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Uncertainty and international adjudication

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Abstract

In deciding whether to rule against a state party, international courts regularly confront a compliance dilemma: declare the state in breach of the international regime but with the risk that it will defy the court's authority; or defer to the state but at the price of acquiescing to an unjust or undesirable outcome. Specifically, international adjudicators must solve this dilemma in a context of uncertainty, that is, without knowing with exactitude whether or not the state will prefer complying with an adverse ruling over overt defiance. I use a simple strategic model to cast light on this aspect of the compliance dilemma. Building off from the model's insights, I then discuss the practices, doctrinal tactics and institutional mechanisms apt to reduce uncertainty and minimize state defiance. I highlight, in particular, the advantages of defiance avoidance mechanisms that help create informational feedback loops like test-the-water *dicta* and double-tier review. I illustrate how these mechanisms have been deployed by two of the world's most powerful international courts, the European Court of Justice and the European Court of Human Rights. Finally, I consider the limitations of these mechanisms along with the possibility for other international dispute settlement bodies to replicate them.

Keywords: defiance; international adjudication; international courts; political economy; uncertainty

1. Introduction

The past 30 years have seen international courts growing not only in number[1] but also in power, influence and confidence. In parts of the world, the rise of international judicial power has also sparked a backlash against judges.[2] Yet there is a great degree of variation in the situation of international courts and international adjudicators do not, by any means, all wield the same authority. Some institutions – such as the European Court of Justice (CJEU) and the European Court of Human Rights (ECtHR) – have morphed into mighty judicial bodies. But others – including the courts set up by regional trade agreements in Africa – occupy a more precarious position in their respective legal regimes.[3] Yet even the most powerful international courts must reckon with the fact that there are limits to their power. These limits arise in part from the fact that international adjudicatory bodies – even the European Court of Justice or the European Court of Human Rights – do

[1]K.J. Alter, 'The Global Spread of European Style International Courts', (2012) 35 *West European Politics* 135–54 (mapping the diffusion of ECJ-style international judicial bodies).

[2]M.R. Madsen, P. Cebulak and M. Wiebusch, 'Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', (2018) 14 *International Journal of Law in Context* 197–220; X. Soley and S. Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', (2018) 14 *International Journal of Law in Context* 237–57; S. Caserta and P. Cebulak, 'The Limits of International Adjudication: Authority and Resistance of Regional Economic Courts in Times of Crisis', (2018) 14 *International Journal of Law in Context* 275–93.

[3]See Alter, *supra* note 1, at 135–54.

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not hold the formal power to strike down domestic legislation or to overturn domestic court rulings.[4] They reflect, more generally, the fact that international legal regimes, unlike nation states, cannot rely on any extensive administrative apparatus, let alone a network of local courts to implement and enforce their decisions. Compliance with international court rulings thus appears to require that states will have enough goodwill to abide by decisions that condemn their actions.

An expanding literature, straddling the disciplines of law and political science, has begun to shed light on the compliance environment of international courts. This rich, transdisciplinary scholarship stresses the penetration of domestic legal orders;[5] political fragmentation;[6] compliance partnerships with infra-state actors;[7] and the active cultivation of public support through effective judicial rhetoric;[8] as major determinants of the authority of international adjudicators. Simply put, the broad lesson of this body of research is that international courts need the support of, at least, some state actors in order to secure domestic compliance. Courts that fail to cultivate some form of state support face the prospect of irrelevance, leaving them with an unenviable choice between permanent self-restraint and endemic disobedience. Yet even the more established international judicial bodies cannot assume that state actors will get along with just any kind of activist decision. Indeed, it is in the international adjudicators' own institutional self-interest to take into account the possibility that normally compliant states may refuse to obey a ruling seen as overreaching or as unduly interfering with a cherished domestic policy or practice. Defiance will damage the court's authority and, potentially, its long-term influence. Judges who care about their court's institutional standing, therefore, have a strong incentive to choose their battles carefully and refrain from making decisions that will invite defiance.[9]

These aspects of the decision-making environment of international courts have been well attended. Scholars have generally argued that international adjudicators seek to maximize compliance by avoiding decisions for which the odds of compliance are low.[10] One question, though,

[4]This holds true for the CJEU despite the doctrines of supremacy and direct effect. Formally, only domestic courts have the power to set aside national legislation.

[5]R.O. Keohane, A. Moravcsik and A.-M. Slaughter, 'Legalized Dispute Resolution: Interstate and Transnational', (2000) 54 *International Organization* 457–88.

[6]C.J. Carrubba, M. Gabel and C. Hankla, 'Judicial Behavior under Political Constraints: Evidence from the European Court of Justice', (2008) 102 *American Political Science Review* 435–52 (analyzing the effect of the direction and frequency of member state observations on ECJ decision-making).

[7]A. Huneeus, 'Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights', (2011) 44 *Cornell International Law Journal* 493–531; K.J. Alter and L.R. Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice', (2010) 64 *International Organization* 563–92.

[8]Y. Lupu and E. Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights', (2012) 42 *British Journal of Political Science* 413–39; O. Larsson, D. Naurin, M. Derlén and J. Lindholm, 'Speaking Law to Power: The Strategic Use of Precedent of the Court of Justice of the European Union', (2016) 50 *Comparative Political Studies* 879–907.

[9]It bears emphasis that the focus of the present contribution is on 'defiance' rather on the broader issue of 'noncompliance'. Although the two concepts largely overlap, 'defiance' presupposes that the state's behaviour is deliberate rather than a result of managerial failure. Defiance and what we may call, for want of a better term, non-deliberate noncompliance, thus, raise distinct sets of problems and call for distinct solutions.

[10]See S. Dothan, 'Judicial Tactics in the European Court of Human Rights', (2011) 12 *Chicago Journal of International Law* 115–42 (examining how variations in the institutional costs associated with noncompliance affects decision-making on the ECtHR); C.J. Carrubba, 'Courts and Compliance in International Regulatory Regimes', (2005) 67 *Journal of Politics* 669–89 (arguing that international adjudicators only punish states when there is a chance that these will comply); G. Garrett, R.D. Kelemen and H. Schulz, 'The European Court of Justice, National Governments, and Legal Integration in the European Union', (1998) 52 *International Organization* 149–76 (using insights from game theory to analyze interactions between CJEU and member state governments in the European Union). Relatedly, scholars have debated the extent to which legalization by adding or reducing flexibility can prevent or, on the contrary, precipitate regime breakdown, see B.P. Rosendorff, 'Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedure', (2005) 99 *The American Political Science Review* 389–400; L.R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes', (2002) 102 *Columbia Law Review* 1832–1911; L. Johns, 'Depth versus Rigidity in the Design of International Trade Agreements', (2014) 26 *Journal of Theoretical Politics* 468–95.

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deserves greater attention than it has received so far in the literature. This relates to the uncertainty surrounding the judicial decision-making process. Often enough, international adjudicators must solve the compliance dilemma in a context where they do not possess perfect information over state preferences. Does the state value its commitment to the international regime to a sufficient degree to accept an adverse ruling over this or that particular issue? This question is all the more difficult to answer for the judges sitting on an international court as these judges – with the possible exception of the judge appointed by the state whose action is being reviewed – ordinarily possess limited knowledge of the domestic legal, political, and cultural context potentially affected by their decisions. To be sure, careful investigation by the judges and their clerks or other court personnel can help mitigate uncertainty. Yet, helpful as they are, such measures cannot entirely eliminate uncertainty. At the end of the day, a decision has to be reached on the basis of information that is inevitably imperfect. So, if the judges decide to rule against the state, they will only know whether they were right to bet on obedience after the state has taken cognizance of the decision.

