THE REPUTATION AND STRATEGY OF INTERNATIONAL COURTS

Shai Dothan

PhD candidate, Tel Aviv University
Buchmann Faculty of Law
The Center for Advanced Legal Studies
Tel: 0524-652409 Email: shai.dothan@gmail.com

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ABSTRACT

Reputation is a resource which determines the ability of an international court to convince states to comply with its judgments without the use or threat of sanctions. The reason to comply with a judgment by an international court with a high reputation is that non-compliance will damage substantially the reputation of the non-complying state. Therefore a court with a higher reputation will enjoy higher compliance rates.

Courts try to increase their reputation in order to be able to promote their preferences more fully in the future. States try to increase their reputation in order to be able to give more credible commitments and for other reasons.

The interest of states and courts in increasing their reputations explains their interaction and the courts’ judgments. The article shows the payoffs for the interaction between courts and states with different reputations.

The court can increase its reputation by taking calculated risks. If the court issues a risky judgment, a judgment which enjoys lower chances of compliance, it will earn more reputation if the state complies. Furthermore the very practice of issuing risky judgments sends a signal that the court has a high reputation because of the Handicap Principle – since only high reputation courts can achieve compliance to risky judgments, giving risky judgments is a credible signal of the court’s high reputation.

The level of risk is determined first by the initial reputation of the court and the state, the lower the reputation of the court and the lower the reputation of the state the lower the chances of compliance. Furthermore Judgments could be risky because they demand substantial effort from the state (termed here activism) or because they use less convincing or less legitimate reasoning. One way of issuing unconvincing reasoning is revealing the discretion employed by the judge (termed here progressiveness).

This article is a part of a bigger project designed to expand on the theory of courts as reputation maximizers. In later stages I will show how this theory will affect the courts’ behavior and important phenomena in the international arena.
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INTRODUCTION

The purpose of this essay is to answer two questions: what courts want? And how do they get it?

The first question, what courts want? demands an explanation. Courts are institutions, therefore, unlike human beings, they do not have motivations or aspirations in the psychological sense of the word. Nevertheless by studying the courts' behavior we can learn about the forces that motivate them. If we find a tendency of the court to make certain decisions in certain cases, we can hypothesize about the reason the court has that tendency, and call that reason the court's motivation.

Although many interesting phenomena can be learnt by looking at the motivations of the individual judges within the court, the phenomenon this essay describes is probably best studied by looking at the entire court as a unit.

This article is dedicated to the interaction between an international court and a single state (for instance the interaction between the European Court of Human Rights and Germany). Part V discusses the application of the theory presented here to national courts and their relations to other government branches (for instance the relations between the Supreme Court of the United States and Congress) and to the interaction between an international court and two or more states (for instance the International Court of Justice deciding in a case between the United Kingdom and France).

A similar theory is used to explain the conduct of international courts and of states, since the theory claims that both of these actors strive to increase their reputation. States and courts wish to increase their reputation for different reasons discussed in parts II and III respectively.

The concept of reputation and its effect on the practice of states is beginning to be studied in the literature. The purpose of this article is primarily to discuss the reputation of courts, which are active players who can change the reputation of other actors. This article therefore adopts a unique definition of reputation, focused on the
ability of one player with a certain reputation to influence the reputation of another player. This article accordingly defines reputation as the asset which determines the ability of one player (for instance an international court) to make another player (for instance a state) act according to its wishes without the use or threat or sanction. The reason the state will comply with the wishes of the court is that non compliance will damage the reputation of the state. Therefore reputation is held both by the commanding and the obeying, or disobeying, party, and the levels of reputation serve as an incentive for the conduct of both parties. The kind of judicial reputation this article studies, which is termed here legal reputation, is therefore a measurement of the compliance courts will receive. As will be shown in chapter IIIC there are also other ways to study the reputation of courts, but all relate to the ability of the court to receive compliance from the states.

Although the term reputation means different things for international courts and for states, as will be shown in the following chapters, both assets affect the behavior of the player holding the reputation and the other player interacting with it in similar fashions. The interaction between international courts and states with different levels of reputation is discussed in part IV.

The theory that courts try to maximize their reputation continues the present literature on the motivation of courts. The literature on the motivation of courts could be divided into four generations, each one increases the level of sophistication ascribed to the court.

