plays an important role in allowing international actors to assess whether courts are implementing rules in a fair and unbiased manner.<sup>77</sup>

### 1. Procedural Fairness

An actor who influences or shapes state preferences is unlikely to view a tribunal as legitimate unless all parties to the litigation have an equal opportunity to present their views on both procedure and merits. As Table 1 demonstrates, provisions guaranteeing equal rights to parties to present their views, both in writing and orally, as well as equal access to written pleadings and annexed documents, are omnipresent across tribunals.<sup>78</sup> For example, parties must typically transmit all of their pleadings to the other party, usually through the registrar or secretariat.<sup>79</sup> If the claimant writes one

73. This is consistent with United States domestic legal theoretical approaches to legitimacy. Susan Sturm asserts that “[w]idely accepted norms” of legitimate judicial process include participation, impartiality, reasoned decision-making, and efficacy, particularly with respect to determinations of liability or traditional court functions. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1379-80 (1991); see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 382 (1978) (positing that the integrity of adjudication—without distinguishing between domestic and international contexts—must be judged by whether “the meaning of the affected party’s participation in the decision by proofs and reasoned arguments” is “adversely affected”).

74. FRANCK, *supra* note 6, at 134.

75. *Id.*

76. See McDougal & Lasswell, *supra* note 67, at 9; see also Moore, *supra* note 67, at 666.

77. See *infra* Parts III.A.4, III.C.

78. See *infra* Part V tbl. 1.

79. See, e.g., ICJ Statute, *supra* note 17, art. 43; Protocol on the Statute of the Court of Justice art. 20, 2002 O.J. (C 325) 167 [hereinafter ECJ Statute]; DSU, *supra* note 28, arts. 12(6), 18; Permanent Court of Arbitration [PCA], Optional Rules for Arbitrating Disputes Between Two States art. 15(3), Oct. 20, 1992, 32 I.L.M. 572 (1993) [hereinafter PCA Optional Rules]; Int’l Tribunal for the Law of the Sea [ITLOS], Rules of the Tribunal art.

brief, the respondent writes one brief.<sup>80</sup> If a second round of pleadings occurs, both parties will have an opportunity to present their views in writing.<sup>81</sup> The same rules apply to all parties with regard to oral procedures, handling of witnesses and experts, and submission of documents.<sup>82</sup>

The extent to which tribunals prize efficiency over flexibility in deadlines and the litigants' role in shaping procedure varies greatly. While some tribunals have explicit deadlines and mandates to meet them, others have none. For example, the ICJ has no explicit time limits for pleadings submissions or rendering decisions, only very weak language against unjustified delay if parties agree on a schedule, and a mandate that the Court make deadlines "as short as the character of the case permits."<sup>83</sup> Despite the hortatory language, generous deadlines set in ICJ cases have led to criticism of the Court's fairness and efficiency where cases drag on for

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66, Oct. 27, 1997, available at [http://www.itlos.org/documents\\_publications/documents/rules\\_en.pdf](http://www.itlos.org/documents_publications/documents/rules_en.pdf) [hereinafter ITLOS Rules].

80. See, e.g., ICJ Statute, *supra* note 17, art. 43(2); ICSID Arbitration Rules, *supra* note 27, r. 31, at 114-15; ECJ Statute, *supra* note 79, art. 20; PCA Optional Rules, *supra* note 79, arts. 18-19 (claimant files a statement of claim; respondent files a statement of defence); ITLOS Rules, *supra* note 79, arts. 44(2), 60-61; DSU, *supra* note 28, art. 12(6).

81. In the ICJ, the order of pleadings on the merits is Memorial, Counter-Memorial, Reply, and Rejoinder, when two rounds of pleadings are deemed necessary. Rules of the Court art. 45, 2007 I.C.J. Acts & Docs. 91 [hereinafter ICJ Rules]. In the ECJ, when an applicant to the Court files an application, the defendant has the opportunity to lodge a written "defence," which may be supplemented by the applicant's reply, and the defendant's rejoinder. Rules of Procedure of the Court of Justice of the European Communities arts. 39-41, 1991 O.J. (L 176) 7, as amended and corrected [hereinafter ECJ Rules]. A PCA Arbitral Tribunal will determine whatever further written submissions shall be required or may be presented, but "each party [must be] given a full opportunity of presenting its case." PCA Optional Rules, *supra* note 79, arts. 15(1), 22. Written proceedings in ITLOS consist of memorials, counter-memorials, "and, if the Tribunal so authorizes, replies and rejoinders . . ." ITLOS Rules, *supra* note 79, art. 44(2).

82. See, e.g., ICJ Rules, *supra* note 81, arts. 57, 63 (providing that both sides must produce the witnesses' names and relevant information before oral hearings and that each party may call witnesses from the compiled list); PCA Optional Rules, *supra* note 79, art. 25 (requiring parties to provide names and relevant information concerning witnesses); ITLOS Rules, *supra* note 79, arts. 69-88 (setting forth rules on oral proceedings, production of documents, witnesses, and experts).

83. See ICJ Statute, *supra* note 17, art. 43(3) ("within the time fixed by the Court"); ICJ Rules, *supra* note 81, arts. 44, 48. The ITLOS Statute provides similar flexibility for its Tribunal to decide the timing of the proceedings. See Statute of the International Tribunal for the Law of the Sea art. 27, Dec. 10, 1982, United Nations Convention on the Law of the Sea, Annex VI, 1833 U.N.T.S. 176 [hereinafter ITLOS Statute] ("The Tribunal shall make orders for the conduct of the case, decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.").

years.<sup>84</sup> But deadline flexibility may afford litigants an increased ability to respond to political circumstances and reach a negotiated solution.

Other tribunals have explicit statutory deadlines, or seek to limit delays and maximize efficiency.<sup>85</sup> The WTO makes clear that precise deadlines should be set for filing written pleadings that “parties should respect.”<sup>86</sup> It also sets explicit time limits for a panel to conclude its work.<sup>87</sup> The WTO Appellate Body permits extension of deadlines only “[i]n exceptional circumstances, where strict adherence to a time-period . . . would result in a manifest unfairness.”<sup>88</sup> The ICSID Arbitration Rules also contain explicit deadlines for appointing arbitrators and issuing awards.<sup>89</sup> The IACHR sets “non-renewable” time limits for respondents and alleged victims’ next of kin or representatives to present pleadings, motions, and evidence to the Court.<sup>90</sup> The ECJ, too, contains explicit deadlines for some pleadings, although it allows extensions upon “reasoned application” and permits the President to fix time limits for other pleadings.<sup>91</sup> ITLOS specifies that proceedings are to be conducted “without unnecessary delay or expense,”<sup>92</sup> and like the ICJ, “time-limits shall be as short as the character of the case permits.”<sup>93</sup>

84. See, e.g., Sienho Yee, *Notes on the International Court of Justice (Part 2): Reform Proposals Regarding the International Court of Justice—A Preliminary Report for the International Law Association Study Group on United Nations Reform*, 8 CHINESE J. INT’L L. 181, 186 (2009) (noting that the “perceived excessive length of time it took for the Court to complete a case” motivated recent efforts by the Court to streamline procedure and increase the pace of decision making).

85. See, e.g., DSU, *supra* note 28, art. 12(2) (“Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process.”).

86. *Id.* art. 12(5).

87. See *id.* art. 12(8)-(9). From the date of composition of a panel to a final report, the time should not exceed nine months unless specific circumstances apply. *Id.* art. 12(9).

88. World Trade Organization [WTO], *Working Procedures for Appellate Review*, ¶ 16(2), WT/AB/WP/5 (Jan. 4, 2005), available at [http://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/ab_e.htm) [hereinafter WTO Working Procedures].

89. ICSID Arbitration Rules, *supra* note 27, r. 2, at 104 (putting forth the procedure for constituting a tribunal in the absence of previous agreement, and containing explicit deadlines), r. 46, at 121 (“The award (including any individual or dissenting opinion) shall be drawn up and signed within 120 days after closure of the proceeding. The Tribunal may, however, extend this period by a further 60 days if it would otherwise be unable to draw up the award.”). Nonetheless, there are no explicit deadlines for filing pleadings. See *id.* r. 31, at 114 (“filed within time limits set by the Tribunal”).

90. Rules of Procedure of the Inter-American Court of Human Rights arts. 40, 41 available at <http://www.corteidh.or.cr/reglamento.cfm> [hereinafter IACHR Rules].

91. ECJ Rules, *supra* note 81, arts. 40-41.

92. ITLOS Rules, *supra* note 79, art. 49.

93. *Id.* art. 46.

It adds, though, that the maximum time for filing a pleading is six months, extendable only by “adequate justification.”<sup>94</sup> The PCA’s Optional Rules for Arbitrating Disputes between Two States contain explicit time limits for selecting arbitrators and maximum time limits of 90 days for filing written submissions, unless “an extension is justified.”<sup>95</sup> Although most tribunals permit some extensions, usually for good cause, an emphasis on efficiency exists that is absent from the statutes and rules of others.

The extent to which tribunals allow parties to shape the proceedings also varies greatly. While some statutes and rules of procedure allow litigants to set the rules for particular adjudications, others assign the tribunal a much more active role in determining their form. For example, parties to litigation before ITLOS and the ICJ may jointly propose changes to the rules of procedure, but these changes must be ruled upon by the Tribunal or Court.<sup>96</sup> The ICSID Convention, on the other hand, *requires* arbitral panels to apply the agreement between the parties on procedural matters, unless otherwise provided in the Convention for the Administrative and Financial Regulations.<sup>97</sup> Similarly, the PCA’s Optional Rules for Arbitrating Disputes between Two States specify that disputes “shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.”<sup>98</sup>

Despite variations among tribunals, the omnipresence of provisions granting equal procedural rights aimed at placing litigants on an equal playing field suggests that those who influence and shape state policy are unlikely to consent to adjudication in their absence. How these provisions are implemented and interpreted over time, however, may impact willingness to utilize a tribunal in the future. If international actors perceive that a court is implementing a rule arbitrarily or in a biased manner, both the rule and

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94. *Id.* art. 59.

95. PCA Optional Rules, *supra* note 79, arts. 6-8, 11 (imposing time limits on selecting and challenging arbitrators); *id.* art. 23 (“The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed ninety days. However, the arbitral tribunal may set longer time limits, if it concludes that an extension is justified.”).

96. ITLOS Rules, *supra* note 79, art. 48; ICJ Rules, *supra* note 81, art. 101 (stating that the Court may apply changes to the Rules of Court jointly proposed “if the Court or the chamber considers them appropriate in the circumstances of the case,” excluding rules concerning the giving and form of judgments).

97. ICSID Arbitration Rules, *supra* note 27, r. 20(2), at 111.

98. PCA Optional Rules, *supra* note 79, art. 1.

the institution implementing it may lose force.<sup>99</sup> The consistent application of procedural and substantive rules influences legitimacy.<sup>100</sup> Because many tribunals are not required to publish their reasoning on procedural decisions,<sup>101</sup> it may be difficult for states and other constituencies to assess whether procedural decisions are made in an unbiased and nonarbitrary manner.

While legal theorists prize procedural fairness, some political-science studies of domestic and international courts question whether perceptions of procedural fairness affect the mass public's opinion of a body's legitimacy, defined either as the likelihood of compliance with or acceptance of an unpopular judicial decision or general support for a judicial institution. The mass public's (lack of) concern about procedural fairness is relevant because it shapes the views of those who set state policy. At least in the U.S. domestic context, the hypothesis that perceived procedural fairness induces compliance with unpopular legislative or judicial decisions "does not fare particularly well."<sup>102</sup> In the same vein, a 1992 mass-public survey of E.U. residents found that perceptions of procedural justice "are of no consequence for acceptance of" an ECJ decision.<sup>103</sup> Nonetheless, U.S. "opinion leaders"—individuals who self-report

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99. See FRANCK, *supra* note 6, at 147-48. Franck refers to the idea of consistent application of rules as "coherence," a quality which will affect the "compliance pull" of rules. *Id.* Specifically, "[c]oherence legitimates a rule, principle, or implementing institution because it provides a reasonable connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems." *Id.*

100. For a discussion of how the consistent application of substantive rules influences legitimacy, see *infra* Part III.B.2.

101. See ICJ Statute, *supra* note 17, art. 48 ("The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence."). Neither the Statute nor the Rules require these procedural orders to be published, unlike judgments, which must be read in open court and produced in a written form accessible to the public. See *id.* art. 58; ICJ Rules, *supra* note 81, arts. 21, 94-95. Consequently, the ICJ issues orders on evidentiary and procedural issues which might be instructive for members of the bar of the ICJ and the public, but are not available for review. Similarly, the ITLOS Rules empower the President of the Tribunal to make some procedural decisions, such as setting time limits and deciding on extensions, but they contain no explicit requirement for publishing these procedural decisions or their reasoning. See ITLOS Rules, *supra* note 79, art. 59(3) (empowering the President of the Tribunal to set time limits and decide on extensions).

