Comparative Political Studies
Volume 39 Number 1
February 2006 22-49

10.1177/0010414005283216
http://cps.sagepub.com
hosted at
http://online.sagepub.com

Private Litigants and the New International Courts

Karen J. Alter
Northwestern University, Evanston, IL

Scholars expect International Courts (ICs) with private access and compulsory jurisdiction to be more independent and effective. This article shows a trend of creating and using ICs with compulsory jurisdiction and private access, using as evidence the founding statutes and usage rates of 20 ICs created since 1945. Analyzing where and for what private actors are granted access to ICs, the author finds that what is driving the expansion of private access and compulsory jurisdiction is an attempt to extend the types of juridical checks found at the domestic level to the international governance level. Although this trend will likely lead to more rights claiming by private actors, limitations on the types of cases that can be raised combined with a lack of usage suggests that outside of Europe, private right claiming potentials have yet to be exploited.

Keywords: *international organizations; international law; courts; delegation; Europe*

There has been a revolution in the creation and use of international courts (ICs). Nineteen ICs were created since 1990, so that today there are 26 international legal bodies that meet the *Project on International Courts and Tribunal's* definition of an IC.[1] Not only are there more ICs, but most of these

1. According to Project on International Courts and Tribunes (PICT), ICs are permanent institutions composed of independent judges that adjudicate disputes between two or more entities, one of which is a state or international organization. They work on the basis of predetermined rules of procedure and render decisions that are binding. See PICT's synoptic chart. Since it was last updated, the Carribbean Court has come into existence and a criminal tribunal for Sierre Leone was created. http://www.pict-pcti.org/matrix/matrixhome.html

Author's Note: The author would like to thank Rachel Cichowski, Larry Helfer, Jonas Tallberg, and Erik Voeten for their helpful comments on an earlier draft of this article, Elena Herrero-Beaumont and Kate Fugina for their research help, and Northwestern University, Northwestern Law School, and the Dispute Resolution Research Center for financial support for the research. Correspondence regarding this article can be addressed to Karen J. Alter, Northwestern University, 601 University Ave., Evanston, IL 60201; e-mail: kalter@northwestern.edu

ICs are also "new-style international courts" with compulsory jurisdiction (in which no consent to litigation is required) combined with enforcement jurisdiction and access for private (i.e. nonstate) litigants. IC usage is increasing too; roughly 70% of the total international judicial activity and rulings have come in the past 14 years alone.[2]

This volume builds on an extensive scholarship showing that private access has helped transform European courts into constitutional legal bodies, facilitating private and group litigation strategies to pressure national and supranational policy change. Drawing from the European experience, scholars have developed general theories of how ICs with private litigant access have a greater ability to influence state behavior (Alter, 2001; Helfer & Slaughter, 1997; Slaughter, Keohane, & Moravcsik, 2000). If private access transforms the nature of international judicial politics, why would sovereignty-jealous states ever agree to let private actors into ICs? I posit a functional explanation of the design trend: As international governance has expanded, the roles ICs are designed to play have expanded to replicate at the international level the types of legal checks on public authority that one finds at the domestic level. The expansion in roles drives design decisions because if an IC is to play an administrative review, constitutional review, or enforcement role, it must have compulsory jurisdiction, and if an IC is to play a war crimes role or administrative review role, private actors must have standing in front of the court. But because private access is limited to specific judicial roles, expanded private access does not per se presage the rise of ICs on the European model in which private actors use international legal mechanisms to influence domestic policy.

Section I explains why scholars expect ICs with private access to facilitate private-actor participation in law making and rights claiming, leading to ICs that are more politically influential. Section II provides evidence of the trend toward creating ICs with compulsory jurisdiction combined with enforcement authority and access for nonstate actors—what I am referring to as the "new" ICs. Section III develops the functional argument and examines 20 ICs identifying which roles they were created to serve and the design of these courts by role. Section IV analyzes data on IC usage to consider whether the trend toward "new style" ICs presages a rise of ICs on the European model. Section V concludes by asking what kind of democracy private access to ICs helps generate.

2. 70% (19,568 of 27,904) of the admissible cases are since 1990, and 69% (15,396 of 22,206) completed rulings, opinions, or orders are since 1990.

I. How Are ICs With Compulsory Jurisdiction and Private-Actor Access Different From ICs Without Compulsory Jurisdiction and Private-Actor Access?

In international law, "compulsory jurisdiction" means that the defendant does not need to first give consent for the legal case to proceed. Most scholars believe that compulsory jurisdiction and access for private litigants contributes to IC independence (Alter, 2002; Helfer & Slaughter, 1997, 2005; Posner & Yoo, 2005), and most also associate IC independence with greater IC effectiveness, believing that judicial independence enhances the legitimacy and authority of courts (Gordon, Burton, Falk, Franck, & Nezis, 1989; Schneider, 1998, pp. 627-629; Walker, 1988).[3] In addition, scholars see private access as fundamentally changing the nature of an IC, making it a transnational instead of an interstate institution (Keohane, Moravcsik, & Slaughter, 2000). Private access is important because private actors are more numerous and would appear especially likely to pursue cases that are either too politically "hot" or a low priority for international commissions or states with limited resources and conflicting priorities (Alter, 2002). Private-actor cases also tend to have domestic enforcement components, bringing international law into the domestic realm, thereby harnessing domestic actors to help enforce international rules (Hathaway, 2005; Helfer & Slaughter, 1997, 2005; Keohane et al., 2000; Slaughter, 2000, 2004; Slaughter & Bosco, 2000). Even without the domestic component, more cases create more opportunities for courts to intervene in policy debates and facilitate incremental decision making, which can be used to build political support for legal doctrine with time (Alter, 2001, pp. 188-189; Helfer & Slaughter, 1997, pp. 314-318; Slaughter et al., 2000, p. 482).

Much of the literature linking private access and compulsory jurisdiction to IC effectiveness is based on European examples and has as an implicit assumption that private actors are the plaintiffs, instigating international litigation to assert their rights or influence national policy. But private access simply means that private actors have standing in front of ICs. War crimes courts allow private actors to assert their rights and put before the court all relevant arguments, but private actors will be the defendants in war crimes courts. And many private-access cases are challenging international organizational behaviors, not national policy. Still, the above logic holds—private actors are more numerous and motivated by personal incentives; thus, ICs with private access are likely to hear more rights claims and be better able to develop their jurisprudence, legitimacy, and authority. Although authors are

3. For a dissenting view, see Posner and Yoo, 2005.

careful to note that private-litigant access is no guarantee of rights protection or IC influence,[4] the logic of the arguments point only in one direction. ICs with private access and compulsory jurisdiction should be better able to induce state respect for international law compared to ICs lacking these design features.