The first generation is described as the legal model, this model claims that what motivates judges is their wishes to enforce and uphold the law. In a sense every judgment issued by any court is siding with the legal model, since the reasoning used by the judges tries to find basis in the law for the court's decision.2

The second generation is termed the social psychological paradigm, it tries to explain judicial behavior by looking at certain other factors which influence judicial behavior, besides the word of the law. A prominent model under this paradigm is the attitudinal model; this model claims that under certain conditions judgments will reflect the ideological attitudes or preferences of the judges.4

The third generation is the strategic choice model, this model claims that judges make decisions to achieve certain goals, and their actions are strategic, which means they take into account their expectations about the actions of other actors, and act accordingly.5 Most strategic choice models specify that the goal the judges pursue is policy. This means that the difference between this model and the attitudinal model is

3 For a list of these determinants in the literature see - Lee Epstein & Jack Knight, Toward a Strategic Revolution in Judicial Politics: A Look Back, a Look Ahead, 53 (3) POL. RES. Q. 625, available at http://prq.sagepub.com/cgi/content/abstract/53/3/625, at p. 630.
4 For an explanation of the attitudinal model and the conditions for its validity see - Lee Epstein, Jack Knight & Andrew D. Martin The Political (Science) Context of Judging, 47 ST. LOUIS L.J. 783, 794-795. For more information about the attitudinal model see - SEGAL & SPAETH supra note 2.
5 See Epstein, Knight & Martin, supra note 4 at page 798.
that it admits the judges act strategically, they are willing to compromise and decide a case not at their ideal point in order to insure that the final outcome of the case, after the response of the other branch of government, will be closer to their preferences.

This article is in fact a strategic choice model of the behavior of the court; however it is a part of a new, fourth, generation, which claims courts are long term strategic players. This article claims that courts wish to increase their reputation over time, and in order to do that they are willing to sacrifice not only the contents of their judgments, but also the final result which will be reached in certain cases. In other words, the court will sometimes risk non compliance which may lead to a result contrary to its preferences in a given case, in order to attempt increasing its reputation.  

If a court enjoys a higher reputation it will be able to achieve compliance in more cases. Therefore gaining a higher reputation allows the court to better pursue its preferences over a long time span. A court with a higher reputation will always have a higher probability of compliance for the same decision in the future.

Each of the theories about courts motivation can convincingly explain some of the actions of the court. This work is a part of a bigger project trying to propose a theory of courts as reputation maximizers. The purpose of this article is to lay the theoretical foundations for the theory of reputation as an interactive asset, opening the way for new research on the courts as long term strategic planners interested in increasing their reputation. In later stages of this project this theoretical framework will be used to explain the conduct of international courts.

This work is descriptive. This article adopts a realist perspective, this means it studies law as a way to predict and describe the actions of courts. This article assumes the existence of judicial discretion, which means that although the judges may be influenced by the law and the legal system, they still have latitude of choice which they can employ strategically.

This work is a part of the rational choice paradigm since it views the different actors in the international arena as utility maximizers. This work could be classified as part

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6 For a long term strategic choice model, claiming that judges act in order to increase their future latitude of possible decisions see Omri Yadlin, *Judicial Activism and Judicial Discretion as a Strategic Game*, 19 BARI ILAN UNI. LAW REV. 665 (2003). For a brief discussion of courts deciding cases according to long term interests see Lee Epstein & Jack Knight, *The Choices Justices Make* 48-49 (1998).

7 Another way to describe exactly this phenomenon is to maintain that a court with a higher reputation will have a wider latitude of possible decisions in future cases that stand a good chance of achieving compliance. For an illuminating study of the ways to enhance that latitude see –Yadlin, *supra* note 6.


of the institutionalist theory in international relations. This means it looks at states as primary rational actors but believes that international institutions can assist with their cooperation\(^{10}\).

This article unfolds in the following manner: Part I explains the concept of reputation and presents the specific form of reputation termed here legal reputation. Part II explains why states want to enhance their reputation. Part III explains how courts garner reputation, why it is in their interest to do so, and how the reputation of a court is determined. Part IV looks at the interactions of courts and states with different degrees of reputation. Part V discusses the interaction between national courts and other branches of government and the interaction between international courts and two or more states. Part VI explains the judicial strategy of taking calculated risks. Part VII presents the next steps of this project and concludes.

I. REPUTATION

A. What is Reputation

When two actors interact in a repeated game each actor can form a belief about the future actions of the other actor. Such a belief is formed by studying the previous conduct of the other actor and trying to predict how it will act in the future in different scenarios. Such a belief can be termed the actor's reputation.

