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Tipping the Balance: International Courts and the Construction of International and Domestic Politics

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Abstract: The proponents of international courts (ICs) expect that creating formal legal institutions will help to increase respect for international law. International relations scholars question such claims, since ICs have no tools to compel state compliance. Such views are premised on the notion that states have unique preferences that ICs must satisfy in order to be effective. The tipping point argument is premised on the notion that within each state are actors with numerous conflicting preferences. ICs can act as tipping point actors, building and giving resources to compliance constituencies—coalitions of actors within and outside of states—that favour policies that happen to also be congruent with international law.

IN THE POST-WORLD War II period, the world has witnessed a remarkable transformation in the political power of courts. Many countries have created new constitutional courts, and constitutional and supreme courts around the world have become increasingly willing to confront governments and powerful actors.¹ The rising political power of courts alters state politics. Courts have become venues in which litigants, interest groups and opposition politicians can challenge the policies and actions of governing bodies. Because law is sticky and courts are powerful, stacking law and courts allows political actors to lock in influence over time. By creating laws that are difficult to change, and by populating courts with people who are committed to defending existing laws and legal interpretations, political factions can ensure that their influence continues

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¹ C Epps, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago, University of Chicago Press, 1998) 572; A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, Oxford University Press, 2000); T Halliday, L Karpik and M Feeley, *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*, Oñati International Series in Law and Society (Oxford, Portland, OR, Hart Publishing, 2007).

even when they leave office.² Courts are also increasingly agents of change, working with cause-lawyers to reframe issues and thereby reshape politics and societal values using the language and tool(s) of law.³

International courts (ICs) offer a new twist in the story of how factions can lock-in political agendas and how courts can be agents of change. International law is particularly sticky in that it can only be changed by multilateral assent. States retain flexibility under international law through their ability to interpret international agreements as they see fit. But ICs, with their formal authority to interpret international rules, introduce the prospect that independently generated interpretations of existing international rules can emerge. Through ‘alliances’ with cause-lawyers and domestic interlocutors, ICs can be agents of national and international change.

ICs are designed to influence state behaviour; indeed, influencing states is a key *raison d’être* for ICs. ICs are surprisingly independent actors. Neither a single country nor a bloc of like-minded countries can control the appointment process, nor is it easy to retaliate against individual judges.⁴ Yet ICs face many constraints. ICs must wait for litigants to present them with cases on which to rule. ICs can offer authoritative interpretations of the law, but they are constrained by the caveats and loopholes that states write into international laws. Also, ICs control neither the sword nor the purse. They can pronounce in favour of one side and order remedies, but they cannot themselves compel compliance with their rulings. This last limitation is especially problematic when the defendant in the case is a powerful political actor, like a government. International judges respond to these constraints with both legal and political strategies.

This chapter focuses on the role of ICs in constructing interests and shaping state behaviour. Most international relations approaches expect that states have unique preferences which ICs must satisfy in order to be effective. The argument here is premised on the notion that within each state there are actors with numerous conflicting preferences. ICs can act as ‘tipping point’ actors,

² S Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, Princeton University Press, 2009).

³ Sarat, Austin and Scheingold, *Cause Lawyers and Social Movements* (Stanford, Stanford University Press, 2006).

⁴ Individual countries choose only their own judicial nominees. A government can, if it feels very strongly, veto a controversial nominee from another country. But governments cannot ensure that a majority of international judicial appointees share its views of the law. ICs often randomly assign panels of judges to hear cases, so there is no way to predetermine the subset of judges that will rule on specific cases. IC decision-making follows the will of the majority, and many ICs still issue unanimous rulings so that it can be hard to associate individual decisions with individual judges. Also, most judges will not in any event be reappointed because successor governments generally substitute their own choices when the opportunity arises. For all of these reasons, IC judges are able to be truly independent actors. See K Alter ‘Delegation to International Courts and the Limits of Recontracting Power’ in D Hawkins, D Lake, D Nielson and M Tierney (eds) *Delegation and Agency in International Organizations* (Cambridge, Cambridge University Press, 2006); and E Voeten, ‘The Impartiality of International Judges: Evidence from the European Court of Human Rights’ (2008) 102(4) *American Political Science Review* 417.

building and giving resources to ‘compliance constituencies’—coalitions of actors within and outside of states—that favour policies that also happen to be congruent with international law. ICs are unusual tipping point actors in that they include judges from other countries and they operate outside of states. Indeed, their international nature is the reason why litigants turn to them in the first place. ICs are also unusual in that they can forge direct connections with the domestic actors who construct understandings of the law. By working with the sub-state interpreters of the law in multiple countries, ICs can adapt existing rules to new situations, and help to constitute transnational coalitions of support for political adherence to international covenants. ICs are thus global actors, intervening in both the internal politics of states and international relations more generally to redirect policy and politics.

This chapter investigates the role of ICs in tipping politics by examining an empirical puzzle. The Court of Justice of the European Union (CJEU) is a well-known expansionist law-maker that uses novel legal interpretations to overcome political blockages and promote European integration. People have explained the CJEU’s extraordinary law-making activism by focusing on the design of the European legal system as it helps to empower a variety of actors: the CJEU itself, national judges, economic actors engaged in cross-border trade, and lawyers and law professors specialising in European law.⁵ Such explanations suggest that institutional design readily combines with the power-seeking nature of ICs and their interlocutors, in which case similarly designed ICs should follow the trajectory of the CJEU, seizing empowerment opportunities that are presented by litigants to diminish state control of the law. If all ICs are empowerment-oriented, then we should expect ICs to become increasingly invoked as tools of activist litigants.

But if ICs are tipping point actors, we should instead expect policy and legal preferences that are shared with key domestic and international compliance constituencies to shape the trajectory of law’s development. These are not mutually exclusive hypotheses, in that the second conjecture can be seen as a specification of the first. But the tipping point argument suggests that ICs are not dependent upon governments, government-defined interpretation of international rules, or accepting as given a government’s claim about the national interest. The tipping point actor argument puts more power in the hands of the ICs’ compliance constituency. The argument suggests that the preferences of compliance partners matters more than the preferences of the litigant, the defendant state and perhaps even more than those of the IC judges in determining where law and politics are reconstituted.