II. The New ICs

"Old-style" ICs—the Permanent Court of Justice, the Permanent Court of Arbitration, and the International Court of Justice—were primarily dispute resolution bodies. Although these courts may have had enforcement authority on paper, without compulsory jurisdiction ICs could only really be used for interpretive disputes in cases where both parties agreed to abide by the interpretation of the law given by the IC. This limitation was intentional, with states refusing compulsory jurisdiction provisions to allow them to avoid IC authority (Levi, 1976, pp. 70-71). What I am calling the "new-style ICs" are the now very large number of ICs that (a) have compulsory jurisdiction and are thus genuinely designed at least in part to hold states accountable to their international obligations (as evidenced by compulsory jurisdiction combined with an explicit or implicit jurisdiction to hear cases involving state noncompliance) and (b) allow private actors access. There is a clear trend toward the "newer" style ICs, as revealed in Table 1 that includes 20 ICs meeting the *Project on International Court and Tribunal's* definition of an *international court*.[5] At this point, we can fairly say that most ICs fit this new-style model, and nearly every IC created since 1990 fits this new style. The final column supports the notion that ICs with compulsory jurisdiction

4. Private litigants may choose not to use international legal mechanism, and litigation strategies not backed up by a postruling politics tend to be less influential (Alter & Vargas, 2000; Conant, 2002; Harlow & Rawlings, 1992; Helfer, 2002). Stone Sweet notes that political actors can block or stop the process of judicializing politics (Stone Sweet, 1999), and Helfer and Slaughter note that factors such as the nature of violations, the extent to which a rule of law ethos prevails within the domestic system, and the relative cultural or political homogeneity of states within a supranational legal system may influence whether or not international litigation is effective (Helfer & Slaughter, 1997). Also, as Posner, Yoo and Hathaway note, states can choose to ignore ICs and their rulings (Hathaway, 2005; Posner & Yoo, 2005).

5. Excluded due to lack of information are the African Court of Human Rights (not yet established), Southern African Development Community Tribunal (not yet established), the Court of the African Union (2003), three different courts of the Economic Community of West African States (established 1996 to 2001), and the East African Court of Justice (2001). A decision was made to merge the African Court of Human Rights into the African Union; hence, my report of 26 ICs meeting PICT's definition.

Table 1
Old-Style and New-Style International Courts, By Date Established

International Courts	Date Established/ Created[a]	Compulsory Jurisdiction	Jurisdiction for Noncompliance Suits	Private-Actor Access	Total Cases (Last Year Included in Figures)[a]
Old-style courts					
International Court of Justice	1945/1946	Optional protocol			104 contentions cases filed, 80 judgments, 23 Advisory opinions (2003)
Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries	1980/1980	So qualified as to be meaningless[b]		X By optional state consent	2 cases (1999)
International Tribunal for the Law of the Seas	1982/1996	Optional protocol + (exception, seabed authority, and seizing of vessels)		Seabed authority and seizing of vessels only	13 judgments (2004)
New-style courts					
European Court of Justice	1952/1952	X	X	X	2,497 infringement cases by Commission, 5,293 cases referred by national courts, 7,528 direct actions (2004)
European Court of Human Rights	1950/1959	X	X	X (as of 1998)	8,810 cases deemed admissible, 4,145 judgments (2003)
Benelux Court	1965/1974	X	X	Indirect[c]	No data
Inter-American Court of Human Rights	1969/1979	Optional protocol	X	Commission is a gatekeeper	104 judgments, 18 advisory opinions, 148 orders for provisional measures (2003)
Court of Justice of the Cartagena Agreement (Andean Pact)	1979/1984	X	X	X	31 nullifications, 108 infringement cases, 711 preliminary rulings (2004)
European Court of First Instance	1988/1988	X	ECJ hears these cases	X	2,083 decisions from 3,003 cases filed (figures exclude staff cases; 2004)
Central American Court of Justice	1991/1992	X (some exceptions)[d]	X	X	65 cases, 21 advisory opinions, 30 rulings, 7 cases dismissed for lack of competence, 7 cases in progress (2004)
European Free Trade Area Court	1992/1995	X	X	(Via national courts, advisory opinions only)	59 opinions (2003)
Economic Court of the Commonwealth of Independent States	1992/1993	X	X	X	47 cases, not clear if they are ruled on yet (2000)

Court of Justice for the Common Market of Eastern and Southern Africa	1993/1998	X	X	X	3 judgments, 1 order (2003)
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa	1993/1997	X	X	X	4 opinions, 27 rulings (2002)
International Criminal Tribunal for the Former Yugoslavia	1993/1993	X	X	X (defendant only)	75 public indictments, 18 completed cases, 11 judgments (2003)
General Agreement on Tariffs and Trade[e]	1953 to 1993	—X	X	X	229 cases, 98 rulings
World Trade Organization Appellate Body[f]	1994				304 disputes formally initiated, 59 appellate rulings, 115 panel reports (2003)
International Criminal Tribunal for Rwanda	1994/1995	X	X	X (defendant only)	58 cases in progress, 17 completed cases (2003)
International Criminal Court	1998/2002	X	X	X (defendant only)	3 situations under investigation but no indictments or rulings to date
Caribbean Court of Justice	2001/2005	X	X	X	Began operation April 2005
International Criminal Tribunal for Sierra Leone	2002/2002	X	X	X (defendant only)	11 indictments proceeding, 2 withdrawn because of death (2003)
Total international judicial activity					29,261 admissible cases filed or under investigation

Note: Data compiled by author, based on the best information available on the Project on International Courts and Tribunes Web site, updated by visiting the Web sites of the international courts and consulting scholarship where available. I have excluded a number of African courts for lack of information about them. ECCIS data are from Dragneva (2004). I have excluded from consideration private access when it only includes suits brought by employees of the international organization. ECJ = European Court of Justice.

a. Because I am interested in the decision to delegate authority to ICs, I focus on the year of treaty establishment. But ICs are only created after a sufficient number of states have actually deposited their ratification of the treaty. There can be significant lags between when ICs are established in treaties compared to when they are actually created, which can account in part, but only in part, for variation in the number of rulings and the judicial activity of ICs.

b. Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries court has an implicit compulsory jurisdiction, but only as long as the disputes do not infringe on the sovereignty of any of the countries concerned. Also, for cases involving firms, jurisdiction must be consented to by the state.

c. Indirect means that cases with private litigants would come through national courts references to the international court.

d. As a general rule, consent to the Central American Court of Justice's contentious jurisdiction is implicit in the ratification of the Protocol of Tegucigalpa. However, consent must be explicitly given in the case of (a) territorial disputes (in which case consent to jurisdiction has to be given by both states' party to the dispute), (b) disputes between states' member of the Central American Integration System and states that are not members, and (c) cases in which the court sits as arbitral tribunal.

e. General Agreement on Tariffs and Trade does not meet Project on International Courts and Tribune's definition because there was no permanent court. This is the reason that NAFTA is not included on the table as well.

f. World Trade Organization Appellate Body replaced General Agreement on Tariffs and Trade and has a permanent appellate body.

and private access hear more cases, but it also shows that not all new-style ICs are equally active.

There is no explanation for this turn to enforcement through ICs, and it is not my goal to offer one. Rather, I am interested in explaining the design trend toward creating new-style ICs as opposed to old-style ICs. Scholars have generated lists of reasons to delegate to ICs—transaction cost-reducing reasons (to have courts fill in incomplete contracts, to create decentralized systems to monitor compliance), enforcement reasons, strategic reasons, and credibility reasons (Alter, 2003; Elster, 2000; Garrett & Weingast, 1993; Hathaway, 2005; Majone, 2001, 2003; Scott & Stephan, 2006; Simmons, 2002)—but providing reasons why delegation may be attractive does not explain why delegation is more common or is taking a different form today compared to the past. Those who focus on the timing of the trend offer observations that are surely correct: The end of the Cold War likely facilitated the creation of many of the new ICs, and the proliferation of regional trade agreements has contributed to a proliferation of ICs operating within specific regions (Brown, 2002; Romano, 1999). Such explanations do not really explain why we have more delegation to ICs or account for the change in IC design. We come closer to an explanation of the design trend in the work of James McCall Smith and Alan Sykes. McCall Smith seeks to explain delegation to more legalized dispute resolution mechanisms. His cases are all trade agreements, but he finds that delegating enforcement to more legalized third-party dispute resolution bodies (with compulsory jurisdiction, private access, binding rulings, and permanent legal bodies) is associated with deeper trade agreements with more specified obligations and a greater desire by parties to have compliance with the agreement (McCall Smith, 2000). Sykes identifies political economy incentives to allow private judicial access to enforce bilateral investment treaties compared to trade treaties—treaties that may or may not be enforced through ICs. Sykes provides a potential explanation of states' preferences for private access (to domestic or ICs), but he is focused exclusively on investor agreements (Sykes, 2005).