In a game which contains more than two actors, the belief each actor creates about the future actions of another actor is based not only on the previous actions of that actor, but also on the reactions of other actors towards it. The reaction of actor B towards actor A, can teach actor C about the reputation of actor A. Furthermore the beliefs of actor B about actor A can be communicated by other channels to actor C and affect her beliefs\(^{11}\).

A reputation is therefore determined both by the actions of a certain actor, and by the beliefs and reactions of other actors towards it. Because each actor forms a slightly different belief\(^{12}\), an actor can be said to have a different reputation in relation to each and every one of the other actors. However since the beliefs of the other actors affect each other, we can study the prevailing belief regarding an actor, as a unified measure of that actor's reputation. This unified reputation can be regarded as an asset which can be decreased or increased by the actions of the actor and the reactions of other actors towards it.

\(^{10}\) For a brief explanation of the institutionalist theory see – Guzman, A Compliance, supra note 1 at 1839-1840. For the basic assumptions of this theory see Anne-Marie Slaughter, International Law and International Relations Theory: A Prospectus, in THE IMPACT OF INTERNATIONAL LAW, supra note 9, 16, 26-27.

\(^{11}\) In this sense reality is more complex than the model presented by Axelrod at ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984). Axelrod stipulates at pp. 11-12 that the only information available to the players is the history of their own interaction, they cannot create a reputation based on the interaction with third parties.

\(^{12}\) Different beliefs may be a result of gaps in information, or differences in interest between the different actors.
The unified measure of reputation tells us two distinct things: 1. What are the predicted actions of an actor 2. What are the attitudes and what will be reactions of other actors against it. These two factors are connected and affect each other; they both form the reputation of an actor.

For example, states in the international arena have a reputation for aggressiveness. If state A attacks state B the reputation of state A for aggressiveness will increase. If state A fails to respond to an attack by state B the reputation of state A for aggressiveness will decrease. The reputation of state A may also be influenced by the actions of state B, for instance if it is known that state B arms itself in expectation of an attack by state A, the reputation of state A for aggressiveness will increase.

In every arena where people or organizations interact reputation can be formed and garnered. In human societies there are many different kinds of reputations, such as reputation for aggressiveness, for vengefulness, for resolve, for morality etc. This article deals with a specific kind of reputation held by institutional actors in the international arena.

B. Legal Reputation

As indicated above reputation can tell us both what are the predicted actions of an actor and what are the attitudes and the predicted reactions of other actors towards it. When the reputation of states for compliance with international law is dealt with in the literature, two similar questions are asked, the first is: will a state comply with its international commitments? The second is: what are the beliefs of other states about the conduct of the observed state?13

This article is focused on one particular kind of conduct of states which can affect both these factors of reputation; this conduct is compliance with judgments of international courts. When a state complies with a judgment of an international court it signals its willingness to comply with future judgments as well as with international law in general, helping by this to predict its future actions. This article also claims that by complying with a judgment a state creates a greater incentive for itself to comply in the future in order to preserve its reputation, thus increasing the future probability of compliance14.

Compliance with judgments of international courts is relatively highly scrutinized by the other states. Therefore if a state complies with a judgment it will also affect the attitude of other states towards it, by this increasing the second measure of reputation.

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13 These two facets of reputation are presented at: George W. Downs & Michael A. Jones, Reputation, Compliance, and International Law, 31 J. LEGAL STUD. S95, S96 (at footnote 2) which claims: “International legal theorists use reputation to refer to both (1) the extent to which a state is considered to be an honorable member of the international community and (2) the degree to which a state reliably upholds its international commitments.” Number one answers the second question I presented above; number two answers the first question.

14 The assumption that states have greater incentive to preserves their already strong reputation than to increase a weak reputation can be found at: Guzman, The Limits, supra note 1 at page 382. This issue is dealt with later on part IV.
By choosing to focus on compliance with judgments this article therefore links the
two measures of reputation to create a unified measure of the reputation of states.

A significant part of the reason states agree to the jurisdiction of international courts is
probably to form a more stable system of reputation, which also allows them to
rehabilitate their reputation by taking certain feasible actions\(^{15}\). Without the existence
of a court non compliance to an international commitment can adversely affect the
reputation of a state without a mechanism to rebuild it. Undoubtedly being found in
violation of international law damages the reputation of a state as well, but it allows it
to rebuild its reputation by compliance with the judgment. Because the judgments are
made public and compliance with them is often scrutinized, this allows all the other
states to form a much more stable and consistent reputation of the state in question,
due to the better dispersion of information\(^{16}\).

