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Not Quite a World Without Trials: Why International Dispute Resolution is Increasingly Judicialized

*Andrea Kupfer Schneider**

One of the benefits of teaching both dispute resolution and international law (and combining them into seminars in international conflict resolution) has been the pleasure of watching both fields evolve over the past decade. There has been much progress in both areas—increased use of alternative dispute resolution (ADR), increased understanding of interdisciplinary theories in negotiation and mediation, better use of international organizations to promote peace, and efficient dispute resolution in trade, just to name a few. Yet one of the striking features for me has been that while we are now discussing the vanishing trial in the U.S., any study of international disputes must conclude that we are witnessing an explosion in the use of trials, courts and almost any process *other* than traditional diplomacy to move countries to democracy, to peace and to more efficient economic solutions. How does this contradiction explain itself?

The focus of this brief essay is to first outline some of the factors leading to increasing judicialization on the international level where public disputes (disputes between countries) are increasingly resolved by a neutral third party. In some cases, this increased judicialization includes arbitration (which we might put under the category of ADR in the U.S.). However, the use of arbitration at the international level is not ADR as we would define it in the U.S., since the important element at the international level is that the decisionmaking power is handed over to a third party—whether we call that a court, tribunal, standing body, or panel—and voluntarily removed from the sovereign states. That development—of shifting power—is one of the amazing features of the judicialization on the international level. Nations are now willing to grant power to third parties to make binding decisions. Second, I will highlight some differences that may begin to explain these different trends. Finally, I will argue that it is the same need for justice, voice and party control that has increasingly led to ADR in the U.S. while leading to trials on the international level.

I. THE APPEARING TRIAL (INTERNATIONALLY)

For purposes of demonstrating the increasing use of trial in international disputes, I will examine three separate topic areas—economic, human rights and border disputes.

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A. Economic Disputes

The first time I read about the judicialization of international disputes was in reference to the creation of the World Trade Organization (WTO) whose story is perhaps the best example of a move from a failed diplomatic system (GATT) to a stringent and effective dispute resolution system using arbitral panels and a standing appellate body to resolve disputes.¹ Other authors and I have written about the impact of moving toward the WTO.² Most would agree that the move from trade diplomacy, which, by the mid-1980s, was not working for most countries including the U.S., to the WTO has been dramatic. First, the number of disputes already resolved by the WTO is quite impressive. Countries from all around the world and with all types of economies have brought cases to the WTO and are demonstrating their willingness and desire to have disputes decided under law rather than through negotiation with their trading partners.³ Second, these decisions are being followed. Contrary to much of the writing from the realist school⁴ and John Austin,⁵ even powerful countries are acquiescing to unfavorable decisions.⁶ At the global economic level, the caseload is exploding.⁷

At the same time that the WTO was being drafted, NAFTA also turned to third-party neutrals to resolve economic disputes under the treaty.⁸ In two different sections, NAFTA refers certain types of disputes to third parties. First, under

1. See Joel R. Trachtman, *The International Economic Law Revolution*, 17 U. PA. J. INT'L ECON. L. 33, 58 (1996) (arguing that judicial institutions make international trade agreements more binding and more attractive); ERNST-ULRICH PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM* (1997); Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398 (1997).

2. Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT'L L. 697, 697-773 (1999); Andrea Kupfer Schneider, *Democracy and Dispute Resolution: Individual Rights in International Trade Organizations*, 19 U. PA. J. INT'L ECON. L. 587, 587-638 (1998).

3. There have been 336 cases filed as of March 2006 with 56 different countries (not counting the EU and its member states) filing these cases. World Trade Organization, *Chronological List of Disputes Cases* [hereinafter WTO, Disputes Cases], available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited Mar. 22, 2006); World Trade Organization, *Dispute by Country*, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Mar. 22, 2006).

4. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 336-38 (1989). See also Anne-Marie Slaughter Burley, *International Law Relations Theory: A Dual Agenda*, 87 AM J. INT'L L. 205, 214-18 (1993) (discussing realism theory).