As this article seeks to demonstrate, defiance avoidance is a complex and delicate matter. Its success is heavily contingent on information over the court's political environment. Moreover, compliance management does not necessarily end with the court's *dictum* in the case in which the spectre of state defiance initially arose but may extend over several cases. I use a simple formal theoretical framework to elucidate how uncertainty and the extent of the information available to judges affect international judicial rule-making. In the model, an International Court (IC) interacts with a State.[11] The IC must decide whether the State has violated the international regime, but without knowing for certain whether the State is supportive and thus prefers compliance over defiance or non-supportive with a preference for defiance over compliance. I show that the IC's choice is sensitive to the judges' 'prior beliefs' over state preferences. When over-optimistic, these beliefs can lead the IC to draw the wrong conclusion and to render decisions that trigger the sort of pushback its judges hoped to avoid.[12] I then use the insights derived from this simple game-theoretic setup to discuss the institutional mechanisms and doctrinal tactics employed by international adjudicators to mitigate this informational problem, and to revise their beliefs about state preferences in light of the actions and behaviour of participating states. Test-the-water *dicta*, for instance, can serve to assess whether there is enough goodwill to permit doctrinal innovation in a sensitive policy area. Similarly, appeal to a grand chamber within the international judicial body can operate as a safeguard to avert defiance when a state does not react as international adjudicators had initially expected. By creating informational feedback loops, these mechanisms give international adjudicators the ability to adjust their level of activism to what states will stomach. I illustrate these two mechanisms with CJEU and ECtHR cases. Variations in institutional design, I suggest, implicate that some of these tools are more easily deployed and better suited to some international legal regimes than others. In discussing these examples, my aim is not to test a theory of international adjudication but to sharpen our theoretical understanding of the compliance dilemma. Thus, the examples selected are meant to be illustrative of the problem I am pursuing rather than a representative sample of the caseload of international courts. In that sense, the contribution of this article should be understood as primarily theoretical and conceptual.

[11]In the remainder of the article, I use 'State' (with uppercase 'S') to refer to the player in the game-theoretic model, which is an abstract theoretical construct, and 'state' (with lowercase 's') to refer to real-world state actors.

[12]Conversely, when overly pessimistic, these beliefs can result in lost justice. This occurs when the IC refrains from ruling against a State that would have complied with an unfavourable ruling. Note, though, that because states will invariably welcome a favourable ruling irrespective of their degree of support for the regime, state reactions to favourable rulings are unlikely to provide international judges with new information about state preferences.

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2. Modelling uncertainty in the environment of international courts

The formal modelling approach applied in the present article rests on assumptions about the behaviour of international adjudicators which I take to be uncontroversial.

First, I assume that international judges behave rationally when deciding cases, consciously weighing preferences over case outcomes and concerns of a more institutional nature such as long-term authority. To be sure, human decision-makers are not always rational and empirical research has confirmed that this holds for judicial decision-making too – judges are not Vulcans immune to emotional impulses or cognitive biases in the mould of the imperturbable Mr. Spock from the Star Trek franchise.[13] The incentive to use rationality, however, rises with the importance of the choice to be made. Assuredly, few judicial choices are more consequential than the decision to rule for or against a sovereign state. So, it is unlikely that the outcome of such cases will have much to do with when or what the judges had for breakfast or with an imaginary coin toss.[14]

Second, I assume that international adjudicators think strategically and in forward-looking fashion when they seek to solve the compliance dilemma. It bears emphasis that this assumption does not commit us to a Machiavellian conception of adjudication in which judges have no concern for the law and are exclusively preoccupied with advancing their personal ideological agenda. Indubitably, the relative indeterminacy of international law and inter-state treaties entails that considerations extraneous to the law do, by necessity, play a role in international dispute resolution. Yet the model set forth in this Section is compatible with a rich and nuanced picture of the determinants of judicial conduct.[15] The judges sitting on an international court may wish to rule against a state out of a genuine conviction that it is what the law requires; or because of the conception of justice they happen to hold; or simply because they expect that the decision will enhance their own social prestige. All these goals are compatible with the model. Yet I assume that in seeking to achieve these goals, international adjudicators normally care about their court's institutional standing and about how state responses to their rulings may affect it. Thus, I do not assume that judges strategize for the sake of strategizing but because a loss of institutional standing will diminish their capacity to influence the development of the law in subsequent cases.

Third, I model the strategic interaction as one between a judicial rule-maker and a unitary state actor. This, arguably, is a simplifying assumption. Some ICs, especially the more powerful ones, engage not just state governments but also infra-state actors, such as domestic courts and private litigants. While a more complex model may be needed to investigate compliance dynamics specific to these more advanced regimes, the framework presented here provides enough analytical leverage for the substantive point I am concerned with in this article – even for these more advanced regimes.[16]

Finally, it may help the reader unfamiliar with game-theoretic analysis to know that the point of a model is not to provide a theory of everything or a thick description of reality. Instead, the

[13]See D. Chen, T.J. Moskowitz and K. Shue, 'Decision-Making Under the Gambler's Fallacy: Evidence from Asylum Judges, Loan Officers, and Baseball Umpires', (2016) *The Quarterly Journal of Economics* 1181–1242; See S. Danziger, J. Levav and L. Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions', (2011) 108 *Proceedings of the National Academy of Sciences* 6889–92.

[14]Ibid.

[15]For a discussion of recent advances in judicial behaviour theory and the preferences of judges see L. Epstein, W.M. Landes and R.A. Posner, *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* (2013); L. Epstein and J. Knight, 'Reconsidering Judicial Preferences', (2013) 16 *Annual Review of Political Science* 11–31.

[16]One way of conceptualizing compliance dynamics in integrated regimes is as exploiting differences among domestic actors to render opposition to the regime more difficult. When international adjudicators can rely on multiple domestic constituencies to implement their rulings, it becomes harder for the state to speak with one voice. Inasmuch as all compliance constituencies must agree in order to prevent compliance, the mechanism is thus akin to hedging. Hence, as compliance constituencies get more numerous and differentiated, the joint probability that they will all agree to resist the international regime decreases.

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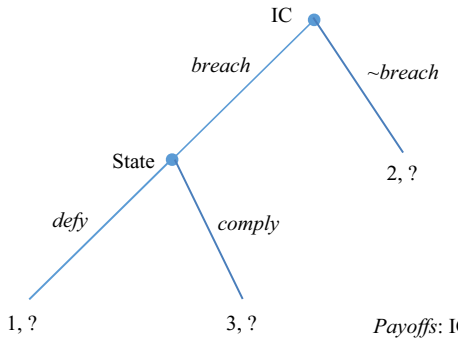


Figure 1. International Court and Uncertainty over State Preferences.

objective of a model is to shed light on the question at hand by ensuring that all the assumptions of our analysis are consistent. The particular question I seek to clarify is how uncertainty over state preferences affects international judicial decision-making when international adjudicators would, in principle, prefer to rule against the state. To make it perfectly clear, I am only concerned with the situation in which *ruling against the state is the best outcome for international adjudicators conditional on state compliance*, as this is the configuration that I take to be characteristic of the non-compliance dilemma. I do not intend to elucidate state–court interactions that do not meet this characteristic, such as when a no violation verdict is the international court's most preferred outcome. The choice to leave out these and other facets of international adjudication is thus a deliberate one.

Figure 1 illustrates the situation I purport to model. The IC must decide between two legal findings: to declare the state in breach of the legal regime (*breach*) or not in breach (*~breach*).[17] If the IC chooses *~breach*, the game stops there. But if it opts for *breach*, then the State must decide whether to comply with the ruling (*comply*) or to defy it (*defy*). The IC would prefer to declare a state violation rather than to defer to the State, but only if the latter complies with its ruling. If the State chooses to defy, the IC would rather defer than suffer non-compliance. The IC's payoffs reflect this preference ordering and characterize the problem we aim to elucidate.[18] The IC receives a payoff of 3 (the highest payoff) if it declares a violation and the State complies; a payoff of 1 (the lowest payoff) if it declares a violation and the State defies; and a payoff of 2 if it defers to the State.[19] It is easy to see in this setup that for the IC the outcome of choosing *breach* depends on the behaviour of the State and, more specifically, on whether the State prefers *defy* or *comply*. The uncertainty surrounding the IC's decision environment arises from the fact that it does not know with certainty which of the two actions the State prefers. This is why I put a question mark on the State's payoffs.

The IC can safely assume that the outcome where it defers to the State by choosing *~breach* will invariably be the State's most preferred. But if it chooses *breach*, there are two possibilities. Either

[17]One may object that this dichotomous choice fails to capture the full range of options available to international adjudicators. An international court may, for example, elect to declare only certain aspects of a state's conduct contrary to the regime so as to make its decision more acceptable to the state or dismiss the case on procedural grounds to avoid considerations of its merits. However, although it is true that variations exist between outright win and outright lose holdings, no insight is gained by adding this complication to the model.