III: A Functional Explanation of the Design Trend in Delegation to ICs

This article posits a functional explanation whereby IC design decisions follow from the functional jurisdictional task assigned to courts. The jurisdictional categorization comes from the way a number of domestic legal systems organize themselves—by creating separate administrative courts to hear complaints against the actions of public administrators, civil courts to

resolve disputes among private actors, criminal courts to enforce state law, and constitutional courts to review the compatibility of national law with constitutional provisions.[6] Courts with different designated jurisdictions often have appointment procedures and designs that differ. For example, administrative courts hear suits raised by private actors, and the courts themselves can be part of the administrative agencies they review or draw judges from the ranks of administrators. Criminal courts, by contrast, have prosecutors who bring cases against private actors who violate the law. Civil law judges can have different training procedures and qualifications compared to administrative court judges. Meanwhile, constitutional courts tend to be separate entities with judges that have lifetime appointments, or nonrenewable appointments, to reinforce their independence from the political branches they oversee.

The following discussion separates four roles courts play. Because of this special edition's interest in rights claiming, I have focused on how the types of rights claimed can vary by judicial role leaving aside how the types of remedies vary by role and by how the relationship between courts and the state varies by role. The roles are first described as Weberian "ideal types," meaning synthetic intellectual constructs with a conceptual purity that often cannot be found in reality (Gerth & Mills, 1958, pp. 59-60). My discussion of "role morphing" considers how these ideal types are artificial.

This functional metric differs from other scholars' arguments about the role of courts in the political process. Martin Shapiro sees all courts as government tools to maintain social control over the population (Shapiro, 1981). Rational choice scholars see courts as efficiency devices that fill in incomplete contracts, generate information useful to parties, and facilitate monitoring of compliance (Garrett & Weingast, 1993; Milgrom, North, & Weingast, 1990; Posner & Yoo, 2005; Raustiala, 2004; Tallberg, 2003). Liberal scholars see international legal systems as precommitment devices to reassure the weak that the powerful will follow similar rules (Elster, 2000; Ikenberry, 2001; Moravcsik, 1997). The argument here does contradict these alternative perspectives, but we may well find that courts in certain roles fit these different arguments differently, meaning that the constitutional courts may be precommitment devices and that administrative, civil, and criminal courts may be more focused on social control and so forth.

6. American and common law legal systems are not organized this way, but French and German civil law legal systems (replicated in many countries of the world) separate judicial roles these ways.

The Four Judicial Roles Defined

Dispute Resolution

The role of dispute resolution courts is to resolve the dispute in front of them by interpreting the text of the agreement. ICs with dispute resolution authority have a formal jurisdiction to "interpret the meaning of the law" in concrete cases brought before them. Dispute resolution is the only judicial role lacking a minimum design requirement; dispute resolution mechanisms can work even if the process is not compulsory, the parties pick the judges, the decision is only declaratory, and the ruling is not at all based on pre-existing rules. Indeed, arbitration, mediation, "good offices," and judicial proceedings are all different forms of dispute resolution, effective as long as the two parties are convinced that the dispute resolution mechanism is fair.

Although there is no minimum functional design requirement, design choices influence how a court plays its dispute resolution role. The old-style courts were all dispute resolution courts. Although some of these courts were also nominally given the mandate to help enforce the law, absent compulsory jurisdiction, these ICs could only really be used to resolve disagreements about the law (because recalcitrant states would simply block a case from proceeding). Where an international dispute resolution mechanism is coupled with compulsory jurisdiction, disputes can still be settled outside of court or through arbitration, but negotiation is more likely to take place "in the shadow of the law" because there is a credible background threat of litigation that can shape the bargaining positions of negotiators (Mnookin & Kornhauser, 1979; Tallberg, 2002; Tallberg & Jönsson, 1998)—and thus, dispute resolution can enforce international law. Because dispute resolution is for contract disagreements, access is usually limited to those who sign the contract. For interstate treaties, access is often limited to states only. Because states can sign contracts with private actors, a number of ICs allow access (usually by mutual consent) for private contract holders to raise "breech of contract" charges against foreign governments or international organizations. Sometimes, however, dispute resolution is extended beyond the contract signatories to any affected individual. Once access extends beyond the signatories of the agreement, the contract starts to resemble a statute rather than a mutually binding agreement, and more rights are created. A reason to extend wide access is to harness private actors as monitors and coenforcers of the contract (Raustiala, 2004).

Criminal Enforcement and Infringement Proceedings

Although it is commonly said that courts enforce the law, it is always governments with a monopoly on the legitimate use of force that enforce the law. The functional judicial role of criminal enforcement is to ensure that governments use their exceptional coercive powers legitimately, meaning lawfully. In the criminal enforcement system, courts adjudicate suits raised by a public prosecutor against an actor accused of violating the law. There are two types of international criminal enforcement mechanisms. War crimes tribunals deal with violent abuses of the laws of war, and the criminal label is used precisely because of its stigma. Infringement mechanisms also have supranational enforcers, but the stigma associated with the *criminal* label is removed. For war crimes tribunals, courts are given jurisdiction over an enumerated list of crimes. For nonviolent violations of international law, ICs have jurisdiction to hear infringement suits (with no hint that such suits involve anything criminal). Because we cannot expect guilty parties to voluntarily submit themselves to judicial proceedings about their behavior, criminal enforcement requires that courts have compulsory jurisdiction. War crimes tribunals mirror their domestic criminal counterpart—public prosecutors raise cases and the defendant is an individual—thus, war crimes courts have private access. Infringement cases are usually raised by *commissions* (a less harsh term than *prosecutor* though their role is largely the same) with governments or public actors as defendants in the cases. The international level adapts the traditional enforcement model by allowing states to raise infringement suits against other states, and sometimes even allowing private actors to initiate infringement suits. In these cases, there is not a dispute about the meaning of the law but, rather, the defendant is charged with having violated international rules.

Criminal enforcement is not really intended to be a tool to enhance private participation or rights claiming. Prosecutors are arguably serving a public role in promoting victims' rights, but the victim is usually in the background of the case. The legal process also arguably helps protect the rights of the accused—their right to a fair trial and not to be arbitrarily harmed by the state—but the prosecutors are usually not private actors, the defendants did not choose the terrain of the case, and the defendants often lack sufficient command of the legal rules to assert their rights, which is why defendants often do not view the criminal legal process as aimed at enhancing their participation or rights-claiming abilities. An exception to this rule is the two international legal systems that authorize private actors to raise infringement

suits (the Andean and Central American systems)—though this possibility has not been exploited much at all by private actors (see Part III).

Administrative Review (Public Law Litigation)

The functional role of administrative review is to hold public officials (as opposed to legislative bodies) accountable by providing a means for the subjects of administrative actions to challenge public decisions (Edley, 1990). ICs with jurisdiction to hear cases regarding the legality of a public action, policy, or regulation, actions to annul, or "failure to act" charges regarding decisions or nondecisions of executive bodies have administrative review powers. For administrative review to exist in any meaningful way, the actors subject to government decision making must have standing to bring suits challenging arguably illegal government behavior, and the public decision-maker defendant must be compelled to participate. Thus, the minimum administrative review design criteria include compulsory jurisdiction and access rules that allow actors affected by administrative decision making to challenge arbitrary decisions.