5. John Austin, for example, called international law "public international morality" at best because, according to his definition of law, law would only exist with the threat of enforcement. International law is merely enforced by moral obligation rather than a direct subjection to laws such as those imposed upon a citizen of a nation. See JOHN AUSTIN, *LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW* 121 (New York: Jane Cockcroft & Co., vol. 1, 1875).

6. For example, the United States and the European Union each followed unfavorable rulings in a series of cases about bananas, tax subsidies, and favored treatment. International regime theorists would easily explain this behavior in terms of the long term benefit gained by supporting international organizations versus the short term gain of ignoring a ruling. See, e.g., *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., Cornell University Press, 1983); Friedrich Kratochwil & John G. Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L ORG. 753 (1986).

7. WTO, *Disputes Cases*, *supra* note 3.

8. Andrea Kupfer Schneider, *Getting to NAFTA: Review of Interpreting North American Free Trade Agreement* by Fredrick Mayer, 17 BERKELEY J. INT'L L. 330 (1999).

Chapter 20, disputes among the countries are resolved by a panel.⁹ Second, under Chapter 11, disputes between the countries and private individuals are sent to arbitration.¹⁰ Even in smaller disputes, diplomacy was being replaced by third-party decisionmaking.

Of course, the earliest move toward the judicialization of economic disputes occurred in the European Union (EU) with the creation of the European Court of Justice (ECJ). The success of the EU is due, in no small part, to the ECJ and its ability to interpret and enforce EU law.¹¹ One of the interesting things to note about the ECJ caseload is that much of its growth comes from cases filed by individuals in their home courts which are then referred up to the ECJ for a ruling on EU law. I discuss below why this development, and the involvement of individuals, explains the growth of courts.

As a last note in covering economic disputes around the world, the success of the EU and the WTO continues to set examples for regional organizations around the world which strive to set up similar courts to resolve economic disputes.¹²

B. Human Rights Disputes

The increasing use of trials is also seen in human rights cases. In previous centuries, any violation of a person was handled in one of two ways. First, if the human rights violation was carried out by that person's own government, other international states would not intervene. Second, if a violation was committed by one country to another country's citizen, the victim's country could *espouse* the claim of the individual. We still see this procedurally at the International Court of Justice (ICJ) where, on occasion, there is a case brought by one country against another for violations to the country's citizens.¹³ There were also instances of a government officially apologizing to another government or even paying dam-

9. North American Free Trade Agreement, U.S._Can._Mex., Dec. 17, 1992, 32 I.L.M.289, chap. 10, art. 2008 [hereinafter NAFTA].

10. NAFTA, chap. 11, art. 1115, 1120. Other examples of economic dispute settlement exist with private parties as well. After years of stagnant growth, the International Centre for the Settlement of Investment Disputes (ICSID) has also seen steady growth in its caseload. The World Bank, List of Pending Cases, *available at* <http://www.worldbank.org/icsid/cases/pending.htm> (last visited Mar. 22, 2006). ICSID was created to provide arbitrations between countries and private investors in those countries. The World Group, About ICSIS, *available at* <http://www.worldbank.org/icsid/about/about.htm> (last visited Mar. 22, 2006).

11. See Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); "Political theory, and historical experience (e.g. in the context of EC law and of the European Convention on Human Rights), confirm that granting actionable rights to self-interested citizens offers the most effective incentives for a self-enforcing liberal constitution." ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 8 (1997). There have been over 13,500 cases filed at the ECJ since its inception [chart to follow with number of cases per year starting in 1953...].

