Three Models of Judicial Institutions in International Organizations: The European Union, the United Nations, and the World Trade Organization

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THREE MODELS OF JUDICIAL INSTITUTIONS IN INTERNATIONAL ORGANIZATIONS: THE EUROPEAN UNION, THE UNITED NATIONS, AND THE WORLD TRADE ORGANIZATION

Jeffrey Michael Smith†

Many opponents of the World Trade Organization (WTO) argue that America's sovereignty is threatened by the WTO's judicial structure, which allows international tribunals to rule on claims that laws or regulations of the United States (or of state or local governments) violate international agreements. Perhaps the most hyperbolic critic of the WTO is perennial presidential candidate Patrick J. Buchanan, a former aid to Presidents Nixon and Reagan and one-time media pundit, who writes: "As Christianity dies in the west, the foundation and first floor of a new world government are already in place. The U.N. is to be its parliament . . . and the WTO would be its judicial branch . . . ."¹ Mr. Buchanan bases this apocalyptic assertion, in part, on his observation that the European Union (EU) has eroded the sovereignty of its member governments.²

Indeed, the EU's Commission and European Court of Justice have effectively influenced and enforced the law of the EU at the price of significant erosion of the sovereignty of the EU's constituent nations. While the shift of some amount of sovereignty from European national governments to the EU appears to have significant support within Europe, this type of international judicial authority clearly would not be acceptable to most Americans.

At the other extreme, the United Nations' International Court of Justice (I.C.J.) has not eroded the sovereignty of national governments,

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2. See id.
but generally has been ineffective at enforcing international law in cases concerning important policy issues. The I.C.J. lacks the power to enforce its decisions.

The imperfectness of the EU and the I.C.J. notwithstanding, a closer look at the dispute resolution mechanism of the WTO shows that it differs in important ways from the dispute resolution systems of the EU and United Nations (U.N.). The WTO dispute resolution process has the potential to be effective in enforcing international treaty obligations, while at the same time respecting the sovereignty of its member nations. The WTO is not, as Mr. Buchanan fears, a threat to the sovereignty of the United States (or, for that matter, part of an unholy replacement for Christianity).

Part I of this Article looks at the EU and the ways in which its judicial institutions, particularly the European Court of Justice, have eroded the sovereignty of national governments. Part II examines the United Nations and the ineffectiveness of its International Court of Justice in enforcing its rulings. Finally, Part III examines the World Trade Organization and its dispute resolution process, and shows why this process can be effective without eroding national sovereignty.

I. THE EUROPEAN UNION

The principal institutions of the EU include: the European Parliament, the Council of the EU (often known as the Council of Ministers), the European Commission, the European Court of Justice, the European Court of First Instance, and the European Court of Auditors.

3. The term “European Union” has applied since the Treaty of Maastricht came into force on November 1, 1993. See Treaty on European Union, Feb. 7, 1992, O.J. (C 191) 1 (1992). From 1967 until 1993, the institution was known as the “European Communities.” See The EU’s Constitutional Convention: The Founding Fathers, Maybe, Economist, Feb. 23, 2002, at 53. The European Communities was formed in 1967 by the unification of the European Economic Communities and Euratom (both formed in 1958) with the European Coal and Steel Community (formed in 1952). See id. For simplicity, this Article uses the terms “European Union” and “EU” to apply to the European Union, the European Communities, and the European Economic Community.

4. The “Council” is actually two bodies. Meetings of the heads of state or government (generally, twice a year) constitute the “European Council.” Meetings of lower level ministers constitute the “Council of the European Union.” See Klaus-Dieter Borchardt, The ABC of Community Law 31 (5th ed. 1999).

5. The other EU institutions are the European Central Bank, which, similar to the Federal Reserve Board in the United States, regulates the Union’s currency, the Euro; the European Investment Bank, which administers loans and guarantees to promote development; and two consultative bodies, the Economic and Social Committee of the European Communities and the Committee of the Regions of the EU. See id. at 53-56.
A cursory review of the EU might suggest that the Parliament and Council are its legislative bodies, the Commission is its executive branch, and the courts are its judicial component. Closer study shows, however, that the EU does not neatly divide the legislative, executive, and judicial powers. In fact, the Council, by far the Union's most powerful institution despite being hampered by unanimity requirements on many matters, exercises both executive and legislative powers. The European Commission acts within the legislative, executive, and judicial spheres. The European Parliament, although primarily a legislative body, exercises an executive role. And, while the Courts of Justice and First Instance are judicial organs, the Court of Auditors is actually another executive institution.

The EU aims to establish "a common market and an economic and monetary union" and to "implement ... common policies." The rules and constitution of the EU are set forth in a series of treaties. The most important of these is the Treaty Establishing the European Community, formerly known as the Treaty of Rome. This Treaty went into force between six nations on January 1, 1958, and has been amended by numerous subsequent treaties, now binding fifteen nations. The most recent EU treaty to be signed is the Treaty of Nice.

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7. On February 28, 2002, the EU opened a constitutional convention with the goal of producing a single written constitution for the EU. See T.R. Reid, Europeans Open Talks on Drafting Constitution, Wash. Post, Mar. 1, 2002, at A15. The road to such a constitution will likely be a long one with a large amount of debate: "The Germans will push for a European federation, with nation-states becoming more like the 16 German [states] and the institutions in Brussels more like a real European government. The British, meanwhile, will stick to their old aim of keeping the nation-state supreme and the EU's institutions restricted to tightly-defined common tasks. France sounds ambiguous, reflecting old tensions between its desire to build a united Europe and a Gaullist belief in the nation-state." Europe's Big Three: An Anglo-German Liaison, Economist, Mar. 2, 2002, at 48.

8. The original members of what is now called the EU were Belgium, Germany, France, Italy, Luxembourg, and the Netherlands. See Treaty Establishing the European Economic Community [Treaty of Rome], Mar. 25, 1957, 298 U.N.T.S. 11.

9. The Union now includes the United Kingdom, Ireland, and Denmark (admitted in 1973); Greece (admitted in 1981); Spain and Portugal (admitted in 1986); and Austria, Sweden, and Finland (admitted in 1995). See Borchardt, supra note 4, at 7.

A. The EU Institutions

1. The European Council

The EC Treaty, as amended, defines the principal institutions of the EU. The most powerful institution in the EU is the Council of Ministers. The Council of Ministers consists of one high-level representative from each member state's government. The Council Presidency rotates among the members every six months. The Council is vested with, among other enumerated powers, the extremely broad "power to take decisions." When the Council meets as heads of state or government, its function is to "establish policy guidelines" for the EU; when it meets as junior ministers, its "main task is to lay down and implement legislation."

The Council makes decisions and issues Directives in a myriad of ways, depending on the subject matter at issue. Many matters must be agreed upon unanimously. Other decisions are taken by majority vote. Many other decisions are taken by a "qualified majority," under which the members have weighted votes. The votes are assigned to members based somewhat on population. However, smaller countries are heavily over represented, while larger countries (particularly Germany) are underrepresented. When the Council is acting on a proposal from the European Commission, an affirmative vote requires sixty-two of the eighty-seven votes (which will go to 169 of 227 pursuant to the Treaty of Nice). When not acting on a Commission proposal, an affirmative vote still requires sixty-two of the eighty-seven votes (169 of 227 pursuant to the Treaty of Nice), and the affirmative votes must be cast by ten different members. The Treaty of Nice adds yet another hurdle to decisions requiring a qualified majority: under it, a member may invoke a

11. See, e.g., Lee Ann Askew, Comment, The ECI, the I.C.J and Intellectual Property: Is Harmonization the Key?, 7 TULSA J. COMP. & INT'L L. 375, 379 (2000) ("the most powerful institution of the [Union], the Council of Ministers is the final authority on what becomes EU law.").
12. EC TREATY art. 203.
13. Id.
15. BORCHARDT, supra note 4, at 31, 40.
17. EC TREATY art. 205, para. 1.
18. EC TREATY art. 205, para. 2.
19. See infra Table 1.
20. EC TREATY art. 295, para. 3.
22. EC TREATY art. 205, para. 2.
requirement that the members voting in favor of the decision represent 62% of the total population of the EU.\textsuperscript{23} With this requirement, obtaining a "qualified majority" requires three supermajorities: 1) a supermajority of Council votes; 2) a supermajority of members (except when acting on a Commission recommendation); and 3) a supermajority of population. See Table 1.