The substance of the administrative law combined with how the court's administrative review jurisdiction is defined will largely define the suits the court hears. When the law itself requires public comment periods before administrative rules are adopted, the weighing of competing public interests and adequate explanations for administrative decisions, administrative courts can provide private litigants with a powerful procedural tool to assert rights and challenge administrative policies (Bignami, 2005; Edley, 1990). When administrative rules grant broad discretion to administrators and the jurisdiction of administrative courts only allows for cases where administrative decisions are arbitrary or capricious, litigants may be barred from pursuing procedural irregularities and unable to challenge the policies themselves. Whether administrative review generates broad or narrow rights-claiming possibilities, there is an intended distinction between holding public officials accountable to legislative intent (administrative review) and holding legislative bodies accountable to the constitution (constitutional review), which is why administrative review tends to be less politically controversial compared to constitutional review.

Constitutional Review

For many people, administrative review is sufficient to ensure that there is a rule of law in which public and private actors are equally required to follow the law. But some political systems have opted to create absolute limits on what legislative bodies can do, entrusting constitutional review bodies with

the authority to review the validity of the law itself. Constitutional review bodies have jurisdiction to assess the validity of laws and acts of legislative bodies, ensuring that procedural rules for law making are followed, the policy or law coheres with the constitution or treaty, and the legislative action is not *ultra vires* (exceeding the legislator's authority). In a federal context, constitutional courts also police the constitutionally defined border of federal and state authority, ensuring that neither legislative body encroaches on the power of the other. Because sovereigns usually do not like to be checked by courts, constitutional review only exists if a court's constitutional jurisdiction is compulsory. Access rules for constitutional review will shape the extent to which constitutional review is about rights claiming. Sometimes, judicial constitutional review can only be triggered by members of the legislative body (e.g., a state or a group of legislators), in which case the respect for the constitution is primarily ensured through legislative self-policing and constitutional review is primarily about minority legislative actors challenging decisions made by the majority (Stone, 1992). Other constitutional systems allow private actors to access legal bodies either directly or via ordinary national courts, turning constitutional review into a means for private actors to participate in the legislative process (Stone Sweet, 2000).

Role Morphing: Relaxing the Ideal Types

The ideal-type constructs imply that courts and cases are easily classified into a single role. In reality, a single case can involve questions that span roles. Judicial role morphing occurs when the judge embraces an opportunity presented in a case to expand beyond their designated role. Because judges tend to apply precedent, and because legal rulings are themselves a source of law (Hathaway, 2001), rulings that morph roles can become a source of judicial authority and thus courts created for one role can end up serving more than their designated role. Some contexts and roles are more subject to morphing compared to others. For example, dispute resolution mechanisms may morph into a sort of decentralized criminal enforcement when paired with compulsory jurisdiction because the plaintiff can get the legal system to enforce the law against the defendant. This morphing may well be intentional, providing a way for agreements to be enforced without devoting state resources for a prosecutor and thus avoiding the possibility that the prosecutor may be more zealous than some may like. Dispute resolution and criminal enforcement may morph into constitutional review because the subjects of international law are usually sovereign states, and thus, implicitly, the ICs may be ruling on the compatibility of state policy with international rules. Indeed, the distinction between enforcing international human rights agree-

ments and constitutional review may in practice become meaningless. To the extent a judge moves from investigating the application of a law to investigating the law itself, the distinction between administrative review and constitutional review can become meaningless.

Although roles can morph, it is still analytically useful to keep the four roles distinct. The starting roles provide insight into the reason ICs were created in the first place. They shape the initial design of the legal institution and suggest certain logic of appropriateness for international judges as they carry out their charge.

The Functional Argument About the Design of ICs

The claim of the functional argument is that the jurisdictional role combined with how states want the IC to play its role drives the design of the IC. At the international level, treaty drafters break down the types of legal issues ICs can adjudicate into separate treaty articles, with different access and compulsory jurisdiction rules for each article. The judicial role is defined by the types of questions the court has authority to hear, and it is usually quite clear where consent to jurisdiction is required and where private actors are allowed to raise suits (and on what basis). Table 2 indicates which ICs have which roles and the design of the IC for the role.[7] Some ICs have explicit authority to hear only one type of legal suit, and others have jurisdiction to hear a variety of types of legal questions; thus, some ICs appear under multiple roles.

The evidence in support of the functional argument comes via correlation. If function were not related to design, we would expect the rules for access and compulsory jurisdiction to be randomly distributed (as opposed to clustered by role), and we would expect design choices to be constant within a single IC. Instead, in every case except the Inter-American court of Human Rights (IACHR; signified in dark gray), the design of the IC matches or exceeds (denoted in light gray) the minimum-design criteria for the functional role, and we find that individual courts vary in design depending on the judicial role. That a number of ICs have designs that exceed the minimum-design criteria does not vitiate the functional argument. Rather, mismatch between the minimal design and what we find allows us to identify which court designs call for further explanation. Investigating which courts

7. I do not consider whether an IC can play a role via an advisory opinion because such opinions are not binding; nor do I consider IC roles with respect to employees of the international organization. For space reasons, I have removed a discussion on the relationship between remedies and roles. Each role also has corresponding minimum-design remedy that could be added as a dimension of Table 2.

Table 2
Design of International Court by Role

Judicial Role	Expected Minimum Functional Design Requirements	International Courts With Role	Compulsory Jurisdiction	Private Access
Dispute Resolution Jurisdiction to "interpret the meaning of the law" or to "ensure that the law is respected," jurisdiction to resolve disputes.	No minimum requirements, but according to Project on International Courts and Tribune's definition of an international court, it must be possible for one litigant to be a state or government entity.	International Court of Justice		
	International Tribunal for the Law of the Seas—Compulsory jurisdiction and private access exists only in cases involving the seizing of vessels, and the plaintiff's government must consent to the case being raised.	International Tribunal of the Law of the Seas	←see note	←see note
		World Trade Organization Appellate Body	X	
	European Free Trade Area Court can review preliminary ruling requests, but its opinions are not binding.	European Free Trade Area Court	X	←see note
		European Court of Justice	X	
		Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries		
	Caribbean Court of Justice is authorized to decide on a case by case basis if the needs of justice require allowing private access for the case.	Caribbean Court of Justice	X	←see note
		Economic Court of the Commonwealth of Independent States	X	
		Central American Court of Justice	X	X
	Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa—Private actors can directly appeal national court rulings to this court.	Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa	X	X←see note
	Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)—Private-actor access is limited to contracts between private actors and COMESA institutions.	Court of Justice for the Common Market of Eastern and Southern Africa	X	X←see note
		Benelux Court	X	
		Court of Justice of the Cartagena Agreement	X	

(continued)

Table 2 (continued)