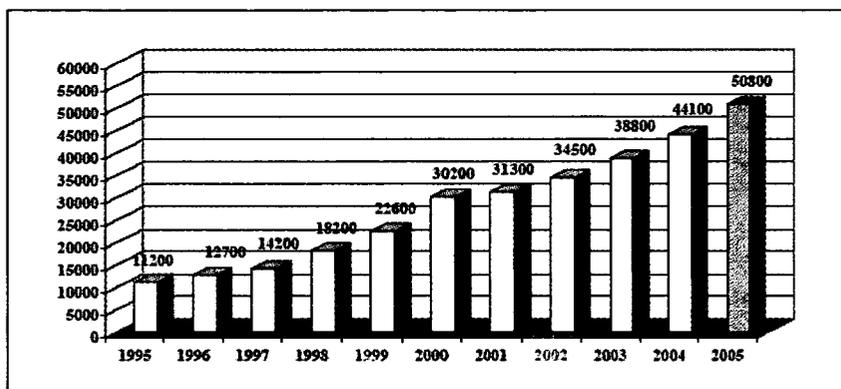
12. See, e.g., Treaty of Asuncion (establishing MERCOSUR) Foreign Trade Information System, Settlement Dispute, *available at* <http://www.sice.oas.org/trade/mrcsr/mrcsrtoe.asp> (last visited Mar. 22, 2006); Andean Protocol, *available at* <http://www.comunidadandina.org/ingles/treaties.htm> (last visited Mar. 22, 2006).

13. See e.g. the Case of Ahmadou Sadio Diallo Brought by Guinea Against Congo on Behalf of its National, *available at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-33_gc_20021113.htm (last visited Mar. 22, 2006).

ages.¹⁴ In either case, it was assumed that international law did not apply to or give direct rights to individuals.

After World War II, however, both ad hoc and regional courts were created to deal with human rights violations of all kinds—even those committed by governments against their own citizens. The first example was the European Court of Human Rights (ECHR) which hears cases brought against its over 40 member states. Rights covered under the ECHR are outlined in the European Convention on Human Rights. The caseload for the ECHR has increased over the past 50 years both because of an increase in both membership and the per capita number of cases.¹⁵ After 1994, the court rules were changed to allow individuals to bring cases directly to the court rather than screening them first by the Commission.¹⁶ This has also added to the caseload.

*New Applications Being Lodged Per Year
(1995-2004 and estimate for 2005)*

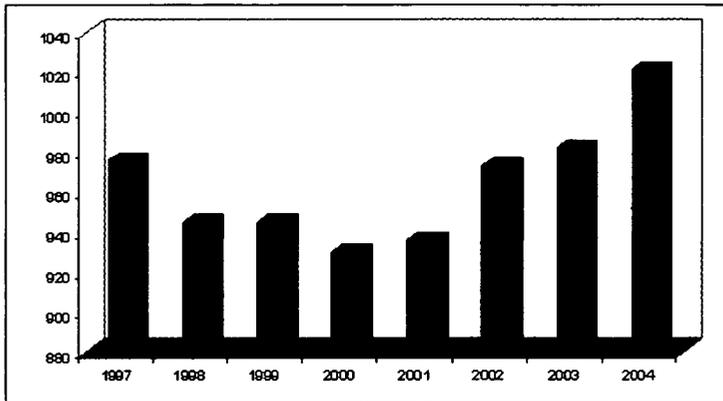


Similarly, the InterAmerican Court of Human Rights was established in 1969. Although it took almost 20 years to hear its first case, its caseload has also increased as the member countries in Latin America move to democracy.

14. "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law." See *Mavrommatis Palestine Concessions (Jurisdiction)*, 1924 P.C.I.J. (ser. B) No. 3, at 18 (Aug. 30, 1924). "The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage." *Factory at Chorzów (Merits)*, 1928 P.C.I.J. (ser. A) No. 17, at 28 (Sept. 13, 1928).

15. EUROPEAN COURT OF HUMAN RIGHTS, REPORTS, available at <http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Statistics/Statistical+Tables/> (last visited Mar. 22, 2006).

16. Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, Protocol No. 11, May 11, 1994, Council of Europe H (94) 5.

Total Number of Cases and Petitions Being Processed by Year

The preceding chart shows the total number of cases and petitions being processed by the Commission in the past eight years.¹⁷

Not only has there been an increasing number of cases in these standing courts, there have also been more ad hoc courts established to deal with human rights violations. These criminal courts conduct their own investigation and prosecution. This trend started with the Nuremberg trials at the end of World War II.¹⁸ After a hiatus marked by the Cold War, the international community, through the UN, moved to establish a veritable plethora of ad hoc tribunals to deal with conflicts.¹⁹ The International Court for the Former Yugoslavia and the International Court for Rwanda were established virtually simultaneously in 1994 to deal with the horrors of the Rwandan genocide and the civil war that tore Yugoslavia apart.²⁰ The trend for more courts continued at the end of the 1990s and into this century with tribunals established in Sierra Leone, East Timor, and other areas.²¹

The culmination of using courts, versus diplomacy, for human rights violations is illustrated by creation of the International Criminal Court (ICC) through the Rome Treaty.²² With similar rules to all of the ad hoc tribunals above, the ICC will serve as a standing court to deal with human rights crimes.