2. The European Parliament

The European Parliament is the one EU institution that is chosen directly by the European people.\textsuperscript{24} However, the European Parliament is also the least powerful of the major EU institutions: "[T]he [European] parliament is that rare beast, a legislature that cannot actually initiate legislation."\textsuperscript{25}

The European Parliament currently consists of 626 seats, allocated amongst the fifteen EU members,\textsuperscript{26} and it has seventeen committees.\textsuperscript{27} Like the votes in the Council, the allocation of seats in the Parliament over-represents smaller countries and under-represents larger ones.\textsuperscript{28} The Parliament, however, more closely represents the various populations of the member states.\textsuperscript{29} Members of the European Parliament serve five-year terms.\textsuperscript{30}

As noted, the European Parliament cannot initiate legislation. It can only request the European Commission to submit "any appropriate proposal."\textsuperscript{31} For certain acts, the European Parliament does have a true legislative role. Acts subject to Article 251\textsuperscript{32} of the EC Treaty are proposed by the Commission, but must be approved, either in original

\textsuperscript{23. Treaty of Nice, Protocol A, art. 3, para. 1(a)(ii) ("If that condition is shown not to have been met, the decision in question shall not be adopted.").}
\textsuperscript{24. EC Treaty art. 190, para. 1.}
\textsuperscript{25. Charlemagne: Europe's Forgotten President, Economist, Jan. 12, 2002, at 49; see also Borchardt, supra note 4, at 33 ("The European Parliament possesses only a few of the functions of a true parliament in a parliamentary democracy.").}
\textsuperscript{26. See infra Table 2.}
\textsuperscript{27. Borchardt, supra note 4, at 35.}
\textsuperscript{28. See infra Table 2.}
\textsuperscript{29. Compare Table 1 with Table 2.}
\textsuperscript{30. EC Treaty art. 190, para. 3.}
\textsuperscript{31. EC Treaty art. 192.}
\textsuperscript{32. Acts subject to Article 251 include directives to enforce the right of establishment of citizens of one member state in another member state, including directives relating to mutual recognition of diplomas and other formal qualifications; directives implementing the EU's common transport policy; and measures taken to strengthen customs cooperation between members. EC Treaty art. 44, para. 1; EC Treaty art. 47, para. 1; EC Treaty, art. 71, para. 2; EC Treaty art. 135.}
Table 1

<table>
<thead>
<tr>
<th></th>
<th>Population (millions)</th>
<th>Percent of Total</th>
<th>Council Votes (pre-Nice)</th>
<th>Percent of Total</th>
<th>Council Votes (post-Nice)</th>
<th>Percent of Total</th>
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<tbody>
<tr>
<td>Austria</td>
<td>8.1</td>
<td>2.2%</td>
<td>4</td>
<td>4.6%</td>
<td>10</td>
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<td>5.7%</td>
<td>12</td>
<td>5.3%</td>
</tr>
<tr>
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<td>5.3</td>
<td>1.4%</td>
<td>3</td>
<td>3.4%</td>
<td>7</td>
<td>3.1%</td>
</tr>
<tr>
<td>Finland</td>
<td>5.2</td>
<td>1.4%</td>
<td>3</td>
<td>3.4%</td>
<td>7</td>
<td>3.1%</td>
</tr>
<tr>
<td>France</td>
<td>58.7</td>
<td>15.5%</td>
<td>10</td>
<td>11.5%</td>
<td>29</td>
<td>12.8%</td>
</tr>
<tr>
<td>Germany</td>
<td>82.1</td>
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<td>11.5%</td>
<td>29</td>
<td>12.8%</td>
</tr>
<tr>
<td>Greece</td>
<td>10.6</td>
<td>2.8%</td>
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<td>5.7%</td>
<td>12</td>
<td>5.3%</td>
</tr>
<tr>
<td>Ireland</td>
<td>3.7</td>
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<td>7</td>
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<td>4</td>
<td>1.8%</td>
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<tr>
<td>Netherlands</td>
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<td>4.2%</td>
<td>5</td>
<td>5.7%</td>
<td>13</td>
<td>5.7%</td>
</tr>
<tr>
<td>Portugal</td>
<td>9.9</td>
<td>2.6%</td>
<td>5</td>
<td>5.7%</td>
<td>12</td>
<td>5.3%</td>
</tr>
<tr>
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<td>39.6</td>
<td>10.6%</td>
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<td>9.2%</td>
<td>27</td>
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</tr>
<tr>
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<td>2.4%</td>
<td>4</td>
<td>4.6%</td>
<td>10</td>
<td>4.4%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>58.7</td>
<td>15.7%</td>
<td>10</td>
<td>11.5%</td>
<td>29</td>
<td>12.8%</td>
</tr>
<tr>
<td>Total</td>
<td>374.4</td>
<td>100%</td>
<td>87</td>
<td>100%</td>
<td>227</td>
<td>100%</td>
</tr>
</tbody>
</table>

form or with jointly agreed amendments, by both the European Council and the European Parliament. For acts subject to Article 252, the Parliament's role is essentially advisory. The Parliament also serves executive functions, approving the appointment of the European Commission members, exercising oversight of the Commission, and, if it deems necessary, voting (by two-thirds) to dismiss the entire Commission. See Table 2.

3. The European Commission

The European Commission currently consists of twenty members. The Commission must have at least one member from each member country and no more than two members may be from the same country. In practice, the Commission consists of two members from each of the larger EU nations—France, Ireland, Germany, Spain, and the United Kingdom—and one member from each of the smaller ten-member nations. Pursuant to the Treaty of Nice, European expansion could increase the size of the Commission to as many as twenty-six.

Members of the Commission are appointed by "common accord" of the Member States for five-year terms, subject to approval by the European Parliament. The Commission is headed by a President under whose "political guidance," the Commission works.

The Commission performs a legislative role; its submission is often mandatory for an act to be passed validly by the Council and/or the Parliament. The Commission also performs numerous executive

33. EC Treaty art. 251. To be precise, the European Parliament only has to refrain from disapproving an act for it to pass. If the Parliament takes no action within three months, it is deemed to have approved the act. Id.

34. Acts subject to Article 252 include acts relating to the non-assumption of obligations of one member state by another member state and acts relating to the common currency. See EC Treaty art. 106, para. 2; EC Treaty art. 103, para. 2.

35. See EC Treaty art. 252.

36. EC Treaty art. 214, para. 2.


40. Id.

41. BORCHARDT, supra note 4, at 44.

42. Treaty of Nice art. 4.

43. EC Treaty art. 214.

44. EC Treaty art. 219.

45. See EC Treaty arts. 251-252.
Table 2

<table>
<thead>
<tr>
<th>Country</th>
<th>Population (millions)</th>
<th>Percent of Total</th>
<th>MEPs (pre-Nice)</th>
<th>Percent of Total</th>
<th>MEPs (under Nice)</th>
<th>Percent of Total (of 15)</th>
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<tbody>
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<td>Austria</td>
<td>8.1</td>
<td>2.2%</td>
<td>21</td>
<td>3.4%</td>
<td>17</td>
<td>3.2%</td>
</tr>
<tr>
<td>Belgium</td>
<td>10.1</td>
<td>2.7%</td>
<td>25</td>
<td>4.0%</td>
<td>22</td>
<td>4.1%</td>
</tr>
<tr>
<td>Denmark</td>
<td>5.3</td>
<td>1.4%</td>
<td>16</td>
<td>2.6%</td>
<td>13</td>
<td>2.4%</td>
</tr>
<tr>
<td>Finland</td>
<td>5.2</td>
<td>1.4%</td>
<td>16</td>
<td>2.6%</td>
<td>13</td>
<td>2.4%</td>
</tr>
<tr>
<td>France</td>
<td>58.7</td>
<td>15.5%</td>
<td>87</td>
<td>13.9%</td>
<td>72</td>
<td>13.5%</td>
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<tr>
<td>Germany</td>
<td>82.1</td>
<td>21.9%</td>
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<td>99</td>
<td>18.5%</td>
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<tr>
<td>Greece</td>
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<td>2.8%</td>
<td>25</td>
<td>4.0%</td>
<td>22</td>
<td>4.1%</td>
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<tr>
<td>Ireland</td>
<td>3.7</td>
<td>1.0%</td>
<td>15</td>
<td>2.4%</td>
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<td>Italy</td>
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<td>3.5%</td>
<td>18</td>
<td>3.4%</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>58.7</td>
<td>15.7%</td>
<td>87</td>
<td>13.9%</td>
<td>72</td>
<td>13.5%</td>
</tr>
<tr>
<td>Total</td>
<td>374.4</td>
<td>100%</td>
<td>626</td>
<td>100%</td>
<td>535</td>
<td>100%</td>
</tr>
</tbody>
</table>

Sources: Economist, Pocket World in Figures (2002); Treaty of Rome; Treaty of Nice.
functions, essentially serving as the EU’s day-to-day government, albeit under the overall direction of the Council. In addition, as described below, the Commission also performs a judicial role.