[18]In that sense, we are not assuming that international adjudicators always prefer ruling against compliant states. In many cases state and court preferences converge so that judges receive their highest payoff when they rule in favour of the state. Yet because such situations, by definition, do not raise a compliance dilemma, they are outside the scope of the present analysis.

[19]To this payoff ordering it may be objected that an international court may suffer an institutional loss vis-à-vis other states when it defers to a state in a case seen as a clear violation. Whether my analysis also accommodates this situation depends on how the institutional loss from not ruling against a clear violator compares to the institutional loss from non-compliance. If the institutional cost associated with the latter is greater, the problem is analytically identical. If the two costs are the same or the non-compliance cost is smaller, *breach* becomes a dominant strategy for the IC (i.e., it is always its best strategy regardless of the State's strategy). This effectively assumes away the compliance dilemma, which is the focus of this article.

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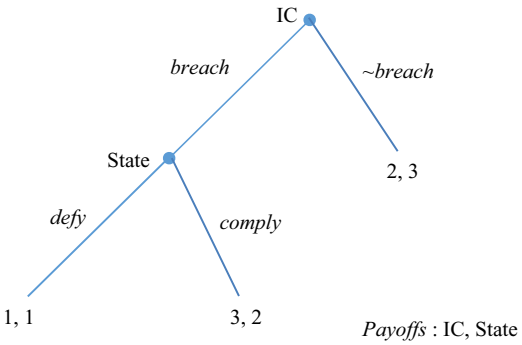


Figure 2.1. International Court and Supportive State.

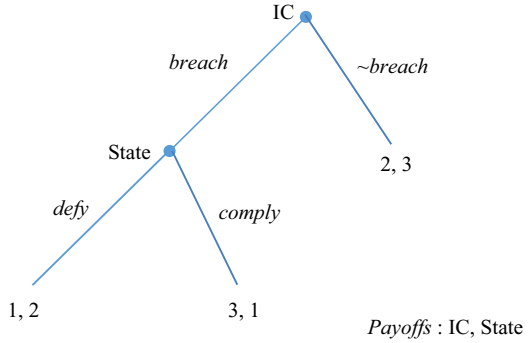


Figure 2.2. International Court and Non-supportive State.

the State has a strong commitment to international law such that it prefers compliance over defiance, as in Figure 2.1. Or the State has a low commitment to international law such that it prefers defiance over compliance, as in Figure 2.2. For the sake of simplicity, I refer to the State in the first scenario as 'supportive' and to the State in the second scenario as 'non-supportive'.[20]

The payoffs in the two figures reflect the difference between the respective preference orderings of the supportive and non-supportive State. Both the supportive and the non-supportive State get their highest payoff, 3, when the IC defers (by choosing ~*breach*). But the supportive State receives a higher payoff from compliance (payoff = 2) than from defiance (payoff = 1), whereas the reverse holds for the non-supportive State (payoffs for compliance and defiance are respectively 1 and 2).

Figures 2.1 and 2.2 represent these two hypotheses (or 'states of the world' in game-theoretic jargon). Now, from the IC's standpoint, the problem lies precisely in the fact that it does not know with certainty which hypothesis is true (that is, which state is the actual state of the world). The IC does not have, in other words, complete information over the State's true preferences.[21] For that reason, it must balance the possibility of defiance against the possibility of lost justice.[22]

[20]I do not mean to suggest that this is necessarily the language that real-world actors will use to designate these two states. Non-supportive states may occasionally be characterized as 'sovereignist' or 'nationalist' and supportive ones as 'multilateralist'.

[21]The framework presented here can easily be extended to account for the situation where an international court prefers ruling against a state even if compliance is unlikely or the situation where international adjudicators have an intrinsic preference for judicial restraint. In these two hypotheses, however, information and beliefs about state preferences are far less relevant to judicial decision-making.

[22]Drawing on the language of medical diagnostics, defiance can be thought of as a false positive: believing that the State is supportive when in fact it is not. Similarly, lost justice can be compared to a false negative: believing that the State will not comply when in fact it will. For reasons discussed above (see *supra* note 9), developing strategies to minimize false negatives is more difficult than for false positives (which are the focus of the present article).

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Information, to be sure, is not an all-or-nothing matter but, rather, comes in shades of grey. International judges can be *more* or *less* informed and, therefore, more or less confident about true state preferences. In our formal setup, this is equivalent to saying that they can be more or less confident about the State's true payoffs. To model this, we merge the two trees from Figures 2.1 and 2.2 and we add a chance node to represent the two possible hypotheses. The chance node determines which payoffs are the State's true payoffs. It can be thought of as representing history or fate, or simply the social process by which state preferences come about. What is crucial here is that the payoffs determined by the chance node are not directly observed by the IC. This is why the IC does not know with certainty the State's true payoffs. Specifically, uncertainty means that the IC does not know with certainty whether it is making a decision at node *L* or at node *R*, as denoted by the dashed line linking the two nodes.[23] The letter *p* stands for the probability the IC ascribes to the State being *non-supportive*. $1 - p$, on the other hand, indicates the probability ascribed by the IC to the State being *supportive*. These probabilities represent the information available to the IC and the confidence it has about the State's true preference ordering. Suppose, for example, that $p = 0.7$. This means the IC believes there is 70 per cent probability that the State is *non-supportive* – and so a $1 - 0.7 = 0.3 = 30$ per cent probability the State is *supportive*. Looking at the tree in Figure 3, this entails that the IC believes it is more likely to be at node *L* than at node *R*.

Equipped with these probabilities, the expected payoff respectively attached to *breach* and ∼*breach* can be readily computed and compared; ∼*breach* always yields a payoff of 2, irrespective of the State's payoffs. Deferring to the State is, in that sense, a safe bet. Anticipating that the supportive State will choose *comply* and the non-supportive State *defy*, the IC's expected payoff from choosing *breach* should reflect the probability attached to each scenario. If the IC believes that there is a 70 per cent chance the State is *non-supportive*, the expected payoff of choosing *breach* is:

$$0.7 * (1) + 0.3 * (3) = 0.7 + 0.9 = 1.6$$

In this case, the expected payoff of *breach* is less than the expected payoff of ∼*breach* ($1.6 < 2$). Balancing the possibility of defiance against the possibility of lost justice, deferring is thus the equilibrium outcome.[24] Contrast this with the situation where the IC believes there is only a 25 per cent chance the State is *non-supportive*. Correspondingly, the expected payoff of choosing *breach* is:

$$0.25 * (1) + 0.75 * (3) = 0.25 + 2.25 = 2.5$$

In which case the expected payoff of *breach* is larger than that of ∼*breach*. Predicted equilibrium behaviour, therefore, is a *breach*. More generally, the IC will only rule against the State if the probability that the State is *supportive* is greater than 50 per cent.[25]

For simplicity of exposition, I assigned the payoffs 1, 2, and 3 to the outcomes. Needless to say, the equilibrium outcome may change if we vary the magnitude of these outcomes even if we keep the same preference ordering. Holding prior beliefs and other payoffs constant, ruling against the State becomes a more attractive proposition if the IC accrues a payoff of 10 rather than 3 when the

[23]The two nodes are, to employ the terminology of game theory, part of the same information set.

[24]For the technically minded, the assumed solution concept here is known in game theory as 'Perfect Bayesian Equilibrium'. 'Perfect' stands for subgame perfection while 'Bayesian' indicates that players have incomplete information about the world (such as the other player's true type). Because choice made at a given node is assumed to reflect anticipated choices made at all subsequent nodes if these were reached (that is what subgame perfection is about), a complete statement of the equilibrium requires that we indicate not only what happens on the path of play (the predicted choices in the game tree) but also off-the-path of play (the paths not taken in the game tree). In this example it would be:

IC: choose ∼*breach*.

State: if type = *non-supportive* choose *defiance*; if type = *supportive* choose *comply*.