Judicial Role	Expected Minimum Functional Design Requirements	International Courts With Role	Compulsory Jurisdiction	Private Access
Criminal enforcement Jurisdiction regarding an enumerated list of crimes or jurisdiction to hear infringement suits against states.	Compulsory jurisdiction Access rules—public plaintiff, public or private defendants. European Court of Human Rights—Pre-1998, only a commission could raise cases. In 1998 the Commission was eliminated and direct access for private actors was allowed (Protocol 11), substantially altering the role the ECHR de facto plays. CACJ—Has general authority to hear infringement suits brought by any actor with standing, including states, private actors, and community institutions but no designated supranational prosecutor.	International Criminal Court International Criminal Tribunal for the Former Yugoslavia International Criminal Tribunal for Rwanda International Court Tribunal for Sierra Leone European Free Trade Area Court European Court of Justice Court of Justice of the Cartagena Agreement (Andean Pact) Court of Justice for the Common Market of Eastern and Southern Africa Central American Court of Justice Inter-American Court of Human Rights European Court of Human Rights	X X X X X X X X X X	as defendant as defendant as defendant as defendant X (Post-1996) X X (post-1998, by optional protocol)
Administrative review Jurisdiction in cases concerning the "legality of any action, regulation, directive, or decision" of a public actor, or the public actor's "failure to act."	Compulsory jurisdiction Defendant will be a public actor. If administrative review is to have any meaning, the public defendant must be required to participate in proceedings. Access rules—Actors subject to the decisions of administrative agencies must have access to court to challenge administrative decisions affecting them.	International Tribunal for the Law of the Seas–Seabed Authority European Court of Justice and European Court of First Instance European Free Trade Agreement Court Court of Justice of the Cartagena Agreement (Andean Pact) Court of Justice for the Common Market of Eastern and Southern Africa Benelux Court Central American Court of Justice	X X X X X X X	X X X X X X X
Constitutional review Jurisdiction to review the legality of any legislative act, regulation, directive, of an international organization.	Compulsory jurisdiction Access rules: Can be limited to states or allow private access too.	Court of Justice for the Common Market of Eastern and Southern Africa European Court of Justice Court of Justice of the Cartagena Agreement (Andean Pact) Central American Court of Justice Post-1998 ECHR (possibility) Caribbean Court of Justice (possibility)	X X X X X X	X X X X X X

have which roles and which courts exceed the minimum-design criteria enhances the credibility of the functional argument in that the design variation itself becomes less surprising. The rest of this section investigates this variation.

The most prevalent role one finds for ICs is that of a dispute resolution mechanism (13 of the 20 ICs). Given that old-style ICs pretty much only played a dispute resolution role, should we ask why even some ICs were not given a dispute resolution role? One finds no dispute resolution role where it would either create redundancy (e.g., the European Court of Justice [ECJ] handles the dispute resolution cases instead of the Court of First Instance [CFI]) or where the legal system is primarily about criminal enforcement (the four criminal courts, the two human rights courts).

A lot of ICs exceed the minimum design for dispute resolution; these courts fit the arguments of McCall Smith and Sykes. McCall Smith tested the notion that there is a trade-off between allowing state discretion and increasing treaty compliance. Analyzing a wide sample of trade agreements, including bilateral agreements that do not create ICs, McCall Smith found that a choice for more legalized dispute resolution (permanent legal bodies, compulsory jurisdiction, with sanctioning remedies) was associated with deeper trade agreements in which the aspiration was to create a common market (McCall Smith, 2000). This finding supports the argument that states may give compulsory jurisdiction to dispute resolution bodies to encourage morphing into an enforcement role, and it could explain why the designs of the European Free Trade Area Court, Caribbean Court of Justice (CCJ), Central American Court of Justice (CACJ), Court of Justice of the Cartagena Agreement (Andean Pact; ACJ), Economic Court of the Commonwealth of Independent States, and Benelux Court include compulsory jurisdiction because they are embedded within common market systems. It also explains the World Trade Organization Appellate Body in which compulsory jurisdiction was added precisely to enhance enforcement, with states recognizing that there would be sovereignty costs (Jackson, 1997). Alan Sykes, who investigated the argument that private access helps reassure private investors that domestic investment rules will be respected, helps us understand why the ICs in international organizations aimed at promoting foreign direct investment, such as the Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA), include compulsory jurisdiction and private access via appeals of national court rulings (Sykes, 2004). The Court of Justice for the Common Market of Eastern and Southern Africa (COMESA), International Tribunal for the Law of the Seas (ITLOS), CCJ, and the CACJ remain unexplained by either argument. For the COMESA and ITLOS courts, private access is primarily limited to

contract disputes between private parties and COMESA and ITLOS institutions. ITLOS, however, also allows for private access and compulsory jurisdiction for disputes regarding vessels that are seized in fishing or territorial disagreements.[8] For the CCJ, private access via appeals of national court rulings (Article XXV) exists because the CCJ is replacing the Privy Council that, as part of the commonwealth system, had served as an appellate body for rulings of Caribbean courts (Pollard, 2003). I do not know the origins of CACJ design decisions.

Criminal enforcement is the next largest role (12 ICs). Only four of these ICs exceed the minimum design by allowing private access (the four criminal enforcement mechanisms are for use against private individuals; thus, private access is functionally required). The European Court of Human Rights (ECHR) and the ACJ did not originally allow private access for their infringement process, suggesting that private access, because it was not required for the functional role, was excluded. The ECHR created an optional protocol in the 1990s that allowed members to opt for direct access for their citizens (agreeing to private access became a requirement for accession to the European Convention on Human Rights in 1998). For the ACJ, private access was added in the *Protocolo de Cochabamba* in 1996 (Arteaga, 2004) with a goal of increasing transparency and popular participation in the Andean community (this provision appears to be a dead letter).[9] The CACJ remains a design exception. The CACJ court has jurisdiction for infringement suits, but the institution lacks a prosecutor and instead allows pretty much any actor to raise an infringement case (O'Keefe, 2001). As section IV notes, there have been 26 admissible infringement suits raised by private actors, though in some of these, the private actor was a member of a CACJ institution acting in a private capacity.

Administrative review authority has been given to seven ICs if one counts the ECJ and CFI together (these two courts split the administrative review tasks for the EU between them). In each case where an IC was given administrative review power, there is also a supranational administrator. This correlation suggests that administrative review was created in large part to replicate the types of administrative checks one finds at the domestic level. Although all six administrative review courts can conduct administrative review vis-à-

8. The boat's flag state must first agree to adjudication, but thereafter, fishermen can sue to have their boat released (Noyes, 1998).

9. Articles 25 and 31 authorizing private actors to use national legal mechanisms to enforce Andean rules were part of the Protocol of Cochabamba (March 10, 1996). Based on an interview with a drafter of Decision 472, a.k.a the Protocol of Cochabamba, Quito Ecuador, March 18, 2005.

vis supranational bodies, only four of them can also hear appeals against national administrative decisions (ECJ, ACJ, COMESA, CACJ.)[10] In the EU, private appeals were allowed (via the preliminary ruling mechanism) because domestic administrators were often the primary actors implementing European rules. The ACJ replicated the ECJ design intentionally (Keener, 1987). This is a possible explanation for the COMESA and CCJ courts as well, though I do not know enough to say. The CACJ simply lists a series of court competences (Article 22 of the Court's statute), allowing administrative challenges to come from private actors, states, and members of the Central American institutions.

Only four of the international legal systems were explicitly created with constitutional review authority, meaning the explicit authority to review the validity of the law itself—the EU, Andean, CACJ, and COMESA courts. These four regional integration systems have multiple institutions and what are essentially supranational legislative bodies that can create binding rules that are directly applicable in the national realm; thus, it appears that the granting of constitutional review authority followed from the decision to grant supranational legislative authority. The CCJ's role in the common market is yet to be defined; thus, it is potentially a fifth IC with constitutional review authority (Pollard, 2003). One may also question whether the design of the ECHR has changed so much with time that it is at this point more of a constitutional court than a criminal enforcement court.