⁵ A-M Burley and W Mattli, ‘Europe Before the Court’ (1993) 47 *International Organization* 47; Weiler, ‘A Quiet Revolution—The European Court of Justice and its Interlocutors’ (1994) 26 *Comparative Political Studies* 510; H Rasmussen, *On Law and Policy in the European Court of Justice* (Dordrecht, Martinus Nijhoff, 1986); A Stone Sweet ‘Judicialization and the Construction of Governance’ (1999) 32(2) *Comparative Political Studies* 147.

I illustrate this argument by comparing the CJEU with the Andean Tribunal of Justice (ATJ), a copy of the CJEU. My research has found that, notwithstanding their identical designs, the ATJ has not followed the path of the CJEU in being an expansionist law-maker. I explain these divergent behaviours by investigating the challenges which the ATJ has faced in building a compliance constituency for Andean law.

Section I develops the argument of courts as tipping point actors. Section II summarises the findings of a larger body of work which compares the behaviour of the CJEU and the ATJ. Section III generalises the argument to help us to understand how delegating authority to ICs is transformative of domestic and international politics beyond the well-known case law of the CJEU. Section IV concludes by considering the implications for democratic politics of the fact that ICs—external non-democratic actors—can influence domestic politics and policy.

I. INTERNATIONAL COURTS AS TIPPING POINT ACTORS

International relations scholarship generally conceives of ICs as a cipher of state interests. This is partly true, although not in the way that many international relations scholars posit. International relations scholars, conservative pundits, and law and economics scholars build their theories around the insight that ICs have no way to compel compliance with their rulings. They then make the following corollary: if ICs can neither compel compliance nor themselves enact strong sanctions for violating the law, the only choice left to an international judge who wants to be useful and relevant is to make rulings which appeal to a state's national interest.⁶ Thus, all ICs can really do is serve as coordination devices for states.⁷

⁶ I have left out the control tools upon which Principal-Agent theory focuses: states re-legislating to reverse legal rulings, states flagrantly ignoring international legal rulings, governments retaliating against international judges. In fact, unanimity rules make changing legislation very hard so that ICs rarely if ever face serious threats of re-legislation (see A Stone Sweet, 'How the European Legal System Works and Does not Work' *Social Science Research Network* (2010); M Pollack, 'Delegation, Agency and Agenda Setting in the EC' (1997) 51(1) *International Organization* 99; J Tallberg, *European Governance and Supranational Institutions: Making States Comply* (London, Routledge, 2006); R Steinberg, 'Judicial Law-making at the WTO: Discursive, Constitutional and Political Constraints' (2004) 98(2) *American Journal of International Law* 247; T Ginsburg, 'Bounded Discretion in International Judicial Law-making' (2005) 43(3) *Virginia Journal of International Law* 631. And both stacking courts and retaliating against IC judges is also exceedingly hard to do (see Teles, above n 2). Thus, once again the claims of state control rest primarily on the assertion that ICs fear non-compliance with their rulings (eg C Carrubba, M Gabel and C Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice' (2008) 104(4) *American Political Science Review* 435); and even for this claim the evidence is highly questionable (see: Stone Sweet, *ibid*; K Alter, 'Agent or Trustee: International Courts in their Political Context' (2008) 14(1) *European Journal of International Relations* 33).

⁷ J Goldsmith and E Posner, *The Limits of International Law* (Oxford, New York, Oxford University Press, 2005); A Guzman, *How International Law Works: A Rational Choice*

ICs can be inter-state arbiters, helping governments to identify areas of common interest and constructing focal point solutions where there are multiple potential equilibrium points. The real question is whether ICs are *only* able to serve as coordination devices. Conservative and law and economics scholars do make this leap.⁸ But the corollary—a lack of coercive power limits ICs to the role of constructing the focal points—contains within it a flawed logic.

All courts lack coercive power; it is states, not judges, which have the monopoly on the legitimate use of force. Nor is the main constraint of ICs their lack of overt sanctioning tools. Indeed, ICs are no different from domestic constitutional courts in facing these constraints. Rather, ICs, like their domestic constitutional counterparts, must create indirect costs for political actors which ignore them.⁹

The problem for ICs is that governments can choose not to comply, defending non-compliance as consistent with domestic constitutional law, and thus consistent with the rule of law.¹⁰ Moreover, domestic populations may actually prefer non-compliance with international agreements (at least in some circumstances). Where domestic populations are either indifferent (lacking an anti-preference) or unhappy about government violations of international agreements, ICs can help to construct counter-pressures which tip the political balance in favour of policies that better cohere with international legal obligations.

ICs can help to constitute state preferences by using their institutional position to aid constituencies (within and outside of states) which share the objectives inscribed into the law. The path to mobilising these compliance allies can take a few different routes. The existence of these alternative routes means that ICs do not per se need to pander to the interests of governments in power.

Theory (Oxford, Oxford University Press, 2008); G Garrett and B Weingast, 'Ideas, Interests and Institutions: Constructing the EC's Internal Market' in J Goldstein and R Keohane (eds) *Ideas and Foreign Policy* (Ithaca, Cornell University Press, 1993).

⁸ Posner and Yoo conceptualise ICs as simple problem-solving devices which do not transform interests (E Posner and J Yoo, 'A Theory of International Adjudication' (2005) 93(1) *California Law Review* 1, 6). Goldsmith and Posner note that they cannot rebut the constructivist challenge that international law can reconstitute state preferences, but they 'doubt it is true in any important degree' (ibid, 9). Guzman assumes away the constructivist notion that interests can be transformed, defending the choice by noting that 'developing a theory of international law requires us to make certain initial assumptions and to stick with them as much as possible' (above n 7, 215).

⁹ Epps, above n 1; G Rosenberg, *The Hollow Hope: Can Courts bring about Social Change?* (Chicago, University of Chicago Press, 1993).

¹⁰ Not all constitutions grant supremacy to international law, so that conflicts between international and domestic laws are not necessarily resolved in favour of international law. Many legal scholars and judges conceive of national constitutions as superior to international law, so that governments are actually barred from following international law if doing so contravenes domestic constitutional law, or federal and democratic structures within a state.

Perhaps the easiest route politically is for ICs to co-opt actors within the state who already have the power to choose compliance with international law. ICs can co-opt governments, providing legal rulings that governments use to overrule the arguments of domestic opponents. ICs can also circumvent governments. If ICs induce administrative agencies and national judges to reinterpret existing domestic laws, ICs can produce policy changes regardless or even in spite of the preferences of ruling governments. This latter route is relatively easy because it does not require that governments or legislatures act. Domestic actors can fairly easily be co-opted where they believe that government incompetence, indifference or corruption has generated non-compliance, or where they think that the government is pursuing an agenda that itself runs counter to domestic laws and constitutional requirements.