4. The European Courts

The European Court of Justice consists of fifteen judges, one from each member nation.46 Officially, all fifteen members are appointed “by common accord of the governments of the Member States.”47 However, “in practice each Member State proposes a candidate of its own nationality.”48 Judges of the ECJ serve six-year terms and can be reappointed.49

The ECJ is empowered to interpret EU law in cases and advisory opinions. The ECJ has jurisdiction over cases brought by the European Commission against a member nation alleging a failure to fulfill Treaty obligations, as well as over cases brought by one member state against another (although such cases must first be brought before the Commission).50 The ECJ also has jurisdiction to review the legality of acts of the Council, Parliament, Commission, and European Central Bank.51 Finally, the ECJ can give opinions to national courts when asked to give a preliminary ruling about the interpretation of the EC Treaty, the validity of EU acts, or the interpretation of acts of the Council.52 When a question falling in one of these categories is before a national court of last resort, that court is required to bring the matter before the ECJ.53

The European Court of First Instance is an “[attachment]” to the ECJ, whose principal role is to serve as a fact-finding court.54 The Court of First Instance has jurisdiction “at first instance” over many cases ultimately within the jurisdiction of the ECJ.55 As the court’s name suggests, its decisions are subject to appeal to the ECJ, although only on points of law, and not on issues of fact.56

46. EC TREATY art. 221.
47. EC TREATY art. 223.
49. EC TREATY art. 223.
50. EC TREATY arts. 226-27.
51. EC TREATY art. 230.
52. EC TREATY art. 234.
53. Id.
54. EC TREATY art. 225, para. 1.
55. Id.
56. See id.
The European Court of Auditors is not really a court at all. Rather, it is essentially an independent executive agency. The Court of Auditors consists of fifteen members, appointed for six-year terms by the member nations. The Court of Auditors' duties include independently examining all accounts of revenue and expenditure by the EU and reporting the results of its examinations to the other EU institutions.

B. The Judicial Role of EU Institutions

1. The European Commission

As noted above, when EU member nations have disputes regarding the EC Treaty, they are required first to take their disputes before the European Commission. Additionally, the Commission plays a judicial role with regard to private individuals and companies both inside and outside of the EU.

When studying the effect and influence of the European Commission, one is immediately drawn to the Commissioner for Competition, who has been described as "the most powerful man in Europe." Best known by many Americans for blocking the proposed merger between General Electric and Honeywell, a regulatory action, the Competition Commissioner also exercises judicial power.

Recent fines imposed on the world's major vitamin manufacturers illustrate the judicial power of the Commission. Beginning approximately 1998, the United States Department of Justice began investigating a decade-long price-fixing conspiracy in which the world's major vitamins manufacturers fixed production quantities, allocated customers, and set prices for numerous vitamins throughout the world. The U.S. Justice Department, however, is purely an executive department, and after investigating the vitamins conspiracy, the Department was required to go to court to seek fines from the participants. The Justice Department brought thirteen court cases against vitamins manufacturers. These cases

57. EC TREATY art. 247.
58. EC TREATY art. 248.
59. EC TREATY art. 227.
60. Europe's Fearless Diplomat: Mario Monti, ECONOMIST, July 7, 2001, at 63 (quoting a comment from former Competition Commissioner Karel Van Miert to current Competition Commissioner Mario Monti).
led to guilty pleas and fines totaling more than $850 million, but these fines required court approval.  

By contrast, the European Commission acted on its own, issuing a detailed 124-page decision signed by Competition Commissioner Mario Monti, with extensive findings of fact and conclusions of law. In its decision, the Commission unilaterally imposed substantial fines on various vitamin manufacturers. The vitamin fines, totaling approximately 860 million euros, are the largest the Commission has levied on a single industry and form a large part of the 1.8 billion euros in fines assessed by the Commission for price fixing since 1994. These fines are appealable, but only in an EU court, not in any national court. Thus, the EU's role in adjudicating antitrust cases puts it on a level with the United States government (in this area), making the EU more like a government and less a typical international organization.

2. The European Court of Justice

Given the European Court of Justice's broad jurisdiction and vague mandate, it should come as no surprise that the ECJ has had a dramatic effect on the law in the EU and its constituent states. Moreover, it is not surprising that the ECJ has tended to strengthen the power of EU law at the expense of national law. For example, the ECJ has repeatedly stressed the supremacy of EU law over national law. This repeated holding has been accepted by courts in the EU's member states.

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63. Press Release Dep't of Justice, supra note 62.
66. As one commentator has observed: “[T]he expansion of judicial review by the European Court of Justice remains the driving force behind the development of constitutionalism of the European Union. In fact, the European Court of Justice and its case law play the most dominant and consistent role in the integration process.” Henkel, supra note 48, at 154.
67. See id. (observing that “the Court of Justice indicates a bias toward deeper European integration and centralized governance.”).
68. See, e.g., Case C-213/89, The Queen v. Secretary of State for Transport ex parte Factortame Ltd., para. 20, 1990 E.C.R. I-2433, [1990] 3 C.M.L.R. 1 (1990) (“The Court has also held that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding
The ECJ's dramatic effect on the sovereignty of EU member nations is most apparent, however, not in the ECJ's broad statement of principles, but in a line of cases in which the ECJ has, at the behest of private individuals, both struck down national laws and punished national governments for either action or inaction, when the ECJ has found national action or inaction to be inconsistent with the EC Treaty or even with Community "principles" that the ECJ has divined.

The EC Treaty and the other treaties of the EU, like all treaties, are agreements between nations. The ECJ, however, has long held that individuals and corporations have the right to challenge the validity of national government actions that they perceive as inconsistent with EU law. In the 1963 case of NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, the ECJ rejected the contention of Belgium and the Netherlands that the ECJ could not entertain the plaintiff company's claims that certain customs duties violated the EC Treaty. The ECJ held that the EC Treaty granted rights to individuals to enforce the Treaty's obligations on member nations: "[T]his Treaty is more than an agreement which merely creates mutual obligations between the contracting states .... [T]he [European] Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals." While the

from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law."); Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629, para. 18 (1978) (holding "that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law" have no legal effect); Case 11-70, Internationale Handelsgesellschaft mbH v. Einfuhr, 1970 E.C.R. 1125, para. 3 (1970) ("the law stemming from the Treaty [of Rome], an independent source of law, cannot because of its very nature be overridden by rules of national law.").

69. Hans Smit, The Relative Role of the European Union (EU) Nation States Vis a Vis the EU Compared to the Roles of States/Provinces in the U.S./Canada Vis a Vis Federal Government, 27 CAN.-U.S. L.J. 63, 64 (2001) ("In the course of time, the member states' courts acquiesced in this assertion of judicial supremacy [by the ECJ].").


71. See EC TREATY art. 25 ("Custom duties on imports and exports and charges having equivalent effect shall be prohibited between Member States."). At the time of the van Gend & Loos case, this provision was in Article 12 of the Treaty.

72. van Gend & Loos, 1963 E.C.J. at II.B (emphasis added).
court stopped short of striking down the customs provision at issue (it remanded the case to the national court for additional factual findings), the ruling established the ECJ's power to review the validity of national laws objected to by private citizens.

A few years later, the ECJ expanded its mandate, ruling that it could, again at the behest of an individual plaintiff, strike down national laws that violate individual rights emanating from a directive of the European Council. In *van Duyn v. Home Office*, Yvonne van Duyn, a citizen of the Netherlands, challenged the United Kingdom's decision to prevent her from entering Britain to work for the Church of Scientology. Ms. van Duyn relied upon a 1964 Council Directive that stated that where a member nation excluded the citizen of another member nation on the basis of public policy or public security, such decision must be based "on the personal conduct of the individual concerned." The ECJ held that an individual could assert rights based on such a directive. Broadening the scope of its holding, the ECJ empowered itself to determine what constituted a proper "public policy" for regulating the entry of one of EU's nationals into another EU member state: "[i]t should be emphasized that the concept of public policy in the context of the Community... must be interpreted strictly, so that its scope cannot be determined unilaterally by each member state...." After accepting Ms. van Duyn's arguments to the extent that they aggrandized the ECJ's power, the court nevertheless ruled that the Church of Scientology could legitimately be considered "socially harmful," and, thus, the United Kingdom could permissibly keep Ms. van Duyn out.