17. Inter-American Commission on Human Rights, The Petition and Case System, *available at* <http://www.cidh.org/annualrep/2004eng/chap.3a.htm> (last visited Mar. 22, 2006).

18. See Nuremberg Trial Proceeding, *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> (last visited Mar. 22, 2006).

19. See United Nations, Rome Statute of the International Criminal Courts, *available at* <http://www.un.org/law/icc/general/overview.htm> (last visited Mar. 22, 2006).

20. For the Rwanda tribunal, see United Nations, International Criminal Tribunal for Rwanda, *available at* <http://65.18.216.88/default.htm> (last visited Mar. 22, 2006); for the Yugoslav tribunal, see United Nations, International Criminal Tribunal for the Former Yugoslavia, *available at* <http://www.un.org/icty> (last visited Mar. 22, 2006).

21. The Special Court for Sierra Leone, *available at* <http://www.sc-sl.org/> (last visited Mar. 22, 2006); Commission for Reception, Truth and Reconciliation for East Timor, *available at* <http://www.easttimor-reconciliation.org/> (last visited Mar. 22, 2006).

22. Rome Statute of the International Criminal Court, *available at* <http://www.icc-cpi.int/about.html> (last visited Mar. 22, 2006).

C. Border and Maritime Disputes

There are a few additional signs that the world is turning to trials even as the U.S. may be turning away. First, the ICJ continues the slow and steady increase in its caseload. While countries seemed reluctant to bring cases in the first few decades of its establishment, that reluctance has dissipated and the court is busier than ever.²³

Second, the global push for courts is even seen in border and maritime disputes. In fact, the newly created Law of the Sea Tribunal has already started to hear cases.²⁴

D. Caveats and ADR at the International Level

Of course, this essay does not argue that ADR structures and even traditional diplomacy has been eliminated, nor should it. In the same timeframe that we have seen tribunals established to deal with the aftermath of conflicts, many of these conflicts have actually been resolved first by negotiation and mediation. In Bosnia, Richard Holbrooke used mediation to bring the parties together at Dayton.²⁵ In Northern Ireland, George Mitchell used mediation to forge the Good Friday accords.²⁶ These examples, and others,²⁷ are terrific examples of ADR in action and are lauded, studied and cited widely in ADR literature.

There are also great examples of mixed processes being created that resemble arbitration at the international level. The earliest example is the Iran Claims Tribunal.²⁸ A more recent example is the Swiss Claims tribunal established to deal with Holocaust bank claims.²⁹ Other quasi-ADR processes are the Eritrea-Ethiopian boundary claims commission³⁰ and the South Africa truth and recon-

23. View its current docket, available at <http://www.icj-cij.org/icjwww/idocket.htm> (last visited Mar. 22, 2006).

24. United Nations Convention on the Law of the Sea, Agreement Pertaining to the Implementation of Part XI of the Convention, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm (last visited Mar. 22, 2006); since 1997, the tribunal already has 13 cases on its docket, available at http://www.itlos.org/start2_en.html (last visited Mar. 22, 2006).

25. Daniel Curran, James K. Sebenius, & Michael Watkins, *Two Paths to Peace: Contrasting George Mitchell in Northern Ireland with Richard Holbrooke in Bosnia-Herzegovina*, 20 NEGOT. J., 513, 514-525, 530-531 (Oct. 2004).

26. GEORGE MITCHELL, MAKING PEACE 1 (1999); Daniel Curran & James K. Sebenius, *The Mediator as Coalition Builder: George Mitchell in Northern Ireland*, 8 INT'L NEGOT. 111 (2003).