Where state and sub-state governmental actors are either unwilling or too politically weak to be allies, ICs must instead try to mobilise political pressure. ICs can appeal to actors in other states, invoking multilateral politics as a tool to influence recalcitrant governments. For example, the World Trade Organization (WTO) allows other states to retaliate for violations of WTO rules by targeting politically sensitive industries and regions. IC interventions may lead orange producers in Florida to mobilise to protest against the steel protections offered to Pennsylvania. Human rights courts may require payments to victims and public apologies, and human rights charges can make it risky for military and political leaders to travel abroad.¹¹ International Criminal Courts may issue indictments and arrest warrants that make travel risky and that lead other countries to cease cooperating with a political leader or to freeze key assets. These are, of course, indirect forms of sanctions. The key point is that they occur as a consequence of IC intervention. In many international legal systems, IC intervention can be instigated at the behest of non-state actors; thus, IC intervention potentially means that non-state actors can harness multilateral and inter-state politics to pursue particular objectives.

ICs can also try to inspire the 'spiral' strategy, where national and transnational activists use an international legal ruling as evidence that political leaders are deviating from their promises of respecting the rule of law, or from adhering to the goals and standards inscribed into international law.¹² In this transnational politics strategy, ICs work with grassroots organisations to influence government policy.

ICs' institutional position allows them to contribute significant support to these politics, which is why raising cases in front of an IC can be attractive.

¹¹ K Sikkink and E Lutz, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America' (2001) 2 *Chicago Journal of International Law* 1.

¹² T Risse, S Ropp and K Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, Cambridge University Press, 1999).

IC rulings provide legal justifications for actors within states—the police, governments, national administrators and national judges—who might otherwise be reluctant to push back against the preferences of a powerful domestic actor. The presumed authority of IC rulings also provides compliance activists with a tool to delegitimise the interpretations of the law that opponents are using to defend the legal validity of their actions. IC rulings can mobilise lawyers, law professors and public interest law groups to find similar cases and to use domestic legal channels to increase the political pressure. IC rulings can also mobilise actors who benefit from the international legal system overall. For example, business groups might support certain interpretations of WTO law because they see compliance as furthering their international economic interests. Even if these groups do not mobilise, their tacit support provides cover for actors who are facing counter-pressures. The public nature of IC rebukes also creates potential costs. Flouting an IC ruling can make it harder for a government to pressure other states to follow rules of the international regime. For example, if the US violates the consular affair rights of foreigners within its prison system, American citizens arrested abroad may find that their legal pleas carry less weight; and for this reason the State Department may become an advocate of following international law.

The ability of ICs to act as external tipping point actors means that simply creating an IC is a politically significant act. What delegation to ICs does most often is to entrench politics across time. States delegate authority to an IC so as to ensure that subsequent governments do not walk away from the set of policies inscribed in the law.¹³ Thus, ICs quite often help to tip the balance in the direction that the authors of the law inscribed into the DNA of the law. ICs enforcing international economic rules will tend to promote market openness. ICs enforcing human rights rules will tend to promote a human rights agenda. International war crimes tribunals will tend to condemn state practices that harm non-combatants (only, however, in cases presented by prosecutors). This means that, to the extent that international agreements codify the goals and objectives associated with economic liberalism or liberal democracy, ICs will more likely than not be a force contributing to these goals. The role of ICs in reinforcing the current order may not be visible because states may either avoid violations that are likely to be challenged or choose to settle out of court. But delegating authority to ICs will nonetheless have the effect of increasing the negotiating leverage of the party which favours what the law requires.

¹³ A Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe' (1995) 1(2) *European Journal of International Relations* 157; J Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge, New York, Cambridge University Press, 2000).

ICs are also able to construct new understandings of the law, underpinned by the support of new political coalitions. Law creates social norms, and plays to the social roles and self-conceptions of actors for whom adhering to the 'rule of law' is an important value.¹⁴ By changing prevailing understandings of the law, ICs can help to foment political change which is supported by certain stakeholders. IC interventions can lead to small and subtle changes in policy, which generally happens when administrators reinterpret existing rules in fairly small ways; and IC interventions can lead to rapid policy change, what Cass Sunstein calls a 'norm cascade'. Norm cascades occur when political entrepreneurs tap into a latent public sentiment, provoking a rapid avulsive change.¹⁵ ICs can be the norm entrepreneurs, or cause litigants and the activists who pick up and build upon IC rulings can be the norm entrepreneur. Although delegation to ICs is neither a necessary nor sufficient condition for international law to be used as a tool of political change, delegation to ICs can facilitate the efforts of such norm entrepreneurs.

ICs inject their own interests into these politics, which can be multifarious. Judges may simply want to do their prescribed job, applying the plain language of the law to the case at hand. Judges may also themselves share the values of the relevant international regime, which may be why they agreed to join the IC in the first place. Judges may have their own biases, which does not per se mean that they are biased actors. Rather, judicial predilections and interpretative traditions shape the ways in which laws get interpreted.¹⁶ But the tipping point argument suggests that judges are constrained by the law and preferences of potential interlocutors.

The tipping point argument does not imply any specific trajectory for how law gets interpreted. The argument does, however, mean that ICs can do more than construct focal points; they can actually contribute to constituting the law, domestic politics and thus state preferences. The role of ICs in constructing interests is easier to observe when ICs redirect the trajectory of politics, but ICs can also stop changes that may otherwise have occurred. In either case, in order to reconstitute politics ICs must have domestic and international level interlocutors who support their interpretations of the law.

This analysis suggests that ICs do not become politically weak because governments oppose them—indeed, opposition to existing government policies is probably the reason why ICs are invoked in the first place. Rather, ICs become politically weak when legal and policy defenders will not organise to demand that governments adhere to the particular legal covenants or to the particular interpretations of the law that the IC is promoting. The next section investigates this argument through a comparative

¹⁴ C Sunstein, 'Social Norms and Social Roles' (1996) 96 *Columbia Law Review* 903, 915–27.

¹⁵ *Ibid.*, 929–30.

¹⁶ Voeten, above n 4.

analysis of the behaviour of the CJEU and the ATJ. The question is: what leads an IC to become an expansionist law-maker? The analysis identifies new legal constraints which broaden the reach and scope of the law in ways that narrow states' discretion.