If we think that compulsory jurisdiction and private access provides courts with cases states may not have wanted raised, and with opportunities for ICs to pronounce on many issues, the trend in empowering ICs makes little sense. Yet if we think that compulsory jurisdiction and private access was accorded to allow ICs to play certain desired functional roles—to allow for the administrative review of the actions of supranational administrators, to create constitutional-level checks on supranational legislative bodies, and because private access is inherent to war crimes trials, the expansion of private access makes more sense. When we understand the compulsory jurisdiction in dispute resolution transforms dispute resolution into an enforcement mechanism, we can see why a higher than minimum design can be attractive. When we understand, however, that compulsory jurisdiction con-

10. Common Court of Justice and Arbitration for the organization for the Harmonization of corporate Law in Africa and Economic Court of the Commonwealth of Independent States bodies do not meet my classificatory criteria in that they do not have nullification powers; nor are they explicitly granted a right to rule on the legality of any action, regulation, directive, or decision of a public actor. Their cases will inherently involve appeals of national legal decisions, which means that they will be reviewing decisions of public actors, but they do not meet the definition of administrative review bodies.

tributes to morphing of roles, we can also see why it may be eschewed even though it is functionally necessary as in the IACHR case. Thus, the functional argument helps us better understand the variation in IC design we observe. In identifying design variations within a single role, the functional argument gives us a first cut way to understand why courts with similar jurisdictional roles (such as the ECHR and IACHR, the World Trade Organization Appellate Body, and the International Court of Justice) can vary in how they play their role.

IV. More European Courts?

A number of institutions outside of Europe (e.g., the ACJ, CACJ, CCJ, and African economic systems) have tried to mimic the European model; they have created supranational administrative and legislative bodies and ICs with administrative and constitutional roles to check the behavior of these supranational actors. These systems are designed to promote rights claiming and democracy within supranational polities and to create checks on the exercise of supranational authority. A separate question is whether private access will lead to a replication of the independence and effectiveness of European ICs vis-à-vis states. The scholarship discussed in Section I posits that compulsory jurisdiction and private access will help ICs influence state behavior (Helfer & Slaughter, 1997), and it has been criticized for drawing general conclusions from a unique context (Alvarez, 2003; Posner & Yoo, 2005).

By examining the usage of ICs with private access, we can get a sense of whether and how private access leads to a replication of the European model. Table 1 identified 14 ICs with private access in which ICs could issue binding rulings. Four of these courts are war crimes courts where private actors are the defendants in the case, not the plaintiff using litigation to promote their rights. Excluding war crimes courts—the recently created CCJ and the largely unused Benelux Court—one finds nine ICs where private actors could be using international legal mechanisms to enforce international rules vis-à-vis member states—three European courts and six non-European courts. Table 3 identifies private-litigant-inspired cases that have been raised in these ICs.

The real bone of contention is whether ICs with private access will allow rights claiming vis-à-vis states. Most of the data reported by ICs are highly aggregated, making it unclear whether or not private access is leading to law enforcement vis-à-vis supranational actors or national governments. For ECHR cases, one can say that most if not all of the cases are raised by private actors targeting national policies and behaviors. For the ECJ and CFI, direct-

Table 3
Cases in International Courts Raised by Private Litigants

International Court	Total Docket	Private-Actor Cases (Last Year of Data)	Private-Actor Cases Targeting State Practices
European Court of Justice	2,497 infringement cases by Commission, 5,293 cases referred by national courts, 7,528 direct actions (2004)	5,293 cases referred by national courts, 7,528 direct actions (2004)[a]	An unknown percentage of the 5,239 preliminary ruling cases (see Note 11)
European Court of Human Rights	8,810 cases deemed admissible, 4,145 judgments (2003)	8,810 cases deemed admissible, 4,145 judgments (2003)	8,810 cases deemed admissible, 4,145 judgments
European Court of First Instance	2,083 decisions from 3003 cases filed (figures exclude staff cases; 2004)	3,003 direct-action cases (2004).	
Potential private-actor cases from European courts (21,695 admissible cases; 96% total potential private cases)			

(continued)

Table 3 (continued)

International Court	Total Docket	Private-Actor Cases (Last Year of Data)	Private-Actor Cases Targeting State Practices
International Tribunal for the Law of the Seas	13 judgments (2003)	7 "prompt release of vessels" rulings	7 "prompt release of vessels" rulings
Court of Justice of the Cartagena Agreement (Andean Pact)	31 nullifications, 108 infringement cases, 711 preliminary rulings raised by private actors in national courts (2004)	711 preliminary rulings raised by private actors in national courts, 10 nullification challenges, 3 private infringement suits (2004)[b]	711 preliminary rulings raised by private actors in national courts, 10 nullification challenges, 3 private infringement suits (2004)[b]
Central American Court of Justice	65 cases, 21 advisory opinions, 30 rulings, 7 dismissed, 7 pending (2004)	34 cases raised by private actors (2004)[c]	26 admissible private-actor cases versus state-actor cases
Economic Court of the Commonwealth of Independent States	47 cases, not clear if they are ruled on yet (2000)	47 cases, presumably all private-actor cases. It is not clear if they have been ruled on yet	Presumably all 47 cases involve private appeals of national court rulings.
Court of Justice for the Common Market of Eastern and Southern Africa	3 judgments, 1 order (2003)	3 judgments, 1 order, presumably all of which are private litigant cases (2003)	Presumably all 4 cases involve private appeal of national court rulings.
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa	4 opinions, 27 rulings (2002)	4 opinions, 27 rulings, presumably all of which are private litigant cases (2002)	Presumably all 31 cases involve private appeals of national court rulings.
Potential private-actor cases from non-European Courts (847 opinions and rulings; 724 are Andean Court rulings)			

a. Figures from ECJ's annual report is available from http://curia.eu.int/en/plan/index.htm. I have excluded appeals cases. Direct action cases include anything brought directly to the ECJ, including cases brought by national administrative actors and labor disputes raised by the employees of European-level institutions. Preliminary ruling cases are raised by private actors and could include challenges to national policies and decisions and challenges to EU policies and decisions.

b. Data complied by author are based on material available from http://www.comunidadandina.org/normativa.asp. Private litigants lacked standing to raise infringement suits until 1996. Thus, in 1987, a private litigant's case was dismissed for lack of competence. There have been only three private actor cases since the change in access rules; one of these was dismissed and one was abandoned.

c. Data compiled by author from material from http://www.ccj.org.ni/

action cases by definition target EU authorities, not national governments. Although many people assume that ECJ preliminary ruling cases involve private-actor challenges to national rules, these cases may also challenge the rules and policies of supranational actors. Indeed the best evidence we have is that most preliminary ruling cases are actually challenges to EU rules and Commission decisions, not questions about the compatibility of national rules and European law.[11] In the Andean system, there have been 714 preliminary ruling cases, and most of these challenge national implementation of Andean rules with respect to intellectual property (96%). In addition, there have been three direct-action cases in which the target of challenge was a national policy (Alter, 2005). The ITLOS court has heard no challenges to decisions of the Seabed authority, and most of the cases involve state-to-state dispute. To date, there have been seven private ITLOS cases raised by the owners of vessels. The CACJ has heard 34 private-actor cases, 26 of which targeted a national policy. (I have no information about the 90 rulings by Economic Court of the Commonwealth of Independent States, COMESA, and OHADA, but I assume that all of these cases involve appeals of national court rulings applying international legal rules.)

