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# INTERNATIONAL COMMERCIAL ARBITRATION AND INTERNATIONAL COURTS

MARK L. MOVSESIAN\*

## INTRODUCTION

In the last fifty years, arbitration has become the most important mechanism for resolving international commercial disputes.<sup>1</sup> Firms in global commerce routinely agree to submit their disputes to private arbitral panels, and states routinely require firms to honor their agreements.<sup>2</sup> Moreover, states routinely enforce arbitral awards.<sup>3</sup> International conventions and national laws allow domestic courts to reject arbitral awards in some circumstances, but courts rarely do so.<sup>4</sup> In terms of its integration into domestic legal regimes, international commercial arbitration (ICA) qualifies as a great success story.

The editors of this symposium have asked us to address an interesting question. Why hasn't ICA's success been repeated in the context of international courts? In the last few decades, states have created scores of permanent tribunals with jurisdiction to resolve

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1. See TIBOR VARADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 21-22 (3d ed. 2006).

2. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 158-59 (2d ed. 2001) (discussing domestic courts' bias in favor of enforcing arbitration agreements). On the prevalence of arbitration clauses in international contracts, see Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. SUPP. 233, 233 & n.1 (2006).

3. See BORN, *supra* note 2, at 779-82.

4. *Id.* at 780-81; see also JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 688 (2003) (discussing the frequency with which domestic courts enforce international arbitration awards).

disputes about international law.<sup>5</sup> By and large, though, states have not been as receptive to the rulings of these tribunals. For example, domestic courts seem less willing to enforce international court judgments than ICA awards. What accounts for this comparative lack of hospitality? Why do states treat ICA and international adjudication so differently?

In this essay, I offer an explanation. States treat ICA and international adjudication differently because they are categorically different enterprises. As a private contractual arrangement, ICA does not raise serious legitimacy concerns.<sup>6</sup> Arbitral awards bind only the parties and lack a systemic impact on domestic law.<sup>7</sup> Moreover, ICA involves commercial disputes between sophisticated international traders. States have little interest in policing such disputes, and commercial law does not differ much from place to place anyway.<sup>8</sup> ICA helps facilitate global commerce, which in turn promotes domestic economic growth.<sup>9</sup> Finally, ICA has the support of influential domestic constituencies: firms that rely on arbitration to resolve interna-

5. The literature on international courts is extensive. See, e.g., YUVAL SHANY, *REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS* (2007); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003); Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59; Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1 (2006); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003); Mark L. Movsesian, *Judging International Judgments*, 48 VA. J. INT'L L. 65 (2007); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877 (2000); Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005).

6. On the contractual nature of arbitration, see KATHERINE LYNCH, *THE FORCES OF ECONOMIC GLOBALIZATION: CHALLENGES TO THE REGIME OF INTERNATIONAL COMMERCIAL ARBITRATION* 7 (2003) and Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 140 (2006).

7. BORN, *supra* note 2, at 653-54 (“[O]nly the parties to an arbitration agreement can be compelled to comply with that agreement.”); cf. John B. Attanasio, *Rapporteur’s Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, in *INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS* 373, 390 (Thomas M. Franck & Gregory H. Fox eds., 1996) (“Commercial arbitration awards generally have comparatively little impact on national sovereignty.”).

8. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 218 (2005) (discussing the convergence of contract law principles across countries).

9. See Thomas E. Carbonneau, *Arbitral Law-Making*, 25 MICH. J. INT'L L. 1183, 1196 (2004).

tional commercial disputes and lawyers who see a lucrative professional opportunity.<sup>10</sup> Given all this, it is not surprising that states see ICA as a promise, not a threat.

International adjudication does not fit the ICA pattern. (International investment arbitration does not fit the ICA pattern exactly, a matter I discuss below.<sup>11</sup>) International courts do raise significant legitimacy concerns. International courts are not ad hoc contractual arrangements, but permanent institutions that create substantial bodies of law.<sup>12</sup> Their rulings increasingly concern public-law questions on which there is little global consensus. Moreover, the economic benefits of international courts are not so straightforward. Even when they promote domestic growth, international courts can become entangled in sensitive policy debates. Finally, although some lawyers and law professors advocate deference to international courts, international adjudication does not have the same level of support from domestic constituencies as ICA does. As a result, states tend to be much less receptive to international adjudication than ICA.

This essay proceeds as follows. First, I describe ICA. I focus on the most important treaty in the area, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention of 1958)<sup>13</sup> and the laws of three countries that are particularly important in the ICA world: the United States, France and Germany. The New York Convention and the domestic laws of these countries all contain a strong pro-arbitration presumption. I explain why this is so and argue that one example that might seem to cast doubt on my theory—international investment arbitration—in fact does not.

Next, I turn to international adjudication. I discuss a series of rulings by the International Court of Justice (ICJ) on the interpretation of the Vienna Convention on Consular Relations (the VCCR). For better or worse, the VCCR controversy has become the focal point

10. Cf. LYNCH, *supra* note 6, at 19 (discussing how the “center of power” in international arbitration resides in “large transnational law firms”).

11. See *infra* notes 71-81 and accompanying text.

12. For a good overview of contemporary international courts, see THE PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS [PICT], THE INTERNATIONAL JUDICIARY IN CONTEXT: A SYNOPTIC CHART (2004), [http://www.pict-pecti.org/publications/synoptic\\_chart/Synop\\_C4.pdf](http://www.pict-pecti.org/publications/synoptic_chart/Synop_C4.pdf).

13. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

for scholarship on international adjudication; the controversy suggests that states are much less comfortable with international courts than they are with ICA. I explore the ways that two domestic courts—the United States Supreme Court and the German Federal Constitutional Court—have responded to ICJ rulings in VCCR cases and explain why international adjudication has less appeal for states than ICA does.

A caveat is necessary right at the start. Because of space constraints, I have been selective both with regard to countries and tribunals. I have painted with a broad brush and avoided some technical questions that experts on ICA and international courts will quickly see. Nonetheless, I have tried to offer representative illustrations, and I hope they help explain why states view ICA and international adjudication so differently.

## I. INTERNATIONAL COMMERCIAL ARBITRATION

In analyzing the domestic treatment of international rulings—either ICA awards or international-court judgments—it is helpful to distinguish among the three different kinds of effect that an international ruling might have. First, a ruling might have *enforcement effect*. A domestic court might compel a party to abide by the ruling in domestic litigation.<sup>14</sup> For example, if an ICA panel awards damages in a breach of contract dispute, a domestic court might enforce the award by requiring the losing party to pay. Alternatively, the court might forbid the party from relitigating a claim that the panel already has decided. (Lawyers sometimes refer to this latter example as recognition, rather than enforcement, but nothing in this essay turns on that distinction).<sup>15</sup> Second, a ruling might have *precedential effect*.<sup>16</sup> A domestic court might hold that an international ruling binds not only the parties to a particular dispute, but also similarly situated parties in different cases. For example, the court might believe that it has an obligation to conform its reading of a treaty to the reading given by an international tribunal, even in cases involving countries and parties not covered by the tribunal's ruling. Finally, a ruling might have *persuasive effect*. A domestic court might decide that, although not binding,

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14. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1010 (4th ed. 2007).