II. NATURE V NURTURE: EXPANSIONIST LAW-MAKING IN THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE ANDEAN TRIBUNAL OF JUSTICE¹⁷

The CJEU is well known for its role in helping to construct European integration. The CJEU created a new legal category of 'Community law' which is supreme and directly applicable in European Member States. The CJEU transformed the Treaty of Rome into a sort of Constitution for Europe, and through its rulings the CJEU has helped to construct whole areas of law—administrative law, economic law, gender equality law and more.¹⁸ The CJEU's extraordinary law-making activism has typically been explained using a narrative of empowerment. The CJEU transformed the European legal system and continually expands the reach and scope of European law in order to expand its own authority and power.¹⁹ Originally, scholars (myself included) thought that the ECJ was capable of being unusually activist because the European legal system was exceptional by design.²⁰

From its founding, what is now the European Union was unusual in its ability to pass legislation that is directly applicable, meaning that it is legally binding within domestic legal orders without requiring that domestic legislatures first pass implementing legislation.²¹ The unusual nature of European law required a change in national legal practice insofar as national judges had to accept the legal validity of directly applicable European rules even if they had not been transposed into national law. But it did not per se require that those national judges had to accept the supremacy of European law over national law. The CJEU invoked the direct applicability of European

¹⁷ This section draws significantly on K Alter and L Helfer, 'Nature or Nurture: Judicial Law-making in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64(4) *International Organization* 563.

¹⁸ F Bignami, 'Creating European Rights: National Values and Supranational Interests' (2005) 11 *Columbia Journal of European Law* 241; A Stone Sweet, *The Judicial Construction of Europe* (Oxford, Oxford University Press, 2004); M Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A Critical Reading of Article 30 of the EC Treaty* (Oxford, Hart Publishing, 1998); J Weiler, 'To Be a European Citizen: Eros and Civilization' in J Weiler (ed) *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999).

¹⁹ Stone Sweet, above n 18; Stone Sweet, above n 5; A-M Burley and W Mattli, 'Europe Before the Court' (1993) 47(1) *International Organization* 41.

²⁰ J Alvarez, 'The New Dispute Settlers: (Half) Truths and Consequences' (2003) 38 *Texas International Law Journal* 405, 425–27; Posner and Yoo, above n 8, 55–57.

²¹ KJ Alter, 'The Global Spread of European Style International Courts' (2011 forthcoming) *West European Politics*.

law, and the aspirations of European integration written into the preamble of the Treaty of Rome, as it offered its own heterodox interpretation of European law. In its famous *Van Gend en Loos* ruling,²² the CJEU made the following claim:

The objective of the EEC Treaty, which is to establish a Common Market, the function of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states ... The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subject of which comprise not only Member States, but also their nationals ... Independent of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon Member States and upon the institutions of the Community.

The European Union's legal order was arguably unique in the 1960s, but that description no longer holds true. There are at least 11 copies of the European legal order. These common market systems espouse the same far-reaching economic goal of eliminating internal barriers to trade and creating unified external trade regimes, and they allow community institutions to adopt rules that are sometimes directly applicable within Member States.²³ The CJEU is also no longer unique as an institution which allows domestic judges and international judges to engage in dialogue about the meaning and application of community rules as they apply to concrete cases heard in national courts. The preliminary ruling mechanism which allows national courts to stop legal proceedings to send a question of interpretation to the CJEU has also been copied, and a number of CJEU copies have explicitly embraced the CJEU's supremacy and direct effect doctrines.

The ATJ is arguably the most successful of these CJEU-copies. It is the third most active IC, having issued more than 2,000 decisions by the end of 2010. Although the Andean Pact and the EC initially had different substantive goals, the Andean Pact's Cartagena Agreement contained the

²² Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

²³ Copies include (in order of their creation): the Benelux Court (1974), Andean Tribunal of Justice (1984), Central American Court of Justice (1992), European Free Trade Area Court (1994), West African Economic and Monetary Union Court (1995), Common Market for East African States Court (1998), Central African Monetary Community Court (2000), East African Community Court (2001), Caribbean Court of Justice (2004), Court of Justice of the Economic Community of West African States (2002) Southern African Development Community Court (2007), and the proposed African Court of Justice and Human Rights. The Benelux court, created in 1974, is older than the ATJ; the other ICs are recent creations. For more on these copies, see Alter, n 21.

same legal elements as those which the CJEU used to expand its authority. Both treaties prohibit Member States from creating new barriers to trade, require national treatment for products from other Member States and allow supranational bodies to adopt directly applicable secondary legislation. The CJEU and the ATJ provide identical mechanisms for challenging government behaviour which conflicts with international rules. Both systems contain a non-compliance procedure which enables private actors and Member States to inform their respective secretariats about rule violations. Both systems contain a preliminary ruling mechanism in which private actors invoke Community/Union-level law in domestic litigation and national judges refer questions of interpretation to the CJEU/ATJ. Domestic courts then apply the CJEU/ATJ ruling to the case at hand. In both systems, sanctions can be imposed if a state fails to comply with the court's ruling.²⁴ As of 1996, the Andean system has one additional feature. If the secretariat refuses to raise a non-compliance suit, a private actor can bring the non-compliance suit directly to the ATJ.

Notwithstanding these nearly identical institutional designs, the ATJ has not followed the CJEU in being an expansionist law-maker. The ATJ has incorporated the key CJEU doctrines of the supremacy and direct effect of EU law in terms quite similar to the CJEU. But even when provided with opportunities to adopt broader interpretations, the ATJ is reluctant to expand its own authority or the reach of Andean rules in ways which constrain national sovereignty.

Elsewhere, Laurence Helfer and I have compared ATJ and CJEU law-making over different 25-year periods when each IC was establishing its legal and political authority.²⁵ We coded all 1,338 ATJ preliminary rulings available on the Andean Community website from that court's founding up to the end of 2007. Where the ATJ broke new legal ground, we analysed its decisions in depth. We also conducted over 40 interviews with lawyers, judges and government officials in Peru, Ecuador and Colombia. To save

²⁴ The Andean system has from its inception allowed for sanctions. The EU system added sanctions in the Treaty of Maastricht in 1992 (see now Art 260(2) and (3) TFEU), and thus after the time period we studied. But this difference works in the favour of our analysis, in that the ATJ in theory had even more tools to compel compliance than those available to the ECJ during the formative period.