These data suggest that with the exception of the ECHR, private access may be focused as much on rights claiming vis-à-vis international institutions as it is on rights claiming vis-à-vis national governments. It also suggests that private enforcement through international legal mechanisms remains largely a European phenomenon. Ninety-six percent the total IC judicial decisions potentially involving private actors have been issued by European courts, 3.2% from the Andean Court, leaving less than 1% of all possible private-litigant-inspired rulings in other courts. Let me underscore that this sample only represents cases raised by private actors that reach the rulings stage. Many cases raised by Commissions and states are on behalf of private actors, many cases settle before the ruling stage, and private actors also use domestic courts to enforce international rules—thus, there are ways other than direct access for private-actor suits to be pursued and for private participation to occur. The comparison is unfair in that European courts have been around a lot longer than the other six courts have. Although one could control for the per annum usage of courts, a larger difference would still remain—the other six institutions do not have as dense of a web of legal rules actors may call on to enforce. Although multiple factors could account for

11. Jürgen Schwartz reviewed German references from 1960 to 1986 and found that roughly 40% of the national references in his sample were about the compatibility of European Court law with national law (Schwartz, 1988). Chalmers reviewed U.K. references and found a similar result (Chalmers, 2000), suggesting that more than half of national references do not involve questions about national policies or rules.

why European courts hear so many more cases, the overall statistics suggest that it is far from clear whether European courts are the model or the exception.

V. Democracy and Access to Justice in the New ICs

This article asks the following question: Why the proliferation of ICs with compulsory jurisdiction and private-litigant access? Scholars expect private access to be associated with more effective ICs, by which they mean ICs more capable of inducing state compliance with international rules. The obvious question the scholarship raises is why sovereignty-jealous states would ever agree to private access if it is likely to lead to more challenges to their behavior.

The previous section developed a functional argument whereby judicial roles require specific minimum designs for a court to actually fulfill its given role. It argued that compulsory jurisdiction is functionally required for constitutional review, administrative review, and criminal enforcement roles—and one finds compulsory jurisdiction empirically associated with all ICs playing these roles, with the exception of the IACHR. Access for subjects of administrative rulings is functionally required for administrative review, and one finds that all ICs with administrative review powers allow private access for these roles. We also find private access for international war crimes courts because the defendant in the case is inevitably an individual. The creation of war crimes courts and ICs with administrative and constitutional roles explains in large part the trend toward new-style ICs. Indeed, although only some of the dispute resolution ICs included compulsory jurisdiction and even fewer allowed private access, all administrative and constitutional ICs had private access and compulsory jurisdiction.

This correlation of compulsory jurisdiction and private access with certain judicial roles suggests an explanation for why, with time, one finds an increasing number of ICs with compulsory jurisdiction and private access. Increasingly, states are creating international institutions with legislative and administrative authority. If international judicial roles were not expanded, these international governance bodies would actually have fewer checks than their domestic counterparts do. The checks have to be international; judicial review of international actors is outside of the authority of domestic courts, and creating multiple national checks on international actors would be a recipe for chaos. Although I have not proven that the change in IC design follows from the change in international governance and the types of tasks delegated to international organizations, this functional argument makes empiri-

cal sense. States display little desire to generally increase the effectiveness of international law vis-à-vis states; nor do they universally allow compulsory jurisdiction and private access. The correlation between compulsory jurisdiction and private access on one hand and certain judicial roles on the other is strong. The fact that the same court has different access rules for different roles suggests that functional considerations are shaping access-rule decisions.

The functional argument gives us a good starting point to understand the variation in design we observe, and it identifies questions for further analysis—such as why do some courts have design features below or above the minimum-design criteria, and why are some courts given some roles whereas others are given other roles? The previous section suggested a logic to giving certain powers to one court and not another, providing further support for the functional argument. But a handful of design decisions could not be explained by functional arguments and even when design choices are functionally required, we must remember to avoid the functionalist fallacy (Hall, 1986); we cannot prove intent based on the function a court serves, and functional arguments will never tell us about how ICs actually fulfill their functional roles or if they stay within the functional boxes created in the founding treaties.

In terms of the theme of this volume—how ICs contribute to the promotion of democracy—it is clear that private access to ICs to challenge supranational actors can help facilitate rights claiming, international organization's accountability, and the rule of law within supranational governance systems. But I find that these tools have not taken a deep hold outside of Europe. Perhaps the problem is that it is too early to say. In many cases where we find new-style ICs, either the court or the larger institution in which it is embedded is fairly new. Until these institutions develop governance rules that affect people's lives, we should not expect much international litigation. Once there are meaningful rules, the Andean experience suggests that existing institutions can spring to life.[12]

12. The Andean Court is the third most active IC in existence. Ninety-six percent of its cases involve intellectual property, but this is also perhaps the only area of Andean law that is truly harmonized. Once the new Andean intellectual property rules were in place, the largely unused Andean Court sprung to life. The Andean Secretariat successfully challenged an Ecuadorian intellectual property law, adopted under U.S. pressure, that violated Andean rules (1-AI-96), and private actors raised all sorts of challenges to Andean rules (one third of all nullification suits the Andean Court has heard were raised by private actors) and to national decisions implementing Andean rules (699 suits as of December 2004). Analysis was based on interviews with Ecuadorian intellectual property lawyers, judges at the Ecuadorian Administrative Tribunal, and judges at the Andean Court of Justice (including a judge who had been at the Colombian Administrative Tribunal until February 2005), March 15-17 2005, Quito, Ecuador.

Notwithstanding the fact that the vast majority of ICs now have compulsory jurisdiction and allow at least partial private access, it is still the case that most ICs provide fairly limited resources for private citizens to use. ICs provide private litigants with new tools to challenge the administrative and legislative actions of supranational bodies, and sometimes private actors can use these tools to challenge national implementation of supranational rules. Usage of these tools, however, is primarily limited to Europe and to intellectual property law in the Andean community. This is not to say that the new-style ICs are not creating qualitative changes in international politics. Many of the newer style ICs are able to help enforce international rules against states—though not per se in suits raised by private actors—and this change remains meaningful. Also, as international institutions engage in more administrative regulation, administrative review of their actions will also be meaningful. It is just less clear from this analysis that outside Europe, private access is an important key to the story of how ICs are transforming international relations or state behavior. At a minimum, this study suggest caution in generalizing across ICs based purely on design features. The study also suggests that greater attention be given to the content of the cases litigated, breaking down aggregated statistics by the role the IC is playing so that we can have a better sense of what ICs are actually doing. Only then can we really understand how ICs facilitate rights claiming by states and private actors alike.

References

Alter, K. (2005). *Exporting the European court of justice model: The experience of the Andean common market court of justice*. Manuscript in preparation.

Alter, K. J. (2001). *Establishing the supremacy of European law: The making of an international rule of law in Europe*. Oxford, UK: Oxford University Press.

Alter, K. J. (2002, August). *International legal systems, regime design and the shadow of international law in international relations*. Paper presented at the American Political Science Association Conference, Boston, MA.

Alter, K. J. (2003). Do international courts enhance compliance with international law? *Review of Asian and Pacific Studies*, *25*, 51-78.

Alter, K. J., & Vargas, J. (2000). Explaining variation in the use of European litigation strategies: EC law and U.K. gender equality policy. *Comparative Political Studies*, *33*(4), 316-346.

Alvarez, J. (2003). The new dispute settlers: (Half) truths and consequences. *Texas International Law Journal*, *38*, 405-444.

Arteaga, W. K. (2004). La necesidad de la integración y el orden y ordenamiento jurídico comunitario [The necessity of integration and the legal order of the community]. In *Testimonio comunitario* (pp. 27-86). Quito, Ecuador: Tribunal de Justicia de la Comunidad Andina.

Bignami, F. (2005). Creating European rights: National values and supra-national interests. *Columbia Journal of European Law*, *11*, 243-350.

Brown, C. (2002). The proliferation of international courts and tribunals: Finding your way through the maze. *Melbourne Journal of International Law*, *3*, 453-475.

Chalmers, D. (2000, January). *A statistical analysis of reported decisions of the United Kingdom invoking EU laws 1973-1998* (Jean Monnet Paper No. 1/2000). Cambridge, MA: Harvard Law School.