102. Gibson, *supra* note 5, at 491. In this study, Gibson examined whether perceived procedural fairness affected the likelihood of compliance with politically unpopular decisions of the United States Supreme Court. He found no correlation. See *id.*

103. Gibson & Caldeira, *supra* note 8, at 468, 477. Gibson and Caldeira define "acceptance" as "countenance [of] a judicial decision on an important issue of public policy as definitive, and . . . desist[ing] opposition on the issue and refrain[ing] from attacking the institution for its actions." *Id.* at 465.

that they are frequently asked their opinions, attempt to persuade others how to vote, and are attentive to the U.S. Supreme Court—“are more likely to report a willingness to comply with an unpopular institutional decision” the more they perceive it as fairly made.<sup>104</sup> Other studies suggest that “when conflict resolution is believed to be impartial and objective, judicial authority is accorded substantial legitimacy.”<sup>105</sup> Perceptions of procedural fairness also have been found to relate to “diffuse support” for an institution.<sup>106</sup> Tom Tyler found that “[i]n the legal arena citizens will be seen as reacting to the procedures through which court decisions are made, as well as to the decisions themselves,” and that “procedural justice” is more important to legitimacy than previously thought.<sup>107</sup>

Unless those who influence and set state policy believe a tribunal is fair and unbiased, a state is unlikely to grant continuing consent to adjudication or to perceive it as possessing justified authority. One element that may influence perceptions of a tribunal’s legitimacy is whether it provides litigants with equal opportunities to be heard on both procedural and substantive matters. In some instances, states seem to prefer flexibility—even the ability to shape rules once they are before the Court—over efficiency in the rules. No matter how stringent a body’s procedural rules might be, however, if the public or international actors perceive them to be applied in an inconsistent or biased manner, the tribunal itself may lose legitimacy.

## 2. Unbiased Adjudicators, Benches, and Panels

Just as states require fair and unbiased procedures to consent to adjudication, they seek to ensure controversies will be decided by fair and unbiased individual adjudicators and panels or benches of adjudicators. If international actors consider decision makers to be unfair or biased, they will perceive the judicial institution as lacking justified authority. As Edith Brown Weiss puts forth with regard to the ICJ, “[s]tates will be willing to submit disputes . . . only if they are confident that their grievances will be heard by a Court which acts independently and treats all states parties to a

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104. Gibson, *supra* note 5, at 489-91.

105. Gibson & Caldeira, *supra* note 8, at 467 (quoting Mary L. Volcansek, *Judges, Courts and Policy-Making in Western Europe*, W. EUR. POL., July 1992, at 1).

106. *Id.* at 484.

107. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 162-63 (1990).



dispute equally.”<sup>108</sup> States require both independence and impartiality of individual adjudicators, benches, and panels.

Legal scholars have identified a number of factors relevant to the bias of individual adjudicators and courts that affect legitimacy. For example, Brown Weiss categorizes concerns about independence and impartiality of the ICJ into four classes: the degree to which individual judges are responsive to the interests of their home state,<sup>109</sup> the selection process for judges and their qualifications, the extent to which judges align themselves into blocs to the detriment of parties to a dispute before the court, and procedural fairness toward state parties.<sup>110</sup> Former ICJ President Rosalyn Higgins focuses on personal qualities of judges, tenure, length of term, confidentiality of deliberations, and transparency of nominating procedures.<sup>111</sup> Higgins asserts that “independence of mind” is “guaranteed by strength of personal character, and supported by the judicial job being an end-of-career assignment, by having a real life outside the law, by security of tenure during the term of appointment, by strong leadership within a court, and by maintenance of the confidentiality of deliberations.”<sup>112</sup> She also believes that nomination procedures should be more transparent for many national groups and that a single term of twelve years would improve judicial independence.<sup>113</sup>

Other scholars focus on factors such as whether adjudicators are chosen at the time a dispute arises on an ad hoc basis or have a set period of tenure. For example, Eric Posner and John Yoo suggest that dispute resolution mechanisms where parties to litigation choose their adjudicators, as opposed to permanent courts in which adjudicators are chosen by a community of states before a

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108. Edith Brown Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 123, 124 (Lori Fisler Damrosch ed., 1987).

109. Eric A. Posner and Miguel F. P. de Figueiredo, too, have looked at the voting patterns of judges on the ICJ to determine whether judges vote in favor of the interests of their home state in assessing whether the ICJ is biased. See Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 600-02 (2005); see also Eric A. Posner, *The International Court of Justice: Voting and Usage Statistics*, 99 AM. SOC'Y INT'L L. PROC. 130, 130-32 (2005). For a critique of Posner and Figueiredo's methodology and results, see Rosalyn Higgins, *Remarks*, 99 AM. SOC'Y INT'L L. PROC. 135, 135-37 (2005).

110. Weiss, *supra* note 108, at 124.

111. See Higgins, *supra* note 109, at 138.

112. *Id.*

113. *Id.*

specific dispute arises, are ultimately more “effective.”<sup>114</sup> They argue that independent tribunals impose rules and constraints on sovereignty, thereby reducing compliance, usage, and success of the treaty regime.<sup>115</sup> Nonetheless, because states have either joined or created tribunals with increasing independence in growing numbers, they appear to prefer independence over dependence.<sup>116</sup> As demonstrated by the treaties discussed below, even treaties giving rise to ad hoc tribunals contain provisions seeking to ensure a high degree of impartiality and judicial independence. Prizing impartiality does not mean that states want judges to ignore the political context of a dispute; rather, states are more likely to authorize a tribunal to decide a dispute when “decisionmaking [is] premised (at least formally) on principle rather than power.”<sup>117</sup>

Still others suggest that selection processes emphasizing political balance on a court—such as reflecting the composition of the Security Council on the ICJ—rather than judicial demeanor, may undermine the perception of a court as “a judicial rather than a

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114. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 3 (2005). *Contra* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899, 901 (2005). Eric Posner and John Yoo suggest that judicial independence, more likely found in courts with permanent secretariats and tenured judges, as opposed to ad hoc arbitration, will undermine effectiveness. *See* Posner & Yoo, *supra*, at 27-28. They measure “effectiveness” as an amalgamation of compliance, usage, and success of the treaty regime, but they acknowledge this approach has serious measurement difficulties. *Id.* at 28-29.

115. *See* Posner & Yoo, *supra* note 114, at 72-74; *see also* Caron, *supra* note 10, at 404 (noting that judges in a community-originated institution may consider themselves to be working for the community, and not the parties to the litigation, while judges in a party-originated institution may perceive themselves as working for the parties alone).

116. Helfer & Slaughter, *supra* note 114, at 902-04, 914. As Helfer and Slaughter demonstrate, Posner and Yoo’s hypothesis suffers from methodological and definitional difficulties, and more important, state behavior in prizing judicial independence by creating or joining independent courts refutes the Posner and Yoo hypothesis. *See id.* “The proliferation of courts that share these formal [independent] characteristics strongly suggests, however, a growing global consensus that adjudicatory bodies outside the nation state should be independent.” *Id.* at 914. “[A] thorough empirical survey reveals that states are doing precisely what Posner and Yoo argue they have no rational interest in doing: setting up more independent tribunals and quasi-judicial review bodies and using them more frequently.” *Id.* at 903.

117. Helfer & Slaughter, *supra* note 6, at 314. While Helfer and Slaughter look at whether neutrality and demonstrated autonomy from political interests enhances a tribunal’s “effectiveness,” *see generally id.*, this Article examines whether they enhance a tribunal’s legitimacy—that is, whether a state is more or less likely to authorize a tribunal to decide a dispute if they perceive the decision makers as impartial or influenced by international power dynamics.

political body.”<sup>118</sup> Monroe Leigh and Stephen Ramsey argue that electing judges on the same agenda and at the same time as members of other U.N. organizations, candidates “pressing-the-flesh” at the General Assembly, and the frequency of elections tend to “increase the political pressure on the judges and decrease the perception of judicial decisions made without political motives.”<sup>119</sup>

The practice of states, as demonstrated by constitutive treaties and rules of procedure of various dispute resolution mechanisms, shows a number of options for guaranteeing individual impartiality and independence, as well as for creating a balanced tribunal. The impact of these choices on perceptions of an adjudicative body’s legitimacy is a question for further empirical study.

### i. Individual Adjudicators

Groups of states setting up tribunals and courts differ in their approaches to ensuring impartiality and independence of individual adjudicators, as demonstrated by Table 2.<sup>120</sup> Statutes and rules of procedure address selection processes, term length, qualifications, content of the adjudicator’s oath, obligations to disclose potential conflicts to parties, grounds for recusal or disqualification, and limitations on activities before and during tenure.

Selection procedures vary based on whether adjudicators are appointed or elected; whether states only or an appointing authority (such as the U.N. Secretary General, the Chairman of ICSID, or the WTO DSB) are involved; the extent to which such an appointing authority is involved; and whether adjudicators are selected when a dispute is ripe for adjudication or every set period of years. As discussed above, states’ choices with regard to selection procedures (election versus appointment) may increase or decrease perceptions of bias of individual adjudicators and perceptions of the underlying institution as “political” or “judicial” in nature, likely affecting perceptions of their legitimacy. If an adjudicator is elected by a group of states and knows which states voted for whom, he or she may be perceived as “owing” something to the states that chose him or her. On the other hand, the link between an adjudicator appointed by only one state or litigant may be considered to create even more bias, particularly when that adjudica-

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118. Monroe Leigh & Stephen D. Ramsey, *Confidence in the Court: It Need Not be a “Hollow Chamber,”* in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS*, *supra* note 108, at 106, 109.

119. *Id.* at 109.

120. *See infra* Part V tbl. 2.

tor has been appointed by the same litigant several times. Election for a set term of years or for only a single dispute may also affect perceptions of bias. A set term of years may increase perceptions of independence because an adjudicator need not “run for re-election” or reappointment after each case.

Required adjudicator qualifications vary based on whether substantive knowledge of a particular area of law is required, although statutes and rules of procedure almost uniformly require “high” or “highest” “moral character” and “integrity” or “independence.”<sup>121</sup> For example, the IACHR Statute, the ITLOS Statute, and the ICSID Convention require “recognized competence” in the field of human rights; law of the sea; and law, commerce, industry, or finance, with a special emphasis on law, respectively.<sup>122</sup> The WTO contains the most specific requirements with regard to qualifications for panel members, providing the following guidance on who is “well-qualified”:

[G]overnmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.<sup>123</sup>

While the link between preventing adjudicator bias and “moral” qualities is clear (although one wonders how these qualities are assessed), the link between qualifications and bias requires some additional comment. High standards for qualifications are important both for giving credibility to the judgments of international courts, as well as for ensuring judicial independence and fair and unbiased tribunals. Judges with the right “pedigree” confer legiti-

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121. See, e.g., Statute of the Inter-American Court of Human Rights art. 4(1), Oct. 31, 1979, 19 I.L.M. 635 (1980) [hereinafter IACHR Statute] (“highest moral authority”); EC Treaty, *supra* note 13, art. 223 (“persons whose independence is beyond doubt”); ICJ Statute, *supra* note 17, art. 2 (“independent” and “of high moral character”); ICSID Convention, *supra* note 1, art. 14(1) (“high moral character” and “may be relied upon to exercise independent judgment”); ITLOS Statute, *supra* note 83, art. 2 (“enjoying the highest reputation for fairness and integrity”).

122. IACHR Statute, *supra* note 121, art. 4(1); ITLOS Statute, *supra* note 83, art. 2; ICSID Convention, *supra* note 1, art. 14(1).

123. DSU, *supra* note 28, art. 8(1). Members of the Appellate Body must be “persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government . . . . [They] shall stay abreast of dispute settlement activities and other relevant activities of the WTO.” *Id.* art. 17(3).

macy on an institution by providing greater authority to the institution and its rulings because they “link[] rights and duties reciprocally in a notion of venerable, authenticated status deserving special deference.”<sup>124</sup> Given the omnipresence of these treaty provisions, states appear to consider special knowledge, integrity, and conscientiousness of judges to heighten the authority of the tribunals themselves. One is hard pressed to find a constitutive treaty or rules of procedure without these requirements.

Perhaps qualifications also serve as a tool in constraining adjudicators from making overtly biased and unprincipled decisions. A knowledgeable and well-known judge or arbitrator will be aware of and engage with prevailing legal understandings, presumably making it more difficult for that person to make a decision based purely on bias. Particularly where a “global community of law”<sup>125</sup> exists, reputational costs may be high for a judge or arbitrator who strays too far from the normative mainstream or is perceived as making decisions based on personal proclivities, and such decisions may endanger her and the institution’s likelihood of being called upon to render future decisions.<sup>126</sup> Qualified adjudicators may be more aware of the “discursive constraints” they are subject to, and whether and how they are nested in an institutional system of checks and balances, as well as politics.<sup>127</sup> Further, judges and arbitrators who are part of a global community of lawyers, judges, and scholars who may comment on their work are more likely to be aware of and sensitive to both the political and normative boundaries within which a tribunal operates.<sup>128</sup> Tribunals must publish

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124. FRANCK, *supra* note 6, at 94; accord Helfer & Slaughter, *supra* note 6, at 300-01 (noting that judges with knowledge of domestic law may assist in increasing the effectiveness of a supranational tribunal—as opposed to staffing a tribunal with only international law experts—to assist in gaining acceptance of particular decisions from national judges).