Two years later, the ECJ ruled that not only did it have the power to strike down national laws that it found to be inconsistent with the European Treaties or Council Directives, it also had the power to enact laws where national governments had failed to do so in derogation of their obligations under Community law. In *Defrenne v. Societe Anonyme Belge de Navigation Aerienne Sabena*, Gabrielle Defrenne complained that from 1963 to 1966, when she worked as an "air hostess," she had been paid less than male "cabin stewards" for the same work. Her former employer, the airline Sabena, pointed out that Belgium, the home country of the parties, had not outlawed gender discrimination in pay until 1967. The

76. See id. para. 24.
ECJ, however, ruled that, pursuant to its treaty obligations, Belgium should have outlawed gender discrimination in pay. Indeed, Article 141 of the EC Treaty (which at that time was Article 119) provides that "[e]ach Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied."8

The ECJ noted that this provision "impose[d] on states a duty to bring about a specific result to be mandatorily achieved within a fixed period."79 And, where Belgium had been derelict (or at least untimely) in its duty, the ECJ would retroactively provide for Belgium law that would comply with Belgium's obligation. Thus, Sabena was liable for violating the law that Belgium should have enacted but had not. In addition to taking upon itself the task of retroactively legislating for Belgium, the court also took a shot at the EU's political institutions, asserting that they "ha[d] not reacted sufficiently energetically against [Belgium's] failure to act."80

In *Becker v. Finanzamt Munster Onnenstadt*,81 the ECJ applied the Defrenne reasoning, under which the court could alter national law to fit treaty obligations, to implement a directive of the European Council. In *Becker*, Germany was a year late in implementing tax changes required by a Council Directive. The court held that the plaintiff could take advantage of the tax law that Germany should have passed. The ECJ held broadly:

[W]herever the provisions of a directive appear . . . to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the proscribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state.82

In *Francovich v. Italian Republic*,83 the ECJ took the next step in elevating itself and EU law above national law, holding that an individual can collect financial reparations from a nation that failed to meet an outcome required by a European Directive, even if the Directive gave the national governments broad discretion. *Francovich* arose pursuant to a European Directive that required, among other things, member states to ensure that when an employer became insolvent, its employees would nevertheless be guaranteed payment of wages earned.84 The directive did

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78. EC TREATY art. 141.
80. Id. para. 33.
82. Id. para. 25.
84. See id. para. 3.
not specify how the nations were to fulfill this guarantee. Presumably, a state could guarantee the wages itself, require employers to segregate some amount of money to pay such claims, or require employers to carry insurance to cover such claims. In any case, it is clear that states had broad discretion in implementing the guarantee and were not required to fund the guarantee from taxpayer revenues. Moreover, under the Directive, a state had the option to limit both the monetary amount of wages guaranteed and the number of months’ wages guaranteed. Finally, a state had the power “to take the measures necessary to avoid abuses and in particular to refuse or reduce liability in certain circumstances.”

Despite the “broad discretion” granted by this directive, Italy did not implement any effective method of ensuring workers could collect wages from an insolvent employer. As a result, when thirty-five workers’ employers became insolvent, they were unable to obtain wages that were owed to them.

The ECJ held that the plaintiffs could not enforce the Directive directly against Italy because the Directive did not require a state to pay unpaid wages; it only required the state ensure payment by “an appropriate institutional guarantee system.” Thus, the Directive was not sufficiently precise to enforce directly against a member state. However, the court ruled that Italy was nevertheless obligated to pay plaintiffs the owed wages on the grounds that Italy had failed its obligation under the Directive and thus must be liable for damages caused by its omission. How this differs from enforcing the Directive against Italy is not immediately clear. In any case, the ECJ decided that the Italian Republic must pay wages owed to the plaintiffs by their insolvent employers.

In reaching this decision, the court recalled its long decisional history that had, step-by-step, eroded the sovereignty of national governments in the name of EU law:

It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also

85. Id. para. 23.
86. Id. para. 16 (“Depending on the choice it makes, the Member State has the option . . . to restrict liability to periods of three months or eight weeks [and] may set a ceiling on liability, in order to avoid the payment of sums going beyond the social objective of the directive.”).
87. Id.
88. Id. para. 25.
their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions.

Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals.

The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

... 

It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.90

Thus, as the ECJ reviewed, national sovereignty is circumscribed because (1) the EU nations are bound to a super-national "legal system" in which their own courts are bound to apply international law as interpreted by the ECJ; (2) the rules of the super-national legal system can be directly enforced by individuals against national governments; (3) the rules that can be enforced by these individuals include more than just the individual rights that are expressly granted by the Treaty, encompassing "obligations" on entities including national governments; (4) national courts must enforce EU law even in the face of contradictory national law; and (5) national governments are liable for money damages when they act outside of what the ECJ determines to be their proper discretion under EU law.

After Francovich, the ECJ had chipped away at national sovereignty in every conceivable way, except one. Through Francovich, the ECJ had limited its overruling of national governments to instances where governmental action or inaction was inconsistent with the text of EU treaties or European Directives. Thus, at least a state could feel confident that it would only be overruled based upon text that its government had

90. Id. paras. 31-33, 35 (citations omitted).
agreed to, either by treaty or by Council Directive. Five years later, however, the ECJ passed this final barrier.

In Brasserie du Pecheur SA v. Bundesrepublik Deutschland, the court joined two cases seeking damages from national governments. In the first case, a French company sued Germany for damages suffered because of a German law that had regulated the purity of beer until 1987. The second case involved a group of plaintiffs led by Factorame Ltd. seeking damages from the United Kingdom for injury suffered from British rules that were in effect from April through November of 1989, and which limited plaintiffs’ rights to fish in British waters. Factorame and the other plaintiffs suing the U.K. also sought exemplary damages.

In both cases, the initial laws at issue—the German beer law and the British fishing law—had previously been struck down by the ECJ in cases brought by the European Commission. The ECJ had held that the German law violated the provision in the EC Treaty that prohibits “[q]uantitative restrictions on imports [from other member states] and all measures having equivalent effect.” Given the breadth and vagueness of this provision (not to mention the equally vague exception in a subsequent paragraph of the Treaty), it seems clear that reasonable minds could differ on the validity of a beer purity law. Thus, while one could hardly state that the ECJ was clearly wrong in invalidating the law, one likewise could hardly accuse Germany of acting in bad faith. The British law was challenged on the basis of several broad provisions of the EC Treaty, including a provision stating that “[t]he internal market [of the EU] shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty” and one stating that “Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies.”

93. EC TREATY, art. 28 (formerly art. 30).
94. See EC TREATY art. 30 (“The provisions of Article 28 . . . shall not preclude prohibitions or restrictions on imports . . . justified on grounds of public morality, public policy or public security . . .”).
95. EC TREATY art. 14 (formerly art. 7).
96. EC TREATY art. 294 (formerly art. 221).
The issue in *Brasserie* was whether the plaintiffs could seek monetary damages from national governments for damages suffered prior to the ECJ rulings striking down the laws. This presented a different scenario from the ECJ's earlier cases. Rather than failing a clear obligation either by action or inaction as national governments had in certain earlier cases, here Germany and the U.K. had passed laws in good faith that had turned out to be violative of EU law as interpreted by the ECJ. After the adverse rulings, the nations had stopped enforcing the laws in question.

The relief that the plaintiffs sought in *Brasserie* was clearly not contemplated by the text of the EU Treaties. Indeed, Germany objected to the recognition of a general right to reparations, arguing that "for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States and with the institutional balance established by the Treaty." 97 This argument did not stop the ECJ from recognizing such a right, for while the court conceded that "the Treaty contains no provision explicitly and specifically governing the consequences of breaches of Community law by Member States," the ECJ could craft those "consequences" "by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States." 98

The consequences of this statement are dramatic. The ECJ held that where EU textual law (e.g., treaties and directives) is silent on a subject, the ECJ can decide what the EU law on that subject is. Moreover, the ECJ does this by looking not only to broad "fundamental principles of the Community legal system," but also to "general principles common to the legal systems of the Member States." By holding that principles of national law could be applied by an international court to national governments, the ECJ effectively grants itself the status of a national (or super-national) court, relegating the sovereign nations of the EU to the status of mere provinces. 99 Furthermore, by stating that it is to be guided by broad principles of the EU and/or equally broad principles of national law, the ECJ grants itself near infinite license to choose outcomes as it will,

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97. EC TREATY art. 24.
98. EC TREATY art. 27.
99. The ECJ's self-established grandeur is shown by its justification of its own aggressive "interpretation" of EU law: "In any event, in many national legal systems the essentials of the legal rules governing State liability have been developed by the courts." EC TREATY art. 30. Again, the court is placing itself in the role of a national court whose role includes providing a check against co-equal branches of government, rather than its proper role of international court whose role is to interpret treaties to settle disputes between sovereign nations who have agreed to certain explicit terms.
fitting them into whichever of the many European and national general principles that suits the ECJ’s purpose. This ruling is remarkable because it binds national governments to an ever evolving European law that is additional to, and different from, the texts to which the member nations agreed.

There is no question that the ECJ has eroded the sovereignty of the EU’s member nations. The line of cases in which the ECJ allowed broader and broader rights to individuals to sue nations based on acts (or omissions) of governing leads to, by design and effect, a diminution in national sovereignty. As the ECJ itself has stated, “[t]he purpose of that right [of individuals to sue on provisions on European law] is to ensure that provisions of Community law prevail over national provisions.”

This line of cases is not the only one that diminishes national sovereignty. Sovereignty is also diminished in a series of cases in which the European Commission has brought suit against national governments.

Given the effect that the ECJ has had on the role, power, and sovereignty of EU nations, it is perhaps understandable that some might be wary of submitting the United States to a treaty-based international dispute resolution system such as that of the WTO. However, not all international courts necessarily have the power and discretion of the ECJ.