[25]In that case, the expected payoff of *breach*, the riskier bet, is the same as the expected payoff of ∼*breach*. Note, though, that this presumes risk neutrality. Results differ when a different risk profile is assumed. If we assume that judges are risk averse, as human decision-makers in general tend to be, they will, in such a situation, prefer the sure thing, which is to defer to the State.

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State complies. In other words, when international judges regard a violation as particularly severe they will be more inclined to take risks.

Nevertheless, what I want to underline here is not the effect of varying the payoffs on the judges' conduct or the precise probability threshold at which deference becomes an equilibrium outcome. Rather, my point is about the importance of information along with the beliefs over state preferences based on this information. The belief that states are more likely to defy than to comply with an adverse ruling is arguably what differentiates passive international courts from their more activist counterparts. At one end of the activism–restraint spectrum lie the two self-confident European judicial bodies, the CJEU and ECtHR. At the other end are the courts – some of which modelled after the CJEU – in Africa and Latin America that, owing to low state commitment, have had a considerably smaller impact on domestic law and policy.[26] Then somewhere in between are the Inter-American Court of Human Rights (IACtHR) and the Appellate Body of the WTO – which have displayed a fair amount of activism, but are not quite as solidly established and powerful as the CJEU and the ECtHR.[27] Information on state preferences thus appears essential to the conduct of international judges.

More specifically though, the model helps us pinpoint the type of scenario that international adjudicators want (or should want) to avoid. Indeed, in our model, even when the IC is confident or is at least ready to take the gamble that the State is *supportive*, there is still a chance that the IC gets it wrong and that the State turns out in fact to be *non-supportive*. A prime example of judicial overconfidence[28] and of the high institutional price international adjudicators paid for it is the decision of the Tribunal of the Southern African Development Community (SADC) in *Mike Campbell (Pvt) Ltd* v. *Zimbabwe*.[29] The dispute related to the eviction and expropriation of white farmers by the Zimbabwean government. Evicted from his farm, Mike Campbell challenged various government actions, including the passage of a constitutional amendment transferring ownership of mostly white-owned land to the Zimbabwean state. Filed in October 2007, *Campbell* was the first case ever heard by the SADC Tribunal – the institution had officially been inaugurated in 2005. The judges of the Namibia-based Tribunal announced their final ruling on 28 November 2008. They held that the actions of the Zimbabwean government amounted to *de facto* racial discrimination against white landowners.[30] Zimbabwe's government and judges, however, refused to obey the judgment. Zimbabwe's justice minister informed the Tribunal of his country's intent to withdraw from its jurisdiction, while the High Court of Zimbabwe rejected the petition to execute the SADC judgment on the ground that it was contrary to the Constitution as newly amended.[31] Worse still, at a SADC summit, heads of state and government announced a review of the 'role and functions' of the SADC Tribunal. Consequently, member states stopped filling vacancies on the Tribunal and it soon stopped accepting cases. Finally, after another SADC summit pledged to restrict the Tribunal's jurisdiction to disputes between member states, the SADC was ultimately disbanded in late 2012.[32]

The manner in which participating states reacted to the SADC Tribunal's ruling seems extreme. But even in more established legal regimes, bad 'surprises' of this kind – where states do not respond in the way judges hoped – can damage the authority of international adjudicators.

[26]See Alter and Helfer, *supra* note 7; Alter, *supra* note 1.

[27]See G.L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', (2008) 19 *European Journal of International Law* 101–23; A.S. Sweet and T.L. Brunell, 'Trustee Courts and the Judicialization of International Regimes', (2013) 1 *Journal of Law and Courts* 61–88.

[28]It bears underscoring that overconfidence here is overconfidence with *hindsight*. Based on the judges' subjective prior beliefs, their choice is still a rational one, even if it fails to produce the expected result.

[29]*Campbell v. Zimbabwe*, Judgment, Case No. SADCT: 2/07 (SADC, 28 November 2008). Text of the judgment available at www.worldcourts.com/sadct/eng/decisions/2007.11.28_Campbell_v_Zimbabwe.htm.

[30]Ibid.

[31]Ibid. See D. Hemel and A. Schalkwyk, 'Tyranny on Trial: Regional Courts Crack down on Mugabe's "Land Reform"', (2010) 35 *Yale Journal of International Law* 517–23, at 520.

[32]L. Nathan, 'The Disbanding of the SADC Tribunal: A Cautionary Tale', (2013) 35 *Human Rights Quarterly* 870–92.

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This is especially likely when the defiant state has an otherwise strong compliance record[33] and is seen as crucial to the international regime's support community.[34]

What can international adjudicators do to minimize such a risk without, at the same time, being forced into permanent judicial restraint? The next two sections consider some of the tools and practices international courts may deploy to address this problem and limit the institutional damage potentially caused by unexpected defiance.

3. Prior beliefs and information collection

The first and most obvious manner to mitigate uncertainty is for international adjudicators to get their prior beliefs, p and $1 - p$, as accurate as possible in the first place. One way to do this is to look at the state's compliance record. Does the state have a history of defiance or is it a scrupulous rule stickler? The state's compliance record is certainly not a perfect measure of commitment, but it may nonetheless give some indication of the state's likelihood to defy. This applies, of course, only as long as such a record exists. An important feature of the case that led to the collapse of the SADC Tribunal is that its judges could not rely on any history of interactions with Zimbabwe – or other member states for that matter – to assess the threat of defiance. In that respect, older international courts may have an advantage over younger ones. Even when it exists, though, history may on occasion be misleading. Not only because state preferences may change over time but because it may not say much about state preferences over the particular policy question before the international court. A state may be impeccably compliant until the point where international judges start crossing what it regards as its red lines. In such circumstances, history will offer little guidance as to the state's likely behaviour.

Where else to look for information? One can look at party and amicus curiae briefs. While party briefs are by their very nature biased statements designed to persuade judges to rule in favour of the corresponding party's interests, they can nonetheless contain useful information on state preferences.[35] Party briefs are seen as one of the sources used by the WTO Appellate Body to gather information on state preferences.[36] Likewise, in the EU context, member state governments – whether or not they are parties to the case brought before the CJEU – commonly present 'observations' stating the government's stance on the legal question at issue. A string of empirical studies has documented this practice and attempted to relate it to the outcome of the adjudication process.[37] Scholars have found some evidence that the European Court does take into account the information set forth in these documents.[38] Declarations and credible threats of defiance by government leaders and, in some instances, top court judges may also provide information cues to guesstimate state preferences.[39]

[33]As we shall see below, a strong record of compliance is often likely to be the principal reason judges underestimate p in the first place.

[34]F. de Londras and K. Dzehtsiarou, 'Managing Judicial Innovation in the European Court of Human Rights', (2015) 15 *Human Rights Law Review* 523–47, at 541 (contrasting the widely differing weight of the UK and Macedonia in shoring up the authority of the ECtHR); see also S. Dothan, *supra* note 10 (distinguishing costlier noncompliance by 'high-reputation' states and less costly noncompliance by 'low-reputation' states).

[35]Economists have conceptualized the role of legal counsels in court proceedings as that of an 'enfranchised lobby' providing judicial policy-makers with decision-relevant information, see M. Dewatripont and J. Tirole, 'Advocates', (1999) 107 *Journal of Political Economy* 1–39.

[36]See R.H. Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints', (2004) 98 *The American Journal of International Law* 247–75, at 273 (highlighting in the WTO context rules and practices that assist the Appellate Body in generating information on state preferences).

[37]O. Larsson and D. Naurin, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU', (2016) 70 *International Organization* 377–408; see Carrubba, Gabel and Hankla, *supra* note 6; M-P.F. Granger, 'When Governments Go to Luxembourg ... : The Influence of Governments on the Court of Justice', (2004) 29 *European Law Review* 1–31.

[38]See Larsson and Naurin, ibid.

[39]See the analysis with respect to domestic courts in A. Dyevre, 'Domestic Judicial Defiance and the Authority of International Legal Regimes', (2017) 44 *European Journal of Law and Economics* 453–81.