²⁵ We compare the first 25 years of the European Economic Community (1960 and 1985) to the first 25 years of the ATJ's operation (1984–2007). In these time periods, the ECJ issued 305 non-compliance decisions and 1,808 preliminary rulings (an average of 86.1 cases per year), whereas the ATJ, with a geographically and demographically smaller region to oversee, issued 85 non-compliance decisions and 1,338 preliminary rulings between 1984 and 2007 (an average of 71.5 per year). ECJ data from Stone Sweet, above n 18, 72–79; For ATJ litigation patterns, see L Helfer and K Alter, 'The Andean Tribunal of Justice and its Interlocutors: Understanding the Preliminary Ruling Reference Patterns in the Andean Community' (2009) 42(4) *Journal of International Law and Politics* 871.

space, I summarise below our main findings, which have been documented in the cited publications.

First, we found many instances where the ATJ avoided interpretations that would have expanded the reach and scope of both Andean rules and its own jurisdictional and political authority. A comparison of the two courts' pre-emption doctrines provides a good example of how the ATJ is more deferential to state autonomy. Without any textual support in the Treaty of Rome, the CJEU asserted that, in fields such as the common commercial policy, Union powers were exclusive and precluded Member States from legislating regardless of whether their actions conflicted with Union law. In other areas regulated by European law, the CJEU concluded that Member States could not legislate even where there is no EU rule on point. Not only do these rulings diminish state discretion; it is the CJEU which determines whether a particular EU rule or policy space is exclusive and pre-emptive.²⁶

In a striking contrast, the pre-emptive force of Andean law is far more modest. In an early ruling, the ATJ announced the principle of *complemento indispensable*: even in areas where Andean law clearly governs, Member States may enact domestic laws necessary to implement a Community rule provided that the laws do not obstruct or nullify the Community rule.²⁷ Stated differently, whereas the CJEU both implied powers not explicitly delegated to the EU and asserted pre-emptive authority even where EU law is silent, the ATJ has not implied powers for the Community, and it has concluded that states retain the power to legislate with the sole exception of national laws which directly conflict with extant Community rules.²⁸ Second, the Andean Tribunal is effective in shaping national and regional intellectual property (IP) law and politics primarily due to the support of national IP agencies. These agencies encouraged the early judicial references to the ATJ, and they regularly consult and incorporate ATJ rulings in their decision-making. The result, as we have explained elsewhere, is the creation of an IP rule of law in the Andean Community in which the ATJ plays a critically important role in shaping legal understandings and the behaviour of national actors. We have argued that agency support has encouraged the ATJ to interpret Andean IP law in a purposive fashion. We discussed a high profile, multi-country, multi-case legal controversy involving the medication commonly known as Viagra, where the ATJ ordered IP administrators to ignore national legal edicts that supported Pfizer's efforts to extend its patent beyond what Andean law allows. We explained why national IP

²⁶ J Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2415–17.

²⁷ ATJ decision 2-IP-88: point 3. ATJ rulings are available at: http://www.comunidadandina.org/canprocedimientosinternet/interpretacion_prejudicial.htm.

²⁸ K Alter and L Helfer, 'Nature or Nurture: Judicial Law-making in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64(4) *International Organization* 563, 571–72.

agencies have supported the ATJ, and suggested that ATJ doctrine contains the somewhat unusual legal protections for notorious (meaning famous) trademarks at least in part because national IP agencies also include in their mandate the protection of consumer interests, and thus national interlocutors seek to balance IP protection against public and consumer interests.²⁹

Third, we found that, unlike their European counterparts, national judges in the Andean Community do not send precedent-building cases to the ATJ. Instead, they are mostly passive intermediaries situated between the ATJ and the domestic administrative agencies charged with protecting IP. We also explored cases that did not involve IP issues, and here too we found that national judges were primarily passive intermediaries.³⁰

Fourth, while the CJEU and ATJ possessed the same potent combination of wide access rules, self-interested litigants, swelling dockets and repeat-player legal entrepreneurs who sought out cases to build legal doctrine,³¹ unlike the CJEU, the ATJ usually thwarted litigant efforts to use Andean law to dismantle national policies contrary to their economic interests. We examined efforts to get the Andean Tribunal to scrutinise national policies for products that fell under the 'list of exceptions' to Andean free trade rules and national practices that created market barriers to alcohol produced in neighbouring states. The ATJ was willing to condemn patently illegal policies, but it did not take the extra step of helping to create remedies that litigants could use to force policy changes.³² The ATJ's refusal purposively to interpret Andean rules so as to help litigants to achieve their policy goals has set up a vicious circle which inhibits the filing of additional cases that might expand Community law. The abstract and repetitive nature of ATJ rulings also contributes to a sense among lawyers that ATJ preliminary rulings have little practical benefit. It is a striking fact that, of the 1,338 ATJ preliminary rulings between 1984 and 2007, only 35 involved subjects other than IP.³³

²⁹ L Helfer, K Alter and M Guertzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103 *American Journal of International Law* 1, 21–34.

³⁰ L Helfer and K Alter, 'The Andean Tribunal of Justice and its Interlocutors: Understanding the Preliminary Ruling Reference Patterns in the Andean Community' (2009) 42(4) *Journal of International Law and Politics* 871, 920–28.

³¹ Repeat players are litigants who raise multiple suits. Scholars presume that repeat players are advantaged in litigation because of their experience, and that repeat players are prevalent where we find litigation aimed at influencing policy (see M Galanter, 'Why the "Haves" come out Ahead: Speculations on the limits of legal change' (1974) 9(1) *Law and Society Review* 95). We found repeat players in the Andean context in the aluminium, alcohol, and second use patent cases, and regarding technical issues of Andean intellectual property and tax law.

³² In the aluminium cases, the ATJ removed itself from deciding on the legal validity of Colombian policy. In the alcohol cases, the ATJ condemned Colombian policy but did not require that national courts set aside conflicting domestic rules (see Alter and Helfer, above n 28). The ATJ did, however, condemn Venezuela for not privileging Andean ships over ships from neighbouring countries (see Helfer and Alter, above n 30, 910–11).

³³ Helfer and Alter, above n 30.