II. THE UNITED NATIONS

An international organization that has had much less of an effect on the sovereignty of its members is the United Nations. However, this lesser effect is based more upon the U.N.’s ineffectiveness at enforcing judicial judgments than on any inherent respect for sovereignty.

100. Indeed, Brasserie, 1996 E.C.R. I-1029, itself presents an example of this. The law of Germany (one of the parties to the case and one of the member states whose “general principles” the ECJ claims it will look to) provides that, where a law passed by a German state is in violation of a federal law of Germany, and is therefore invalid, an individual can only win reparation from the state if he can show that the legislature’s act or omission was referable to his own situation. Id. The ECJ declined to adopt this principle, ruling that a German court must not apply such a rule when judging the liability of the Federal Republic of Germany for a law that violated EU law. Id. In doing so, the ECJ effectively held that, in least in this respect, Germany’s position vis-à-vis the EU was actually lower than a German state’s position vis-à-vis Germany. Id.

101. Id. para. 20.

102. See, e.g., Case C-473/93, Commission v. Grand Duchy of Luxemburg, 1996 E.C.R. I-3207 (holding that Luxemburg had to allow non-nationals to work in positions within the government of Luxemburg).
The United Nations was formed on June 26, 1945, in San Francisco, in the closing days of World War II, in order "[t]o maintain international peace and security." Needless to say, it has not always been successful.

A. The United Nations Political Institutions

The principal political entities of the United Nations are the General Assembly, the Security Council, and the Secretary-General.

1. The General Assembly

The General Assembly consists of all members of the United Nations. The General Assembly is little more than a glorified debating society, having little real power. Its enumerated powers include the ability to "discuss" important international questions and matters; the right to "consider the general principles of cooperation in the maintenance of international peace and security;" the power to "make recommendations" to countries or to the Security Council; the right to "call the attention of the Security Council" to situations threatening peace and security; and the power to "initiate studies" relating to certain matters. And, even these speech and debate powers are limited. The General Assembly is not permitted, absent specific permission from the Security Council, to make any recommendations relating to any dispute or situation that is then before the Security Council. The General Assembly's substantive powers consist of the power to accept the Security Council's nomination for Secretary-General, and the power to approve the U.N. budget and apportion the expenses among members. When the General Assembly makes decisions on "important questions," it must act by two-thirds majority vote.

103. U.N. CHARTER art. 1, para. 1.
104. U.N. CHARTER art. 7, para. 1.
105. U.N. CHARTER art. 9, para. 1.
106. U.N. CHARTER art. 10; U.N. CHARTER art. 11, para. 2.
107. U.N. CHARTER art. 11, para. 1.
108. Id.
109. U.N. CHARTER art. 11, para. 4.
110. U.N. CHARTER art. 13, para. 1.
111. U.N. CHARTER art. 12, para. 1.
112. U.N. CHARTER art. 97.
113. U.N. CHARTER art. 17.
114. U.N. CHARTER art. 18, para. 2.
2. The Security Council

The real political power in the United Nations resides with the fifteen-member Security Council. While the U.N. is ostensibly "based on the principle of the sovereign equality of all its Members," the makeup of its most powerful component is based decidedly upon inequality between the members. The five World War II victors—the United States, the Soviet Union, China, France, and the United Kingdom—obtained permanent seats on the Security Council. When the Soviet Union dissolved in 1991, its Council seat devolved to Russia; and the Chinese seat has moved from the Republic of China (better known as Taiwan) to the People's Republic of China; but the five permanent seats remain. The ten non-permanent seats are chosen by the General Assembly from amongst the other 185 members of the U.N. Non-permanent members serve two-year terms and cannot be immediately re-elected.

The Security Council is vested with "primary responsibility for the maintenance of international peace and security." To carry out this serious responsibility, the Council is empowered to determine the existence of any threat to, or breach of, the peace, to decide what non-military measures (including trade sanctions, interruption of communications, and severance of diplomatic relations) "are to be employed" by U.N. members, and to take such military action "as may be necessary to maintain or restore international peace and security." Despite its vast enumerated powers, the Security Council's effectiveness is

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115. U.N. CHARTER art. 2, para. 1 (emphasis added).
119. U.N. CHARTER, art. 23, para. 1.
120. Id.
121. U.N. CHARTER art. 24, para. 1.
123. U.N. CHARTER art. 41.
124. U.N. CHARTER art. 42. Of course, neither the Security Council nor the U.N. has a military capable of taking such action. As a result, action pursuant to Article 42 is generally a sanction for an American-led military campaign. See SCOR Res. 678, U.N. SCOR, 45th Sess., at 27, U.N. Doc. S/INF/46 (1990) (authorizing member nations to use "all necessary means" to end Iraqi occupation of Kuwait). And, the permission of the Security Council is, of course, by no means necessary for American military action. See, e.g., Simon Freeman, Nightmare with No End in Sight, SUNDAY HERALD, Mar. 28, 1999, at 12 (noting that the American-led military action against Yugoslavia relating to Kosovo was not authorized by the United Nations).
hampered because, in addition to possessing limited ability to enforce its edicts, decisions of the Council require nine affirmative votes, and each of the five permanent members has veto power over all substantive decisions of the Council.125

3. The Secretary-General
The Secretary-General is the chief administrative officer of the U.N.126 He is nominated by the Security Council and appointed by the General Assembly.127 As a result, to become Secretary-General, a candidate must have the support of a majority of U.N. members, as well as nine members of the Security Council, including all five permanent members.128 The Secretary-General's responsibilities are administrative, not executive. Thus, he appoints the staff of the Secretariat129 and carries out functions assigned by the bodies of the U.N., including the General Assembly and the Security Council,130 but his substantive role is limited to the power to "bring to the attention of the Security Council" such matters that he believes may threaten international peace and security.131

B. International Court of Justice

1. The Constitution of the I.C.J.
The U.N. Charter requires that "[a]ll Members... settle their international disputes by peaceful means."132 The judicial organ of the United Nations that is theoretically supposed to ensure this is the International Court of Justice,133 which sits at The Hague.134 The I.C.J. consists of fifteen judges, each of whom is from a different country.135 The

125. U.N. CHARTER, art. 27, paras. 2-3.
126. U.N. CHARTER art. 97.
127. Id.
128. Any permanent member of the Security Council can veto a candidate for any reason. For example, in the past, France let it be known that it would not allow an individual who does not speak French to become Secretary General. See Africans Lobby To Keep Top UN Post, ASSOCIATED PRESS, Oct. 26, 1996; cf. Zainul Ariffin, Time for Us To Launch a Bid for UN Chief's Post, NEW STRAITS TIMES, Jan. 6, 1997, at 17 (noting France's anachronistic contention "that French is perhaps the second most important global language.").
129. U.N. CHARTER, art. 101, para. 1.
130. U.N. CHARTER art. 98.
132. U.N. CHARTER art. 2, para. 3.
134. I.C.J. Statute, supra note 133, art. 22, para. 1.
135. Id. art. 3, para. 1.
judges serve nine-year terms, with five judges selected every three years. A judge may be reelected. A judge may be dismissed only by a unanimous determination of the other judges that he is no longer fulfilling the required conditions for service on the I.C.J.

The judges are selected through a complicated multi-step process. Candidates are nominated by national groups from members of the United Nations (and, in some cases, nations that are not U.N. members but are parties to the Statute of the International Court of Justice). A list of all nominees is compiled by the Secretary-General, and presented to both the General Assembly and the Security Council. Each body, acting independently, then considers and votes on the nominees, "bear[ing] in mind" that the I.C.J. should contain "representation of the main forms of civilization and of the principal legal systems of the world." Those candidates that receive a majority vote in both the General Assembly and the Security Council are elected to the I.C.J., except that no more than one candidate from the same country can be elected. If more than one national from a single country receives a majority vote in both bodies, only the eldest is elected. This selection process is a rare instance where, on a substantive vote, the permanent members of the Security Council do not have a veto.