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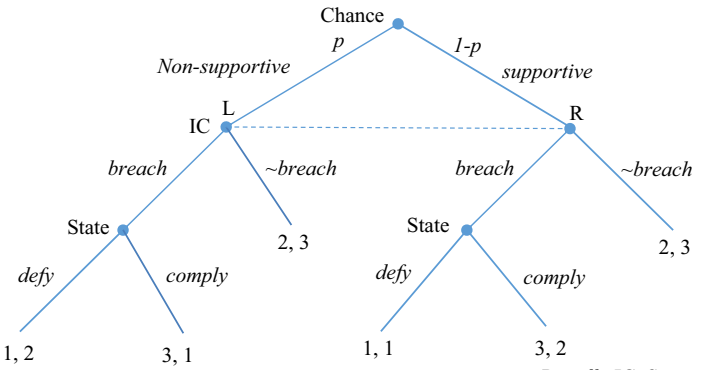


Figure 3. International Court and Compliance Dilemma.

Careful analysis of these sources may give adjudicators some confidence that the state will not defy an adverse ruling. Yet they may still guess wrong and discover that the state, in reality, prefers defiance over compliance. Is it too late then to avert an authority crisis? Not necessarily. As the next Section will demonstrate, international courts can create informational feedback loops and put mechanisms in place that permit them to reassess their position in light of the state's reaction to their initial ruling.

4. Informational feedback loops and belief revision: Institutional and doctrinal mechanisms

In this Section, I dwell on two mechanisms that allow international judges to gather new information on state preferences and to reassess their decision-making strategy in light of the new information: 1) review of contentious judgments by a special panel or grand chamber within the international court, and 2) test-the-water *dicta*.[40] I illustrate their use by, respectively, the ECtHR and the CJEU. Picture these mechanisms as adding two additional steps to the game tree in Figure 3 after the IC has chosen *breach*. The State observes the adverse ruling and then decides to issue a threat to defy or not. Based on the State's signal, the IC updates its beliefs about the State's true preferences and decides whether to overrule or to confirm its initial ruling. Finally, if the IC confirms its initial ruling, the State chooses *defy* or *comply*.

4.1 ECtHR: Referral to the Grand Chamber

Suits filed with the ECtHR and declared admissible are normally reviewed by chambers of seven judges formed from the ECtHR's several 'Sections'. Chamber judgments are final three months after they have been issued unless a party to the dispute requests that the decision be referred to the Grand Chamber. The Grand Chamber is the Court's largest and most solemn formation. It comprises 17 judges, including the Court's president, vice-president and the five chamber presidents. Referral to the Grand Chamber, however, is not available as a matter of right. Instead, the decision to refer the case to the Grand Chamber is left to a panel of five senior judges.[41]

[40]It bears observing that my argument here is that these mechanisms *can* be used to address uncertainty, not that states intentionally designed them for that purpose when they created or reformed the judicial bodies under consideration.

[41]Art. 43 ECHR:

> Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
>
> A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
>
> If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

For a discussion of the procedure, see de Londras and Dzehtsiarou, *supra* note 34, at, 533.

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This mechanism effectively allows the Grand Chamber to overrule a Chamber after observing the state's reaction to its ruling. Using the terminology of our formal model, the Court can update its prior belief p that the state is non-supportive and decide, on that basis, whether to reconsider the Chamber judgment against the state.

One case illustrating this use of the Grand Chamber is *Lautsi* v. *Italy*. Though Italy regularly ends on the losing side of ECtHR rulings – mostly for excessive length of proceedings[42] – it is habitually committed to the Convention and to the judgments of its Court. In regard to Italy, compliance has more to do with inefficient public management and less with defiance or sovereignist impulses. Hence, despite the country's high degree of administrative and judicial inefficiency, the expectation is, and most probably was on the eve of the first *Lautsi* ruling, that Italy does not normally seek to defy adverse ECtHR judgments.[43] History, in other words, suggested that p was low.

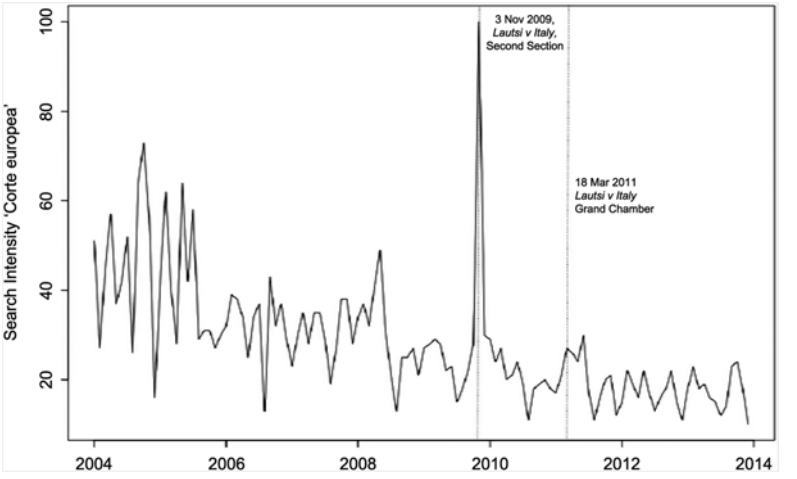
The *Lautsi* case involved the display of crucifixes in state-run schools. Mrs. Soile Lautsi claimed that the presence of the religious symbol violated her negative freedom of religion under Article 9 of the Convention. On 3 November 2009, the chamber of the Court's Second Section unanimously declared that the practice violated the Convention.[44] Yet the decision sparked an unprecedented uproar.[45] It drew sharp criticism from parties in the governing coalitions as well as from those in the opposition.[46] Defying the authority of the Court, the government of Silvio Berlusconi pledged that the 'crucifixes would stay in the classrooms'.[47] In January 2010, the Italian

[42]Of the 1,791 judgments pronounced against Italy between 1959 and 2016, 1,190 involved a violation of the right to a speedy trial. See ECHR Overview 1959–2016, available at www.echr.coe.int/Documents/Overview_19592016_ENG.pdf.

[43]Italy's paradoxical situation of high political commitment to the ECHR and dismal record of violations mirrors its status as founding EU member state but most frequent EU law infringer. See T.A. Börzel, T. Hofmann, D. Panke and C. Sprungk, 'Obstinate and Inefficient: Why Member States Do Not Comply with European Law', (2010) 43 *Comparative Political Studies* 1363–90.

[44]*Lautsi v. Italy*, Judgment of 3 November 2009, ECHR, Application no. 30814/06.

[45]The unmatched intensity of the public backlash against the decision is reflected in Google searches for the term '*Corte europea*' on the Italian web. From the plot below, we can see that the day the chamber ruling was announced (3 November 2009) coincided with a sharp and unprecedented surge in internet searches for the term, indicating that the ECtHR was receiving an unusually high level of attention in the Italian peninsula:



Google Searches for 'Corte Europea', Monthly Intensity, 2004–2013
(Data source: Google Trends).

[46]'"Via il crocifisso dalle scuole" Vaticano: "Sentenza miope"', *Corriere della Sera*, 3 November 2009, available at www.corriere.it/cronache/09_novembre_03/crocifisso-aule-scolastiche-sentenza-corte-europea-diritti-uomo_e42aa63a-c862-11de-b35b-00144f02aabc.shtml.

[47]'Il crocifisso resterà nelle aule', *Corriere della Sera*, 6 November 2009, available at www.corriere.it/politica/09_novembre_06/berlusocni_crocifisso_9674b4aa-cacc-11de-89f9-00144f02aabc.shtml.

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government requested that the decision of the Second Section be referred to the Grand Chamber. Twenty-one governments expressed support for the Italian position, either via *amicus curia* briefs[48] or through public statements.[49] These reactions suggested that the prospect for compliance was poor, while the damage to the Court's institutional standing was potentially large.

Italy's request for referral was held admissible and, on 18 March 2011, the Grand Chamber announced the Court's final decision. By 15 votes to 2, the Grand Chamber overturned the Chamber decision, holding that the display of crucifixes in Italian schools did not constitute a violation of Article 9.[50] As can be seen from Figure 4, the judgment of the Grand Chamber came nowhere near to generating the same level of attention as the ruling of the Second Section. Some academics rebuked the Grand Chamber for its failure to articulate a convincing legal rationale for the decision.[51] Yet, while the position of the Second Section may have been more coherent from a juristic standpoint, the Grand Chamber may well have spared the ECtHR a painful loss of authority.