15. See *id.* (distinguishing between enforcement and recognition).

16. See John Harrison, *International Adjudicators and Judicial Independence*, 30 HARV. J.L. & PUB. POL'Y 127, 128 (2006).

an international ruling contains convincing arguments that the court should adopt as its own.<sup>17</sup>

In the ICA context, only the first of the three effects is significant. For example, ICA awards lack precedential effect. As a conceptual matter, an ICA award binds only the parties to a particular dispute; outsiders are not affected.<sup>18</sup> Indeed, giving ICA awards precedential effect would entail serious practical difficulties. Research costs would be prohibitive. First, ICA panels are ephemeral; they meet to decide a dispute and then dissolve, and they often leave little record of their work. Further, much ICA is confidential. Even in published opinions, arbitrators do not always explain themselves in detail. Finally, the major international arbitration institutions receive thousands of filings a year,<sup>19</sup> to say nothing of the many ad hoc arbitrations for which data is unavailable.<sup>20</sup> Coordinating all these decisions in a way that domestic courts would find useful would be a Herculean task. At the moment, there is no authoritative body that even attempts to do so.<sup>21</sup>

Similarly, ICA awards lack persuasive effect in domestic law. There is no conceptual bar, of course. Judges could adopt the reasoning of particular awards they find convincing, just as they adopt the

17. Cf. John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 310 (2006) (distinguishing between “informational” and “dispositional value” of legal authority).

18. See BORN, *supra* note 2, at 653-54; see also INT’L CHAMBER OF COMMERCE, ICC RULES OF ARBITRATION, art. 28, para. 6 (1998), [http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules\\_arb\\_english.pdf](http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf) (“Every Award shall be binding *on the parties*.”) (emphasis added); see also AM. ARBITRATION ASS’N, INTERNATIONAL DISPUTE RESOLUTION PROCEDURE: INTERNATIONAL ARBITRATION RULES, art. 27, para. 1 (2008), <http://www.adr.org/sp.asp?id=33994#INTERNATIONAL%20ARBITRATION%20RULES> (“Awards . . . shall be final and binding *on the parties*.”) (emphasis added); ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 397 (3d ed. 1999) (“[A]n award can neither directly confer rights nor impose obligations upon a person who is not a party to the arbitration agreement.”). For example, in the view of the United States Supreme Court, “a particular arbitration is a ‘one-off’ event devoid of larger systemic consequences.” Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 807 (2002).

19. TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 341 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (showing numbers of filings from 1993-2003).

20. Drahozal, *supra* note 2, at 233 n.2.

21. For a proposal for a new international tribunal on the enforceability of international commercial arbitration awards, see Howard M. Holtzmann, *A Task for the 21<sup>st</sup> Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, in THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE 109 (Martin Hunter et al. eds., 1995).

reasoning of particular treatises and law review articles they find convincing. But domestic courts generally do not cite arbitral awards. Once again, practical factors, especially the confidential and ad hoc character of much ICA, probably explain this phenomenon. Whatever the reasons, ICA awards simply do not appear on the radar screens of most judges.

States do grant ICA awards a powerful enforcement effect, however. The New York Convention, the most important treaty on ICA with roughly 140 member states, contains a strong pro-enforcement presumption, as do the laws of most countries, certainly the laws of most developed countries.<sup>22</sup> In understanding this pro-enforcement presumption, it is useful to look at two focal points in the arbitration process: a domestic court's decision whether to enforce an arbitration agreement, and its decision whether to enforce an arbitral award rendered in a different country.<sup>23</sup> At both points, a domestic court must decide whether or not to defer to the ICA regime. In both situations, contemporary principles routinely require courts to defer.

In deciding whether to enforce an arbitration agreement, a domestic court has two options. The court can either enforce the agreement and send the parties to an international arbitral panel or scrap the agreement and force the parties to litigate in the domestic forum. The New York Convention creates a strong presumption in favor of the first option.<sup>24</sup> Article II provides that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made" a valid arbitration agreement, "shall . . . refer the parties to arbitration."<sup>25</sup> Article II allows courts to avoid referring parties to arbitration in certain exceptional cases, such as

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22. See BORN, *supra* note 2, at 20-23 (discussing the New York Convention), 39-40 (discussing national laws on arbitration); see also UNCITRAL, Status: 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited May 18, 2008) (listing members of the Convention).

23. A domestic court's decision to vacate an award rendered in the country where the court sits presents a similar choice, but in the interests of space it is not discussed here. In the vacatur context, too, international arbitral awards are presumptively valid under contemporary principles. For more on this topic, see LEW ET AL., *supra* note 4, at 673-78; James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 13, 53-63 (2004).

24. See BORN, *supra* note 2, at 157-59.

25. New York Convention, *supra* note 13, art. II(3).

where the arbitration agreement was the result of fraud. Domestic courts generally construe these exceptions quite narrowly, however.<sup>26</sup>

The most important exception relates to the “arbitrability” of a dispute. Under Article II, a court need not enforce an arbitration agreement if the “subject matter” is one not “capable of settlement by arbitration” under domestic law.<sup>27</sup> Arbitrability is a vague concept, but the gist of the doctrine is that certain categories of public-law claims are too sensitive to give to private arbitrators.<sup>28</sup> For example, employment, intellectual property, and family-law disputes historically have not been arbitrable in some countries.<sup>29</sup> Similarly, some countries historically have refused to allow the arbitration of antitrust claims.<sup>30</sup> Today, though, there is “a steady trend towards a more liberal approach” to arbitrability in most countries.<sup>31</sup> In contemporary practice, most claims are arbitrable, at least in the international commercial context.<sup>32</sup>

The leading American case on arbitrability is *Mitsubishi Motors v. Soler Chrysler-Plymouth*, which the Supreme Court decided in 1985.<sup>33</sup> *Mitsubishi* concerned the arbitrability of federal antitrust claims. Although American courts traditionally had refused to allow the arbitration of such claims, the *Mitsubishi* court believed it was “necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”<sup>34</sup> If private firms agreed to arbitrate antitrust claims, American courts should let them: “concerns of international comity,” as well as “sensitivity to the need of the international commercial system,” counseled in favor of enforcing parties’ agreements.<sup>35</sup> Besides, the Court noted, there would be a chance to review the arbitrators’ work when the time came to enforce the eventual award. While “substan-

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26. See BORN, *supra* note 2, at 160.

27. New York Convention, *supra* note 13, art. II(1). The Convention does not specify what body of law should govern the arbitrability question; most courts apply their own domestic law. For a brief discussion, see LEW ET AL., *supra* note 4, at 189-91.

28. See LEW ET AL., *supra* note 4, at 188; see also Patrick M. Baron & Stefan Liniger, *A Second Look at Arbitrability*, 19 ARB. INT’L 27, 27 (2003).

29. BORN, *supra* note 2, at 245-46.

30. *Id.*

31. Baron & Liniger, *supra* note 28, at 53.

32. See REDFERN & HUNTER, *supra* note 18, at 154.

33. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

34. *Id.* at 639.