125. Helfer and Slaughter define a “community of law” as a “community of interests and ideals shielded by legal language and practice. It is a community in which the participants—both individuals and institutions—understand themselves to be linked through their participation in, comprehension of, and responsibility for legal discourse.” Helfer & Slaughter, *supra* note 6, at 370.

126. See, e.g., Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 249 (2004); Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT’L L. 631, 633 (2005) (asserting that international judges’ lawmaking discretion is constrained by the preferences of states and other actors).

127. See Steinberg, *supra* note 126, at 257. He notes that states might screen Appellate Body candidates to select for “a more restrained interpretive stance,” which, in essence, amounts to an additional qualification. See *id.* at 274.

128. See, e.g., Caron, *supra* note 10, at 411-14 (asserting that the structure and operation of international courts and tribunals can be understood as the result of the interactions of different groups of actors “within and against the bounded strategic space defined by the

judgments, dissents, separate opinions, and their reasoning for qualifications to affect legitimacy in this manner. This legitimacy-influencing factor also requires a relatively high degree of judicial candor—adjudicators “should neither omit their reasoning nor conceal their motives.”<sup>129</sup>

Another mechanism states appear to value in promoting adjudicator independence and impartiality is an oath or solemn declaration made upon taking office. As demonstrated in Table 2, the obligations, specificity, and form (written, oral, or both) of the oaths differ across tribunals.<sup>130</sup>

While all oaths require “independence,” “conscientiousness,” or “honor,” only some oaths explicitly require preservation of secrecy of deliberations or continuing obligations during and after service as an adjudicator.<sup>131</sup> The ICJ and ITLOS oaths do not contain explicit secrecy of deliberations provisions, although other provisions in their statutes and rules of procedure indicate that deliberations are to be secret.<sup>132</sup> Also, some oaths mention service in an “individual capacity,” as well as independence. For example, ICSID arbitrators must commit to “judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in [the ICSID Convention] and in the Regulations and Rules made pursuant thereto.”<sup>133</sup> WTO Panel and Appellate Body members must declare they have read the Understanding on Rules and Procedures Governing the Settlement of

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constitutive instrument establishing the international court or tribunal”); Ginsburg, *supra* note 126, at 633 (asserting that independent courts’ interpretations of international law are “constrained by the preferences of states and other actors”); Steinberg, *supra* note 126 (discussing constraints on “judicial activism” in the WTO and emphasizing the importance of international legal discourse, politics, and constitutional structure).

129. Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1309 (1995). For additional discussion regarding transparency’s impact on legitimacy, see *infra* Part III.C.

130. See *infra* Part V tbl. 2.

131. The ECJ, IACHR, and ICSID require the judge or arbitrator to swear orally, in writing, or both to uphold the secrecy of deliberations or the confidentiality of proceedings. See, e.g., ECJ Statute, *supra* note 79, art. 2; IACHR Statute, *supra* note 121, art. 11; ICSID Arbitration Rules, *supra* note 27, r. 6(2), at 106-07. The ICJ and ITLOS do not explicitly mention confidentiality or secrecy in their oaths as described in their statutes or rules of procedure.

132. See ICJ Statute, *supra* note 17, art. 54(3) (“The deliberations of the Court shall take place in private and remain secret.”); ITLOS Rules, *supra* note 79, art. 42(1) (“The deliberations of the Tribunal shall take place in private and remain secret. The Tribunal may, however, at any time decide in respect of its deliberations on other than judicial matters to publish or allow publication of any part of them.”).

133. ICSID Arbitration Rules, *supra* note 27, r. 6(2), at 106.

Disputes and the Rules of Conduct, which require service “in their individual capacities and not as government representatives, nor as representatives of any organization.”<sup>134</sup> The IACHR specifies that judges are “elected in an individual capacity,” although this is not noted in the judicial oath.<sup>135</sup> Oaths and other similar provisions about independence and impartiality serve as additional legitimacy-conferring cues that “validate symbolically” a tribunal.<sup>136</sup>

Tribunals also differ on obligations to disclose potential conflicts to parties, grounds for recusal or disqualification, and limitations on activities before, during, and after tenure. While some courts require disclosure of potential conflicts to litigating parties, others require disclosure only to the president of the tribunal. For example, ICSID requires arbitrators to list potential conflicts in a written declaration prior to the first meeting of the arbitral panel, allowing the litigants to assess for themselves whether the arbitrator should be dismissed.<sup>137</sup> The WTO requires Panel and Appellate Body members to disclose any information “which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism.”<sup>138</sup> This information is ultimately forwarded to the parties to the dispute.<sup>139</sup> The PCA Optional Rules for Arbitrating Disputes between Two States state that a prospective arbitrator is under an obligation to disclose “any circumstances likely to give rise to justifiable doubts as to his/her impartiality or independence.”<sup>140</sup> On the other hand, the ECJ, ICJ, IACHR, and ITLOS require no disclosure to litigants. Instead, individual judges must approach the president of the court should they have “some special” or “appropriate” reason for not participating in a case.<sup>141</sup>

While grounds for disqualification vary somewhat across tribunals, all appear to allow disqualification for manifest lack of independence or partiality. For example, many tribunals require disqualification if an adjudicator served as an agent, counsel, advocate or adviser to one of the parties, or on another judicial body or

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134. DSU, *supra* note 28, art. 8(9); *accord* WTO Working Procedures Annex II, *supra* note 88, at VI.4(a), annex 3.

135. American Convention, *supra* note 22, art. 52; *accord* IACHR Treaty, *supra* note 121, art. 11.

136. FRANCK, *supra* note 6, at 134.

137. *See* ICSID Arbitration Rules, *supra* note 27, r. 6(2), at 107.

138. WTO Working Procedures Annex II, *supra* note 88, at VI.2, VI.4(a), annex 3.

139. *Id.* at VI.4(a).

140. PCA Optional Rules, *supra* note 79, art. 9.

141. ECJ Statute, *supra* note 79, art. 18; ICJ Statute, *supra* note 17, art. 24; IACHR Statute, *supra* note 121, art. 19(2); ITLOS Statute, *supra* note 83, art. 8(2).

commission of enquiry which ruled on the same dispute.<sup>142</sup> The IACHR extends possible disqualification to instances where judges' family members "have a direct interest."<sup>143</sup> In ICSID, a "manifest lack" of qualifications or failure to comply with procedures for appointment can also lead to disqualification.<sup>144</sup>

States have chosen different options for limiting the activities of judges during their tenure. For example, judges may not be permitted to serve in political positions for their home countries during their tenure.<sup>145</sup> Judges on the IACHR may not simultaneously hold positions in the executive branch of government (with some limited exceptions), as officials of international organizations, or "[a]ny others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office."<sup>146</sup> ITLOS judges may not "associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed."<sup>147</sup>

Requirements for disclosure of potential conflicts, disqualification provisions, and limitations on activities during tenure may profoundly affect the legitimacy of a tribunal. For example, disclosure of possible conflicts to a tribunal's president alone limits the ability of the parties to present arguments on possible bias and likely creates an inconsistent standard on the appropriateness of recusal dependent on the views of each individual adjudicator or president. When and how recusal and disqualification may occur is similarly significant. Nonetheless, as with any other provision, what statutes or rules of procedure require and what a tribunal's practice is, are different questions. For example, although the ICJ Stat-

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142. See, e.g., IACHR Statute, *supra* note 121, art. 19(1); ICJ Statute, *supra* note 17, art. 17(2); ITLOS Statute, *supra* note 83, art. 8(1); ECJ Statute, *supra* note 79, art. 18.

143. IACHR Statute, *supra* note 121, art. 19(1).

144. ICSID Convention, *supra* note 1, art. 57.

145. See, e.g., ECJ Statute, *supra* note 79, art. 4 (prohibiting judges from holding political or administrative offices or engaging in any occupation unless they obtain an exemption); IACHR Statute, *supra* note 121, art. 18(1) (prohibiting judges from serving as members or high-ranking officials of the executive branch of government, officials of international organizations, any other position which might affect "independence or impartiality, or the dignity and prestige of the office"); ICJ Statute, *supra* note 17, art. 16 (prohibiting the exercise of political or administrative functions); ITLOS Statute, *supra* note 83, art. 7(1) (forbidding the exercise of "any political or administrative function" and any active association or financial interest in "any enterprise concerned with the exploration for or exploitation of . . . the seabed").

146. IACHR Statute, *supra* note 121, art. 18(1).

147. ITLOS Statute, *supra* note 83, art. 7(1).



ute requires disqualification if a judge was an agent, counsel, or advocate for one of the parties, individuals who were political appointees in litigants' previous governments when the facts giving rise to a dispute took place may still serve as judges ad hoc.<sup>148</sup> The implementation of these provisions is likely to have a significant impact on perceptions of adjudicators and institutions as fair, unbiased, and independent. Despite the variation among them, the omnipresence of provisions aimed at reducing the bias of individual adjudicators strongly suggests they are an important prerequisite to recognizing a tribunal's legitimacy.

## ii. Benches and Panels

Not only do states insert provisions into constitutive treaties and rules of procedure regarding unbiased and independent individual adjudicators, but also they seek to create a kind of balance on panels or benches of adjudicators. In some instances, states prefer that neither litigant be "represented" by a national on the bench.<sup>149</sup> In others, provisions specifically affirm the right of judges of a litigant's nationality to retain their seats or grant litigants the right to appoint a judge ad hoc if no judge of their nationality is already on the bench or panel.<sup>150</sup> In the latter case, states prefer to have the opportunity to cancel out what bias might exist, rather than attempting to root it out a priori. Alternatively, states may perceive the adjudicator that they themselves appoint as an advocate for them who sits on the bench, rather than arguing before it. Nonetheless, even where national judges retain the right to hear a case or litigants each choose an arbitrator, the tribunal's president usually cannot be of the nationality of one of the par-

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148. See Phillipe Couvreur, *Article 17*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 337, 349 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., 2006).

149. See, e.g., PCA Optional Rules, *supra* note 79, art. 6(4) ("[T]he appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."). For example, individuals whose governments are involved in a WTO dispute may not serve on a panel unless the parties to the dispute agree otherwise. DSU, *supra* note 28, art. 8(3).

150. See, e.g., ICJ Statute, *supra* note 17, art. 31(3) (allowing a party to choose an ad hoc judge if no judge of its nationality is on the bench); IACHR Statute, *supra* note 121, art. 10 (affirming a judge's right to hear a case even if the judge is a national of one of the parties, and permitting a state party to name a judge ad hoc if the other litigating party has a judge of its nationality on the bench or if neither litigating party has a judge of its nationality on the bench); ITLOS Statute, *supra* note 83, art. 17(3) (allowing a party to choose an additional member of the Tribunal if no member of the party's nationality is on the bench).

ties.<sup>151</sup> The ECJ, on the other hand, expressly prohibits using nationality as a basis for challenging a judge.<sup>152</sup> These different options for balancing out a panel or bench may affect perceptions of the dispute settlement mechanism's impartiality, fairness, and reputation as an adjudicative, as opposed to political, institution. Table 3 shows the variation across tribunals.<sup>153</sup>

States have also made rules and aspirational statements concerning the overall makeup of panels and benches, perhaps in an effort to guarantee a particular kind of balance and to prevent undue bias. For example, no two members of ITLOS may be nationals of the same state, and the Tribunal as a whole must be representative of the principal legal systems of the world and should enjoy equitable geographical distribution.<sup>154</sup> WTO Panel members "should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."<sup>155</sup> If there is a dispute between a developing country and a developed country, the developing country may request that at least one panelist come from a developing country.<sup>156</sup> In ICSID, the chairman, when designating persons to serve on panels, "shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity."<sup>157</sup> "The majority of arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute," unless all the members of the Tribunal have been appointed by agreement of the parties.<sup>158</sup> No two judges on

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151. See, e.g., IACHR Rules, *supra* note 90, art. 4(3) (requiring a president who is a national of a party to a case before the court to relinquish the presidency for that case); ICJ Rules, *supra* note 81, art. 32(1) (stating that a national of one of the parties before the court may not serve as president for that case); ITLOS Rules, *supra* note 79, art. 16 ("No Member who is a national of a party in a case, a national of a State member of an international organization which is a party in a case or a national of a sponsoring State of an entity other than a State which is a party in a case, shall exercise the functions of the presidency in respect of the case.").

152. ECJ Statute, *supra* note 79, art. 18 ("A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.").

153. See *infra* Part V tbl. 3.

154. ITLOS Statute, *supra* note 83, arts. 2-3. Further, "[t]here shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations." *Id.* art. 3(2).