If vacancies remain after the initial votes of the Security Council and the General Assembly, the bodies vote a second, and, if necessary, a third time. If one or more vacancies on the I.C.J. remain after the third round of voting, either the General Assembly or the Security Council may request that a joint conference, consisting of three members chosen by each body, be formed. The joint conference then chooses, by absolute majority, one name for each remaining vacancy to submit to the General Assembly and the Security Council for their respective approval. If the members of the joint conference unanimously agree, they can submit the

136. Id. art. 13, para. 1.
137. Id.
138. Id. art. 18, para. 1.
139. Id. art. 5, para. 1.
140. I.C.J. Statute, supra note 133, art. 4, para. 2.
141. Id. art. 7.
142. Id. arts. 8-9.
143. Id. art. 10, para. 1.
144. Id. art. 10, para. 3.
145. Id. art. 10, para. 2.
146. I.C.J. Statute, supra note 133, art. 11.
147. Id. art. 12, para. 1.
148. Id.
name of a person who was not previously nominated by a national group.\textsuperscript{149} On the other hand, if the joint conference determines that it will not be able to get the General Assembly and the Security Council to agree on a candidate, the members of the I.C.J. that have been elected shall fill the remaining vacancies by selecting from among those candidates who received a majority vote in either the Security Council or the General Assembly.\textsuperscript{150} In the event that this vote results in a tie, the eldest judge shall select between the tied candidates.\textsuperscript{151}

2. Enforcement (or Lack Thereof) of I.C.J. Decisions

While the United Nations Charter states that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party,"\textsuperscript{152} in reality, I.C.J. rulings are little more than learned suggestions. The I.C.J. has no means of enforcing its judgments. Where a party ignores an I.C.J. decision, the opposing party's only recourse is to complain to the Security Council, which may, "if it deems necessary," make recommendations or decisions "to give effect to the judgment."\textsuperscript{153} Thus, any permanent member of the Security Council can use its veto to prevent any enforcement of an I.C.J. decision against it or its ally. Moreover, even if the Security Council were inclined to enforce an I.C.J. judgment, its ability to force nations to act against their will is extremely limited.

The scope of the I.C.J.'s decisions has an additional limitation. As the Statute of the I.C.J. makes clear, "[a] decision of the Court has no binding force except between the parties and in respect of that particular case."\textsuperscript{154} As will be seen, even between parties to the case, the "binding force" is often ephemeral.

3. I.C.J. Cases

\textit{a. United States of America v. Iran}

A case study in the impotence of the International Court of Justice is the litigation between the United States and the Islamic Republic of Iran over American hostages held in Iran. In January 1979, Shah Reza Pahlavi, who had ruled Iran with one short interruption since 1941 and had been a strong U.S. ally since the U.S. aided a 1953 counter-coup that returned the

\begin{itemize}
  \item \textsuperscript{149} \textit{Id.} art. 12, para. 2.
  \item \textsuperscript{150} \textit{Id.} art. 12, para. 3.
  \item \textsuperscript{151} \textit{Id.} art. 12, para. 4.
  \item \textsuperscript{152} U.N. \textit{CHARTER}, art. 94, para. 1.
  \item \textsuperscript{153} U.N. \textit{CHARTER} art. 94, para. 2.
  \item \textsuperscript{154} U.N. \textit{CHARTER} art. 59.
\end{itemize}
Shah to power after a week in exile, was overthrown in a revolution led by Ayatollah Ruhollah Khomeini. On November 4, 1979, after months of Khomeini’s anti-American rhetoric, the American Embassy in Tehran was seized and American hostages were taken by Khomeini’s followers.

On November 29, 1979, the United States filed suit against Iran before the I.C.J. The United States contended that Iran had violated various international legal obligations by “tolerating, encouraging, and failing to prevent and punish” the seizure of the U.S. Embassy and the detention of its staff. Iran argued that the I.C.J. could not and should not adjudicate the U.S. claim regarding the hostages because “this question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, inter alia, more than 25 years of continual interference by the United States in the internal affairs of Iran.”

On December 15, 1979, the I.C.J. issued a provisional ruling, rejecting Iran’s contention that the holding of hostages was “marginal [or] secondary,” and unanimously ordering that Iran 1) immediately ensure that the embassy be returned to the United States; and 2) ensure the immediate release of all U.S. nationals held as hostages. Iran simply disregarded the order. Indeed, Iran did not even participate further in the case. On May 24, 1980, the I.C.J. issued its final opinion, again unanimously ordering Iran to release the American hostages. Furthermore, by a vote of twelve to three, the I.C.J. ruled that Iran had an obligation to pay reparations to the United States for damages suffered as a result of the hostage-taking and subsequent events. Once again, however, Iran simply ignored the ruling.

156. Id. at 544.
158. Id. at 8.
159. Id. at 11 (emphasis added).
160. Id. at 15.
161. Id. at 21.
163. Id. at 100-01.
165. Id. at 45.
166. See CARTER & TRIMBLE, supra note 162, at 101.
The I.C.J. proved to be ineffectual in remedying the international law violation that it found. The U.N. Security Council, too, was unable to free the hostages, despite its unanimous resolution calling for their release.  

On January 20, 1981, after 444 days of captivity, the hostages were finally released as a result of negotiations between the United States and Iran mediated by Algeria. This release occurred more than a year after the I.C.J.'s first order to Iran.

b. Nicaragua v. United States of America

Although the United States was frustrated by the I.C.J.'s inability to enforce its decision against Iran, the U.S. gained advantage from the I.C.J.'s impotence in later litigation brought by Nicaragua. On April 9, 1984, the Republic of Nicaragua filed a case in the I.C.J. against the United States, alleging violations of customary international law and several treaties. Since approximately 1981, the United States, as part of its Cold War against Communism, had actively opposed Nicaragua's Communist government, which had taken power from a pro-U.S. government in a coup. The U.S. supported the anti-Communist Contra rebels, laid mines in waters near Nicaragua, and flew military flights through Nicaraguan airspace.

On May 10, 1984, the I.C.J. issued an opinion ordering provisional relief pending judgment on the merits. The court ordered that the U.S. "immediately cease" actions that impeded access to Nicaraguan ports.

168. CARTER & TRIMBLE, supra note 162, at 101.
170. Nicaragua’s complaint to the I.C.J. stated:

- The United States is presently engaged in the use of force and the threat of force against Nicaragua through the instrumentality of a mercenary army of more than 10,000 men, recruited, paid, equipped, supplied, trained and directed by the United States, and by means of the direct action of personnel of the Central Intelligence Agency and the U.S. armed forces. The United States has publicly accepted responsibility for these activities.

- These activities have already resulted in the deaths of more than 1,400 Nicaraguans, military and civilian, serious injury to more than 1,700 others, and $200,000,000 in direct damage to property.

- The object of these activities, as admitted by the President of the United States, senior U.S. officials and members of Congress, is to overthrow or at least destabilize the Government of Nicaragua.

Id. at 180-81.
such as laying mines), and to refrain from “military and paramilitary activities” that contravened “principles of international law,” such as the principle that a state may not use “the threat or use of force against the territorial integrity or the political independence of any [other] State.”

The United States did not dispute its support for the Contras or its opposition to Nicaragua’s Communist government, although it did not admit to the specifics of Nicaragua’s allegations. Rather, the U.S. justified its actions as collective self-defense, noting that its Nicaragua policy was only “one facet of a complex of interrelated political, social, economic and security matters that confront the Central American region,” which included Nicaragua’s own military activities against the government of El Salvador. The U.S. also contended that the I.C.J. lacked jurisdiction over Nicaragua’s claims.

The I.C.J., after rejecting El Salvador’s attempt to intervene, determined that it had jurisdiction over Nicaragua’s claims that the U.S. actions violated customary international law and the Treaty of Friendship between the U.S. and Nicaragua. This decision led the United States to boycott further proceedings in the case. Proceeding without U.S. participation, the I.C.J. rendered a sweeping opinion in favor of Nicaragua. By majorities ranging from twelve to fourteen judges, the fifteen-member court ruled that the U.S. had violated both customary international law and the Treaty of Friendship by, among other things, supporting the Contras, directing or authorizing flights over Nicaragua,

171. Id. at 187.
172. Id. at 182.
173. Id. at 183; “[T]he United States placed on record such charges made not only by the United States, but by the Governments of Costa Rica, El Salvador and Honduras.” Id. at 191 (Schwebel, J., dissenting).
176. Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26) [hereinafter Nicaragua III]. The court determined that it did not have jurisdiction over Nicaragua’s claims pursuant to multilateral treaties. Id.
177. See Statement of the United States Dep’t of State (Jan. 18, 1985) (“The Court’s decision of November 26, 1984, finding that it had jurisdiction, is contrary to law and fact. With great reluctance, the United States has decided not to participate in further proceedings in this case.”).
and laying mines in Nicaraguan waters. Moreover, the I.C.J. held that the U.S. had an obligation "immediately to cease" these activities, as well as "an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua" by these activities.

Despite this sharp, clear ruling, the I.C.J. could not achieve the desired results from the U.S. Instead, the United States terminated its acceptance of compulsory jurisdiction before the I.C.J., and decided not to alter its policy towards Nicaragua. Moreover, the United States never paid any damages to Nicaragua. The U.S. continued its opposition to the Nicaraguan Communists until Nicaraguan President Daniel Ortega was defeated by U.S. backed Violeta Barrios de Chamorro in February 1990. In September 1991, the I.C.J. removed the case from its docket after the new Nicaraguan government renounced all of its rights based on the case. Once again, the I.C.J. had been decisive but entirely ineffectual.

III. THE WORLD TRADE ORGANIZATION

The examples of the EU and I.C.J. might reasonably lead one to question whether an international organization's dispute resolution process can effectively resolve disputes involving sovereign nations without severely damaging that sovereignty. The recently established WTO dispute resolution system, however, meets this standard – to a large extent.