35. *Id.* at 629.



tive review at the award-enforcement stage” would be minimal, there would be sufficient opportunity to ensure that the arbitrators had at least considered parties’ antitrust claims.<sup>36</sup>

Other countries take a similar approach. For example, in France, a country that has played a large role in the development of international commercial arbitration,<sup>37</sup> there is a strong presumption in favor of arbitrability.<sup>38</sup> Although the Civil Code prohibits the arbitration of “any matter that concerns the public order,”<sup>39</sup> the French courts have construed this limitation quite narrowly.<sup>40</sup> In practice, the French approach is indistinguishable from *Mitsubishi Motors*.<sup>41</sup> Similarly, Germany recently amended its arbitration law to expand the concept of arbitrability substantially.<sup>42</sup> Under the 1998 law, which is modeled on the UNCITRAL Model Arbitration Law, arbitration agreements can extend generally to “[a]ny claim involving an economic interest.”<sup>43</sup> This category is understood to cover a “broad range of disputes.”<sup>44</sup>

The decision whether to enforce an award presents a similar choice. The domestic court can defer to the international panel and require the parties to comply with the award or ignore the panel’s ruling and require the parties to litigate again in the domestic forum. Once again, contemporary principles favor the international regime. The New York Convention creates a clear presumption in favor of enforcing awards.<sup>45</sup> Under Article V, domestic courts can decline enforcement only in limited circumstances, many of which focus on pro-

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36. *Id.* at 638.

37. See Carbonneau, *supra* note 18, at 781 (discussing French role in development of international commercial arbitration).

38. See Matthias Lehmann, Comment, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT’L L. 753, 774 (2004).

39. Code civil [C. CIV.] art. 2060 (Fr.), *quoted in* VARADY ET AL., *supra* note 1, at 220.

40. See Lehmann, *supra* note 38, at 766.

41. See *id.*; Thomas E. Carbonneau & Francois Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 TUL. J. INT’L & COMP. L. 193, 219-20 (1994).

42. See Baron & Liniger, *supra* note 28, at 36.

43. Bürgerliches Gesetzbuch X [BGBX] [Civil Code Book X] Jan. 1, 1998, Bundesgesetzblatt [BGBI] I, § 1030, ¶ 1, *quoted in* PETER BINDER, INTERNATIONAL COMMERCIAL ARBITRATION IN UNCITRAL MODEL LAW JURISDICTIONS 21 (2000).

44. STEFAN RUTZEL ET AL., COMMERCIAL DISPUTE RESOLUTION IN GERMANY 114 (2005).

45. See BORN, *supra* note 2, at 779-80; see also REDFERN & HUNTER, *supra* note 18, at 460 (explaining that, under the New York Convention, “the grounds for refusing . . . enforcement of arbitral awards should be applied restrictively”).

cedural problems like lack of notice or inability to present one's case.<sup>46</sup> Although some of Article V's exceptions are substantive – for example, a court may decline to enforce an award that is “contrary to the public policy” of the forum state—domestic courts have construed these exceptions narrowly.<sup>47</sup> Notably, none of Article V's exceptions relate to the merits of a dispute.<sup>48</sup> A domestic court cannot refuse to enforce an award simply because the court believes the arbitral panel decided the case incorrectly.<sup>49</sup>

National arbitration laws, particularly in developed countries, endorse this pro-enforcement presumption.<sup>50</sup> In the United States, the Federal Arbitration Act “incorporates Article V's exceptions by reference,”<sup>51</sup> providing that a domestic “court shall confirm [an] award unless it finds one of the grounds for refusal . . . specified in the . . . Convention.”<sup>52</sup> In construing these exceptions, American courts have demonstrated a strong “pro-enforcement bias.”<sup>53</sup> For example, American judges have interpreted the public-policy exception quite narrowly to cover “only” those situations in which “enforcement would violate the forum state's most basic notions of morality and justice.”<sup>54</sup> International commercial disputes do not

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46. New York Convention, *supra* note 13, art. V; see William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 258-59 (2006) (reviewing exceptions); see also May Lu, Note, *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England*, 23 ARIZ. J. INT'L & COMP. L. 747, 769-71 (2006) (reviewing exceptions).

47. New York Convention, *supra* note 13, art. V(2); see Lu, *supra* note 46, at 771.

48. Lucy Reed & Phillip Riblett, *Expansion of Defenses to Enforcement of International Arbitral Awards in U.S. Courts?*, 13 SW. J. L. & TRADE AM. 121, 121 (2006).

49. In domestic arbitration, American courts have held that awards may be vacated for serious legal errors under the “manifest disregard” doctrine. Drahozal, *supra* note 2, at 240. A party seeking to vacate an award “must show that the arbitrators knew of the governing legal standard but intentionally disregarded it, and that the legal standard was well defined and plainly applicable to the case.” *Id.* at 240-41. So far, American courts have declined to apply the manifest disregard standard in the context of international arbitral awards. See *id.* (asserting that manifest disregard standard does not apply under the New York Convention); see also Reed & Riblett, *supra* note 48, at 122 (noting that American courts “have not yet applied the ‘manifest disregard of the law’ doctrine to . . . refuse to enforce an international arbitral award”).

50. BORN, *supra* note 2, at 780.

51. *Id.*

52. 9 U.S.C. § 207 (2006).

53. See REDFERN & HUNTER, *supra* note 18, at 460 (citation omitted).

54. Parsons and Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974).

typically implicate such concerns, and parties who raise the public-policy defense in American courts tend not to succeed.<sup>55</sup>

Other national laws also adopt a pro-arbitration stance. In France, the Civil Code's provision on enforcement closely tracks Article V;<sup>56</sup> as a practical matter, French courts are even more pro-enforcement than the Convention requires.<sup>57</sup> In Germany, the 1998 law adopts Article V's exceptions as the exclusive grounds for refusing to enforce ICA awards.<sup>58</sup> Review on the merits is not allowed,<sup>59</sup> and the "assumption" is that awards will be enforced.<sup>60</sup> For example, in order to resist enforcement on public-policy grounds, a party must show, not simply that enforcement would contravene an important public policy, but that enforcement would be "unbearable due to a gross violation of the fundamental principles of German public and economical life."<sup>61</sup>

Three factors explain why states have adopted a pro-enforcement presumption in the ICA context. First, enforcing an arbitral award does not raise concerns about legitimacy. In liberal democracies, legitimacy turns on the process by which law is made.<sup>62</sup> To be legitimate, law must be made by actors who are publicly accountable, directly or indirectly.<sup>63</sup> These actors should be familiar with local institutions and concerns.<sup>64</sup> Public accountability helps ensure that law is generally acceptable to those who must comply with it. Deci-

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55. See Lu, *supra* note 46, at 771; see also Reed & Riblett, *supra* note 48, at 122 (noting that "recent cases confirm that this defense remains a very high hurdle for those attempting to . . . avoid enforcement of international arbitral awards").

56. See Code civil [C. CIV.] art. 1502 (Fr.), quoted in BORN, *supra* note 2, at 785.

57. See Lynch, *supra* note 6, at 190; see also Nicolas Brooke & Elie Kleiman, *France*, in ICLG TO: INTERNATIONAL ARBITRATION 164, 169-70 (2007), available at [www.iclg.co.uk/khadmin/Publications/pdf/1436.pdf](http://www.iclg.co.uk/khadmin/Publications/pdf/1436.pdf) (discussing French law on enforcement of awards).

58. Stefan Kroll & Marc-Oliver Heidkamp, *The German Law On The Recognition And Enforcement Of Foreign Arbitral Awards*, 18 MEALEY'S INT'L ARB. REP. 28, 31 (2003).