Another illustration of the Grand Chamber's strategic use of overruling in cases where it faced defiance is provided by *Al-Khawaja and Tahery* v. *United Kingdom*. The case pertained to the compatibility of UK hearsay evidence law with the right to a fair trial under Article 6 of the Convention. At issue was the question whether criminal conviction can be based solely or decisively on evidence from a witness who does not appear in court. The first appellant had been convicted on the basis of a statement by a woman who had subsequently committed suicide. The second, meanwhile, had been found guilty of assault on the basis of a statement made by the victim, who, however, refused to testify in court. On 20 January 2009, by a Chamber judgment of the Fourth Section the practice was unanimously found to violate Article 6.[52] In April 2009, the UK government requested that the decision be referred to the Grand Chamber: A request that the Court did not grant until March 2010. In the meantime, however, the UK Supreme Court had rendered its judgment in *R.* v. *Horncastle*.[53] As with the two applicants in the case before the ECtHR, the defendants had been convicted on the basis of statements by absent witnesses. In express (albeit polite) language, the UK Supreme Court rejected the argument of the Fourth Section. Writing for the majority, Lord Philipps underlined that the UK Supreme Court would normally apply 'principles that are clearly established by the Strasbourg Court', except in the 'rare occasions' where it 'has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of [the] domestic process'.[54] After critiquing the ECtHR for its failure to appreciate the specificities of the common law tradition,[55] the UK Supreme Court went on to affirm the convictions of all four defendants in the case.

Consequently, by March 2010, when the ECtHR announced that the Grand Chamber would review the decision of the Fourth Section, it was clear that the UK would not budge on hearsay evidence. The wording of Article 6 of the Convention was not easy to reconcile with UK evidence law. Indeed, Article 6(3)(d) states that everyone charged with an offence has the minimum right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'.[56] From a strategic point

[48]Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Monaco, Romania, Russian Federation, and San Marino.

[49]These included Albania, Austria, Croatia, Hungary, Macedonia (FYRM), Moldavia, Norway, Poland, Serbia, Slovakia, and Ukraine. See G. Puppinck, 'The Case of Lautsi v. Italy: A Synthesis', 2012 *Brigham Young University Law Review* 873–930, at 873.

[50]*Lautsi v. Italy*, Grand Chamber, Judgment of 18 March 2011, ECHR, Application no.30814/06.

[51]See L. Zucca, 'Lautsi: A Commentary on a Decision by the ECtHR Grand Chamber', (2013) 11 *International Journal of Constitutional Law* 218–29.

[52]*Al-Khawaja and Tahery v. United Kingdom*, Judgment of 20 January 2009, ECHR, Applications nos. 26766/05, 22228/06.

[53]*R. v. Horncastle*, [2009] UKSC 14.

[54]Ibid., at 4.

[55]Ibid., at 14.

[56]The European Convention on Human Rights, 1953 (1950). On the interpretation of this provision see W.E. O'Brian, 'Confrontation: The Defiance of the English Courts', (2011) 15 *The International Journal of Evidence & Proof* 93–116.

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of view, the choice the Grand Chamber was presented with was straightforward. It was a clear choice between retreat and a now very probable loss of authority. Not unreasonably, the judges of the Grand Chamber chose the first option. On 15 December 2011, they ruled that securing criminal conviction solely or decisively on the basis of statements by absent witnesses was not automatically incompatible with ECHR law.[57] Playing down textualist arguments, the Court cited previous rulings on witness evidence and emphasized the need to balance the competing interests of defendants, victims and witnesses in an overall evaluation of the fairness of trial proceedings.[58]

Though lawyers and judges may prefer to speak of successful 'judicial dialogue',[59] both *Lautsi* and *Al-Khawaja* suggest that the Grand Chamber can serve as a defiance avoidance mechanism. When a chamber ruling is met with overt pledges of defiance by heads of government or supreme court judges, the Grand Chamber can avert a damaging loss of institutional standing by revising the position of the Court.[60] On the other hand, if reactions to the chamber reveals no new information about state preferences, the Court may let the chamber ruling stand by dismissing the referral. In sum, the subsidiary role of the Grand Chamber creates an informational feedback loop. Chambers decide in light of their prior belief $1 - p$ that the state will be supportive. Then if reactions to a chamber ruling indicates that this prior belief was too optimistic, the Grand Chamber can step in to defuse a looming authority crisis.

4.2 CJEU: Test-the-water dicta

The CJEU does have a grand chamber, too. But, unlike the Grand Chamber of the ECtHR, it does not have the power to overturn chamber decisions.[61] Yet a grand chamber review is not the only way international adjudicators can address the uncertainty characteristic of the compliance dilemma. An alternative tactic used by the Luxembourg Court is the test-the-water *dicta*. The test-the-water *dicta* are not merely about strategic judging à la *Marbury* v. *Madison* and *Costa* v. *ENEL* – cases in which respectively the US Supreme Court and the CJEU had good reasons to be confident that an adverse ruling would be met with defiance. Rather, they are about eliciting strategic information in the absence of certainty. The idea is nicely summarized by Trevor Hartley in his discussion of the manner in which the CJEU conducts policy-making:

[57] *Al-Khawaja and Tahery v. United Kingdom*, Grand Chamber, Judgment of 15 December 2011, Application nos. 26766/05, 2228/06.

[58] Ibid., at 126–65.

[59] See M. Redmayne, 'Hearsay and Human Rights: *Al-Khawaja* in the Grand Chamber', (2012) 75 *The Modern Law Review* 865–78.

[60] One question raised by the analysis of defiance avoidance mechanism relates to the credibility of the state's signal. Obviously, the resolve to defy the pronouncements of an international tribunal is credible enough when it is expressed through the final decision of a court of last resort – as with *Al-Khawaja*. But the answer may seem less evident when it comes to the declaration of politicians which, as such, are not legally binding. Inasmuch as supportive states too would prefer international judges to exert restraint rather than produce an adverse judgment, all states would seem to have an incentive to bluff and feign defiance in an attempt to deter judicial activism. International adjudicators may treat such a signal as inconsequential cheap talk. On the other hand, the failure to follow through on a defiance threat can entail significant reputational costs. First, a state regularly vowing to defy the rules of an international legal regime would no longer enjoy the benefits associated with a reputation for multilateralism. Second, being caught bluffing by international judges, after complying with a judgment that it had initially pledged to defy, would earn the state a reputation for bluff, which in turn would damage its soft power and diplomatic influence. See A.E. Sartori, 'The Might of the Pen: A Reputational Theory of Communication in International Disputes', (2002) 56 *International Organization* 121–49. In democratic regimes, reneging on a public promise to defy the decision of an international judicial body may also entail electoral costs. The difficulty of evading these costs, by turning the promise into an effective pre-commitment, confers greater credibility on the signal; see R.D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', (1988) 42 *International organization* 427–60. A related question is whether reputation is an attribute of the state or an attribute of its leaders; see R. Brewster, 'Unpacking the State's Reputation', (2009) 50 *Harvard International Law Journal* 231–70.

[61] Of course, rulings of the General Court can be appealed to the Court of Justice under Art. 256 TFEU. However, not only does the Court of Justice have little discretion over case selection but cases exclusively pertain to EU regulatory measures (such as Commission decisions over cartels and mergers) which do not directly raise compliance issues.

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> A common tactic is to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle, but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the facts of the case before it. The principle, however, is now established. If there are not too many protests, it will be reaffirmed in later cases; the qualifications can then be whittled away and the full extent of the doctrine revealed.[62]

Hartley points to the lines of cases concerning the treaty-making power of the European Union[63] and the direct effect of directives[64] as instances where this tactic was put to use. A similar argument has been made with regard to the Court's case law on patient mobility.[65] Yet an even starker illustration is provided by the CJEU's citizenship jurisprudence.