A reputation of a state is influenced in four separate stages: the first stage is when a
state acts in contrary to international law, or is believed to have acted in contrary to
international law by other states or individuals. This conduct or belief damages the
reputation of a state in the eyes of other states.

A second stage is the opening of a procedure against a state in an international court.
If such a proceeding is initiated it indicates that at least another party (a state, an
individual or a bureaucrat in the court) believes the state violated international law.
This belief damages the state’s reputation.

A third stage is the decision by the court. If the court finds a state in violation of
international law the state’s reputation is again damaged. If a court finds the state
acted in accordance with international law this may rehabilitate the damage caused to
the state’s reputation by the belief of another state or individual that it did break
international law, a belief which lead to the court’s proceedings. This ability to
rebuild reputation by the finding that there is no violation is the first reason states
need international courts.

In the fourth stage, occurring if the court found there was a violation, if the state
complies with the court’s judgment it rebuilds its reputation and if it does not comply
its reputation will again be damaged. This is the second reason states need courts,
even if the court found there was a violation it allows the state to rebuild its reputation
by compliance. This work is focused on compliance with international courts, it
therefore deals only with reputational effects in the fourth stage, relating to
compliance with the court’s judgments.

\(^{15}\) A similar reason, the ability to minimize the reputational cost of a breach by complying with a
judgments of an arbitrator is presented in Lisa Bernstein, *Opting Out of The Legal System: Extralegal

\(^{16}\) Theoretically it is possible for a state to disobey international law and break its commitments
consistently, but abide completely with all the judgments issued against it. In reality this problem is
probably not likely to occur, especially in areas such as Europe which are under the jurisdiction of
effective supranational courts. When the probability of discovery of a violation is high, the possibility
of a state which does not comply with international law but complies fully with judgments against it is
highly unlikely.
The literature deals with compliance with international treaties and commitments and calls the asset determining the level of compliance – compliance reputation\(^{17}\). My definition of reputation has a very different emphasis; its focus is not on the conduct of the actor in question but on its ability to influence other actors. This article terms that asset legal reputation. This definition allows this article to study the incentives of courts as well as states.

This article defines legal reputation as an asset which determines the ability of one actor to influence the behavior of another actor without the use or threat of sanction. The reason to act according to the wishes of an actor with a high reputation is that acting against its wishes will damage the reputation of the disobeying actor. Different actors have different, non reputational, reasons to preserve and increase their reputation, these reasons are discussed in the following chapters. Therefore an actor with a higher reputation has more power to influence the conduct of other actors, since non compliance with its wishes will damage the reputation of the disobeying actor.

Legal reputation tells us about the expected actions of an actor. The theory proposes, for the reasons given below, that the higher the reputation of an actor the greater the incentive it has to preserve it by continuing to act in ways that will increase its reputation. Legal reputation also tells us about the beliefs and reactions of other actors; it shows us that other actors will comply with the wishes of an actor with a high reputation to preserve their own reputation.

Different actors increase their reputation in different ways and for different reasons, therefore the legal reputation of a court tells us slightly different things than the legal reputation of a state. Furthermore states and courts are not the only actors in the international arena, other actors including individuals, NGO’s, corporations and other institutions have reputations as well, but they will not be dealt with in this article.

The interaction this article studies is that between international courts and states. Both of these actors have reputations. The reputation of the court determines the damage to the reputation of the non complying state, the higher the reputation of the court the greater the damage to the non complying state. A high reputation court is therefore a court which states will usually comply with to preserve their reputation\(^{18}\). The reasons why courts want to increase their reputation are dealt with in part III.

The reputation of the state determines the injury to the reputation of the court in case of non compliance, the higher the reputation of the state the greater the injury to the reputation of the court in case of non compliance. The reason the reputation of the court will suffer more from non compliance by a high reputation state is that a high reputation state normally complies with international law. If it fails to comply with the

\(^{17}\) See Guzman, The Limits, supra note 1 at 387.