155. DSU, *supra* note 28, art. 8(2).

156. *Id.* art. 8(10).

157. ICSID Convention, *supra* note 1, art. 14(2).

158. *Id.* art. 39.

the IACHR may share nationality.<sup>159</sup> States electing judges to the ICJ should “bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”<sup>160</sup>

The presence of these kinds of provisions suggests that some kind of overall representativeness is important to states agreeing to adjudication in an international tribunal, or at least, that no state or litigant or one perspective be overrepresented on a bench or panel. The WTO rule that developing countries are entitled to at least one panelist from the developing world is particularly interesting. The implication is that if developing countries feel their perspectives are not understood by panelists, it undermines the authoritativeness of the adjudicative body’s decisions. At the same time, it acknowledges that decisions are being made in a political context, where some players feel inherently disadvantaged. The presence or absence of balancing provisions may serve to increase or undermine the legitimacy of a tribunal, and is worthy of cross-tribunal comparison and debate. The kinds of “diversity” parameters states have envisioned thus far may change and evolve in the future. For example, increased gender diversity on the bench or panel might increase the legitimacy of international tribunals in the eyes of some international actors.<sup>161</sup>

Perhaps the most important indicator of persistent bias on a bench or panel, however, is not the structure of the panel or rules about nationality, but rather the institution’s record. If the adjudicative body always rules in favor of one class of litigants or even of one litigant, it is likely to be viewed as biased.<sup>162</sup> For example, if ICSID always rules in favor of the investor over the sovereign, the WTO rules in favor of the developed over the developing country,

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159. IACHR Statute, *supra* note 121, art. 4(2).

160. ICJ Statute, *supra* note 17, art. 9.

161. See, e.g., Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 614-15 (1991) (describing international law as “a thoroughly gendered system” and decrying the dearth of women in the primary organizational structures of international law); Iyiola Solanke, *Diversity and Independence in the European Court of Justice*, 15 COLUM. J. EUR. L. 89, 92 (2008/2009) (“A widely acknowledged legitimacy input for courts lies in the extent to which their composition reflects those whose lives are affected by their decisions.”).

162. See, e.g., Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism*, 41 HARV. INT’L L.J. 419, 427-29 (2000) (discussing the debate between Jan Paulsson and M. Sornarajah concerning whether international commercial arbitration was and is inherently biased against southern states).

or, if during the Cold War the ICJ ruled in favor of the communist over the capitalist country, the losing class of litigants will question the authority of the institutions. The perception that the scales are unjustifiably tipped in one direction undermines the strength of adjudicative bodies.

Not only are international actors assessing bias likely to look to win/loss records, but also they will examine the manner in which benches and panels use and shape legal doctrine. Was the outcome “legally sound,” or was it somehow divorced from conventional approaches?<sup>163</sup> Did it sound like a tirade, or was it framed in the prevailing legal discourse? For example, scholars assessing bias in the wake of Libyan oil arbitrations of the 1970s looked to “doctrines relied upon by the arbitrators to reach their decisions, the legal validity of the doctrine, and its current state of acceptance under international law.”<sup>164</sup>

Yet a litigant may continue to authorize a tribunal to decide its disputes even if its class of litigants loses most of the time, or even in the face of perceived bias in doctrine if other legitimacy-enhancing factors are present. For example, states may prefer to continue to subject themselves to liability before international human rights courts because of the importance they place on human rights norms. They prefer to compensate a victim or change their laws because the value of human rights outweighs the costs of participation. Similarly, a state in an investor-state dispute resolution tribunal may prefer to suffer occasional losses because it believes that staying will make it a more attractive candidate for foreign investment.<sup>165</sup> This idea, which this Article calls “normative buy-in,” is discussed in Part III.B below.

### 3. Equal Treatment from Registrars and Secretariats

For the same reasons that states require fair procedural rules and impartial judges, arbitrators, panels, and benches, states expect equality and fairness from the secretariats or registries of courts and tribunals. Like clerks’ offices in the domestic context, secretariats are an extension of the tribunals themselves, and they play important roles in ensuring that states receive equal treatment and equal information. When a tribunal’s officials are perceived as

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163. For discussion on the meaning of “legally sound,” see *infra* Part III.B.

164. Shalakany, *supra* note 162, at 445.

165. See, e.g., *id.* at 428 (describing the argument of a Singaporean legal scholar that “developing countries simply must accept arbitration if they are to attract any long-term foreign investment”).

arbitrary, biased, incompetent, or unfair, states are less likely to authorize that tribunal to decide their dispute. This state preference is demonstrated in various treaties giving rise to international tribunals requiring professional and ethical qualifications, as well as oaths upon taking office, for registrars and secretariat officials.<sup>166</sup>

#### 4. Transparency's Role

To ensure that a tribunal is not acting in an unacceptably biased manner, states established a number of mechanisms to monitor fairness and promote equal treatment. Specifically, through their constitutive documents, states and other international actors demand institutional transparency from international tribunals to protect themselves against observable bias.<sup>167</sup> Transparency mechanisms may take the form of requiring open hearings and published opinions in accessible languages, and information concerning the functioning of the secretariats.<sup>168</sup> As a result, increased transparency may assist in heightening the legitimacy of an institution. The importance of transparency for evaluating whether a tribunal is fair and unbiased, as well as its power as an

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166. Registrars are often appointed or elected by members of the court or tribunal to set terms. *See, e.g.*, ECJ Rules, *supra* note 81, art. 12(1), (4) (appointed by court to six-year term); IACHR Rules, *supra* note 90, art. 7 (elected by court for a five-year term); ICJ Rules, *supra* note 81, art. 22(1) (elected by court for a seven-year term). Qualifications are often quite high, and impartiality is mandated. *See, e.g.*, ECJ Rules, *supra* note 81, art. 12 (requiring applications for the Registrar position to include age, nationality, university degrees, knowledge of languages, present and past occupations and experience in judicial and international fields); ICSID, *Administrative and Financial Regulations, in* ICSID CONVENTION, REGULATIONS, AND RULES, *supra* note 27, at 51, 59 (Regulation 13); ICSID Convention, *supra* note 1, art. 10(2) (prohibiting the Secretary-General and Deputy Secretary-General of ICSID from the exercise of any political function and from any other employment or occupation except with approval of the Administrative Council); ICJ Rules, *supra* note 81, art. 22(3) (requiring nominations for the Registrar position to include information as to the candidate's age, nationality, present occupation, university qualifications, knowledge of languages, and previous experience in law, diplomacy, or the work of international organizations). Registrars are often required to swear an oath of loyalty and impartiality as well. *See, e.g.*, ECJ Rules, *supra* note 81, arts. 3, 12(5) (mandating that a judge will take an oath to perform his duties "impartially and conscientiously" and to "preserve the secrecy of the deliberations of the Court"); IACHR Rules, *supra* note 90, art. 9(1) (requiring the Secretary and Deputy Secretary to swear "to discharge their duties faithfully, and to respect the confidential nature of the facts that come to their attention while exercising their functions"); ITLOS Rules, *supra* note 79, art. 34 (requiring the Registrar, Deputy Registrar, and Assistant Registrar to make a solemn declaration at a meeting of the Tribunal to perform their duties "in all loyalty, discretion and good conscience and . . . faithfully observe all the provisions of the Statute and of the Rules of the Tribunal").

167. Table 4 describes some of the specific mechanisms that states require to ensure transparency. *See infra* tbl. 4 and discussion *infra* Part III.C.

168. *See infra* tbl. 4 and discussion *infra* Part III.C.

independent legitimating factor is discussed in depth in Part III.C below.

In sum, states are more likely to grant continuing consent to adjudication in a particular forum when procedural rules, adjudicators, and secretariats and registries are perceived as fair and unbiased. Neither side must be viewed as favored with respect to appointment of individual adjudicators or benches and panels of adjudicators. A state is likely perceive an institution as biased and may withdraw its consent to adjudication if one side is perceived to win all the time unless other legitimacy-increasing factors are present. Transparency also plays an important role in increasing the perception of tribunals as fair and unbiased in the eyes of international actors.

### B. *Buy-in to the Underlying Normative Regime*

International actors are unlikely to perceive a tribunal as authorized to decide a dispute if they do not support the underlying normative regime that the tribunal is interpreting and applying. A “normative regime” is the “law” potentially applicable by a tribunal to a dispute pertaining to a particular substantive area, such as that relevant to use and preservation of the seas, human rights, or property rights (in many investor-state cases). These legal rules are usually initially codified in a treaty; for example, upon its entry into force, the U.N. Convention on the Law of the Sea contained the law applicable to disputes before ITLOS for states that had ratified that treaty. Treaty provisions are subject to new interpretations over time, often in light of states’ actions and understandings of what constitutes binding international law, judicial decisions, the writings of publicists, and the actions and views of other actors who influence the sources of international law. Thus, the normative regime of the Law of the Sea is arguably not the same today as it was in 1982.

International actors will not perceive a tribunal to possess justified authority if the underlying normative regime lacks “currency.” A normative regime has “currency” for an international actor when it believes the regime is consistent with its view of what the law is or should be. The currency of a normative regime may change over time, growing or shrinking depending on actors’ evaluations of the normative regime’s evolution as compared to their interests and values. When interests and values diverge, international actors must decide which is more important to them in assessing a regime’s currency. Each time a tribunal issues a decision that

diminishes the currency of a normative regime, international actors are less likely to submit willingly their disputes to the tribunal or to consider its rulings authoritative, although international actors' interests and values may themselves be shaped by changes to the normative regime. (Whether and to what extent a state or other international actor's preferences and interests are influenced by the decisions and actions of institutions and vice versa are questions of considerable debate among international relations scholars.<sup>169</sup>)

Regardless of where one stands on the international relations debate, at least two factors influence a normative regime's currency for international actors. First, the normative regime developed over time must accord with international actors' interests and values. For some actors, the morality of a decision will be the linchpin of its currency; there is no legitimacy without morality. Second, the currency of a regime may be influenced by whether the decisions of the tribunal are considered legally sound, or consistent with commonly accepted principles or discourse of legal decision making. Although political acceptability (whether based on morality or not) and legal soundness appear at odds with each other, they are both integral to normative buy-in. Legal soundness prevents a decision from appearing too political because it is grounded in commonly accepted legal discourse. A failure to understand or account for interests and values is equally dangerous to normative buy-in. Again, transparency assists states and other stakeholders in evaluating developing norms. The factors influencing normative buy-in are discussed in turn below.

### 1. Norms in Accordance with Interests and Values

For actors influencing state policy to "buy in" to a normative regime or for it have currency, they must find that it accords with their interests and values. If a tribunal makes decisions over time that run contrary to an international actor's interests and values, its legitimacy is likely to decline. Also, tribunals risk undermining their authority to interpret a normative regime by failing to address international actors' concerns external to the law, or by ignoring shifting ideological and political winds and moral concerns. But if actors' interests and values are shaped by evolving norms, decisions

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169. See, e.g., John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SEC., Winter 1994/95, at 5, 7 (contrasting realist and institutionalist international relations paradigms).

that would not have been acceptable in the past may become more so.

If a tribunal consistently makes decisions that do not coincide with international actors' interests and values, they will likely cease to perceive the tribunal as possessing justified authority. Imagine that a treaty sets out a standard by which a decision shall be made which reflects a political compromise between the parties to the treaty. A tribunal repeatedly interprets that provision in a manner inconsistent with that political compromise. As a result, parties may ultimately reject the tribunal's rulings as failing to accord with their view of what the law is or should be, undermining their willingness to recur to the adjudicative body at all.

More concretely, suppose that various states decide that the continental shelf should be delimited to achieve an "equitable solution" on the basis of "international law."<sup>170</sup> When they ratify the 1982 UNCLOS treaty, they have divergent views of what "equitable" means or what international law requires; some believe "equitable" means delimitation by an equidistance line in most or all cases, while others assert the continental shelf should be delimited by an alternative method, such as the angle bisector approach.<sup>171</sup> If the ICJ decides that "equitable" always means equidistance, states that prefer the angle-bisector approach may seek an alternative tribunal with different jurisprudence on the meaning of "equitable," or they may prefer a negotiated solution, or even no solution at all. Their disagreement with the court's rulings may translate into criticism, diminished will to refer disputes to the court, and perhaps even attempts to undermine the treaty regime or the tribunal itself. Another example is the ICJ's 1966 judgment in the South West Africa cases, which was so disappointing to African and Asian states that concerns arose they would stop using the court.<sup>172</sup> Even

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170. See United Nations Convention on the Law of the Sea art. 83, Dec. 10, 1982, 1833 U.N.T.S. 3.

171. See, e.g., *Guyana v. Suriname* ¶¶ 210, 221 (ITLOS 2007), available at <http://www.pca-cpa.org/upload/files/Guyana-Suriname%20Award.pdf> (describing Guyana's position in favor of delimitation based on equidistance and Suriname's advocacy for an angle-bisector approach).