27. See, e.g., John McDonald, *A New Future for Kashmir*, in THE NEGOTIATOR'S FIELDBOOK (Andrea Kupfer Schneider & Christopher Honeyman eds., forthcoming 2006)

28. For a history of the tribunal, see Iran-United States Claims Tribunal, Background Information, available at <http://www.iusct.org/background-english.html> (last visited Apr. 4, 2006).

29. For a description of the history and purposes of the tribunal, see Holocaust Victims Claim Resolution Tribunal, Official Information Website, available at http://www.crt-ii.org/index_en.phtml (last visited Apr. 4, 2006).

30. Tony Cotton, *Awet N'Hafsah—Have the Masses Attained Victory? Fourteen Years of Eritrean Independence and the Activities of the Claims and Boundary Commissions* (May 2005) (student paper on file with author). See also Nejib Jibril, Note, *The Binding Dilemma: From Bakassi to Badme—Making States Comply with Territorial Decisions of International Judicial Bodies*, 19 AM. U. INT'L L. REV. 633 (2004).

ciliation commission.³¹ Therefore, it is not that the international community has rejected diplomacy but rather focused on balancing diplomacy with the need for trials.

II. REASONS FOR DIFFERENT TREND DIRECTIONS

There are a variety of potential reasons that explain why internationally we seem to be moving toward more courts and more trials while domestically we are moving away from the trial. This section addresses a few of those reasons.

A. Responding to Different Needs

In some ways, the most helpful question to ask about the development of ADR in the U.S. and trials overseas is, "For what purpose?" In other words, why was ADR created in the U.S. court system and what needs is it meeting? Similarly, why have international states agreed to create courts and what needs are those meeting? These different needs can, in one sense, be understood as the difference between the need to create law versus the need to efficiently execute existing law.

How did we arrive at ADR? Various explanations abound (and probably overlap.) First, the law in the 1960's and 1970's changed to grant more rights to minorities, women, injured consumers, environmentalists and others who now viewed the courts as the appropriate method to protect those rights. Second, the explosion in criminal cases placed more pressure on courts to limit the number of civil cases on their docket. Third, some scholars have written about the types of cases now being brought to the courts—more complex, multiparty, often involving a government agency—and how these cases placed additional pressure on the courts. All three of these explanations focus on the increased docket of courts and could explain why judges started to favor ADR as a policy. For litigants with simpler cases, the overcrowded docket and likely delay of their case could also explain a willingness to use ADR. "New" plaintiffs could want to avoid the courts that had become so slow that they were no longer effectively enforcing the laws. Defendants (employers, manufacturers, perhaps husbands) could want to use ADR to avoid or manage these new rights that had been granted. And perhaps the law itself had become so standardized in certain areas that we no longer needed the careful process provided by the courts to establish and interpret the law. Theorists also hoped that, in addition to docket control and saving money, ADR would give parties more control over the outcome and allow parties themselves to participate in the process.³²

Internationally, the creation of courts is responding to a variety of needs that are quite different than the needs which started the push toward ADR domestically. First, in the economic area, we can see the desire to have court decisions indicates a move to standardize and enforce the law. The story of GATT to the

31. For information about the commission's purpose, see Truth and Reconciliation Commission, Official Website, available at <http://www.doj.gov.za/trc/> (last visited Apr. 4, 2006).

32. CARRIE MENKEL-MEADOW, LELA LOVE & JEAN STERNLIGHT, *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* (2004).

WTO is one of failed diplomacy pushing the major economic powers toward a court that could interpret and enforce trade law as a benefit for all. Rather than a need for party control, states were willing to give this up in order to actually have the law enforced. The success of the ECJ and the desire to model this court are rooted in the need to have the law interpreted and enforced clearly so that member countries could reap the economic benefits planned for in the treaties.

In the area of human rights, courts are meeting a similar need by actually enforcing the law. When left to diplomacy and negotiation, these rights were rarely enforced. The creation of global, regional, and ad hoc courts symbolizes to the world that human rights violations will be punished.