59. *Id.*

60. Stefan M. Kroll, *Recognition and Enforcement of Foreign Arbitral Awards in Germany*, 5 INT'L ARB. L. REV. 160, 165 (2002).

61. Kroll & Heidkamp, *supra* note 58, at 34.

62. Cf. John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229, 233 (2003) (arguing that the process of its derivation reduces the legitimacy of customary international law).

63. See Curtis A. Bradley, *International Delegation, the Structural Constitution, and Self-Execution*, 55 STAN. L. REV. 1557, 1558 (2003).

64. See Movsesian, *supra* note 5, at 94-95.

sions by unaccountable actors, or by actors who lack familiarity with local practice, could easily conflict with the will of the governed.

Of course, arbitrators are not accountable to the public, directly or indirectly. They are accountable to the parties who choose them, and perhaps also to their institutional sponsors.<sup>65</sup> Moreover, arbitrators do not necessarily have a good feel for domestic legal institutions and practice. Parties select arbitrators more for their expertise in international business law and practice. Nonetheless, legitimacy questions are largely absent in the ICA context. Because an ICA award affects only the parties, enforcement has a very limited domestic impact. This explains why domestic judges are willing to enforce an award even when arbitrators have made serious legal errors. The parties contemplated the risk of legal errors when they signed the arbitration agreement, and there is no danger that the arbitrators' mistakes will creep into the substance of domestic law.

The nature of the disputes involved also limits ICA's domestic impact. Most arbitral awards relate to commercial disputes between firms in international transactions. States have relatively little interest in policing such disputes. The parties are usually sophisticated actors of roughly equal bargaining power, and concerns about unfair surprise and oppression do not arise.<sup>66</sup> Moreover, international contract doctrine is becoming standardized. Commercial law varies less and less from place to place,<sup>67</sup> and there is general agreement on the benefits of the free market.<sup>68</sup> Despite some regional differences, "the basic liberal governing structure for the state and the economy is

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65. See Thomas E. Carbonneau & Andrew W. Sheldrick, *Tax Liability and Inarbitrability in International Commercial Arbitration*, 1 J. TRANSNAT'L L. & POL'Y 23, 27 (1992) (arbitrators are accountable basically to the parties alone); Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 498 (2004) (arbitrators are not publicly accountable).

66. See Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 531 (2005) (defending the assumption that parties in international commercial arbitration are "sophisticated and well-informed"); Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 21 (2003) (describing degree of sophistication and financial resources of parties in international commercial arbitration).

67. See Dubinsky, *supra* note 8.

68. See LYNCH, *supra* note 6, at 46.

largely uncontested.”<sup>69</sup> Thus, in the typical international arbitration, there is relatively little danger that arbitrators will depart significantly from consensus norms.

To be sure, unlike ICA, some investment arbitration does raise legitimacy concerns.<sup>70</sup> Throughout the 1990s, states entered into thousands of bilateral investment treaties (BITs) that confer significant rights on foreign investors.<sup>71</sup> The terms vary, but most BITs require the host state to provide “fair and equitable treatment” and “full protection and security” for foreign investments; often, BITs contain express most-favored-nation and national-treatment obligations as well.<sup>72</sup> Most BITs provide for the arbitration of disputes between investors and host governments, either before an ad hoc panel or an arbitration institution, the most important of which is the International Center for the Settlement of Investment Disputes (ICSID).<sup>73</sup> For example, the investment chapter of the North American Free Trade Agreement (NAFTA), a multilateral treaty among Canada, Mexico, and the United States, allows an investor to choose between ICSID and *ad hoc* arbitration under UNCITRAL rules.<sup>74</sup>

Unlike ICA, investment arbitration typically involves high-stakes claims with the potential to alter domestic law. Investors “regularly seek to recover hundreds of millions or even billions of dollars” from domestic authorities.<sup>75</sup> Because the rights that investment treaties confer are so open-ended, investors’ claims can cover a variety of sensitive issues, including tax and monetary policy, product safety rules, environmental regulations, even the conduct of jury trials.<sup>76</sup> Although arbitral panels cannot order states to amend their laws, the prospect of large damage awards, enforceable in domestic courts, may have a

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69. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 314 (1996).

70. See Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, GEO. WASH. INT’L L. REV. (forthcoming 2008).

71. CAMPBELL MCLACHLAN ET AL., *INTERNATIONAL INVESTMENT ARBITRATION* 26 (2007).

72. *Id.* at 30.

73. LEW ET AL., *supra* note 4, at 763.

74. *Id.* at 770-71. Because neither Canada nor Mexico is presently a member of the ICSID Convention, NAFTA arbitrations must use ICSID’s Additional Facilities Rules. Matthias Lehmann, *Options for Dispute Resolution under the Investment Chapters of NAFTA and CAFTA*, 16 AM. REV. INT’L ARB. 387, 401 (2005).

75. Drahozal, *supra* note 2, at 247.

76. See Van Harten & Loughlin, *supra* note 6, at 146-47.

substantial chilling effect. Rather than run the risk of an adverse arbitral decision, domestic authorities might decline to take action they believe to be in the public interest.<sup>77</sup>

These concerns are valid, but one should not overestimate the domestic impact of investment arbitration. While the chilling effect is a theoretical possibility, in practice investors have not been able to win large awards against host countries.<sup>78</sup> Moreover, after some close calls, states have begun to appreciate the danger and adopt “safeguards to ensure that the protection of investors . . . does not threaten the ability of governments to regulate in the public interest.”<sup>79</sup> For example, even though the United States has so far avoided liability, its experience with NAFTA arbitrations has led it to clarify and narrow its obligations in subsequent investment treaties.<sup>80</sup> The Australia-United States Free Trade Agreement, adopted in 2004, does not even allow investors to arbitrate claims against host governments.<sup>81</sup> Thus, while investment arbitration presents more of a legitimacy threat than ICA, the threat is still somewhat limited.

Second, by making the arbitration regime more effective, the pro-enforcement presumption creates significant economic benefits for states. As economists since Ricardo have recognized, international commerce promotes domestic economic growth.<sup>82</sup> The well-known theory of comparative advantage explains why. By selling those goods and services they can produce comparatively efficiently and purchasing the rest, nations can capture the benefits of specialization and become more prosperous. Practical experience since World War II confirms this dynamic. As communications and other technological barriers have fallen, international commerce has increased,

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77. Jack J. Coe, Jr., *Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods*, 36 VAND. J. TRANSNAT'L L. 1381, 1438 (2003).

78. *Id.* at 1438-39 (discussing NAFTA arbitration); see also Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 6 (2007).

79. Gilbert Gagne & Jean-Frederic Morin, *The Evolving American Policy on Investment Protection: Evidence from Recent FTAs and the 2004 Model BIT*, 9 J. INT'L ECON. L. 357, 358 (2006).

80. *See id.* at 367.

81. William S. Dodge, *Investor-State Dispute Settlement Between Developed Countries: Reflections on the Australia-United States Free Trade Agreement*, 39 VAND. J. TRANSNAT'L L. 1, 2 (2006).

82. For a detailed discussion of the points in this paragraph, see John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521-23 (2000).

creating substantial wealth effects for nations that participate in the global market.