172. See RICHARD A. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* 397 (1970). Falk notes:

[T]he disappointment caused by the 1966 decision has seriously undermined confidence in the ICJ to such an extent—especially in the eyes of the Afro-Asian group—that no opportunity is likely to provide the Court with an opportunity to signal a revival of jurisprudential progressivism in its operations. To overcome this ironic situation from inhibiting recourse of the ICJ and to international adjudication in general it is important for observers to appreciate the combination of improbable circumstances that allowed the judicial conservatives to muster a



though a prior decision is binding only on the parties to the case in which the Court rendered the decision,<sup>173</sup> the ICJ frequently cites its prior rulings on similar legal issues, and states are likely to consider these in evaluating the normative regime.

The mass public's view of (at least national) tribunals depends to some extent on their satisfaction with specific policy outcomes over time.<sup>174</sup> In their study of highest national courts in Europe and the United States, James Gibson, Gregory Caldeira, and Vanessa Baird propose that satisfaction with a court's policy outcomes ("specific support") over time is correlated with support for the institution itself ("diffuse support"), and this relationship is stronger the longer the court has been in existence.<sup>175</sup> In other words, the more instances of satisfaction with the decisions of a court over time, the more likely mass publics will support the judicial institution.<sup>176</sup> To the extent that mass publics shape state policy, satisfaction with specific outcomes over time may significantly affect legitimacy.

How a tribunal handles issues seemingly external to the normative regime may also affect its legitimacy. For example, assume that states conclude bilateral investment treaties with other states and agree to binding arbitration with investors at a time when environmental concerns are only beginning to appear on the international stage. States then sign decades-long concession agreements with investors for extraction of natural resources, which lack provisions to protect the environment. In response to domestic and international political pressure following an oil spill in a protected area or the collapse of a tailings dam into a river, a state decides to expropriate the natural resource or to impose sanctions on the investor. The investor sues for a violation of the applicable bilateral investment treaty. If domestic constituencies and states perceive that a tribunal fails to take such concerns into account, the tribunal will lose favor, and its authority may be undermined. On the other hand, an investor might find the tribunal to be "activist" or "too

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majority in 1966 and the probability that the judicial conservatives will exert a declining influence in future activities of the ICJ.

*Id.*

173. ICJ Statute, *supra* note 17, art. 59.

174. See James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 356 (1998). The Gibson, Caldeira & Baird study focuses on individuals with a threshold level of awareness about their highest national court. *Id.* at 347-48.

175. See *id.* at 356.

176. See *id.*

political” if it considers factors found nowhere in the bilateral investment treaty.

Shifting ideological or political winds may also affect the political acceptability of decisions, and thereby, the currency of a normative regime. Again in the context of investor-state disputes, assume that a corrupt dictatorship signed bilateral investment treaties with binding arbitration clauses, as well as a number of agreements with foreign investors containing terms that could easily be construed as unfavorable to the state (and perhaps favorable to the dictator). Today, host country nationals believe that the foreign investments have brought little to no benefit, and they elect a leader to reclaim their natural resources, or at least, to renegotiate terms of agreements. If a tribunal persistently rules in favor of investors in such situations, holding that the states are treating foreign investors in a discriminatory manner or engaging in illegal expropriations, states and the domestic constituencies they represent will likely begin to disparage the normative regime. The tribunal’s interpretations will be seen as too constraining on sovereign power exercised on behalf of the people. Tribunals may be seen as out of touch with reality on the ground in the litigating state.

A normative regime’s currency may grow over time, even if tribunals make decisions that appear contrary to states’ and other international actors’ short- or medium-term interests. An actor’s commitment to a particular normative regime may increase if it perceives benefits to staying a “member of the club” that go beyond particular doctrinal decisions against it, or if it believes the tribunal’s decisions are morally justified. For example, states might choose to continue to consent to adjudication in human rights bodies despite adverse decisions because they are committed to human rights and their sense of justice or morality compels them to continue to consent to adjudication, or because they want to preserve the veneer of such a commitment. Similarly, even if states perceive bias in investment arbitrations, states and other actors might advocate on behalf of remaining in a dispute settlement mechanism because they perceive that it is a necessary prerequisite to attract foreign direct investment.<sup>177</sup> An international relations theorist of the Constructivist school might assert that decisions of a

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177. See, e.g., Shalakany, *supra* note 162, at 428 (describing the argument of a Singaporean legal scholar that “developing countries simply must accept arbitration if they are to attract any long-term foreign investment”).

tribunal over time can themselves alter state preferences and identity.<sup>178</sup>

Allegiance to the transnational polity associated with the normative regime might also affect normative buy-in. Unlike national courts, international ones “cannot rely upon the ‘presumption of legitimacy’ associated with national institutions.”<sup>179</sup> For example, social-science research suggests that if citizens feel like they are a part of the European Union, they may be more willing to support the ECJ.<sup>180</sup> If they feel no link whatsoever to the European Union, however, the ECJ’s authority is called into question. In their discussions about the WTO, Robert Keohane and Joseph Nye suggest that one way to strengthen such links is through the use of intermediating politicians with access to both the institutions and domestic constituencies.<sup>181</sup>

## 2. Legally Sound Norms

The perception of a tribunal’s decisions as “legally sound” likely affects the currency of a normative regime and support for the underlying judicial institution. In deciding disputes, international judges and arbitrators shape the underlying normative regime. Even if precedent is generally not formally binding in the international legal system, lawyers and judges refer to previously decided cases as persuasive authority.<sup>182</sup> Consequently, tribunals’ interpretations of a treaty or relevant doctrine impact the kinds of arguments that future litigants make, the standards that are applied to future disputes, and presumably the behavior of those bound by the normative regime. If interpretations and rulings lack particular hallmarks, international actors may perceive them as unduly

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178. See Alexander Wendt, *Constructing International Politics*, INT’L SEC., Summer 1995, at 71, 71-72 (stating that the two basic claims of critical international relations theory, which includes constructivism, are “that the fundamental structures of international politics are social rather than strictly material (a claim that opposes materialism), and that these structures shape actors’ identities and interests, rather than just their behavior (a claim that opposes rationalism)"); Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998) (discussing “norm entrepreneurs” and the influence of membership in a community on state preferences).

179. Gibson & Caldeira, *supra* note 8, at 464.

180. See *id.* at 464-65 (suggesting that legitimacy of transnational institutions depends in part on citizen identification with the supranational polity, “which, in the case of the EU, is only beginning to emerge”).

181. See Keohane & Nye, *supra* note 34, at 280.

182. The ICJ Statute’s article 38 lays out the sources of international law traditionally referenced by international courts, including “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” ICJ Statute, *supra* note 17, art. 38(1)(d).

political, arbitrary, or biased, rather than authoritative or binding. To be seen as authoritative, rulings and judgments must both accord with interests and values *and* be framed in the predominant legal discourse. They must utilize a kind of legal reasoning or discourse that is commonly accepted by litigants and members of the treaties establishing tribunals. For domestic or other constituencies, the form of legal discourse is probably less important than whether the court's decision accords with their interests and values.

Franck's work on international rule legitimacy provides a useful delineation of the kinds of reasoning likely to be considered authoritative in the international context. Although Franck's project examines what draws states to comply with international rules—his definition of legitimacy—the qualities of the rules he identifies are applicable to legal reasoning in international court opinions. Specifically, Franck asserts that a rule's (lack of) "determinacy," "coherence," and "adherence" will affect its legitimacy, or ability to pull parties to compliance. If a tribunal issues rulings that lack these characteristics, it may undermine its own credibility. States are less likely to submit a case to adjudication in a tribunal that fails to incorporate these elements into its rulings.

Franck states that determinacy "denotes a rule's clarity of meaning," as well as "the extent to which the rule's communicative power exerts its own dynamic pull toward compliance."<sup>183</sup> A legitimate rule distinguishes clearly between prohibited and permitted conduct,<sup>184</sup> or "is open to a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed."<sup>185</sup> Although tribunals are often faced with preexisting rules in the form of positive law such as treaties, the extent to which their decisions clarify rules may affect their legitimacy. If a tribunal confuses rather than clarifies identifiable principles governing behavior, its utility will be questioned.

The same applies to consistent application of rules to like situations—what Franck calls "coherence"—as opposed to an idiosyncratic or arbitrary application.<sup>186</sup> Coherence "legitimizes a rule, principle, or implementing institution because it provides a reason-

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183. FRANCK, *supra* note 6, at 84. Nonetheless, as Franck explains, a rule's clarity is not necessarily an indicator of its compliance pull, particularly when its clear command produces results "at variance with common sense." *Id.* at 68.

184. *Id.* at 57.

185. *Id.* at 61.

186. *See id.* at 152.

able connection between a rule, or the application of a rule, to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems.”<sup>187</sup> If a court applies the same rule in a number of different ways, those governed by the rule cannot modify their behavior to accord with the rule. Further, if a court or series of arbitral panels within one normative regime applies the same rule to identical situations yet achieves divergent outcomes, international actors will perceive the dispute resolution mechanism as arbitrary and ineffective. If litigants get no predictability from the dispute resolution mechanism, they may prefer to avoid it altogether.

To protect against inconsistency, states have created appellate mechanisms for some adjudicative bodies. For example, the WTO's Appellate Body hears appeals on legal issues from panel decisions and is composed of adjudicators who serve fixed terms of four years.<sup>188</sup> ICSID has no such appellate mechanism, and the system has been criticized for rendering inconsistent decisions.<sup>189</sup> Some have also raised concerns about ICSID litigants attempting to utilize annulment proceedings as a form of de facto appeal.<sup>190</sup> Further, ad hoc tribunals hear annulment proceedings in the ICSID system, not adjudicators with a fixed tenure.<sup>191</sup> The ECJ serves as a court of last resort for some kinds of appeals, but it also possesses exclusive and original jurisdiction over others.<sup>192</sup> The ICJ generally acts as a court of first instance for contentious cases, with no possibility of appeal.<sup>193</sup> In both the ICJ and the ECJ, a party may seek to revise a judgment, but only in a very limited set of circum-

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187. *Id.* at 147-48.

188. DSU, *supra* note 28, art. 17(1)-(2).

189. See Franck, *supra* note 3, at 1524, 1547-48 (noting that “because legal errors cannot be corrected in ICSID awards, the possibility of inconsistent awards is an accepted reality [sic] at ICSID” and suggesting a single investment treaty arbitration appellate body for a number of different arbitral institutions including ICSID); Burke-White & von Staden, *supra* note 4, at 314-15 (questioning the viability of ICSID in light of inconsistent decisions in four cases involving the same facts and legal issue).

190. See Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444, 452-53 (2006) (describing three “generations” of annulment cases in ICSID and how they addressed the distinction between annulment and appeal).

191. See ICSID Convention, *supra* note 1, art. 52(3).

192. ECJ Statute, *supra* note 79, arts. 51, 56. For example, the ECJ has exclusive jurisdiction over actions for annulment brought by a member state against the European Parliament or brought by one community institution against another, and it has appellate jurisdiction over points of law decided by the Court of First Instance. See *id.*

193. ICJ Statute, *supra* note 17, arts. 36, 60.

stances.<sup>194</sup> Litigants in these courts may get only one bite at the apple, with no corrective mechanism available in case of inconsistent decisions. The existence of another layer of review to prevent inconsistent decision making or to establish clear rules of law may affect whether a state authorizes or continues to authorize a particular tribunal or court to hear its disputes.

The extent to which adjudicators link their rulings to an “organized normative hierarchy”<sup>195</sup> will also enhance or diminish their authoritativeness. Franck labels this concept “adherence”: the “vertical nexus between a *primary rule of obligation* . . . and a hierarchy of secondary rules identifying the sources of rules and establishing normative standards that define how rules are to be made, interpreted, and applied.”<sup>196</sup> The point is that “a rule is more likely to obligate if it is made within the framework of an organized normative hierarchy, than if it is merely an *ad hoc* agreement between parties in a state of nature.”<sup>197</sup> Judicial decisions that go beyond the primary rules of obligation—such as those found in normative regimes as defined in this Article—and extend to obligations derived from status or membership in a particular community will

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194. The ICJ Statute’s article 61 states:

1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.
3. The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision.
4. The application for revision must be made at latest within six months of the discovery of the new fact.
5. No application for revision may be made after the lapse of ten years from the date of the judgment.

*Id.* art. 61. The ECJ Statute’s article 44 states:

An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

No application for revision may be made after the lapse of 10 years from the date of the judgment.

ECJ Statute, *supra* note 79, art. 44.

195. FRANCK, *supra* note 6, at 184.

196. *Id.*

197. *Id.*

exert a stronger compliance pull.<sup>198</sup> International actors will perceive them to be more authoritative.