\(^{18}\) My definition of the reputation of courts is similar to the definition of effectiveness used at Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 290 (1997). Effectiveness is defined there as the ability of a supranational tribunal to compel compliance with its judgments. Since high reputation courts, according to my terminology, can cause more reputational damage in case of non compliance they have more ability to compel compliance to their judgments, and are therefore more effective according to the definition of Helfer & Slaughter.
court this is strong negative signal regarding the court’s reputation, it means the court failed to achieve compliance even from a state which normally has a strong incentive to comply. The incentives of states to increase their reputation are dealt with in part II.

By looking at the interactive meaning of reputation, and studying the reputations of courts as well as states this article tries to form a more comprehensive theory of reputation. Such a theory explains why actors seek reputation and how the reputation of one actor can affect the reputation of other actors. Answering these two questions allows us to learn how reputation affects the actions and incentives of actors in the international arena.  

Speaking about the reputation of courts as a unified asset which can be increased or decreased is a simplification of reality. In fact the reputation of the court is determined towards a certain reference group. For instance an international court can have a certain reputation towards developed states and a very different reputation towards developing states.

Despite the existence of different reputations towards different reference groups, those different reputations are linked and affect each other. The linkage between the reputations of courts towards different reference groups allows us to speak of a unified measurement of the court's reputation.

For states different kinds of reputations may be increased by different and even contrary actions. For instance, if Syria wants to increase its reputation towards Iran it may have to act in ways which will damage its reputation regarding the rest of the international community. Within the international community there are sub-communities of rebels in which reputation may be acquired by actions which damage the reputation in the general community of nations.

However this article deals only with a very specific kind of reputation, which looks at the ability of an actor to make other actors comply with its wishes in order to preserve their own reputation. The theory therefore distinguishes between what is termed here legal reputation and the other types of reputations of states. In studying this kind of reputation the theory creates a simplified version of the international community, in which compliance with judgments of courts increases the reputation of states and non-compliance damages it. Courts on the other hand increase their reputation by gaining compliance, and decrease it by suffering non compliance.

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19 In Guzman, The Limits, supra note 1 at page 383 it is stated: “...no good theory of reputation currently exists. Understanding how reputation can affect international law requires elaboration of how states acquire and lose reputation, how they make decisions in light of reputational concerns, and how non-reputational and reputational concerns interact.” Despite the fact that the focus of this article is courts and not states, the theory presented here provides preliminary answers to those questions as far as compliance with judgments is concerned.

20 Sometimes the situation is more complex, because the reputation of the court towards one reference group damages its reputation towards another. This type of problem may occur when the court is dependent or biased in favor of one reference group which is a rival of another reference group affected by the judgment. This problem will be dealt with in later stages of this project.

21 For the phenomenon of rebel reputation see - Alex Geisinger & Michael Ashley Stein, A Theory of Expressive International Law, 60 VAND. L. REV. 77, 126 (2007).

22 This theory ignores the possibility of an evil court, which issues decisions in contradiction to international law. Therefore every act of compliance to a court can only increase the reputation of a state and never damage it.
The reputation of courts and the reputation of states tell us different things, but they both teach us about the commitment of these institutions to international law and their ability to influence the actions of other actors. The differences between the reputation of courts and of states will be discussed in the following parts.23

Other reputational concerns can undoubtedly affect the conduct of states, for instance states may sacrifice their legal reputation to create a reputation for toughness24. The theory deals with these concerns as it deals with other non reputational incentives, as a counterweight to the incentive of states to increase their legal reputation.

II: REPUTATION OF STATES

A. What Is the Reputation of States and How It Is Increased

The issue of compliance of states with international law was studied extensively in previous years. Many theories tried to explain the conduct of states, why they sometimes comply and sometimes fail to comply with their international obligations.25

Some theories explain state compliance in a way similar to this article. These theories consider states as players in an iterated game and explain compliance by the interest of states in increasing their reputation, which will benefit them in future interactions26.

The focus of this article on compliance with judgments of international courts is unique. There are several reasons why this focus is interesting. The first reason is that the main emphasis of this theory is the conduct of courts. The second reason is that compliance with international judgments is an area with relatively dispersed information as opposed to compliance with treaties for instance. The dispersion of information allows the theory to speak of a uniform measure of reputation, instead of on different reputations held by each individual state with relation to each other state, as a result of gaps in information. This allows the theory to speak of actions of states or courts as increasing or decreasing the unified asset of reputation. The focus on compliance with judgments also allows us to study the way reputation affects the

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23 another problem is that states have multiple reputations for compliance, according to George W. Downs and Michael A. Jones, Reputation, Compliance and Development, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION – THEORETICAL PERSPECTIVES 117 (Eyal Benvenisti Moshe Hirsch ed., 2004). This problem as well will be dealt with in later stages of this project.