Finally, the creation of the Law of the Sea Tribunal and the expansion of cases at the ICJ continue to demonstrate that some state-to-state disputes just cannot be negotiated. In some instances, it is better for countries to let a third party resolve the dispute rather than be perceived as negotiating away important domestic interests. For example, in the early 1980s (prior to the LOS tribunal) the United States and Canada could not reach a negotiated agreement over fishing rights in the Gulf of Maine.³³ Compromising for either country would have been politically difficult as important domestic constituencies were involved. The countries submitted the case to the ICJ and could then claim that they were following the court's decision rather than caving in to diplomatic pressure.³⁴

In all of these international cases, creating a court and steady enforcement of the law is a crucial need. In addition, judicialization promoted transparency in these international systems and better enforcement. As each case is decided in front of these tribunals, nations can look to these decisions for guidance on how future disputes should be handled.³⁵ These tribunals, in effect, create the shadow of the law for international disputes.

B. Different Parties and Different Scope

The two trends may also be explained by the argument that ADR in the U.S. has been primarily designed for and used by individual parties to resolve (relatively) small disputes. The exceptions to this are the larger public disputes concerning environment or land use which might involve several states, sovereign Native American tribes, and the federal government. Nonetheless, ADR has had its explosion in the U.S. dealing with common disputes where savings in time and money can be persuasive.³⁶

Internationally, there are a number of factors concerning the subject matter and scope of the disputes that also explain why courts are preferred. First, courts may move faster than negotiations (believe it or not), particularly in the trade area.

33. See *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246, 252 (Oct. 12).

34. See *id.*

35. For more on how decisions can influence behavior, see Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1263-75 (2004).

36. *But see* studies showing that the cost savings may not actually be the case even though that is still the perception for ADR. Deborah Hensler, *Suppose It's Not True: Challenging Mediation Ideology* 2002 J. DISP. RESOL. 81.

Second, countries are looking to establish a standardized body of law that ADR cannot provide. Third, in dealing with human rights violations, a court is needed in order to have a prosecution. While ADR will come into play with plea bargaining at human rights courts, the backdrop of the law must be established first. Without courts, there would be no enforcement of these rights.

In some ways what we have at the international level is recognition that for big disputes—on trade, human rights, and boundaries—countries want courts deciding the outcome rather than relying on power politics and negotiation. It is as if the international community has read the articles critiquing ADR for taking “big” disputes out of the court systems in the U.S.³⁷ and recognized the value of the court system for creating and enforcing laws.

III. LINKING EXPLANATION IS NEED FOR PROCEDURAL JUSTICE

The commonality between the two trends both toward and away from trials can be explained through the push for a procedurally just process that can produce results. As Tom Tyler wrote about processes years ago, fairness is dependent on the process.³⁸ When individuals have a voice in the process, the process as well as the outcome will be more fair.³⁹ This need for voice is not limited to domestic disputes and can explain the trend toward trials internationally as well.

As I have discussed above, the move toward ADR in the U.S. reflects a substantial interest in letting parties control their own destiny in disputes. (Of course, actual control might be illusory⁴⁰) Nonetheless, ADR offers parties at least a perception of substantive control through the ability to speak for themselves and be heard in a respectful manner. Parties can decide when and how to settle, and meet their needs for cost savings, quick resolution, and an agreement directly crafted to meet their interests. Recent writing on ADR also focuses on the fairness of the process and the need to give parties a voice in the process.⁴¹ Research indicates that when parties perceive that they have exercised process control, they are also more likely to assume that they have a level of control over the outcome. And, even if the outcome is unfavorable, parties are more likely to perceive that outcome as substantively fair. On the other hand, ADR writing has noted that when parties feel like they do not have a voice, the process is more likely to be seen as unfair.⁴² Much of what we worry about in the ADR world is too much legalization of the process where the process becomes dominated by lawyers and judges

37. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

38. Tom R. Tyler et al., *Influence of Voice on Satisfaction with Leaders: Exploring the Meaning of Process Control*, 48 J. PERSONALITY & SOC. PSYCHOL. 72, 80 (1985) (based on one field study and two laboratory studies, researchers concluded that voice heightens procedural justice judgments and leadership endorsement even when disputants perceive that they have little control over the decision); Tom R. Tyler, *The Psychology of Disputants' Concerns in Mediation*, 3 NEGOT. J. 367 (1987).