Another factor states and others may consider in evaluating the legal soundness of a court or tribunal's decisions is its compliance record. When litigants comply with a court or tribunal's judgment, they are announcing to the world that they accept the adjudicative body's decision. Every time a litigant complies with a court decision, it confers authority on the court or tribunal and on its reasoning or methodology. To what extent such peer pressure affects a state's decision to continue authorizing a court or tribunal to decide disputes is a matter for further empirical study.

While legal scholars and litigants may read and analyze opinions to determine whether a court's decisions are legally sound, mass publics may be more interested in the outcome of the decisions themselves. It is unlikely that the man or woman on the street will sit down and read an entire ICJ opinion to determine whether the court engaged with the predominant legal discourse. Whether a court's reasoning is legally sound is relevant, however, to the extent legal scholars, litigants, or opinion leaders who might influence mass publics care about it. Again, this is a matter for further empirical study.<sup>199</sup>

### 3. Transparency's Role

International actors must have access to an adjudicative body's rulings and reasoning to evaluate and assess the currency of a normative regime. The importance of transparency in this regard is discussed in Part III.C below.

In sum, the currency of a normative regime is likely to affect whether international actors perceive the tribunal interpreting it as possessing justified authority. Currency is influenced both by the coincidence of the court's decisions with international actors' interests and values, and by the perceived legal soundness of those decisions, although the former is likely more important for mass publics. If adjudicators go too far in favoring particular interests over legal soundness or vice versa, they may threaten the legitimacy of the tribunals on which they serve. Transparency is an important prerequisite for allowing international actors to assess and evaluate a normative regime's currency.

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198. See *id.* at 190-91.

199. See Gibson, *supra* note 5, at 489-91 (asserting that opinion leaders' views of procedural fairness might impact the mass public's support for a judicial institution).

### C. Transparency and Democratic Norms

Transparency affects the legitimacy of international tribunals both directly and indirectly. First, transparency is indirectly linked to legitimacy because it allows interested parties to assess whether a tribunal is fair and unbiased and to decide whether to continue to buy in to a tribunal's interpretation and application of a particular normative regime. Without access to information about a tribunal's functioning and reasoning, no such assessments can occur. Second, transparency is directly linked to legitimacy because it is a democratic norm and permits some degree of accountability. The extent to which an institution is infused with such democratic norms may affect its legitimacy in the eyes of some interested parties.

A "transparent" tribunal is one in which interested parties, both inside and outside the judicial process, can observe its processes and outcomes.<sup>200</sup> A proceeding is transparent "if it can be seen through easily, 'just as one can easily see through a clean window.'"<sup>201</sup> The purpose of transparency in this context is to allow interested parties to evaluate the decision making and functioning of a tribunal. Transparent tribunals also provide principals with the ability to assess how well their agents are representing them in judicial proceedings. Citizens of a state can reach conclusions about their government's behavior and effectiveness before a tribu-

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200. Transparency is variously defined. See, e.g., Jack J. Coe, Jr., *Transparency in the Resolution of Investor-State Disputes—Adoption, Adaptation, and NAFTA Leadership*, 54 U. KAN. L. REV. 1339, 1339 ("extent to which the public may be alerted to, gain information about, and perhaps participate in, proceedings organized to adjudicate an investor's claim"); Jeffrey T. Cook, *The Evolution of Investment-State Dispute Resolution in NAFTA and CAFTA: Wild West to World Order*, 34 PEPP. L. REV. 1085, 1100 (2007) ("the full and timely disclosure of information"); Ann Florini, *The End of Secrecy*, FOREIGN POL'Y, Summer 1998, at 50, 50 ("the opposite of secrecy"); Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1306 (2006) ("the ready availability to 'interested parties' of the rules that regulate an adjudicatory decision-making process"). A state's transparency is linked to "legal, political, and institutional structures that make information about the internal characteristics of a government and society available to actors both inside and outside of the domestic politic system." Bernard I. Finel & Kristin M. Lord, *The Surprising Logic of Transparency*, 43 INT'L STUD. Q. 315, 316 (1999). An institution's transparency may also be defined as "any kind of measure that publicizes information about an institution's behavior, such as monitoring, reporting, or simply responding to inquiries." Thomas N. Hale & Anne-Marie Slaughter, *Transparency: Possibilities and Limitations*, FLETCHER F. WORLD AFF., Winter 2006, at 153, 153.

201. Carl-Sebastian Zoellner, Note, *Transparency: An Analysis of an Evolving Fundamental Principle in International Economic Law*, 27 MICH. J. INT'L L. 579, 583 (2006) (citing William B. T. Mock, *An Interdisciplinary Introduction to Legal Transparency: A Tool for Rational Development*, 18 DICK. J. INT'L L. 293, 295 (2000)).



nal. Transparency is traditionally linked to accountability.<sup>202</sup> Armed with knowledge gained through transparency, international actors may shape the behavior of adjudicators and litigants and work to influence institutions.

A number of different options are available for enhancing the transparency of tribunals. A transparent tribunal might hold open hearings with translation into the languages of the litigating parties and produce minutes of its proceedings for public access in relevant languages.<sup>203</sup> It might make pleadings of pending and past cases and the names of adjudicators and parties publicly available. A tribunal might also issue written decisions listing the names of adjudicators and including explicit reasoning, dissenting, concurring, and separate opinions, vote tallies, and signatures. Table 4 demonstrates the differences between several tribunals with regard to these various options.<sup>204</sup> Not all tribunals employ the same approach to transparency. For example, the ECJ has no concurring, dissenting, or separate opinions, and its opinions are unsigned and include no vote tallies. ICJ opinions, on the other hand, contain all of these elements.

Table 4 does not capture some nuances that may be relevant when assessing a tribunal's transparency. For example, although tribunals may publish opinions, the information they convey may vary tremendously. As Mitchel Lasser points out in a comparative study of the ECJ, the U.S. Supreme Court, and the French Cour de Cassation, ECJ opinions are more formulaic and contain less insight into judicial reasoning than those of the U.S. Supreme Court.<sup>205</sup> Despite these differences, Lasser argues that the ECJ enhances transparency by publishing Advocate General opinions, which typically grapple with relevant case law and academic writ-

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202. See, e.g., Hale & Slaughter, *supra* note 200, at 153; Buys, *supra* note 14, at 134 ("To the extent that public international arbitrations are made more transparent, democratic ideals are enhanced because the public has the opportunity to observe the process and hold the governments accountable for their actions with respect to the arbitration and for the result. If the public is dissatisfied with its government's actions, it can express that dissatisfaction at the ballot box.").

203. The issue of the language of a proceeding may appear insignificant at first glance. Nonetheless, in cases where the official languages of the court do not include the languages of the litigants, transparency becomes harder to achieve and more costly because of translation costs.

204. See *infra* Part V tbl. 4.

205. See MITCHEL DE S.-O.-L'É. LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 16, 21-23 (2004) (describing the ECJ as a fusion of the French institutional and the American argumentative approaches while not "going far enough in either direction to solve the problems or to take advantage of the possibilities of either").

ings.<sup>206</sup> These Advocate General opinions give the public additional insight into the legal debates informing judicial opinions, even if the debates are not always explicitly addressed in the judicial opinions themselves.<sup>207</sup> The close analysis that Lasser does of the opinions of these three courts is a model for the kind of comparative analysis that will yield more insight into additional transparency-enhancing features.

Transparency is an important indirect legitimacy-influencing factor because it permits international actors to assess whether a tribunal is treating litigants in a fair and unbiased manner, both in its processes and decisions. More specifically, transparency allows domestic constituencies, interested litigating and nonlitigating states, academics, and other “court watchers” to evaluate the functioning of the adjudicative body, and the behavior and judgments of adjudicators. Court watchers cannot assess whether a tribunal and its adjudicators treat the parties fairly and impartially if the doors to the courtroom are locked. Open hearings allow court watchers to observe the implementation of procedural rules, such as how much time each party is given to present its case and whether both parties are treated with respect by the judicial panel. Similarly, access to preliminary decisions and judgments, their reasoning, and separate, concurring, and dissenting opinions allows interested parties to determine whether individual adjudicators or benches and panels made their decisions based on legally sound reasoning in the predominant legal discourse, pure bias, or by flipping a coin. Conclusions about a court’s processes and decisions can profoundly affect whether an international actor views a tribunal as authorized to decide disputes.

Neither can interested parties form opinions about their own normative buy-in if judgments and their reasoning are not made public. It is very difficult, if not impossible, for a state or other party bound by a normative regime to discern definitively what legal rules are, or how they may be implemented and applied, if no explanation accompanies decisions, much less whether they were made in a legally sound manner. Nor can court watchers grasp the state of the debate surrounding a legal issue without some indication of what adjudicators considered in their decision making and of what was controversial. Transparent opinions may influence the content of a normative regime by affecting the development of

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206. *See id.* at 16, 206-08, 228.

207. *See id.* at 236-38.

legal principles and by leading to consistency in opinions.<sup>208</sup> Although *stare decisis* does not formally apply, prior opinions on similar issues are highly persuasive.<sup>209</sup> At a minimum, judges and arbitrators are forced to grapple with another person or tribunal's approach to the same problem. Further, the strength or weakness of the reasoning provided in an opinion may affect its political acceptability, an important component in maintaining a normative regime's currency.

Transparency not only influences legitimacy indirectly by allowing interested parties to come to conclusions about a tribunal's bias and their own normative buy-in, but also, it may have independent force as a free-standing democratic norm.<sup>210</sup> Keohane and Nye suggest that the legitimacy of the WTO, for example, is linked to the presence or absence of such norms, including transparency.<sup>211</sup> In their view, a lack of transparency and opportunities to participate undermines legitimacy because the public "does not trust the honesty and legitimacy of secret proceedings."<sup>212</sup> Open hearings show that neither the parties nor the tribunal "has anything to hide."<sup>213</sup> Keohane and Nye further assert that democratic societies habitually demand transparency of institutions "that allocate values profoundly affecting people's lives" by requiring them to publish results, reasoning, and disagreement, and the same applies to organizations like the WTO.<sup>214</sup>

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208. See Coe, *supra* note 200, at 1356-57; Buys, *supra* note 14, at 136.

209. Buys, *supra* note 14, at 136.

210. See Keohane & Nye, *supra* note 34, at 281-82 ("[I]n the contemporary world, democratic norms are increasingly applied to international institutions as a test of their legitimacy. If international institutions are to be legitimate, therefore, their practices and the results of their activities need to meet broadly democratic standards."). But see Daniel C. Esty, Comment, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM*, *supra* note 34, at 301, 301 (rejecting Keohane and Nye's reliance on "global popular sovereignty" and instead asserting that "legitimacy of a governing body in the modern world derives interactively from the degree to which it reflects the will of a political community . . . and the reason or rationality of the outcomes it generates").

211. See Keohane & Nye, *supra* note 34, at 265, 276. Keohane and Nye also discuss the importance of participation—or opportunities to "make one's views known," as well as the presence of politicians with ties to both institutions and constituencies. See *id.* at 277-81; Florini, *supra* note 200, at 52 (suggesting that transparency is spreading throughout the world, along with democratization and globalization).

212. Keohane & Nye, *supra* note 34, at 277 (quoting Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 *MINN. J. GLOBAL TRADE* 1, 45 (1999)).

213. Coe, *supra* note 200, at 1361.

214. Keohane & Nye, *supra* note 34, at 277. But see Robert E. Hudec, Comment, in *EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM*, *supra* note 34, at 295, 298 (questioning the basis for asking an international "mem-

Transparency is also linked to legitimacy through the concept of accountability.<sup>215</sup> Transparency allows constituencies of accountable actors, such as adjudicators and litigants, not only to observe them, but also to attempt to exert some degree of control over their behavior. For adjudicators, relevant constituencies might include the litigating parties, nonlitigating parties to the relevant normative regime, other adjudicators, scholars, lawyers, and the public at large. For state litigants, relevant constituencies might include the electorate, political party members, special interest groups such as NGOs, and the media,<sup>216</sup> as well as other members of the international community including states, parties to relevant treaties, and international NGOs. Private litigants such as public companies might be accountable to shareholders and other private and public actors.

Transparency allows constituencies to shape behavior in at least two ways. First, the mere knowledge that they are being watched may affect behavior: “[t]ransparency regulates by deterring actions that are unlikely to withstand public scrutiny.”<sup>217</sup> In other words, if judges and arbitrators know that their opinions will be read and reviewed, they will think twice before putting pen to paper. The act of publication makes arbitrators and judges more cautious and heightens their sensitivity to the environment in which they are acting. Similarly, representatives of domestic constituencies or shareholders will review their own declarations and legal strategies with a different lens if they know they are being observed. When a hearing is open, litigants have more than just one audience—the tribunal—to please.

Transparency also allows constituencies to shape behavior because if adjudicators and litigants act in a way that is perceived as unacceptable or highly undesirable by relevant constituencies, they may suffer consequences. The consequences themselves may cut short aberrant adjudicator behavior, and awareness of possible consequences may shape behavior. For example, if an adjudicator

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ber-driven organization” like the WTO to “meet the legitimacy standards of an institution with powers of governance”).