Fifth, we found that, even though Andean integration is now over 50 years old, relatively few law professors and lawyers have mobilised in support of Andean law. In contrast, as early as the 1960s the European Community had an active community of lawyers, subsidised in part by the European Commission which helped to create and pay for legal associations, law journals, dissertations, professorships and conferences.³⁴ The Andean Community has created a university, and lawyers who worked for the Andean Community teach courses on Andean law at local universities. But with the exception of IP law, there is no network of scholars and practitioners who actively research, talk and write about Andean law. Nor are there specialised journals, let alone a body of scholarship on Andean Community law.

Six, these findings hold notwithstanding the waxing and waning political support for both Andean and European integration. In the European context, scholars have found that the CJEU is willing to be active when the political process is blocked, and that the CJEU continues its law-making even when political opposition arises³⁵ and seemingly even when enthusiasm for European integration wanes.³⁶ We broke down our analysis of ATJ law across time and found that, while the ATJ also developed its key doctrines during its foundational period, ATJ law-making tends to reflect rather than counter-balance political steps towards integration.³⁷

In our more detailed comparison of the ATJ and CJEU, we investigated whether a variety of contextual factors might help to explain these findings. We compared appointment politics and efforts to sanction both the ATJ and CJEU. We considered whether political instability in the Andean context or a general reluctance of domestic courts to challenge their governments might explain the variation. We considered how differences in levels of intra-Community trade might matter. Without ruling out the possibility that variations contributed to the patterns of litigation we observed, we nonetheless concluded that none of these variations could account for the contrast between the ready willingness of the CJEU to identify new legal constraints not found in legal texts or in the intentions of their drafters

³⁴ K Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975)' in *The European Court's Political Power: Selected Essays* (Oxford, Oxford University Press, 2009) 65–72.

³⁵ J Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 *Yearbook of European Law* 257.

³⁶ It is hard to assess the quantity of law-making, but most studies of ECJ law-making identify continuity over time suggesting that there is no significant retreat from law-making despite bouts of Euro-scepticism. See A Stone Sweet, 'Constitutional Courts and Parliamentary Democracy' (2002) 25(1) *West European Politics* 77; R Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge, Cambridge University Press, 2007); M Maduro, *We the Court: The European Court of Justice and the European Economic Constitution: A critical Reading of Article 30 of the EC Treaty* (Oxford, Hart Publishing, 1998).

³⁷ Alter and Helfer, above n 28.

(and thus to narrow states' discretion) and the ATJ's general reluctance to embrace expansionist law-making.

Our findings led us to question the dominant explanations of CJEU law-making. The assumption that judges by their very nature are power-hungry, and thus predisposed to become expansionist law-makers, makes the ATJ look abnormally timid. But if we reverse this presumption, the ATJ mainly seems prudent in its willingness to let Member States set the pace of integration. The CJEU, however, appears exceptional in its penchant for expansionist law-making. The question then is: why did the CJEU repeatedly choose to be an engine for economic integration, especially when European governments, by all appearances, had largely abandoned the integration project? Here, again, I can only summarise the findings.

The tipping point analysis suggests that courts respond to their own particular environment, letting the preferences of their interlocutors largely determine their level of activism. The CJEU went far beyond prevailing legal interpretations, filling in legal *lacuane* with inferences based on the preamble of the Treaty, and the direct applicability of European law. The CJEU found support for these novel interpretations within an advocacy movement that included a small number of law professors, government officials, lawyers and national judges. These interlocutors actively sought out test cases and used their positions of power to promote the validity of the CJEU's legal doctrines.³⁸ The CJEU extended its support network by incorporating national legal doctrines in its judge-made law, so as to build support within national judiciaries.³⁹ It is also likely that the CJEU incorporated the preferences of national administrators charged with applying European secondary legislation. And, over time, the CJEU sought out societal support for its doctrines.⁴⁰

³⁸ A Vauchez, 'Europe's first Trustees: Lawyers' Politics at the outset of the European Communities (1950–1970)' and M Madsen and A Vauchez, 'European Constitutionalism at the Cradle: Law and Lawyers in the Construction of a European Political Order' (1920–1960) in A Jettinghoff and H Schepel (eds) *In Lawyers' Circles Lawyers and European Legal Integration* (The Hague, Elzevir Reed, 2005); G Sacriste and A Vauchez, 'The Force of International Law: Lawyer's Diplomacy on the International Scene in the 1920s' (2007) 32(1) *Law & Social Inquiry* 83; A Cohen, 'Constitutionalism without Constitution. Transnational Elites between Political Mobilization and Legal Expertise (1940s–1960s)' (2007) 23(1) *Law & Social Inquiry* 109; W Davies, 'The Constitutionalisation of the European Community: West Germany between Legal Sovereignty and European Integration 1958–1975' (Dissertation, German, Kings College, London, 2008).

³⁹ Bignami, above n 18; L Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca, Cornell University Press, 2002); P Lindseth, 'The Contradictions of Supranationalism: Administrative Governance and Constitutionalization in European Integration Since the 1950s' (2003) 37(2) *Loyola of Los Angeles Law Review* 363; P Lindseth, 'Always Embedded Administration: The Historical Evolution of Administrative Justice as an Aspect of Modern Governance', in B Christian Joerges and P Wagner (eds) *The Economy as Polity* (London, UCL Press, 2005).

⁴⁰ Cichowski, above n 36; L Conant, *Justice contained: Law and Politics in the European Union* (Ithaca, Cornell University Press, 2002).

The ECJ could also surely build on latent public sentiments. National court judges did not initially support the ECJ's assertion of a 'new order of international law',⁴¹ but they did agree that the ECJ had clear authority to interpret European law and review state application of European rules. European judges were also wary of nationalist assertions of sovereignty and authority, especially if the assertions seemed to suggest that governments could ignore the rule of law.⁴² These latent sentiments made confronting the ECJ unattractive. So long as the ECJ did not require states to abandon cherished policies, most sub-state actors were willing to let the ECJ's doctrinal assertions stand uncontested.