ICA facilitates international commerce by reducing intangible barriers to cross-border trade. Although contract law does not differ that much from nation to nation, there remains a risk that local courts will treat outsiders unfairly.<sup>83</sup> By providing a neutral forum for resolving disputes, ICA helps minimize this danger.<sup>84</sup> Similarly, firms may worry that litigation will expose them to negative publicity, or that generalist domestic judges will lack practical knowledge of the ins-and-outs of the parties' particular business.<sup>85</sup> In ICA, parties can keep their disputes mostly confidential, and can select arbitrators on the basis of business expertise.<sup>86</sup> ICA thus ameliorates these worries as well.<sup>87</sup>

Of course, the benefits of neutrality, confidentiality, and expertise are meaningful only if parties can obtain domestic enforcement of their arbitration awards.<sup>88</sup> This explains why the pro-enforcement presumption is so important. The presumption helps assure that, if a party prevails in arbitration, it will be able to enforce the award without having to retry its claims in local courts. The presumption helps assure that an award has cash value.

Third, two key domestic constituencies have strong incentives to push for a pro-enforcement regime: firms involved in international transactions and the lawyers that represent them. Domestic firms benefit from a pro-enforcement regime in two ways. First, because foreign countries will probably not enforce awards against their own citizens unless other countries reciprocate,<sup>89</sup> the domestic firms have an incentive to make sure that their governments do not oppose enforcement. Second, a pro-enforcement regime helps to reassure for-

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83. See Ya-Wei Li, Note, *Dispute Resolution Clauses in International Contracts: An Empirical Study*, 39 CORNELL INT'L L.J. 789, 795 (2006).

84. See *id.*

85. See *id.* at 796.

86. See *id.*

87. A 1996 survey revealed that sophisticated players viewed neutrality, confidentiality, and expertise as among arbitration's most important advantages. VARADY ET AL., *supra* note 1, at 20-21.

88. See BORN, *supra* note 2, at 704 ("[T]he ultimate test of any arbitration proceeding is its ability to render an award which, if necessary, will be recognized and enforced in relevant national courts.").

89. Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1343 (2003).

eign parties that *they* will be able to collect against the firms in the event of a dispute. A pro-enforcement regime thus makes domestic firms more attractive business partners and helps them compete in the international setting.

Lawyers also have a strong interest in promoting a pro-enforcement regime. As international commerce has grown, large law firms, particularly the major Anglo-American firms that dominate private international law, have expanded their ICA practices.<sup>90</sup> These firms “now . . . include [ICA] in the gamut of services” they provide their clients, and they have an obvious stake in ICA’s expansion.<sup>91</sup> Moreover, international business lawyers often aspire to become arbitrators themselves.<sup>92</sup> Being an arbitrator confers significant professional status and has substantial financial rewards, particularly if one is associated with one of the elite arbitration institutions.<sup>93</sup> And the more ICA there is, the more jobs there will be for arbitrators.<sup>94</sup> Lawyers thus have powerful, tangible incentives to encourage ICA’s acceptance by domestic authorities.

In sum, ICA’s limited impact on domestic law, its beneficial effect on the domestic economy, and its ability to harness influential domestic interests explain why states are so receptive toward it. When one turns to consider international adjudication, however, a very different picture emerges. Although international courts are relatively new, and the law on them is still evolving, it is fair to say that states seem less enthusiastic about international adjudication than ICA.

## II. INTERNATIONAL COURTS

To understand the domestic effect of international adjudication, it is helpful to focus on the international court that has drawn the most attention in recent years, the International Court of Justice (ICJ). As “the principal judicial organ of the United Nations,” the

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90. LYNCH, *supra* note 6, at 19.

91. DEZALAY & GARTH, *supra* note 69, at 37.

92. See Bryant G. Garth, *How to Become an International Commercial Arbitrator*, 8 WORLD ARB. & MEDIATION REP. 10, 10 (1997).

93. *Id.*; see also Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT’L & COMP. L. 499, 516-17 (2006) (noting that “[a]rbitrators can earn hundreds of thousands of dollars from a single arbitration”).

94. See Van Harten & Loughlin, *supra* note 6, at 148 (discussing investment arbitration).



ICJ resolves legal disputes between UN members.<sup>95</sup> Although states can submit to the Court's general jurisdiction, they typically refer disputes to the ICJ in the context of particular treaties.<sup>96</sup> Hundreds of bilateral and multilateral treaties grant the ICJ jurisdiction over disputes about their interpretation and application.<sup>97</sup> Some of these treaties address uncontroversial matters, but others cover divisive issues like criminal punishment, the environment, race and sex discrimination, and national security.<sup>98</sup> The United States is party to at least seventy such treaties.<sup>99</sup>

The ICJ Statute provides that only states may appear as parties before the Court.<sup>100</sup> A judgment binds only the parties, and only in respect of the particular dispute.<sup>101</sup> The UN Charter requires that parties comply with an ICJ judgment, but the Charter does not address a judgment's effect in domestic law.<sup>102</sup> Rather, the Charter contemplates enforcement by the UN itself. Under Article 94, a prevailing party may apply to the Security Council for assistance if a losing party fails to comply with an ICJ ruling. The Council "may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."<sup>103</sup> Parties rarely seek assistance, however, and the "Council has never acted to enforce an ICJ decision."<sup>104</sup>

A significant difference from ICA is immediately apparent. While the New York Convention creates a pro-enforcement presumption, the ICJ Statute and the UN Charter leave the question of domestic enforcement to states themselves. And states have been comparatively unreceptive—particularly when ICJ rulings have an impact on domestic policy questions. Consider, for example, the familiar controversy over the ICJ's interpretation of the Vienna Con-

95. U.N. Charter art. 92.

96. Movsesian, *supra* note 5, at 73-74.

97. See Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 58, 61 (Lori Fisler Damrosch ed., 1987). For a list, see International Court of Justice, *Jurisdiction, Treaties*, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4> (last visited November 23, 2007).

98. See Morrison, *supra* note 97, at 61.

99. Ku, *supra* note 5, at 35.

100. Statute of the International Court of Justice art. 34, para. 1, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

101. *Id.* art. 59.

102. U.N. Charter art. 94, para. 1.

103. *Id.* art. 94, para. 2.

104. Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1308 (2004).

vention on Consular Relations (the VCCR).<sup>105</sup> Among other things, the VCCR requires that domestic law enforcement authorities give foreign nationals the opportunity to communicate with their consulates in the event they are arrested.<sup>106</sup> An Optional Protocol grants the ICJ jurisdiction over disputes about the VCCR's interpretation and application.<sup>107</sup>

In a series of rulings beginning in the late 1990s, the ICJ has held that the United States has failed to fulfill the consular-assistance requirement.<sup>108</sup> The most recent of these cases, *Avena and Other Mexican Nationals (Mexico v. United States)*, addressed the status of fifty-one Mexican nationals on death row in the United States.<sup>109</sup> The ICJ held that, where American courts had convicted foreign nationals and sentenced them to "severe penalties," the United States must remedy its VCCR violations by providing judicial review and reconsideration of the convictions, notwithstanding any procedural bars under local law.<sup>110</sup> The United States withdrew from the Optional Protocol shortly after *Avena* came down, thereby ending the ICJ's jurisdiction over VCCR claims against the United States, but President Bush issued an order directing state courts to comply with *Avena* itself in the interest of international comity.<sup>111</sup>

The reaction of American courts to these ICJ rulings has been tepid at best. For example, in its 1998 decision in *Breard v. Greene*, the Supreme Court held that provisional ICJ orders are not enforceable domestically.<sup>112</sup> In *Breard*, Virginia had convicted a Paraguayan defendant of capital murder and sentenced him to death. Shortly before his scheduled execution date, Paraguay brought an action in the ICJ alleging that the United States had violated the VCCR by failing to notify him of his consular assistance rights.<sup>113</sup> When the ICJ or-

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105. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR]. The VCCR controversy has drawn intense attention from international law scholars. See Movsesian, *supra* note 5, at 76.