215. See Hale & Slaughter, *supra* note 200, at 153 (stating that transparency is traditionally linked to accountability); Buys, *supra* note 14, at 134; Keohane & Nye, *supra* note 34, at 291 (“Whatever form accountability takes, transparency will be crucial to ensure that accountability is meaningful.”).

216. Barry Leon & John Terry, *Special Considerations When a State is a Party to International Arbitration*, DISP. RESOL. J., Feb.-Apr. 2006, at 69, 72.

217. R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT’L ORG. 103, 106 (2004).

fails to engage in legally sound reasoning or widely exceeds the bounds of political acceptability, the adjudicator may suffer professional reputational damage or may not be chosen to serve as an arbitrator or judge in the future.<sup>218</sup> Conversely, decisions that strike the right balance may be rewarded. The idea that judges and arbitrators are rewarded or punished based on outcome or reasoning appears problematic when juxtaposed with ideals such as judicial independence, moral courage, and impartiality. Yet international judges and arbitrators, like domestic ones, must straddle the line between producing politically acceptable opinions and utilizing legally sound rhetoric. States may decide to limit a tribunal's funding if they are dissatisfied with outcomes or simply never use it to decide any disputes. Without these sorts of restraints on adjudicator and tribunal behavior, both the normative regimes and the tribunals themselves might be endangered.

In addition, transparency allows domestic and other constituencies to hold governments accountable for their actions and results.<sup>219</sup> The link between holding litigants accountable and legitimacy may be that for some international actors, the inability to monitor what their agent is doing taints the entire judicial or arbitral process. By having access to information about their state's actions, domestic constituencies can make informed decisions about the authority or legitimacy they wish to confer on their own political representatives. Consequently, transparency enhances democratic ideals.<sup>220</sup>

Transparency may also make some international actors *less* likely to authorize tribunals to decide their disputes. For example, open hearings or other measures increasing transparency may be disruptive, costly, or heighten the vulnerability of information litigants

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218. See, e.g., Keohane & Nye, *supra* note 34, at 277 (“[The United States Supreme Court and the Federal Reserve Board] are held accountable through criticisms by professional networks, such as legal scholars writing in law journals and economists writing scholarly articles and offering opinions in the public media. Without transparency, these means of accountability would be eviscerated.”); Buys, *supra* note 14, at 137 (arguing that the publication of arbitral awards will assist future parties in selection of arbitrators for their disputes); Coe, *supra* note 200, at 1356 (arguing that publication of awards “exposes the tribunal’s work to scrutiny by the academic and practice communities, supplying a species of peer review”); Rogers, *supra* note 200, at 1306 (asserting that “the general aim of transparency is to facilitate monitoring the adjudicator”).

219. Cook, *supra* note 200, at 1101.

220. See, e.g., Buys, *supra* note 14, at 134 (“To the extent that public international arbitrations are made more transparent, democratic ideas are enhanced because the public has the opportunity to observe the process and hold the governments accountable for their actions with respect to the arbitration and for the result. If the public is dissatisfied with its government’s actions, it can express that dissatisfaction at the ballot box.”).

may want to keep secret.<sup>221</sup> Providing translations of pleadings, hearings, and judgments in a number of different languages is expensive and may lengthen filing times and proceedings. Confidentiality may be preferable when it allows parties to keep damaging allegations out of the public eye and prevents outsiders from gaining access to confidential government or business information such as trade secrets.<sup>222</sup> On the other hand, purported principals, such as domestic constituencies and shareholders, might prefer to shine light on damaging allegations, and procedures can be tweaked to protect sensitive information that is not necessary to ensure accountability.

Complete transparency may occasionally aggravate conflict and prevent negotiated dispute settlement. Bernard Finel and Kristin Lord assert that transparency can exacerbate crises “by overwhelming diplomatic signals with the ‘noise’ of domestic politics and confusing opponents about which domestic voices are authoritative expressions of state policy.”<sup>223</sup> Litigants in a transparent tribunal might be forced to frame their arguments to appease particular interest groups or powerful domestic constituencies rather than to arrive at a reasonable solution. If the government was elected by those constituencies, however, perhaps democratic accountability obligates the government to frame its arguments in their rhetoric.

Despite some possible drawbacks that are difficult to reconcile with democratic principles, transparency probably is correlated positively with legitimacy. Transparency provides international actors insights about a tribunal’s independence and impartiality and the development of the normative regime the tribunal is charged with interpreting and applying. Further, transparency may itself influence the normative regime by requiring adjudicators to grapple with prior decision making on the same or similar issues, perhaps leading to greater consistency in the law. Finally, as a democratic norm linked to accountability, transparency may directly confer legitimacy on an adjudicative body.

#### IV. CONCLUSION

When states (or the actors who influence and shape state preferences) submit a dispute or category of disputes to international adjudication, they choose to forego some amount of their sovereignty in favor of other values. For example, by joining ICSID,

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221. Coe, *supra* note 200, at 1361-62.

222. Buys, *supra* note 14, at 137.

223. Finel & Lord, *supra* note 200, at 315.

states limit their range of options for handling economic crises in favor of a perception that they are attracting investment. Agreeing to allow an ITLOS tribunal to undertake a maritime delimitation is an affirmative choice for peaceful dispute resolution over traditional approaches, such as the use of force. States commit themselves to particular human rights principles by submitting to the jurisdiction of the Inter-American Court of Human Rights, limiting the policy choices available to governments for handling dissenting views. So long as these trade-offs are considered worthwhile, strengthening the legitimacy of international adjudicative bodies is essential. To that end, and in light of states' increasing recourse to international adjudicative bodies, this Article seeks to spark discussion about legitimacy.

Specifically, this Article proposes that legitimacy should be understood as the perception that an international adjudicative body possesses justified authority, and that this perception may vary over time and across different international actors who may influence state preferences. The Article further suggests that an international court will be perceived as legitimate if it is (1) fair and unbiased, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and infused with democratic norms. By moving beyond legal legitimacy and focusing on what underpins authority, rather than what pulls toward compliance or a sense of obligation to international legal rules, this Article hopes to reframe scholarly inquiry about legitimacy and international courts from a theoretical standpoint and spur empirical research on the topic. Such research might test the hypotheses generated in this paper, consider the relationship between different drivers of legitimacy, and seek to understand the link between different constituencies' perceptions of legitimacy and the decisions of a state to consent or not to adjudication in a tribunal. Both theoretical and empirical scholarship about legitimacy and international courts can make a real difference to institutional reformers and those interested in strengthening the underlying normative regimes that international courts interpret and apply.

V. FIGURE AND TABLES

FIGURE 1: LEGITIMACY-INFLUENCING FACTORS

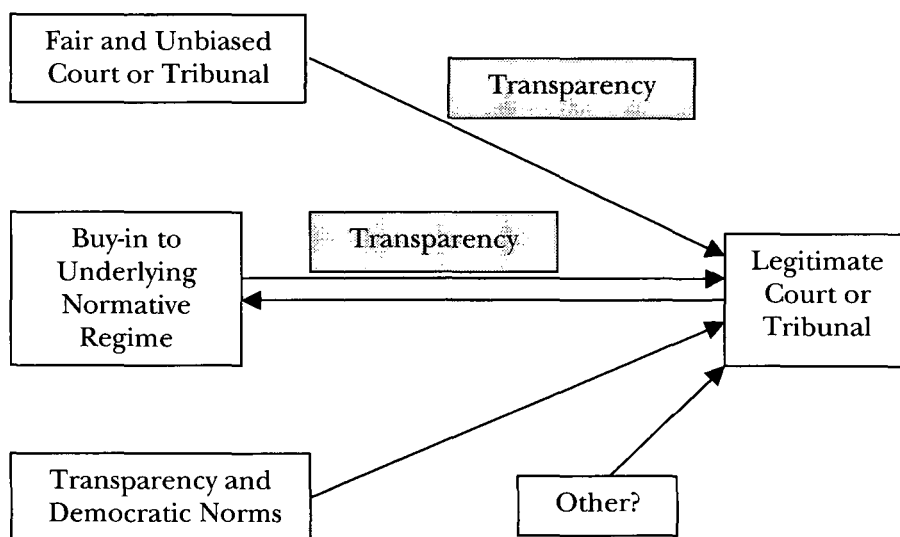




TABLE 1: PROCEDURAL FAIRNESS

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
Equal right to present views on procedure	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Panels and Appellate Body: Yes.
Equal right to present views on substance	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Panels and Appellate Body: Yes.
Equal access to written pleadings	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Panels and Appellate Body: Yes.
Preset deadlines for filing of pleadings on the merits	Yes, <i>e.g.</i> , Defendant must file Defence within thirty days of receipt of Application, but the President may extend the deadline upon "reasoned application." But, the President sets deadlines for Replies and Rejoinders.	Yes, <i>e.g.</i> , Respondent has two months (non-extendable) to present an Answer. The President sets deadlines for additional pleadings.	No, but the Court may shorten the briefing schedule agreed upon by parties based upon "unjustified delay."	No. The Tribunal sets deadlines for filing pleadings if there is no agreement by the parties.	Yes, the time limit for each pleading cannot exceed six months, but the Tribunal may extend the time limit only if there is "adequate justification" for the request.	Yes, there is a ninety-day time limit for filing written statements, unless "an extension is justified."	Panels: Yes, the Panel sets "precise deadlines for written submissions by the parties and the parties should respect those deadlines." But, the "suggested timetable" in the Working Procedures is almost always applied.  Appellate Body: Yes, but "[i]n exceptional circumstances, where strict

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
							adherence to a time-period . . . would result in a manifest unfairness . . . a party . . . may request that a division modify a time-period . . . .”
Preset deadlines for naming of adjudicators	N/A	Yes.	No.	Yes.	No, but party must notify the Tribunal of its intention to name a judge <i>ad hoc</i> within two months of counter-memorial filing deadline. Explicit deadlines for filing objections to judge <i>ad hoc</i> .	Yes.	<p>Panels: Yes. Once a party requests the establishment of a panel, it must be established at the latest at the next Dispute Settlement Body meeting, unless the DSB decides by consensus not to establish a panel.</p> <p>Appellate Body: N/A</p>
Preset number and type of pleadings on the merits	Application, Defence, and possibility of Replies and Rejoinders.	Application, Answer, and possibility for additional pleadings.	Memorial and Counter-Memorial, with possibility of Replies and Rejoinders.	Memorial and Counter-Memorial, with possibility of Reply and Rejoinder.	Memorial and Counter-Memorial, with possibility of Reply and Rejoinder.	Statement of Claim and Statement of Defence, with possibility of “further written statements.”	Panels: Yes, round of first written submissions (sequential), second written submissions (simultaneous),

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
							and comments on panel report.  Appellate Body: Yes, Notice of Appeal, Appellant's Submission, and Appellee's Submission.
Party Input on Procedural Matters	Yes, <i>e.g.</i> , a Party may request expedited procedures, but the President has discretion to accept the request.	Yes, <i>e.g.</i> , parties may seek permission for additional written pleadings.	Yes, but the Court has sole discretion on whether to accept proposed modifications.	Yes, and the Tribunal must apply any agreement of the Parties consistent with Convention and Administrative and Financial Regulations.	Yes, but the Tribunal has sole discretion on whether to accept proposed modifications.	Yes. Rules are subject to modification by agreement of the parties in writing.	Panels: Yes, <i>e.g.</i> , parties may seek accelerated or slower proceedings.  Appellate Body: Yes, but modifications only in exceptional circumstances.