24 For treatment of other reputational considerations as influencing the state's compliance decision without affecting compliance reputation see – Guzman, The Limits, supra note 1 at 386-387.


26 For a theory which looks at states’ reputation for compliance with international law see – Guzman, A Compliance, supra note 1 and Guzman, The Limits, supra note 1. For a different theory which looks at reputational benefits of esteem and membership in the international community see Geisinger & Stein, supra note 21.
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interaction between states and courts, and how the reputation of states affects the reputation of courts and vice versa.

Focusing on compliance with international judgments can teach us also about compliance with international law and international commitments. This is true especially in Europe which is governed by effective supranational courts, the ECHR and the ECJ. The higher probability that violations will be discovered and discussed in court makes compliance with judgments a better indicator of compliance with international law in general.27

How do states increase their legal reputation? The simple answer will be that according to this theory each time a state complies with an international judgment its reputation increases and each time it disobeys a judgment its reputation decreases.28

However if we would try to measure the reputation of states simply by looking at compliance rates to international judgments we will be facing a serious problem of selection effects. For instance a state which complies with almost all its international obligations without the need for litigation, may litigate only cases in which the cost of compliance is immense, in those few cases it will choose not to comply. Such a state will have overall lower compliance rates than a state which ignores its international commitments and is constantly brought to court, but then complies with many judgments which demand only little effort29.

In order to solve this problem we must acknowledge that some instances of compliance are a better signal of the commitment of a state to international law and will therefore increase its reputation more than compliance to other judgments.

Reputation is a result of signaling. The signal does not only convey information about reputation it actually creates the asset of reputation. A signal is more potent, which means it has a greater effect on our previous assessment when it communicates unexpected information. This means that when we do not expect a state to comply and it does comply, against our initial expectation, this will serve as a stronger positive signal increasing the reputation of the state. On the other hand if we do expect a state to comply and it does not comply, against our initial expectation, this will serve as a strong negative signal which will damage the reputation of that state.

27 See supra note 16.
28 See Heiner Schulz, The Political Foundations of Decision Making by the European Court of Justice, 99 ASIL Proceedings 132, 133 (2005). Where it is claimed that when a member government disobeys the ECJ it damages the legitimacy of the EU legal system but also “threatens to establish or reinforce that government’s reputation for not playing by the rules”, when member states comply with an adverse ruling they “strengthen the EU legal system’s norm of reciprocity and enhance their own reputation for playing fair”. This article stipulates that there exists also a reputation of courts besides that of states and for each act of non compliance the reputation of the court as well as that of the state is damaged, while for each act of compliance both the reputation of the court and the reputation of the state are increased.
29 A state may also submit harder cases, with which it is less likely to comply, to more effective courts. This phenomenon will affect the compliance rates to that court. On this phenomenon see Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 CAL. L. REV. 1, 28 (2005). This phenomenon is dealt with on chapter IIIIC1.
In order to better grasp this intuition I propose we compare it to the ELO rating system in chess. According to this system if a weak player were to bit a stronger player the weak player would earn more to her rating than the strong player would have earned had she won the match. The victory by the weak player is unexpected; it therefore sends a more potent signal of the player’s strength.

In a similar fashion unexpected compliance will result in more reputation points earned by the complying state, unexpected non compliance will result in more reputation points lost for the state. Expected compliance will result in less reputation points earned and expected non compliance will result in less reputation points lost.

Several factors influence our expectations regarding the state’s compliance; this article will focus on four such factors. This list is not necessarily comprehensive but it probably illustrates the main factors which influence the strength of a reputational signal.

The first factor is the preliminary reputation of the state. The higher the reputation of the state the more we expect it to comply in future cases. Reputation is garnered by compliance, therefore a state which has a high reputation complied in the past and is expected to comply in the future. Since compliance by a high reputation state is expected (and therefore non compliance is unexpected) a high reputation state will earn less reputation in case it decides to comply and lose more reputation in case it decides not to comply.30

The second factor is the preliminary reputation of the court deciding in the case. Since courts increase their reputation by receiving compliance, a high reputation court received compliance in the past and is expected to receive compliance in the future. If a state will comply with a high reputation court it will be acting according to our expectations and will therefore earn only little reputation. However if the state would not comply with a high reputation court it would be acting unexpectedly and will therefore lose more reputation.