106. See VCCR, *supra* note 105, art. 36, para. 1.

107. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

108. For a more detailed description of these cases, see Movsesian, *supra* note 5, at 76-87.

109. Case concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

110. *Id.* at 69-70.

111. See Movsesian, *supra* note 5, at 80-81.

112. *Breard v. Greene*, 523 U.S. 371, 377-78 (1998).

113. *Id.* at 374.

dered a stay of execution to allow it to hear Paraguay's claim, the Supreme Court declined to enforce it.<sup>114</sup> The Court held that the defendant's VCCR claims were procedurally barred under federal law, and that there was no reason to wait to hear what the ICJ would decide.<sup>115</sup> The ICJ's views would be entitled only to "respectful consideration" and would not bind American courts.<sup>116</sup>

In *Sanchez-Llamas v. Oregon*, decided in 2006, the Court held that final ICJ judgments lack precedential effect in U.S. courts.<sup>117</sup> In *Sanchez-Llamas*, a state court had convicted a Honduran national, Mario Bustillo, of murder.<sup>118</sup> Local authorities had failed to notify Bustillo of his right to consular assistance when they arrested him, but Bustillo did not raise this issue at trial or on appeal, and state courts ruled that his VCCR claim was procedurally defaulted.<sup>119</sup> In the Supreme Court, Bustillo argued that *Avena* required that his conviction be reconsidered.<sup>120</sup> Because he was not one of the Mexicans covered by *Avena*, Bustillo could not seek enforcement of the ICJ judgment itself.<sup>121</sup> Rather, he maintained that the ICJ's reasoning also applied to third parties like himself. The ICJ had interpreted the VCCR to preclude the assertion of state procedural default rules, he argued, and the Supreme Court should conform to the ICJ's interpretation.<sup>122</sup>

The Supreme Court rejected this argument. Once again, the Court explained that ICJ judgments merited only "respectful consideration;" American courts had no obligation to adopt the ICJ's reasoning.<sup>123</sup> The Court explained itself in dualist terms. The ICJ could resolve disputes between UN members, but that was strictly an international matter – a question, ultimately, for the Security Council.<sup>124</sup> For domestic purposes, the Constitution gave American courts the power to interpret treaties.<sup>125</sup> Moreover, the ICJ had misinterpreted

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114. *Id.* at 379.

115. *See id.* at 375-76.

116. *See id.* at 375, 378.

117. 126 S. Ct. 2669, 2683 (2006).

118. *Id.* at 2676.

119. *Id.* at 2676-77.

120. *See id.* at 2683.

121. *See* Harrison, *supra* note 16, at 128.

122. *See Sanchez-Llamas*, 126 S. Ct. at 2683.

123. *Id.* at 2685 (*quoting* Breard v. Greene, 523 U.S. 371, 375 (1998)).

124. *Id.* at 2684-85.

125. *Id.* at 2684.

the VCCR.<sup>126</sup> The Court argued that one could not plausibly read the VCCR to override local procedural default rules. Such rules were fundamental to an adversarial system like that of the United States; the VCCR itself required foreign nationals to exercise their consular-assistance rights “in conformity with the laws and regulations of the receiving state.”<sup>127</sup> The *Sanchez-Llamas* Court thus declined to give *Avena* even persuasive effect (though the Court’s reference to “respectful consideration” suggested it would have done so if, in fact, it had been persuaded).

The Court considered the enforcement effect of final ICJ judgments just this term in *Medellin v. Texas*, a case that involved the claims of one of the Mexican nationals covered by *Avena*.<sup>128</sup> *Medellin* has a complicated history. Jose Medellin was convicted of capital murder in Texas in 1997. Although state authorities failed to notify him of his right to seek consular assistance, Medellin did not raise a VCCR claim until his first habeas action, by which time it was procedurally barred under Texas law.<sup>129</sup> When the ICJ decided *Avena* in 2004, Medellin argued that the international court’s ruling required that his conviction be reconsidered.<sup>130</sup> The Supreme Court granted certiorari to resolve this question in 2005, but dismissed the case as potentially moot after President Bush issued his order directing state courts to comply with *Avena*.<sup>131</sup> Medellin returned to seek habeas in the Texas courts, where once more he was unsuccessful. Once again, the Court granted certiorari to hear Medellin’s claims.<sup>132</sup>

This time, the Court made clear that ICJ judgments lack enforcement effect in American courts.<sup>133</sup> As in *Sanchez-Llamas*, the Court relied on a dualist analysis. Once again, it emphasized the *international* quality of ICJ rulings in VCCR cases.<sup>134</sup> The UN Charter envisioned enforcement by the Security Council, not domestic

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126. *Id.* at 2685.

127. *Id.* at 2686 (quoting VCCR, *supra* note 105, art. 36, para. 2).

128. *Medellin v. Texas*, 128 S.Ct. 1346 (2008).

129. *Id.* at 1354.

130. *See id.* at 1355.

131. *See id.* at 1356.

132. *See id.*

133. *Id.* at 1367. The Court also ruled that President Bush had no authority to order state courts to comply with the ICJ’s ruling in *Avena*, *id.* at 1367-72, but I do not address that question here.

134. *See id.* at 1356.

courts;<sup>135</sup> indeed, nothing in the Charter, the ICJ Statute, or the Optional Protocol could be read to give domestic judges authority to enforce ICJ judgments.<sup>136</sup> Notably, the Court drew a distinction between the ICJ and ICA regimes. In the ICA context, Congress had expressly provided for the domestic-court enforcement of arbitral awards when it implemented the New York Convention.<sup>137</sup> If Congress had contemplated domestic-court enforcement of ICJ rulings, the Court reasoned, Congress would have adopted similar implementing legislation in the ICJ context as well.<sup>138</sup>

*Breard*, *Sanchez-Llamas*, and *Medellin* make clear that American courts are not receptive to the notion of giving domestic effect to ICJ rulings. The situation in other countries is more nuanced, but, on the whole, domestic courts everywhere seem reluctant to give much weight to ICJ rulings. There is apparently no country in which courts give ICJ judgments enforcement effect.<sup>139</sup> A recent German decision suggests that ICJ judgments might have precedential effect, but the full implications of that decision are unclear.<sup>140</sup> In its *Vienna Convention Decision*—a German counterpart to *Sanchez-Llamas*—a chamber of the Federal Constitutional Court held that German courts have a constitutional duty to consider the ICJ's views in VCCR cases.<sup>141</sup> The case concerned three foreign defendants who had been convicted of murder and sentenced to life imprisonment.<sup>142</sup> Local authorities had failed to inform them of their rights to consular assistance, but

135. *Id.* at 1358-60.

136. *See id.* at 1364-65.