Just as federal law in the United States only applies, in principle, to situations that presents an interstate dimension, the prevailing assumption was that rights deriving from EU law, such as residence and family reunification rights, can only be invoked when a member state national has crossed an EU internal border. Unless an EU internal border had been crossed, a member state national or, for that matter, her third-country relative could not invoke EU law.[66] Extending the reach of EU law to internal situations where neither the plaintiff nor her relatives had crossed an internal EU-border would have impinged on policy arrangements viewed as highly sensitive. Some authors and Advocate Generals did claim that the Maastricht Treaty by establishing a 'European Union citizenship'[67] had extended the benefits of these rights to all member state citizens, irrespective of their status as EU migrant worker.[68] But these arguments failed to gain traction.[69]

As a result, the principle that residence and family reunification rights deriving from EU law legislation did not apply to 'wholly internal' situations remained the status quo. This was the case, at least, until the CJEU's preliminary ruling in *Ruiz Zambrano* issued in March 2011. The facts of the case that gave rise to the preliminary reference involved two Colombian nationals facing a deportation order and their two Belgian children. As Belgian citizens, the children automatically enjoyed EU citizenship. Yet, because they had never left Belgium, their situation was, in principle, a purely internal one. This fact was thought to preclude their non-EU parents from challenging the deportation order as violating EU rights to family reunification. Eight member states (Belgium, Denmark, Germany, Ireland, Greece, the Netherlands, Austria and Poland) intervened in the proceedings to argue that the case had to be regarded as 'wholly internal', making EU law inapplicable. The CJEU, however, found that Article 20 of the Treaty on the Functioning of the European Union (TFEU):

> precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit

[62]T.C. Hartley, *The Foundations of European Union Law: An Introduction to the Constitutional and Administrative Law of the European Union* (2014), 75.

[63]Ibid., at 176–85.

[64]Ibid., at 218–39.

[65]A.J. Obermaier, 'The National Judiciary—Sword of European Court of Justice Rulings: The Example of the Kohll/Decker Jurisprudence', (2008) 14 *European Law Journal* 735–52, at 749 (arguing that the ECJ, by excluding some categories of patients from the scope of its patient mobility doctrines, significantly lowered compliance costs, thereby making defiance less likely).

[66]See for rights associated with free movement of workers provisions *R. v. Saunders* [1979] ECHR 1129; *Morson and Jhanjan v. Netherlands* [1982] ECHR 3723. See also P.P. Craig and G.D. Búrca, *EU Law: Text, Cases, and Materials* (2015), 762.

[67]See Arts. 20 and 21 TFEU.

[68]See Craig and Búrca, *supra* note 66, at 865; P.V. Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law', (2011) 38 *Legal Issues of Economic Integration* 263–76.

[69]See *Kremzov v. Austria*, [1997] ECHR-I 2629; *Uecker and Jacquet v. Land Nordrhein-Westfalen*, [1997] ECHR I-3171.

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> to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.[70]

Clearly, the ruling entailed that border-crossing was no longer a necessary prerequisite for the application of EU law family reunification rights. Yet the phraseology used by the Luxembourg Court, 'the substance of the rights attaching to the status of European Union citizen', was remarkable for its vagueness. This allowed both broad and restrictive interpretations.[71] A broad reading of the *dictum* cast the ruling as a truly constitutional moment. It meant EU law now governed deeply controversial questions of immigration and residence rights hitherto under domestic control. Yet a narrow reading of the *dictum* was also possible. The latter implied that Article 20 could only be appealed to in exceptional circumstances, when denying a residence or work to non-EU parents would have particularly egregious consequences for their EU children. That Advocate General Eleanor Sharpston had pleaded for the broad construction,[72] though, suggested that it was the position adopted by the Court.

The potential implications of a broad reading caused much dismay among member state governments.[73] To the extent that they implemented the ruling, most member states did so restrictively and narrowly.[74] Moreover, they kept insisting that EU law should not apply to 'wholly internal situations'; first in *McCarthy* –in which five member states intervened (Denmark, Estonia, Ireland, the Netherlands, and the UK) and then in *Dereci and others* – in which seven did so (Austria, Denmark, Germany, Ireland, Greece, the Netherlands, and Poland).[75] This led the Court of Justice to back away from the wider implications of the *Ruiz Zambrano dictum*. Less than two months after *Ruiz Zambrano*, the CJEU handed down its preliminary ruling in *McCarthy*.[76] The case concerned a woman with both British and Irish citizenship, but who had never left the UK. She claimed an EU right of residence so that her Jamaican husband could enjoy derived residence rights. The CJEU, however, rejected the claim on the grounds that Mrs McCarthy had never moved to another member state and that the application of UK law did not have the effect of obliging her to leave the territory of the EU. In December 2011 then, the Luxembourg Court rendered its preliminary ruling in *Dereci and others*.[77] Reiterating the reasoning set out in *McCarthy*, its opinion found that non-EU adult children or spouses of EU nationals could not rely on Article 20 TFEU unless domestic law left them with no choice but to leave the territory of the EU as a whole. The factual determination of whether this was true in the circumstances of the case was left to the Austrian court which had requested the preliminary ruling. In *Ymeraga*,[78] issued in December 2012, and *O, S and L*,[79] issued in May 2013, the Court of Justice confirmed that it was not pursuing the broad reading of the *Ruiz Zembrano dictum*. The Court made this point unequivocal by stating that the deprivation of the 'substance of rights' test outlined in *Ruiz Zambrano* would only be met 'exceptionally'.[80]

Academics have characterized the trajectory of the CJEUs citizenship case law as 'fine-tuning'[81] or 'experimental'[82] law-making, while members of the Court, eager to come to the defence of their

[70]Case C-34/09, *Ruiz Zambrano v. ONEM*, [2011] ECR I-1177.

[71]D. Kochenov, 'The Right to Have What Rights? EU Citizenship in Need of Clarification', (2013) 19 *European Law Journal* 502–16; S.K. Schmidt, 'Judicial Europeanisation: The Case of *Zambrano* in Ireland', (2014) 37 *West European Politics* 769, at 774.

[72]*Supra* note 70 (Opinion of Advocate General Sharpston, 30 September 2010).

[73]See Craig and Búrca, *supra* note 66, at 868.

[74]See Schmidt, *supra* note 71.

[75]Ibid., at 774–75.

[76]Case C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department* [2011] ECR I-3375.

[77]Case C-256/11, *Murat Dereci and others v. Bundesministerium für Inneres* [2011] ECR I-11315.

[78]Case C-87/12, *Kreshnik Ymeraga and others v. Ministre du Travail, de L'emploi et de L'immigration* EU:C:2013:291.

[79]Joined Cases C-356 and 357/11, *O and S v. Maahanmuuttovirasto* (C-356/11) and *Maahanmuuttovirasto v. L* (C-357/11) EU:C:2012:136.

[80]Ibid., at 56.

[81]See Schmidt, *supra* note 71, at 775.

[82]M. Dawson, 'How Does the European Court of Justice Reason? A Review Essay on the Legal Reasoning of the European Court of Justice', (2014) 20 *European Law Journal* 423–35, at 428.

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institution, have described it as a 'stone-by-stone' approach.[83] At any rate, it is not implausible to see the initial *Zambrano dictum* as a tactic to test the political mood – the judicial equivalent of a test balloon. Had the reaction to *Ruiz Zambrano* been more favourable, the Court would probably have chosen the broad construction. The continued opposition of member state governments amid mounting public pressures to curb immigration and 'benefit tourism', however, revealed that the risk of defiance was real. The CJEU responded by severely restricting the scope of its new doctrine. Legal scholars have lambasted the *Ruiz Zambrano* reasoning for its vagueness.[84] But this very vagueness is analyzed here, instead, as calculated ambiguity designed to assess the potential for doctrinal innovation. Analogous to the Chamber-Grand Chamber arrangement at the ECtHR, the ambiguity of the initial *dictum* creates an informational feedback loop, enabling the judges to update their prior estimate of the odds of defiance.

5. Limitations and replicability of defiance-avoidance mechanisms

Inasmuch as all international courts are faced with the compliance dilemma at some point in their existence, we may wonder the extent to which the tactics and practices described in the previous Section are, or can be, emulated by international adjudicators beyond the two European examples.