39. See Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got To Do With It?*, 79 WASH. U. L.Q. 787, 807-09 (2001).

40. See Nancy A. Welsh, *Disputants' Decision Control in Court-Connected Mediation: A Hollow Promise Without Procedural Justice*, 2002 J. DISP. RESOL. 179.

41. *Id.*; Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theory*, 54 J. LEGAL EDUC. 49 (2004).

42. Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Annexed Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1 (2001).

who do not seem to understand that clients need to experience the ADR process as one that provides more than an outcome—the process provides the experience of justice. If clients are taken out of the process—both in terms of voice and actual presence—the process is left to the lawyers with no real benefit of procedural justice.⁴³

In the international realm, this desire for voice, control and procedural justice has manifested itself in the creation of trials. First, in the economic area, we can see voice in a multitude of ways. At the WTO, where only states can bring cases, the dispute resolution system gives voice to countries in new ways. Less powerful countries, that had no previous ability to negotiate with more powerful countries when trade agreements were violated can now bring cases and know they will be heard. Less powerful countries can use the routinization of disputes to bring these cases without having to worry about retaliation or even the more powerful countries ignoring the ruling. Second, the WTO process ensures that equally powerful countries will not come to stalemates in negotiation but, rather, adhere to the trade law for the benefit of all.

Even more similar to the individual need for procedural justice as seen in the US, the EU (and its likely regional copycats in the future) gives direct voice to citizens when there are laws that directly affect them.⁴⁴ The most unique feature of the EU is the ability of citizens to bring cases in front of the ECJ.⁴⁵ Citizens of member states can bring cases in their own domestic courts against the government for violating treaty provisions (i.e. the country promises to lower a tariff and does not).⁴⁶ If the case concerns EU law, the domestic court has the ability to refer the case for a hearing in front of the ECJ (and must refer if the court is the court of last resort).⁴⁷ Over time, this provision has ensured that thousands of cases have been heard between individuals and governments. Historically, sovereign immunity would have prevented these cases from ever reaching courts. A new understanding of how law needs to be created and enforced has given individuals “voice” and a place where they can be confident they will be “heard” in enforcing laws that most directly benefit them.

In disputes focused on human rights, the creation of trials—both prosecutions dealing with war crimes and cases brought by individuals against their government for violations—gives voice to individuals to enforce law.

In both of these instances, giving individuals voice actually results in the enforcement of law in a way that never previously occurred. And perhaps that also explains why the push for trials at the international level has been so powerful. In the U.S., we are generally quite sure that the law will be enforced. So, even when we use ADR, we know that we are bargaining in the shadow of a law we can count on. Internationally, however, these rights under trade and human rights law are new ones. Perhaps years from now when hundreds of precedents have been

43. Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary World*, 19 FLA. ST. U. L. REV. 1 (1991).

44. Weiler, *supra* note 11.

45. See, e.g., George Tridimas & Takis Tridimas, *National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure*, 24 INT'L REV. L. & ECON. 125, 126 (2004).

46. See, e.g., *id.* at 128.

47. See, e.g., *id.* at 126-130.

established, individuals will push for the ability to move away from trials at the international level. In the meantime, however, the best method for confirming these rights is through trial.

IV. CONCLUSION—A WORLD OF TRIALS

While Professor Galanter has eloquently written here and elsewhere about the vanishing trial from the United States, we need to remember that some of the same causes reducing U.S. trials increase the use of trials overseas. Individuals seek voice and control of their lives—both in disputes resolved by ADR and in international disputes where individuals are now permitted to play a role. In a plethora of international courts, both countries and individuals use trials to outline an entire new set of economic and human rights. This phenomenon reminds us that while ADR meets many of the interests of parties and our court system, only trials can create and expand the governing law. Although we may not need that expansion in the majority of cases coming through the U.S. court system, the desire to expand international law has led to an explosion of trials dealing with issues that have never before been handled by the international system. And, at least internationally, the trial is anything but vanishing.