137. *Id.* at 1366.

138. *See id.*

139. *See id.* at 1363; Weisburd, *supra* note 5, at 299.

140. *See* Klaus Ferdinand Garditz, *Article 36, Vienna Convention on Consular Relations – Treaty Interpretation and Enforcement – International Court of Justice – Fair Trial – Suppression of Evidence*, 101 AM. J. INT'L L. 627, 629-30, 632 (2007). It is worth noting that Germany had been the victorious party in one of the early VCCR cases against the United States; it would have been embarrassing for Germany to deny effect to ICJ rulings while arguing that the United States must comply. *Id.* at 634-35.

141. *See* Carsten Hoppe, *Implementation of LaGrand and Avena in Germany and the United States: Exploring a Transatlantic Divide in Search of a Uniform Interpretation of Consular Rights*, 18 EUR. J. INT'L L. 317, 331 (2007). The fact that the decision was issued by a Chamber of the Constitutional Court, and not a full Senate, indicates that the court did not think the case presented a “fundamental issue.” *Id.* at 334-35; *see also* The Federal Constitutional Court, Organization, <http://www.bundesverfassungsgericht.de/en/organization/organization.html> (last visited November 27, 2007) (F.R.G.) (“[I]n proceedings of fundamental importance . . . it is always the Senate that decides.”).

142. Garditz, *supra* note 140, at 627.

the defendants did not raise any VCCR claims until they filed appeals with the Federal Court of Justice.<sup>143</sup> When that court rejected their claims, the defendants filed complaints with the Constitutional Court, arguing that the authorities' failure to advise them of their VCCR rights violated their fair-trial rights under the German Constitution.<sup>144</sup>

The Constitutional Court agreed with the defendants and ordered the Court of Justice to reconsider the convictions.<sup>145</sup> In the course of its ruling, the Constitutional Court criticized the Court of Justice for failing to "take into account" the ICJ's views on the proper interpretation of the VCCR.<sup>146</sup> Unfortunately, the Constitutional Court did not make clear precisely what "take into account" means.<sup>147</sup> The phrase may mean that ICJ opinions have precedential force—that German courts must defer to the ICJ's interpretation unless there is a conflict "with constitutional provisions such as those defining fundamental rights"<sup>148</sup>—but a narrower reading is also possible, one that requires only that German courts explain their departures from the ICJ.<sup>149</sup> The Court of Justice will presumably clarify the proper reading when it hears the case again on remand.

To be sure, national courts in Europe are receptive to the judgments of regional courts like the European Court of Justice (the ECJ) and the European Court of Human Rights (the ECHR). As a general matter, the rulings of these courts receive both enforcement and precedential effect in domestic courts.<sup>150</sup> But the European situation is unique, and the factors that explain the success of these regional courts do not exist in the broader international context.<sup>151</sup> For example, the ECJ has been able to draw on support from European elites

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143. *Id.*

144. *Id.* at 628.

145. *Id.*

146. See Hoppe, *supra* note 141, at 332 (quoting *Vienna Convention Decision*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 19, 2006, 2 BVR 2115/01 (F.R.G.)).

147. Garditz, *supra* note 140, at 632 (arguing that the Court's discussion "is evasive, or at least not explicit").

148. *Id.* at 629-30.

149. See Hoppe, *supra* note 141 at 332.

150. See Movsesian, *supra* note 5, at 103-04 (discussing the European Court of Justice); *id.* at 105 (discussing the European Court of Human Rights).

151. See Jose E. Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 TEX. INT'L L.J. 405, 430 (2003). For an argument that the Constitutional Court in the *Vienna Convention Decision* improperly ignored the differences between the European Court of Human Rights and the International Court of Justice, see Garditz, *supra* note 140, at 633.

for the European Union and its goal of greater political integration.<sup>152</sup> Similarly, the ECHR has been able to rely on the sense of shared values that unites the core members of the Council of Europe.<sup>153</sup> There is no similar commitment to political integration at the global level, nor is there a similar sense of shared identity.<sup>154</sup> As a consequence, one should not draw general conclusions about international courts from the European experience.

If the VCCR controversy is any indication—and the amount of scholarly attention suggests it should be—states are much less receptive to international adjudication than they are to ICA. Explaining why is not difficult. Many of the factors that account for ICA's success do not exist in the adjudication context. First, unlike ICA, international adjudication raises legitimacy concerns.<sup>155</sup> International courts are not ad hoc contractual arrangements, but permanent institutions that create substantial bodies of law. Their judgments increasingly can implicate a state's exercise of public authority.<sup>156</sup> For example, *Avena* purported to override procedural default rules and require the reconsideration of numerous criminal convictions across the United States.<sup>157</sup> The ruling thus aspired to have systemic influence on American law – the sort of influence that private arbitral awards cannot have.

The issues that international courts address also differ greatly from the run-of-the-mill commercial questions that arise in ICA.<sup>158</sup> In earlier times, international adjudication often addressed low-key matters like boundary disputes; states typically did not resist compliance

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152. See Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 529 (2001) (discussing the “elite-driven” nature of European political integration).

153. See J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 30-31 (1993).

154. See Alvarez, *supra* note 151, at 430.

155. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 908 (2005).

156. Cf. Van Harten & Loughlin, *supra* note 6, at 139-42 (distinguishing between commercial and investment arbitration).

157. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 69-70 (Mar. 31).

158. Cf. *Medellin v. Texas*, 128 S.Ct. 1346, 1366 (2008) (distinguishing between ICJ rulings in VCCR cases and “a foreign-court judgment settling a typical commercial or property dispute”).

with decisions on these matters.<sup>159</sup> As the scope of international law continues to expand, however, international courts increasingly address subjects like civil and political rights, environmental protection, and public health.<sup>160</sup> These are often highly sensitive topics on which global consensus is absent. Again, *Avena* provides an illustration. Some American officials reacted indignantly to the notion that that the ICJ would issue directives on local law enforcement.<sup>161</sup> “We have a system of justice that provides people with due process and review of their cases,” a State Department spokesman objected, “[a]nd it’s not appropriate that there be some international court that comes in and can reverse decisions of our national courts.”<sup>162</sup> Moreover, as Peggy McGuinness has observed, the ICJ’s decision implicated America’s continuing reliance on the death penalty, a form of punishment that causes controversy abroad, but that remains popular in much of the United States.<sup>163</sup> However indirectly, the ICJ injected itself into a contentious domestic policy debate.

Because they increasingly address sensitive issues, and because their judgments can purport to have a systemic impact on domestic law, international courts pose serious legitimacy concerns. Like arbitrators, international judges are largely unaccountable to the public. Judges are usually appointed by international organizations removed from democratic control.<sup>164</sup> For example, members of the ICJ are selected through an arcane process involving the General Assembly and

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159. Cf. Ginsburg & McAdams, *supra* note 104, at 1328 (stating that “the disputes resolved by international courts are low stakes relative to larger conflicts”).