The ATJ, by contrast, has not received the support of legal advocacy networks or national judiciaries. We looked for Andean analogues of the academics, attorneys and interest groups who spearheaded European legal integration. We identified a few legal entrepreneurs within the Andean system, but no infrastructure or institutions to connect them to each other or to a larger pro-integration movement.⁴³ The issue was not that Latin America lacks legal interlocutors for ICs. We interviewed an organisation that appeared to be a natural interlocutor for the ATJ. The *Comisión Andina de Juristas* is a 25 year-old organisation with a mandate to promote civic participation, democracy and the rule of law in the Andean region. The *Comisión* has long focused on legal problems created by dictatorships and human rights abuses in the region, and it has worked to support both the Inter-American Court of Human Rights and the International Criminal Court. It has also helped the ATJ, but only starting in 2000 when it was essentially hired to help with a few specific projects. When we asked why the *Comisión* was not involved in Andean legal integration earlier, we were told that the Andean integration project was not central to the *Comisión's* mandate.⁴⁴ The challenge which the ATJ faces is that, outside of the specialised and often technical domain of intellectual property, few legal or societal actors identify with the objectives of Andean integration. There are clear rule of law sentiments within Andean Member States. The Colombian Constitutional Court has become a powerful enforcer of the Colombian constitutional and regional human rights rules, and Peruvian courts have become more willing to challenge government policies. But the Andean Community, it seems, has not managed to become part of the larger regional drive to promote the rule of law.

⁴¹ K Alter, 'The European Court's Political Power' in *The European Court's Political Power: Selected Essays* (Oxford, Oxford University Press, 2009) 90–107.

⁴² K Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford, Oxford University Press, 2001) chs 3 and 4.

⁴³ K Alter, 'Jurist Advocacy Movements in Europe: The Role of Euro-Law Associations in European Integration (1953–1975)' in *The European Court's Political Power: Selected Essays* (Oxford, Oxford University Press, 2009) 82–88.

⁴⁴ Phone interview with Salvador Herencia Carrasco, Asesor jurídico, Comisión Andina de Juristas 20 May 2008 and 8 December 2008.

By contrast, the Inter-American Court of Human Rights has found many interlocutors, including partners located in countries that are also members of the Andean Community.⁴⁵

The next section considers the larger implications of this tipping point argument.

III. TRANSFORMING POLITICS VIA DELEGATION TO INTERNATIONAL COURTS

In today's globalised world, international law does more than regulate politics between states. International law is designed to transform politics within states in subject areas as diverse as human rights, war crimes, and economic and environmental policy. By coupling binding international law with delegation to ICs, governments relinquish control over how international law is interpreted and changed over time. Increasingly, states are coupling binding international agreements with delegation of authority to ICs. In 1960, there were five permanent ICs. Today, there are 28 permanent ICs which have issued over 27,000 binding legal rulings.⁴⁶ There are also many quasi-judicial and temporary legal bodies that replicate the role of ICs in legal interpretation.

These 'new' ICs are not only recent creations; they are qualitatively different entities. What I call 'old-style' ICs are courts that lack compulsory jurisdiction, so that state consent is required before litigation can be initiated. At this point, the only old-style ICs are the International Court of Justice, the African and Inter-American Courts of Human Rights and the International Tribunal of the Law of the Seas. Old-style ICs may mainly help to construct focal points, because the only cases that will reach those ICs are those where state parties consent to judicial resolution of the dispute.

New-style ICs tend to incorporate the key legal-institutional innovation of the European Union by embedding international law into domestic legal orders. Ratification of the international law provides the legal basis for national judges to enforce these laws as domestic laws. Many economic ICs copy the preliminary ruling mechanism of the ECJ and ATJ.⁴⁷ International human rights bodies allow litigants to appeal domestic legal rulings to ICs, to garner a legal decision that is enforceable in the domestic legal order. Ratification of the International Criminal Court's Rome Statute requires signatory states to enact war crimes legislation which national legal bodies will be able to enforce. While domestic judges will not be discussing the

⁴⁵ J Cavallaro and S Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-first Century: The Case of the Inter-American Court' (2008) 102(4) *American Journal of International Law* 768.

⁴⁶ Data for these claims is found in K Alter, *The New International Courts: A Bird's Eye View*. BCICS working paper No 09 – 001 (2010).

⁴⁷ Alter, above n 21.

exact same case as international judges, they will be hearing similar legal arguments to those presented before the International Criminal Court. The Organization for the Harmonization of Business Laws in Africa (OHADA) has created regional business laws that apply across Member States, and a supranational legal system that allows banks and firms to appeal national court rulings to the Common Court of Arbitration and Justice. Where national judges can engage in dialogue with ICs about the application of these laws in the context of concrete cases, ICs can become involved in reshaping domestic understandings of what are both domestic and international rules. These institutional innovations help us to understand why ICs are increasingly able to serve as tipping point political actors in both domestic and international politics.

While there are now many new-style ICs, activation rates for these ICs vary tremendously, as the graph in Figure 1, below, shows.⁴⁸ The CJEU and the European Court of Human Rights remain the most active ICs. The ATJ, the Inter-American Court of Human Rights (IACHR), the WTO Dispute Resolution System, and the OHADA are also relatively active ICs.

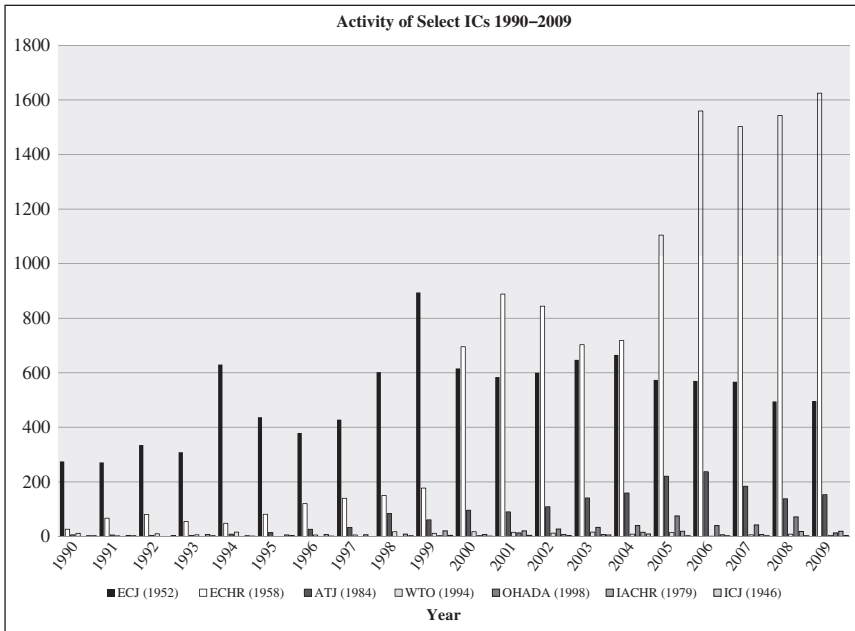


Figure 1: Activity of Select ICs: 1990 to present.