Conant, L. J. (2002). *Justice contained: Law and politics in the European Union*. Ithaca, NY: Cornell University Press.

Dragneva, R. (2004, June). *Legal institutions for economic integration in the commonwealth of independent states*. Paper presented at the Annual Meeting of the Comparative Law and Economics Forum, Zurich, Switzerland.

Edley, C. (1990). *Administrative law: Rethinking judicial control of bureaucracy.* New Haven, CT: Yale University Press.

Elster, J. (2000). *Ulysses unbound: Studies in rationality, precommitment, and constraints*. New York: Cambridge University Press.

Garrett, G., & Weingast, B. (1993). Ideas, interests and institutions: Constructing the EC's internal market. In J. Goldstein & R. Keohane (Eds.), *Ideas and foreign policy* (pp. 173-206). Ithaca, NY: Cornell University Press.

Gerth, H., & Mills, C. W. (1958). *From Max Weber: Essays in sociology.* New York: Galaxy Books.

Gordon, E., Burton, S. J., Falk, R., Franck, T. M., & Nezis, C. (1989). The independence and impartiality of international judges. *American Society of International Law Proceedings*, *83*, 508-529.

Hall, P. A. (1986). *Governing the economy: The politics of state intervention in Britain and France*. New York: Oxford University Press.

Harlow, C., & Rawlings, R. (1992). *Pressure through law.* London: Routledge.

Hathaway, O. (2001). Path dependence in the law: The course and pattern of legal change in a common law system. *Iowa Law Review*, *86*, 603-663.

Hathaway, O. (2005). Between power and principle: A political theory of international law. *University of Chicago Law Review*, *71*(2), 469-536.

Helfer, L., & Slaughter, A.-M. (1997). Toward a theory of effective supranational adjudication. *Yale Law Journal*, *107*(2), 273-391.

Helfer, L., & Slaughter, A.-M. (2005). Why states create international tribunals: A response to professors Posner and Yoo. *California Law Review*, *93*, 899-956.

Helfer, L. R. (2002). Overlegalizing human rights: International relations theory and the commonwealth Caribbean backlash against human rights regimes. *Columbia Law Review*, *102*(7), 1832-1911.

Ikenberry, G. J. (2001). *After victory institutions, strategic restraint, and the rebuilding of order after major wars*. Princeton, NJ: Princeton University Press.

Jackson, J. H. (1997). The great 1994 sovereignty debate: United States acceptance and implementation of the Uruguay round results. *Columbia Journal of Transnational Law*, *36*, 157-188.

Keener, E. B. (1987). The Andean common market court of justice: Its purpose, structure, and future. *Emory Journal of International Dispute Resolution*, *2*(1), 37-72.

Keohane, R., Moravcsik, A., & Slaughter, A.-M. (2000). Legalized dispute resolution: Interstate and transnational. *International Organization*, *54*(3), 457-488.

Levi, W. (1976). *Law and politics in the international society.* Beverly Hills, CA: Sage.

Majone, G. (2001). Two logics of delegation: Agency and fiduciary relations in EU governance. *European Union Politics*, *2*(1), 103-122.

Majone, G. (2003, January). *Information, commitment, and the transformation of European governance.* Paper presented at the Conference on "Transformations of statehood from a European perspective," Vienna, Austria.

McCall Smith, J. (2000). The politics of dispute settlement design. *International Organization*, *54*(1), 137-180.

Milgrom, P., North, D., & Weingast, B. (1990). The role of institutions in the revival of trade: The law merchant, private judges, and the champagne fairs. *Economics and Politics*, *2*, 1-23.

Mnookin, R., & Kornhauser, L. (1979). Bargaining in the shadow of the law: The case of divorce. *Yale Law Journal*, *88*, 950-997.

Moravcsik, A. (1997). Explaining international human rights regimes: Liberal theory and Western Europe. *European Journal of International Relations*, *1*(2), 157-189.

Noyes, J. E. (1998). The international tribunal for the law of the seas. *Cornell International Law Journal*, *32*(1), 110-181.

O'Keefe, T. A. (2001). The Central American integration system (S.I.C.A.) at the dawn of a new century: Will the Central American isthmus finally be able to achieve economic and political unity? *Florida Journal of International Law*, *13*(3), 243-261.

Pollard, D. E. E. (2003, August). *The original jurisdiction of the Caribbean court of justice*. Paper presented at the meeting of *Legislative drafting facility: The thirtieth course of international law*, Rio de Janeiro, Brazil.

Posner, E. A., & Yoo, J. C. (2005). A theory of international adjudication. *California Law Review*, *93*(1), 1-72.

Raustiala, K. (2004). Police patrols & fire alarms in the NAAEC. *Loyola of Los Angeles International and Comparative Law Review*, *3*, 389-413.

Romano, C. (1999). The proliferation of international judicial bodies: The pieces of the puzzle. *New York University Journal of International Law and Politics*, *31*, 709-751.

Schneider, A. K. (1998). Democracy and dispute resolution: Individual rights in international trade organizations. *University of Pennsylvania Journal of International Economic Law*, *19*, 587-638.

Schwartz, J. (1988). *Die befolgung von vorabentscheidungen des europäischen gerichtshofs durch deutsche gerichte* [The adherence to preliminary rulings of the European Court of Justice by German Courts]. Baden-Baden, Germany: Nomos Verlangsgesellschaft.

Scott, R. E., & Stephan, P. B. (2006). *The hardening of international law: Contract theory and international law enforcement*. Cambridge, UK: Cambridge University Press.

Shapiro, M. (1981). *Courts: A comparative political analysis*. Chicago: University of Chicago Press.

Simmons, B. (2002, April). *Why commit? Explaining state acceptance of international human rights obligations.* Paper presented at the meeting of Delegation to International Organizations, Park City, UT.

Slaughter, A.-M. (2000). Judicial globalization. *Virginia Journal of International Law Association*, *40*, 1103-1124.

Slaughter, A.-M. (2004). *A new world order.* Princeton, NJ: Princeton University Press.

Slaughter, A.-M., & Bosco, D. (2000). Plaintiff's diplomacy. *Foreign Affairs*, *79*(5), 102-116.

Slaughter, A.-M., Keohane, R., & Moravcsik, A. (2000). Legalized dispute resolution, interstate and transnational. *International Organization*, *54*(3), 457-488.

Stone, A. (1992). Where judicial politics are legislative politics: The French constitutional council. *Western European Politics*, *15*, 29-49.

Stone Sweet, A. (1999). Judicialization and the construction of governance. *Comparative Political Studies*, *32*(2), 147-184.

Stone Sweet, A. (2000). *Governing with judges*. Oxford, UK: Oxford University Press.

Sykes, A. (2005). *Public v. Private enforcement of international economic law: Of standing and remedy* (John M. Olin Law and Economics Working Paper No. 02/05). Chicago: Author.

Tallberg, J. (2002). Paths to compliance: Enforcement, management and the European Union. *International Organization*, *56*(3), 609-643.

Tallberg, J. (2003). *European governance and supranational institutions: Making states comply.* London: Routledge.

Tallberg, J., & Jönsson, C. (1998). Compliance and post-agreement bargaining. *European Journal of International Relations*, *4*(4), 371-408.

Walker, G. D. Q. (1988). *The rule of law.* Melbourne, Australia: Melbourne University Press.

Karen J. Alter is an associate professor in political science at Northwestern University, specializing in international relations, international law, and European Union politics. She is author of *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford University Press, 2001). She is working on a new book, titled *International Courts in International Politics: Four Judicial Roles and Their Implications for State-IC Relations*.