160. See Young, *supra* note 5, at 1151-53.

161. For the reaction of Virginia’s governor, see Governor Jim Gilmore, Statement Concerning the Execution of Angel Breard (Apr. 14, 1998), in Jonathan I. Charney & W. Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT’L L. 666, 674-75 (1998). For the reaction of Arizona’s governor, see Mani Sheik, Comment, *From Breard to Medellín: Supreme Court Inaction or ICJ Activism in the Field of International Law?*, 94 CAL. L. REV. 531, 544 (2006). Oklahoma’s governor, by contrast, argued that the ICJ’s ruling was binding on American courts. See Press Release, Office of Governor Brad Henry, Governor Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004), available at [http://www.governor.state.ok.us/display\\_article.php?article\\_id=301&article\\_type=1](http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1).

162. Adam Erel, Deputy Spokesperson, U.S. Dep’t of State, Daily Press Briefing (Mar. 10, 2005), available at <http://www.state.gov/r/pa/prs/dpb/2005/43225.htm>.

163. See generally Margaret E. McGuinness, *Medellín, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755 (2006).

164. See Douglas Lee Donoho, *Democratic Legitimacy in Human Rights: The Future of International Decision-Making*, 21 WIS. INT’L L.J. 1, 51 (2003).



the Security Council.<sup>165</sup> National governments have some input in this process, but citizens have virtually none.<sup>166</sup> Though citizens also have relatively little input in the selection of domestic judges, their participation in the international context is even more attenuated. Americans generally know little about the workings of the UN, and it is hard to imagine many of them tracking the appointment of ICJ judges.

Even setting aside concerns about formal accountability, international courts lack the informal ties with local communities that domestic courts enjoy. Domestic judges are products of one legal culture; they share similar assumptions and reason along similar lines.<sup>167</sup> As a result, their decisions have a kind of built-in credibility with domestic constituencies. International judges, by contrast, come from a variety of legal traditions, some of which have very different starting assumptions and modes of thought.<sup>168</sup> At the time of *Avena*, for example, the ICJ had members from China, Egypt, the United States and Venezuela.<sup>169</sup> Moreover, because of their diverse backgrounds, international judges cannot be expected to have the familiarity with local conditions that domestic judges have.<sup>170</sup> Their opinions can thus create unanticipated conflicts with local law. Recall the Supreme Court's complaint in *Sanchez-Llamas* that the ICJ failed to appreciate the role of procedural default rules in American criminal justice.<sup>171</sup>

Second, unlike ICA awards, international court judgments do not promote domestic prosperity in an uncontroversial way. Again, it is important to focus on the sorts of disputes that international courts increasingly address. Rulings on subjects like criminal justice and civil rights advance important human values, but they do not neces-

165. See generally MALCOLM N. SHAW, *INTERNATIONAL LAW* 961-62 (5th ed. 2003) (giving a description of the process).

166. See Movsesian, *supra* note 5, at 97.

167. See Ginsburg, *supra* note 89, at 1336-37 (discussing varieties of legal culture).

168. See ICJ Statute, *supra* note 100, art. 9 (providing that members of the Court should "represent[] . . . the main forms of civilization and of the principal legal systems of the world").

169. See *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 14 (Mar. 31) (listing members of the Court).

170. See Shany, *supra* note 155, at 920 n.78 (noting that national courts are "in principle better placed than an international court to evaluate local needs and conditions" (citation omitted)).

171. *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2685-86 (2006).

sarily contribute to a state's GDP.<sup>172</sup> (It is true that by promoting the rule of law generally, international judgments in these areas can contribute over time to national economic growth, but the connection is an attenuated one).<sup>173</sup> Moreover, even when they are consistent with economic development, rulings on these subjects are much more likely than ICA awards to involve public policy questions on which states strongly disagree.

To be sure, international court judgments in the trade area may have a direct impact on economic growth. For example, by requiring states to forgo protectionist laws, the WTO can facilitate comparative advantage and promote domestic prosperity.<sup>174</sup> But the benefits of WTO rulings do not depend upon domestic-court enforcement. The WTO can effectively police protectionism by authorizing injured states to retaliate against offending states, without involving domestic courts.<sup>175</sup> By contrast, the benefits of ICA—neutrality, confidentiality, expertise—depend on domestic-court enforcement. A state-to-state mechanism would not work as well. If domestic courts did not enforce them, awards would have much less practical value for firms, and ICA could do little to facilitate international commerce.<sup>176</sup>

Third, because international adjudication does not create the powerful financial incentives that ICA does, it cannot motivate as much support from domestic constituencies. Neither businesses nor large law firms have great interest in lobbying for domestic enforcement of international court judgments. To be sure, some lawyers and law professors support a greater role for international courts.<sup>177</sup> The *amicus* briefs in, and commentaries on, *Sanchez-Llamas* suggest that most international law scholars believe that the Supreme Court

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172. Cf. Randall Peerenboom, *The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implications of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability*, 7 CHI. J. INT'L L. 17, 30-31 (2006) (noting that authoritarian regimes can achieve economic growth while restricting civil and political rights).

173. Tyler Cohen, *Caring About the Distant Future: Why It Matters and What It Means*, 74 U. CHI. L. REV. 5, 36 (2007) ("Empirical research suggests that a stable market order, private property, and the rule of law are strongly correlated with economic growth.").

174. See Mark L. Movsesian, *Enforcement of WTO Rulings: An Interest Group Analysis*, 32 HOFSTRA L. REV. 1, 6 (2003).

175. See *id.* at 10-11; Jide Nzelibe, *The Credibility Imperative: The Political Dynamics of Retaliation in the World Trade Organizations Dispute Resolution Mechanism*, 6 THEORETICAL INQUIRIES L. 215, 217 (2005).

176. See *supra* note 88 and accompanying text.

177. See Movsesian, *supra* note 5, at 69 n.23 (discussing "the 'comity model' that has gained considerable academic currency in recent years").

should have deferred to the ICJ.<sup>178</sup> Most probably believe that the Court should have enforced the ICJ's judgment in *Medellin*.<sup>179</sup> But these lawyers and law professors are driven primarily by political and ideological commitments. While there may be some professional rewards for promoting international adjudication—the possibility of an appointment to an international tribunal, a greater reputation in the academy—they cannot, by their nature, entice many people.

To be sure, political and ideological commitments can be strong motivators, and I do not wish to minimize the dedication or sincerity of the lawyers and law professors who support international adjudication. Some of these lawyers and scholars have devoted their careers to promoting international courts, which they see as a vehicle for global progress. My point, rather, is that the absence of financial incentives helps explain why international adjudication has less support among domestic constituencies that ICA does. Along with the other factors I have discussed, the lack of interest-group involvement explains why states are less receptive to international adjudication than they are to ICA.

## CONCLUSION

The question the editors have asked us to address reflects an understandable puzzlement. Why have states embraced ICA but not international courts? As this essay has shown, the reasons are not so hard to make out. ICA and international adjudication differ greatly. ICA avoids legitimacy problems, fosters domestic growth, and appeals to influential domestic constituencies. By contrast, international adjudication raises serious legitimacy concerns, does not foster economic growth so clearly, and cannot rely on the same level of interest-group support. These differences explain why states are more receptive to ICA awards than the judgments of international courts.

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178. See, e.g., Brief for International Court of Justice Experts as Amici Curiae Supporting Petitioners, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2005) (Nos. 04-10566 and 05-51), 2005 WL 3597806.

179. See, e.g., Brief for International Court of Justice Experts as Amici Curiae Supporting Petitioner, *Medellin v. Texas*, 128 S. Ct. 1346 (2008) (No. 06-984), 2007 WL 1886207.