The World Trade Organization was formed in large part to further the goals of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services." The more than 140 WTO members have agreed to abide by certain international trade agreements covering goods, services, and intellectual property

179. Id. at 146-48.
180. Id. at 149.
181. See Letter from U.S. Secretary of State G. Shultz to the U.N. Secretary General (Oct. 7, 1985) ("[T]he declaration of my Government of 26 August 1946 . . . concerning the acceptance by the United States of America of the compulsory jurisdiction of the International Court of Justice . . . is hereby terminated.").
182. CARTER & TRIMBLE, supra note 162, at 329 (noting that in the wake of the I.C.J. rulings, "the U.S. Executive Branch took no steps to change [the United States'] activities in Central America").
183. Id.
184. Id.
Many members also adhere to so-called "plurilateral" trade agreements relating to civil aircraft, government procurement, dairy, and "bovine meat." \(^{187}\)

## A. The Political Institutions of the WTO

The principal political institutions of the WTO are the Ministerial Conference, the General Council, and the Director-General. \(^{188}\) The Ministerial Conference brings together, at least once every two years, high level trade representatives. \(^{189}\) The Ministerial Conference has the power "to take decisions on all matters" pursuant to the various trade agreements that bind the WTO members. \(^{190}\)

Between meetings of the Ministerial Conference, the functions of the WTO are conducted by the General Council, which also consists of one representative from each member nation. \(^{191}\) In addition to wielding these administrative powers, the General Council also doubles both as the Dispute Settlement Body (the titular head of the WTO's judicial functions) and as the Trade Policy Review Body. \(^{192}\)

The Ministerial Conference appoints the Director-General of the WTO, and is empowered to adopt regulations governing his powers, duties, conditions of service, and length of term in office. \(^{193}\)

## B. The WTO Dispute Resolution Process

The Dispute Settlement Body (DSB), an alter ego of the General Council, is nominally in charge of the WTO's dispute resolution functions, \(^{194}\) but, in actuality, it plays a very limited role in the dispute resolution process.

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186. WTO Agreement Annex 1A-1C.
188. WTO Agreement art. IV; WTO Agreement art. VI.
189. WTO Agreement art. IV, para. 1.
190. Id.
191. WTO Agreement art. IV, para. 2.
192. WTO Agreement art. IV, paras. 3-4. The WTO also has a Council for Trade in Goods, a Council for Trade in Services, a Council for Trade-Related Aspects of Intellectual Property Rights, a Committee on Trade and Development, a Committee on Balance-of-Payments Restrictions, and a Committee on Budget, Finance and Administration. WTO Agreement art. IV, paras. 5, 7. Membership on each of these councils and committees is open to representatives of all WTO members. Id.
193. WTO Agreement art. VI, para. 1-2.
The complicated WTO dispute resolution process begins with a mandatory "consultations" phase. A WTO member that believes that another member is violating a WTO trade agreement requests that member to enter consultations aimed at reaching a settlement of the dispute. If the respondent party refuses consultations or if the consultations fail to settle the dispute, the complaining party may request that a dispute resolution panel be convened.

When a dispute reaches the (first) litigation stage, a panel is established to try the dispute. While the panel is nominally appointed by the DSB, in fact, panels are appointed by the Secretariat. The Secretariat initially proposes nominations for the three-member panel from a list of candidates maintained by the Secretariat. Panelists may be government officials or private citizens, and may be former WTO representatives or Secretariat employees. The parties to the dispute may oppose the nominees for "compelling reasons" only, although that term is not defined in the treaty. If the parties do not agree to the Secretariat's nominees within twenty days, the Director-General appoints the panel, after consulting with the Chairmen of the DSB and of the relevant council or committee.

This panel, appointed specifically for the dispute at hand, serves as the trier of fact and (in the first instance) of law. The panel, after receiving submissions from the parties, as well as other information it deems necessary, hands down its decision in the form of a panel report. The panel report is then adopted by the DSB in what is essentially a pro forma
exercise. At this point, the losing party can either acquiesce to the decision, or appeal to the WTO's standing Appellate Body.

The Appellate Body consists of seven individuals who are appointed, by the DSB, for four-year terms. Each member must be unaffiliated with any government, and each may be reappointed only once. Only three of the seven members serve on a single appeal, with the makeup of a given appellate panel determined by rotation. The appellate panel reviews the panel report, but its review is limited to "issues of law" and "legal interpretations." Thus, the appellate panel must take the initial panel's factual findings as given.

While the DSB and its panels can "clarify the existing provisions" of trade agreements, they cannot "add to or diminish the rights and obligations provided in the covered agreements." As such, WTO panels lack the powers of common law courts to shape and create new law or interpret a "living constitution." The panels are not empowered to seek amorphous ideals such as justice; rather, they are to provide "security and predictability."

The Appellate Body is not so much a single court as it is a system of rotating panels, as only three of the seven members serve on any given dispute. Moreover, the membership of the Appellate Body itself changes every two years, with members serving only four-year terms, subject to a maximum tenure of eight years.

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209. Disputes Procedures art. 16, para. 4 (the DSB must adopt the panel report unless it reaches a consensus not to). A consensus cannot be reached, however, if even a single member objects. Disputes Procedures art. 2, para. 4 n.1. The party prevailing in the panel report can force the DSB to adopt the report (by blocking any consensus to reject it); and, "therefore, adoption is virtually automatic." John H. Jackson, The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligations, 91 Am. J. Int'l L. 60, 62 n.10 (1997).

210. Disputes Procedures art. 17, para. 1.

211. Disputes Procedures art. 17, paras. 1-2.

212. Disputes Procedures art. 17, paras. 2-3.

213. Disputes Procedures art. 17, para. 1.

214. Disputes Procedures art. 17, para. 6.


216. Dispute Procedures art. 3, para. 2.


218. Disputes Procedures art. 3, para. 2.
The current WTO dispute resolution procedure is a relatively recent innovation. Prior to 1995, when the results of the Uruguay Round of negotiations took effect, the DSB's predecessor, the GATT Council, could adopt a panel decision only by consensus. As a result, any single member had a de facto veto over any decision. Thus, much like the U.N.'s International Court of Justice, the former dispute resolution process had no teeth.

1. The Banana Dispute – Before the Teeth

A prime example of the I.C.J.-like character of the earlier system is the long-running banana dispute between the EU and several Western Hemisphere countries including the United States. In 1993, the EU implemented a regime for the importation, distribution, and sale of bananas that favored bananas from certain countries, principally in Africa and the Caribbean, over bananas from other countries, principally in Latin America. Not surprisingly, bananas from the favored countries were overwhelmingly imported by European firms while Latin American bananas were overwhelmingly imported by American firms.

In May 1993, a panel of the General Agreement on Tariffs and Trade (GATT) – the predecessor to the WTO – found that the EU banana regime violated the EU's treaty obligations. Notwithstanding the panel's finding, it was never adopted by the GATT Council because the EU simply blocked its adoption.

On July 1, 1993, the EU unilaterally implemented a slightly revised banana regime known as Regulation 404. On January 18, 1994, a GATT Panel found that Regulation 404 also violated the EU's treaty obligations. On February 7, 1994 the EU once again exercised its veto

power to prevent the panel's report from being adopted by the GATT Council.\textsuperscript{225}

Thus, the WTO dispute process, much like the I.C.J. in cases described above, was unable to implement its decision.

2. The Banana Dispute – the WTO with the Teeth

In the February 1996, after the new dispute resolution procedures had been implemented, the United States, Guatemala, Honduras, Ecuador, and Mexico began a new round of dispute resolution by requesting consultations with the EU.\textsuperscript{226} Two months later, after two days of consultations failed to settle the dispute, the five complaining countries requested the establishment of a panel to hear the dispute.\textsuperscript{227} On June 7, 1996, the DSB Chairman appointed a panel.\textsuperscript{228} On May 27, 1997, nearly a year later, the panel issued four reports (one each for the United States, Mexico, and Ecuador, and one for Guatemala and Honduras), each concluding that the EU’s banana regime was inconsistent with numerous treaty obligations.\textsuperscript{229} The panel recommended “that the Dispute Settlement Body request the European Communities to bring its import regime for bananas into conformity with its obligations under [the treaties].”\textsuperscript{230}

The EU promptly appealed to the Appellate Body.\textsuperscript{231} In September 1997, in an extensive report addressing numerous legal issues, a three-member panel of the Appellate Body affirmed most of the initial panel’s rulings, and held that the EU’s banana regime violated its treaty

\begin{itemize}
  \item \textsuperscript{227} Dispute Settlement Body Report, \textit{European Communities – Regime for the Importation, Sale and Distribution of Bananas: Request for the Establishment of a Panel}, WT/DS21/6 (Apr. 12, 1996), available at http://www.wto.org (“Consultations were held pursuant to the request on 14 and 15 of March, but failed to settle the dispute.”).
  \item \textsuperscript{230} Id. at 3.
  \item \textsuperscript{231} Id.
\end{itemize}
obligations. With the EU no longer holding veto power in the DSB, the panel and appellate reports were adopted by the DSB less than two and a half weeks later.