5.1 Two-tier review system

Most conspicuous are the institutional obstacles to the implementation of a Chamber-Grand Chamber setup. The majority of international judicial bodies do not have a two-tier review system comparable to the ECtHR. The principle is that a decision on the merits is final – no matter the size of the judicial panel that issued it.

An exception is the WTO. There, trade disputes are adjudicated by panels but panel reports can be appealed to the Appellate Body (AB). In theory, it is possible for the AB to rely on state reactions to panel reports to assess the odds of compliance. A possibly not insignificant difference with the ECtHR is that appeal to the AB is a matter of right for the parties rather than left to judicial discretion. In practice, more than two-thirds of all panel reports are appealed.[85] Because panels' decisions are not viewed as final, this could mean that states' reactions are harder to interpret or simply less informative about state preferences. On the other hand, the win rate for appeals is sufficiently low that the appellant state should normally expect to lose.[86] So it cannot be ruled out that the AB does indeed use reactions to panel reports as a barometer of sovereignist feelings.

The IACtHR does not have a grand chamber but parties can file a request for an 'interpretive decision' within 90 days of the announcement of a ruling.[87] Requests for interpretation are adjudicated by the same judges that sat on the original decision. Whether or not the Court can really use this procedure as a defiance avoidance mechanism is unclear.[88] Can the Court, under the guise of interpretation, significantly alter the original ruling to avert looming defiance? Alternatively, the Court could rely on the Inter-American Commission of Human Rights, which acts both as gatekeeper to the Court and as investigatory body. The Commission reviews claims of human

[83]K. Lenaerts, 'EU Citizenship and the European Court of Justice's "Stone-by-Stone" Approach', (2015) 1 *International Comparative Jurisprudence* 1–10.

[84]See U. Sadl, 'Case-Case-Law-Law: *Ruiz Zambrano* as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments', (2013) 9 *European Constitutional Law Review* 205–29; Kochenov, *supra* note 71.

[85]See WTO statistics, available at www.wto.org/english/tratop_e/dispu_e/stats_e.htm.

[86]For statistics on win rates for complainants and respondents see J. Maton and C. Maton, 'Independence Under Fire: Extra-Legal Pressures and Coalition Building in WTO Dispute Settlement', (2007) 10 *Journal of International Economic Law* 317–34, at 328.

[87]See Art. 67, IACHR.

[88]Art. 68(4) of the Court's Rules of Procedure stipulates that a request for interpretation does not suspend the effect of the judgment. See www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf.

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violations and issues recommendations to member state governments. Conceivably, the states' responses to the statements of the Commission could serve as bellwether for state opposition to supranational interference.[89] Yet there is little indication that the IACtHR has considered making use of these mechanisms to adjust its determinations to the set of outcomes member states can realistically be expected to accept.[90] The Court has experienced several widely publicized episodes of overt defiance from Venezuela and the Dominican Republic. Some member states have withdrawn from the Convention or threatened to do so following adverse IACtHR rulings. So far, the Court, headquartered in San Jose, may have elected to act as if state support did not matter.[91] Still, in the long run, concern for the Court's effectiveness, if not survival, may compel its judges to take state preferences more seriously and to use existing institutional mechanisms to create the sort of informational feedback necessary for that purpose.

5.2 Test-the-water dicta

The test-the-water *dicta* provide a more flexible and easily replicable defiance avoidance technique. Many international adjudicators probably employ the method in one form or another already. In their study of the Tribunal of the Andean Community, Karen Alter and Laurence Helfer highlight the Tribunal's frequent reliance on abstract reasoning and reluctance to press on with more specific doctrinal pronouncements when encountering domestic resistance.[92] The Tribunal, for example, had to consider whether Colombia's alcohol monopoly was compatible with Community law. The Community's Junta – the equivalent of the European Commission in the Andean system – had issued a binding resolution requiring Colombia to put an end to local practices that discriminated against alcohol products imported from other member states. However, after the Colombian Constitutional Court declined to enforce the resolution, the Tribunal, sitting over a preliminary reference [93] from another Colombian court – the *Consejo de Estado* – refrained from giving specific instructions to the Colombian judges as to what they should do to bring national law in conformity with Andean law.[94] This particular ruling, Alter and Helfer observe, 'is difficult to divorce from the very real concern that national judges might find they lack the legal authority or political will to heed the [Tribunal]'s request'.[95]

The example of both the Andean Tribunal and the CJEU suggest that preliminary ruling systems may be well suited for the deployment of test-the-water tactics. This is, in part, because the decision on the merits of the municipal dispute is formally left to domestic judges. This permits international adjudicators to leave the determination of the more controversial aspects of their *dicta* in the dispute at hand to the appreciation of domestic judicial actors. Domestic judges, who are ordinarily better informed than their international counterparts about the national context, can then decide whether there is scope for the implementation of the international court's doctrines. Yet the use of test-the-water *dicta* probably extends to many other settings.

[89]See Neuman, *supra* note 27, at 108

[90]Ibid., (arguing that the IACtHR has not paid sufficient attention to regional consent, thereby threatening the acceptance and effectiveness of the inter-American human rights system).

[91]Ibid. The fact that the IACtHR does not consistently behave in a compliance-maximizing manner may reflect the perception that the defiant states are low-reputation states lacking the power to inflict substantive institutional damage on the Court. See *supra* note 10. This state of affairs can also be characterized as 'contentious equilibrium', see Dyevre, *supra* note 39 (characterizing situations where domestic and international judges ignore each others' ruling as 'contentious equlibrium').

[92]Alter and Helfer, *supra* note 7, at 572–3.

[93]Similar to the European Court of Justice, the Tribunal of the Andean Community can hear preliminary references from national courts, see Alter and Helfer, ibid., at 568.

[94]ATJ Preliminary Ruling 29-IP-98.

[95]Alter and Helfer, *supra* note 7, at 577.

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6. Conclusion: Knowledge is (judicial) power

The aim of the present article was to sharpen our understanding of how international adjudicators might deal with uncertainty over state preferences. To that end, I applied a very simple formal model of court–state interactions to analyze the informational dimension of the compliance dilemma. As with every formal model, this framework is, of course, a simplification and approximation of reality. Even so, I believe I have shown that it captures an important characteristic of the decision environment of international judges. In a world of complete and perfect information, international courts would often be more activist, though also occasionally less so.[96] International adjudicators would enact their preferred legal outcome whenever states are supportive but they would make sure to defer to the states whenever the latter are not as supportive. In such a world, instances of outright institutional collapse like the SADC Tribunal or cases of defiance by high-reputation states would never actually be observed. In the world that international adjudicators inhabit, however, information is neither complete nor perfect. International judicial decision-makers must operate in a context that is, by its very nature, uncertain. Yet they also have a strong incentive to develop tactics apt to reduce this uncertainty. In that regard, the adage that knowledge is power appears to hold for international judicial power as well. A better-informed international court is a stronger court. I discussed some methods apt to reduce uncertainty and illustrated their deployment in the context of various international legal regimes. I also underlined the limitations of these methods while pointing to potential institutional obstacles to their transferability.

Obviously, the reflections presented in this article leave plenty of room for future research – as it should be. The cases used to illustrate my argument constitute only anecdotal evidence and say little about the overall prevalence of these strategies in the corresponding international regimes. Nor are the two highlighted mechanisms necessarily exhaustive of the information-eliciting techniques deployed by international adjudicators. Future research may unearth other information-gathering mechanisms or imagine new ones. Likewise, we should hope that some ambitious scholars will, one day, take up the task of systematically mapping the frequency with which these mechanisms are used across international legal regimes.

Nonetheless, as scholars begin to ponder the implications of the growing wave of criticism confronting international courts,[97] I hope that the reflections and framework presented in this article will help guide future research on international adjudication. Whether fuelled by populist sentiment or by other causes, growing hostility towards international adjudicators is likely to make the compliance dilemma more acute. Judges should have even more reasons to take information seriously. But so too should students of international law and courts.

[96]The conjecture that activism would, overall, be more frequent derives from the assumption that international adjudicators tend to be risk averse. Judges who do not like gambling with compliance will prefer to defer to state preferences when the risk of defiance is nontrivial. In a world of complete and perfect information, by contrast, there is no need for gambling.

[97]*Supra* note 2.

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