⁴⁸ This graph works with data reported in n 46.

Being active is not the same as being influential. Significant and important legal rulings matter more than the raw number of cases litigated. The fact of litigation, however, means that actors on the ground perceive international litigation as useful for their objectives. Active international legal systems thus become places to examine how ICs may be tipping the political balance in favour of certain legal interpretations. Meanwhile, ICs which have issued some interesting rulings—like the Economic Court for the Community of West African States (ECOWAS) and the East African Court of Justice (EACJ)—but have remained largely inactive become places to examine *why* groups are *not* mobilising more often to seize ICs to influence politics.

IV. INTERNATIONAL COURTS AND DEMOCRATIC POLITICS

International courts can shift understandings of the law, but this fact alone does not present a problem for democracy. Accountable governments determine the content of international law, and the existence and extent of IC authority. Nonetheless, there is a rising concern about the extent to which international law and ‘foreign actors’ are shaping domestic decision-making.

States are intentionally using international law and delegation to ICs to lock in commitments to specific objectives. Locking-in economic rules is attractive to business, which likes legal certainty and legal security. Locking-in human rights guarantees and civil and political protections is attractive to pro-democracy movements. Pro-business governments like to lock in liberal economic rules to bind future leaders to policies that they see as being in the long-term interest of the country. Security-conscious governments want to create effective binding agreements to prevent proliferation of weapons of mass destruction and to be able to trace and thwart terrorist activities. With the benefits of lock-in, however, come constraints on what future governments can do.

Part of the lock-in of international law is institutional. States are unable unilaterally to change the international legal rules to which they are bound, and withdrawing entirely from the regime can bring very large costs. But, at the end of the day, lock-in also requires political commitment from below. The real issue is that governments or political factions may find themselves out of sync with both international commitments and preferences of actors within their states. The more a polity shares a commitment to the rule of law and to the substance of international legal rules, the more constrained domestic actors will be in their attempts to deviate from international law. Governments may use lock-in arguments to defend policies that domestic populations and legislatures do not want. Usually, it is at the point that governments find themselves unable to chart their desired course that democracy concerns get raised.

The lock-in effect of international law and the argument that IC are tipping point actors raise many questions about how international law affects democracy. Lock-in and delegation to ICs may be perceived as problematic where political minorities gain disproportionate influence via international alliances. But the tipping point argument suggests that this does not really happen. It is not enough for *some set* of domestic actors to want something. ICs can help to construct interests, but they are constrained by the power and preferences of existing societal actors. ICs can help to frame minority perspectives in universal terms that garner broader support, and they can help to build alliances between advocates of minority perspectives and rule of law actors and institutions. But ICs cannot impose their own legal solutions in the absence of the support of domestic and transnational interlocutors.

International judges, like all political actors, must make a political calculation about the power and potential of certain interlocutors; and they must take into account the counter-forces that want the opposite interpretation. We thus need more specific conjectures about how ICs make these calculations. It seems reasonable to presume that the more a government is out of sync with its domestic constituents, the easier it is for ICs to figure out what they should do—they should help domestic allies to achieve widely shared values or help governments to resist the pressure of domestic actors who want to deviate from international legal agreements. International human rights law and international humanitarian law are especially likely to connect with widespread sentiments that may be voiced by few but shared by many. International economic law may also find many allies so long as global economic forces are seen as enhancing rather than undermining the health and well-being of citizens.

Less clear is what ICs should do when public sentiment is more internally and internationally divided, or when the issue is arcane and preferences not easily discerned. In these situations, the law provides some direction since the law reflects a set of aspirations that shared significant support at one point of time. But support for these rules can also decline over time. Asylum and humanitarian international laws are becoming perhaps less popular as the number of people crossing borders raises difficulties, and as economies falter. The extent to which governments prioritise promoting free market competition over other objectives is also changing. ICs, like politicians, will need to adapt to these political realities. Politicians use elections to re-equilibrate. ICs do not have the same re-equilibration mechanisms, which is of course part of the point of creating judicial checks on political bodies.

American legal scholars and political scientists tend to focus on conflict and expansionist law-making, thereby perhaps distorting perceptions of what is actually occurring. After all, there are 27,000 international judicial rulings, most of which seem to provoke no controversy. Still, the reality that external international courts can intervene to tip a domestic political

balance raises potential concerns for democratic theory. Whenever courts reverse or attenuate the validity of legislation, critics decry judicial activism and invoke democracy. Courts are, by design, part of a system of checks and balances, designed to help to protect minority interests from the tyranny of majority interests. Thus, we can expect courts sometimes to rule against the interests of those who control political institutions, and even against the preferences of the majority of citizens.

A real issue is that ICs can push in a direction that domestic populations do not like, and disrupt domestic constitutional balances. Of course, states can exit from most international treaties,⁴⁹ and creating limits on states is the point of *jus cogens*, which does not accept the political legitimacy of choices such as genocide or persecuting minorities even if the choice has great domestic wellsprings of support. But the more that international law governs areas which have traditionally fallen within the domestic domain, the more areas of economic and public life will be defined and perhaps constrained by actors outside of the state. Domestic constitutional courts can make rulings that can only be reversed through changing domestic constitutions, a high and sometimes unreachable political threshold but nonetheless a threshold that is wholly shaped by the people within a country. International rules are beyond this threshold; even states may find themselves unable to change international rules that no longer enjoy broad support. For the system of economic rules we associate with globalisation, one can question whether WTO rules should have priority in conflicts with domestic objectives. For many human rights issues there is also a real question of whether it is better to let local polities define what rights are protected. It may be somewhat reassuring to think of ICs as tipping point actors which provide resources to domestic and international interlocutors. But for constitutional nationalists, this reassurance will not be enough. Constitutional law aficionados and political traditionalists are apt to prefer domestic law to international law, which is one reason why international law will remain a politically contentious double-edged sword.

There are, of course, pathways forward. International legal interpretation is a collaborative enterprise. There is more flexibility in international law than many presume, and domestic courts can still serve as gatekeepers which ensure that international rules do not undermine national values. Mainly, the tipping point argument suggests that interests get constructed through legal interpretation, and that delegation to ICs allows international bodies and transnational litigants to have a voice in the process. This is a meaningful change in international and domestic politics, and one that is unlikely to reverse itself.

⁴⁹ L. Helfer, 'Exiting Treaties' (2005) 91 *Virginia Law Review* 1579.