In mid-October 1997, the EU announced that it needed "a reasonable time [to] comply with its international obligations." However, the five complaining countries were unable to induce the EU to state how much time the EU deemed "reasonable." On November 5, 1997, the five filed a request for arbitration on the issue of the EU's implementation of the WTO ruling.

The parties could not even agree on an arbitrator, and, on December 8, 1997, the Director-General appointed one. The EU requested that the arbitrator give it until at least January 1, 1999, or a total of more than fifteen months from the WTO's adoption of the ruling, to implement the ruling. The EU noted that, in addition to the need to balance various treaty obligations, the EU's legislative procedure would take time:

[T]he amendment of [the EU's] banana import regime will require setting in motion a complex legislative procedure involving: the European Commission, which has to submit a proposal for the necessary changes; the European Parliament, which will need to give its opinion on the proposed changes; and the Council of the European Union, which will decide on the changes, either by qualified majority or by unanimity, depending on whether or not it follows the proposal of the Commission. ... Once the amended basic legislation is adopted by

232. Id. at 106.
235. See Request for Arbitration, supra note 234.
236. Id.
237. Award of Arbitrators, supra note 234, para. 3.
238. Id. para. 5.
the Council, the European Commission will still need to adopt implementing legislation to make the new import regime operational.

Moreover, under [the EU’s] administrative practice, any change in legislation which directly affects the customs treatment of products in connection with importation or exportation, enters into force either 1 January or 1 July of the relevant year.\(^\text{239}\)

Although the five complaining nations vigorously disagreed with the EU’s proposed timetable,\(^\text{240}\) the arbitrator accepted the EU’s proposal, giving it until January 1, 1999 to bring its import regime into compliance.\(^\text{241}\)

Over the next few months, the EU began constructing an alternative banana import regime.\(^\text{242}\) However, the newly proposed plan did not abolish the distinction between African and Caribbean countries on the one hand and Latin American countries on the other – the very distinction that had caused the dispute in the first place.\(^\text{243}\) Thus, on August 18, 1998, the five complaining countries started a new round of dispute resolution by requesting consultations with the EU.\(^\text{244}\) The five countries noted that consultations would be fruitless, but acknowledged their obligation to request consultations before requesting a dispute resolution panel: “[I]t is with further regret that we find ourselves writing to you to request unnecessary, hollow procedural steps that will needlessly consume the time and resources of all the parties.”\(^\text{245}\) Ecuador and the United States, not satisfied with such “hollow procedural steps,” later announced that they would seek to impose trade sanctions against the EU.\(^\text{246}\) After a great deal

\(^{239}\) Id. paras. 7, 9.

\(^{240}\) Id. paras. 13-17.

\(^{241}\) Id. para. 20.


\(^{245}\) Id.

of procedural wrangling, the proposed sanctions came before the original panel, which ruled in April 1999 that the United States could suspend trade concessions worth up to $191.4 million per year.\textsuperscript{247}

That very month, the Office of the U.S. Trade Representative announced that, pursuant to the WTO's decision permitting trade sanctions, the United States would impose 100\% tariffs on nine EU products to retaliate for the EU's failure to bring its banana import regime into compliance with its treaty obligations.\textsuperscript{248} These retaliatory tariffs remained in effect for two years until after the U.S. and EU reached a mutually acceptable solution.\textsuperscript{249} Under the agreed-upon plan, the EU adopted a new system of banana licensing on July 1, 2001.\textsuperscript{250} By January 1, 2002, the EU was required to shift additional quota to Latin American bananas,\textsuperscript{251} and, by January 1, 2006, the EU must end banana quotas altogether.\textsuperscript{252}

The banana dispute is perhaps the most high-profile dispute to be settled through the WTO dispute resolution process, but it is by no means the only such success. For example, the WTO dispute resolution process has facilitated mutually agreed settlements relating to Belgian rice imports,\textsuperscript{253} Philippine regulations in the motor vehicles sector,\textsuperscript{254} and U.S. trademark provisions.\textsuperscript{255}

3. Lessons from the Banana Cases

Perhaps the most obvious lesson from the eight-year battle over bananas is that the pre-1995 dispute resolution process was ineffective in

\begin{itemize}
  \item \textsuperscript{247} Decision by the Arbitrators, \textit{European Communities-Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by European Communities Under Article 22.6 of the DSU}, WT/DS27/ARB (Apr. 9, 1999), available at http://www.wto.org.
  \item \textsuperscript{248} U.S. Trade Press Release, \textit{supra} note 219 (noting that the U.S. had announced 100\% tariffs on bath preparations, handbags, wallets, felt paper and paperboard, paper and paperboard boxes, lithographs, bed linen, batteries, and coffee makers).
  \item \textsuperscript{249} Id.
  \item \textsuperscript{250} Id.
  \item \textsuperscript{251} Id.
  \item \textsuperscript{252} Id.
\end{itemize}
enforcing international law. Obviously, if any single member can effectively veto any dispute resolution decision, then no member need accept any decision that it does not want to accept.

But the more relevant lessons are from the post-1995 portion of the dispute. The WTO dispute resolution process could certainly be called inefficient – it took years to reach a resolution, and arguably the EU will not truly be in compliance with its treaty obligations until 2006. However, the process was effective in pushing the EU to honor its international obligations. Moreover, it did so as a true international dispute resolution process, respecting the sovereignty of the individual WTO members. As one commentator has noted, “[t]he genius of the GATT/WTO system is the flexibility with which it accommodates the national exercise of sovereignty, yet promotes compliance with its trade rules through incentives.”

The WTO dispute resolution process ensures respect for sovereignty through a variety of measures. First, the WTO panels are limited to interpretation of the treaties. They are explicitly forbidden from increasing or diminishing the rights and obligations in the written documents. Thus, unlike the ECJ, the WTO panels cannot broaden the scope of their power by looking to customary international or domestic law or to ideals and policies that underlie the treaties or the WTO.

Second, the panels and the DSB lack the ability to directly coerce WTO members into obeying an order or judgment. Unlike the ECJ, the WTO panels cannot directly strike down or enact law in a member country. Nor can they order a member to pay money or to act in any other way. Rather, the WTO dispute resolution identifies treaty noncompliance, measures the cost of the noncompliance to the complaining member, and authorizes the complaining member to take proportionate action against the violator. Rather than acting as a super-sovereign, the WTO dispute resolution process channels the pre-existing power of the complaining member in a way that pushes the violator toward compliance with its obligations, while avoiding a full-scale trade war that would threaten the international trading system. In the absence of the WTO, a complaining party’s retaliatory tariffs (which would be based only

256. Jackson, supra note 209, at 61.
257. See Dispute Procedures art. 3, para. 2.
258. See Jackson, supra, note 209, at 61 (“When a panel established under the WTO Dispute Settlement System Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.”).
on that country's unilateral view of what was "fair") would likely provoke further trade sanctions leading to a breakdown in international trade.259

Additionally, unlike the ECJ, the WTO dispute resolution mechanism only deals with disputes between WTO members; it does not hear cases brought by individuals. The WTO is not a judge of the propriety of the way a nation governs individuals. It is merely an arbitrator of disputes regarding the performance of explicit treaty obligations.

Another feature that assists in keeping the panels within their proper scope is the way in which panels are constituted. The initial panel is created solely for the given dispute. And, the appellate panel consists of three members of the standing seven-member Appellate Body, chosen by rotation. Moreover, the members of the Appellate Body serve only four-year terms with a two term maximum, in contrast to ECJ judges, who can serve an unlimited number of six-year terms, or U.S. judges who serve for life. Thus, in the WTO, there are a series of ever-changing arbitrating bodies, rather than a single standing court that might be tempted (as standing courts tend to be) to amass power for itself.

IV. CONCLUSION

The United Nations, the EU, and the World Trade Organization, perhaps the world's three most prominent international organizations, present three different models of judicial dispute resolution. The important lesson that should be gleaned from a comparison of these three models is that while an international "court" can be a threat to national sovereignty, it need not be. International dispute resolution can, when designed properly, respect the sovereignty of nation-states, while still serving as an effective arbiter of international disputes. Thus, while nations that value independence and national sovereignty should be vigilant in entering into agreements that submit themselves to international dispute resolution processes, nations should not fear that every effective international organization necessarily presents the specter of "new world government."

259. See Calming the Steel Spat, WASH. POST, May 1, 2002, at A24 ("In threatening to retaliate [against recently imposed U.S. steel tariffs with trade sanctions on a variety of industries] without first seeking the blessing of a World Trade Organization tribunal, the EU is jeopardizing the multilateral [trade] system.").