TABLE 2: INDIVIDUAL ADJUDICATORS

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
Selection process	Appointed by common accord of member states.	Elected by states parties to the Convention at the OAS General Assembly from a list of candidates nominated by States. Election by a secret ballot and absolute majority of states parties.	Elected by simultaneous votes of the General Assembly and the Security Council from a list of persons nominated by national groups.	If no agreement on number or appointment of arbitrators, each party chooses one and third is appointed by common accord. Parties may select arbitrators from a pre-established Panel of Arbitrators appointed by Contracting States and ICSID's Chairman, but they are not required to do so. If they cannot agree on a third arbitrator, Chairman selects one from the Panel of Arbitrators.	Elected by States Parties convened by the Secretary General of UN, from a list of up to two nominees from each state party. Nominee must obtain the largest number of votes and 2/3 majority of States Parties present and voting.	Chosen either by State Parties or by appointing authority, which may be the Secretary General of the PCA.	<p>Panels: The Secretariat proposes nominations for panels from a list to which Members may suggest names and which DSB must approve. Parties to a dispute "shall not oppose nominations except for compelling reasons." If there is no agreement on a panel within 20 days, the Director General will determine the composition of the panel after consulting WTO officials.</p> <p>Appellate Body: DSB appoints members of the Appellate Body.</p>

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
Length of term (permanent tenure vs. duration of dispute)	6 year term, may be re-appointed	6 year term, may be re-elected only one time	9 year term, may be re-elected	Duration of the case, or, if appointed to Panel of Arbitrators, a 6 year renewable term.	9 year term, may be re-elected	Duration of the legal proceedings	<p>Panels: Duration of the legal proceedings. The list is updated at the discretion of the Parties.</p> <p>Appellate Body: 4 year term, may be re-appointed once.</p>
Qualifications	"persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence"	"elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them"	"independent," "of high moral character," "qualifications . . . for appointment to highest judicial offices," or "jurisconsults of recognized competence in international law"	"of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators."	"persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea"	"independent and impartial arbitrator"	Panels: "well-qualified governmental and/or non-governmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor"

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
		as candidates"					<p>agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member," "independence," "serve in their individual capacities and not as government representatives nor as representatives of any organization."</p> <p>Appellate Body: "persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be</p>

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
							unaffiliated with any government . . . . [and] shall stay abreast of dispute settlement activities and other relevant activities of the WTO.”
Content of adjudicator's oath	In open court, oath “to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court” Includes giving “a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after	Administered by the President of Court, and if possible, in the presence of other judges. “I swear” - or “I solemnly declare” - “that I shall exercise my functions as a judge honorably, independently and impartially and that I shall keep secret all deliberations.”	In open court, “I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.”	Written declaration before or at first session of Tribunal, stating, in relevant part: “To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted by the [ICSID] with respect to a dispute between ___ and ___. I shall keep confidential all information coming to my knowledge as a result of my participation in	In open session, at first public sitting at which the Member is present, oath that he/she will exercise powers “honourably, faithfully, impartially and conscientiously.”	No oath provided in the treaty.	Panels and Appellate Body: Written declaration prior to confirmation of appointment stating: “I have read the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and the Rules of Conduct for the DSU. I understand my continuing duty, while participating in the dispute settlement mechanism, and until such time

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
	they have ceased to hold office, of certain appointments or benefits.”			<p>this proceeding, as well as the contents of any award made by the Tribunal. I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided by [the ICSID Convention] and in the Regulations and Rules made pursuant thereto.”</p> <p>Must include a statement of past and present relationships which “might cause my reliability for independent judgment to be</p>			<p>as the Dispute Settlement Body (DSB) makes a decision on adoption of a report relating to the proceeding or notes its settlement, to disclose herewith and in future any information likely to affect my independence or impartiality, or which could give rise to justifiable doubts as to the integrity and impartiality of the dispute settlement mechanism; and to respect my obligations regarding the confidentiality of dispute settlement proceedings.”</p>



	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
				questioned by a party.” Assumes continuing obligation to notify Secretary General if any such relationships or circumstances arise.			
Obligation to disclose possible conflicts to parties	No. Must disclose to the President.	No. Must disclose to the President.	No. Must disclose to the President.	Yes. Must disclose potential conflicts in writing by first meeting of tribunal. The arbitrator is under a continuing obligation to do so.	No. Must disclose to the President.	Yes. Must disclose to prospective party proposing to select him/her circumstances likely to give rise to justifiable doubts about impartiality or independence. If appointed or chosen, he/she must disclose the information to all parties.	Panels and Appellate Body: Yes. Disclosure form forwarded to parties through Chair of the Dispute Settlement Body.
Grounds for recusal or disqualification	“For some special reason” in Judge’s or President’s opinion. Difficulties to be settled by decision of the	Matters in which, “in the opinion of the Court, they or members of their family have a direct interest or in which they have	For “some special reason” in the Judge’s or President’s opinion. Disagreements to be settled by decision of the	Disqualification proposed by the Parties on basis of any fact indicating a “manifest lack of the qualities” required by Art.	Matters in which the member served previously as agent, counsel or advocate or as member of national or international	“Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator’s	Panels and Appellate Body: “Material violation of obligations of independence, impartiality, confidentiality or

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
	<p>Court. Matters in which judge has previously participated as “agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.”</p>	<p>previously taken part as agents, counsel or advocates, or as members of a national or international court or an investigatory committee, or in any other capacity.” Judge may recuse himself/herself for “some other appropriate reason,” with concurrence of the President. If the President disagrees, Court must decide. The President must advise the Judge if the President finds “cause for disqualification or for some other pertinent reason [he/she] should not take part in a given matter.” If</p>	<p>Court. Matters in which the judge served as agent, counsel or advocate or on commission of enquiry for one of parties, or in any other capacity. Disagreements to be settled by the Court. Party may make known circumstances relevant to disqualification to the President confidentially, in writing.</p>	<p>14(1) [see qualifications above] or if ineligible for appointment under Section 2, Ch. IV [regarding procedures for constituting tribunal]. Arbitrator may not have previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute. Decision on proposal to disqualify made by the other members of the Tribunal, or if no agreement or only one arbitrator on panel, then the Chairman makes the decision. Party proposing disqualification must file</p>	<p>court or tribunal or in any other capacity. For “some special reason,” in the member’s or the President’s opinion. Doubts to be resolved by the Tribunal. Party may make known circumstances relevant to disqualification to President.</p>	<p>impartiality or independence. A party may challenge the arbitrator appointed by him/her only for reasons of which he/she becomes aware after the appointment has been made.” When the challenge is made, the other party may agree to the challenge, or the arbitrator may choose to withdraw. If parties disagree on the challenge and the arbitrator does not withdraw, an appointing authority is to resolve the dispute.</p>	<p>the avoidance of direct or indirect conflicts of interests” and “impairment” of the “integrity, impartiality or confidentiality of the dispute settlement mechanism.”</p> <p>Appellate Body: “illness or for other serious reasons.”</p>

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
		disagreement, Court decides.		proposal with Secretary General before the proceeding is declared closed, stating basis for seeking the disqualification. Secretary General must transmit the proposal to the other members, including the other party. Arbitrator may resign with the consent of the Tribunal.			
Limitations on activities during and after tenure	Must sign written declaration in open court that during and after tenure "will respect the obligations arising therefrom, and in particular the duty to behave with integrity and discretion," and will behave with integrity	During tenure, may not serve as "a. Members or high-ranking officials of the executive branch of government, except for those who hold positions that do not place them under the direct control of the executive branch and those of	May not act as agent, counsel or advocate in any case during tenure. May not serve in any political or administrative function, or engage in any other occupation of a professional nature. Any doubts to be settled by	May not accept any instruction or compensation with regard to the proceeding from any source, except as provided in the ICSID Convention and relevant Rules and Regulations.	May not "exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of	None listed.	Panels and Appellate Body: May not "incur any obligation or accept any benefit that would in anyway interfere with, or which could give rise to, justifiable doubts as to the proper performance of that person's dispute

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
	<p>and discretion “as regards the acceptance, after they have ceased to hold office of certain appointments or benefits.”            May not hold political or administrative offices or engage in any occupation (gainful or not) unless he/she obtains an exemption from the Council.</p>	<p>diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states;            b. Officials of international organizations;            c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.”            Any doubts to be resolved by the Court.</p>	<p>decision of the Court.            Practice Directions indicate that Court considers it not “in the interest of the sound administration of justice” for a person to sit as a judge ad hoc who is acting or recently acted as agent, counsel or advocate in another case before the Court, within the last three years.</p>		<p>the resources of the sea or the seabed or other commercial use of the sea or the seabed,” and may not act as advocate, counsel or agent in any case before the Tribunal.            Doubts to be resolved by the Tribunal.</p>		<p>settlement duties.”            Must “take due care in the performance of their duties to fulfil . . . expectations [of independence and impartiality], including through avoidance of any direct or indirect conflicts of interest in respect of the subject matter of the proceedings.”            Must “at all times maintain the confidentiality of dispute settlement deliberations and proceedings together with any information identified by a party as confidential.”            May not “at any</p>

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
							<p>time use such information acquired during such deliberations and proceedings to gain personal advantage or advantage for others.”</p> <p>Panels: Member States may “not give them instructions nor seek to influence them” on pending matters.</p> <p>Appellate Body: May “not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.” May not accept employment or pursue any professional activity inconsistent with duties and</p>

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							responsibilities. Must exercise office without "accepting or seeking instructions from any international, government, or non-governmental organization or any private source."

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TABLE 3: UNBIASED PANELS AND BENCHES

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
Number of Adjudicators	For grand chamber, thirteen. Other chambers of three and five. ECJ can sit as full court under specific conditions.	Seven.	Fifteen. Chambers of at least three members.	Either one or an odd number agreed upon by parties. If there is no agreement, three.	Twenty-one. Chambers of at least three members.	If no previous agreement by parties, three. Assume odd number of arbitrators.	Unless parties to the dispute agree to five panelists within ten days of the establishment of the panel, three panelists.  For the Appellate Body, seven. On any one case, three serve by rotation.
Right to a National Judge or a Judge Ad Hoc	No. A Party may not apply for a change in the composition of the Court or chambers on the grounds of either nationality of the Judge or the absence from the Court or chamber of a Judge of the nationality of that Party.	Yes, if the other Party has a judge of its nationality on the bench, or if neither Party has a judge of its nationality on the bench.	Yes, if no judge of the Party's nationality is on bench.	Yes, if the Party appoints its own arbitrators rather than using the appointing authority. If the Party uses the appointing authority, the judges may or may not be of same nationality.	Yes, if no judge of Party's nationality is on bench.	Yes, if the Party appoints its own arbitrators rather than using the appointing authority. If the Party uses the appointing authority, the judges may or may not be of same nationality.	Panels: No. Citizens of Members whose governments are involved in the dispute may not serve on a panel unless parties to the dispute agree otherwise. Also, parties may "not give [panelists] instructions nor seek to influence them" on pending matters.

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
							Appellate Body: No.
Member may serve as President/Chair when the litigating Party is of the same nationality	Yes.	No.	No.	Yes, if appointed jointly or by the appointing authority. But see the aspirations for representation of particular constituencies below.	No.	Yes, if appointed jointly or by the appointing authority. But see the aspirations for representation of particular constituencies below.	Panels: N/A.  Appellate Body: Yes.
Requirement or aspiration for representation of particular constituencies on the adjudicative body	One judge per member state.	No two judges may be nationals of the same state.	Electors to "bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principle legal systems of the world should be assured." No two judges may be nationals of the same	The Chairman, in designating persons to serve on Panels, "shall . . . pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity." Majority of arbitrators shall be nationals of States other than the Contracting State party to the dispute and	No two members may be nationals of the same state. The tribunal as a whole must be representative of the principle legal systems of the world and should enjoy equitable geographic distribution. May be no fewer than three members from each geographical group as established by UNGA.	Appointing authority "shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."	Panels: Panels should be selected "with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience." If dispute is between a developing and a developed country, at least one panelist must come from a developing country if the developing country so



	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
			state.	the Contracting State whose national is a party to the dispute, unless the Parties agree otherwise.			requests.  Appellate Body: The Members should be "unaffiliated with any government" and "broadly representative of membership in the WTO."

TABLE 4: TRANSPARENCY

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
Pleadings public	Confidential at least until oral hearings. After oral hearings, confidentiality depends on whether the content will undermine court proceedings.	Yes, unless the Court decides otherwise.	Only (1) on or after the opening of the oral proceedings and (2) after ascertaining the views of the parties.	No, unless the parties agree otherwise.	Yes, at the time the oral proceedings are initiated, or earlier, after ascertaining the views of the parties. Tribunal may decide to keep pleadings confidential after hearing the views of the parties.	No, unless the parties agree otherwise.	Panels and Appellate Body: Written submissions are treated as confidential, but parties to a dispute may disclose their own positions to the public.
Hearings public	Yes, unless the Court, of its own motion or upon application by the parties, "decides otherwise for serious reasons." Oral hearings held <i>in camera</i> are not public.	Yes, unless the Court, in "exceptional circumstances" decides otherwise.	Yes, unless the Court decides otherwise or the parties demand that the public not be admitted.	No, unless the parties agree otherwise.	Yes, unless the Tribunal decides otherwise or the parties demand that the public not be admitted.	No, hearings are <i>in camera</i> , unless the parties agree otherwise.	Panels and Appellate Body: No, but the parties can agree otherwise.
Judgments or Awards or Recommendations public	Yes.	Yes.	Yes.	No, unless the parties agree otherwise.	Yes.	No, unless the parties agree otherwise.	Panels and Appellate Body: Not public until the DSB adopts

	ECJ	IACHR	ICJ	ICSID	ITLOS	PCA	WTO
							the Findings and Recommendations.
Judgments or Awards or Findings and Recommendations must state reasoning upon which based	Yes.	Yes.	Yes.	Yes.	Yes.	Yes, unless the parties agree otherwise.	Panels and Appellate Body: Yes.
Judgments or Awards or Findings and Recommendations list names of adjudicators participating	Yes.	Yes.	Yes.	Yes.	Yes.	Yes.	Panels and Appellate Body: Yes.
Separate opinions permitted	No.	Yes.	Yes.	Yes.	Yes.	If one arbitrator fails to sign the award, he/she must explain why.	Panels and Appellate Body: Yes, but opinions expressed by individual adjudicators are anonymous.