The third factor is the cost of complying with the judgment of the court, a measure this article refers to as the court’s activism32. When a judgment is hard to comply with compliance is unexpected. This is true for two reasons. The first reason is that a state will comply only if the material cost of compliance is lower than the reputational cost of non compliance plus the reputational benefit of compliance. The higher the material cost of compliance the lower the chances that it will be lower than the reputational incentives.

30 For an explanation of this phenomenon see chapter IVD. You may observe that states are motivated more by the fear of losing reputation than by the prospect of earning reputation. This is why high reputation states that will lose more reputation for non compliance are more expected to comply, even though they will earn less reputation for compliance. This phenomenon as well is explained in chapter IVD.
31 For an explanation of this phenomenon see chapter IVA. Again you will note that what motivates states is the fear of losing reputation more than the prospect of earning reputation. This is why states are expected to comply with high reputation courts to avoid a substantial loss to their reputation, even though they will earn less reputation by compliance to high reputation courts. The stronger effect of the fear of losing reputation is explained in chapter IVA.
32 See chapter VIC.
The second reason is that other states are aware of the reputational calculations by the state in question. They take into account the cost of compliance to a judgment when forming their assessment of the state’s reputation. If the material cost of compliance is low and the state fails to comply, the other states get a signal that this state sets a very low value on its reputation. Since the higher the reputation of the state the higher it values its reputation (which means it will lose more for non compliance according to the first factor listed above), a signal that a state gives little value to its reputation, signals that the state has a low reputation.

The fourth factor is the level of legitimacy the court gives its decision. If the court uses unconvincing reasoning which is less legitimate other states will not expect the state receiving the judgment to comply. Therefore if the state will fail to comply the reputational loss will be smaller. On the other hand if the state will comply with a judgment with illegitimate reasoning, against our expectations, its reputation will be substantially increased. Judges can decrease the legitimacy of their judgments by revealing their judicial discretion using a form of reasoning this article refers to as progressive. By sending those signals over time states can build their reputation. A reputation of a state in a given point in time is a sum of its reputational losses and gains measured according to the factors listed above.

B. Why Do States Want to Increase Their Reputation

All states have an interest in increasing their reputation. This is true because a high reputation can assist a state in achieving many other material gains.

The first reason a state wants to increase its reputation is because a high reputation allows it to make credible commitments. Reputation allows the state to give more credible commitments for two reasons. The first reason is that, as mentioned above, a state which complies with international judgments is more likely to comply with its commitments in the first place. The second reason is that the other states know that even if this state will violate it commitments they can turn to an international court and the offending state will, more probably, comply with its judgment and amend the violation.

A state which is better able to create credible commitments can increase its bargaining power. For instance in economical contracts other states will trust the high reputation state and calculate less risk from the transaction with that state, therefore they will be willing to give that state better conditions in the transaction. In all kinds of treaties, including human rights treaties if a state is able to give credible commitments the other states will demand less costly safeguards to insure the compliance of that state with the rules of the convention.

The second reason states want to increase their reputation is that a high reputation will benefit them in their relations with international courts. This article stipulates that non

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33 See chapter VID.
34 This reason is presented at Guzman, A Compliance, supra note 1 at 1855.
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compliance by a high reputation state will damage more significantly the reputation of the court issuing the judgment. Since the court is aware of that fact it will be much more cautious in issuing judgments which conflict with the interests of high reputation states. High reputation states will therefore receive more lenient judgments. Since high reputation states are expected to perform the judgments issued against them the court will also use less onerous enforcement mechanisms, which will do less damage to the state's sovereignty.

A third reason why states want to increase their reputation is related to their interaction with other states. Up until now this article dealt with courts as the active party, which issues judgments the states can decide whether to comply with. However

35 Although the court expects more damage from non compliance by a high reputation state, the expected probability of compliance from a high reputation state is higher. Since compliance is expected from high reputation states, which fear more for the loss of their own reputation, this may theoretically lead the court to issue more activist judgments against high reputation states. However the theory presented here assumes that what determines the court’s behavior and renders it more lenient against high reputation states is the increased magnitude of expected loss in case of non compliance by a high reputation state, not the decreased probability of non compliance. The assumption that courts will be more lenient towards high reputation states or more activist against low reputation states is supported by previous literature. For instance see: Brendan Mangan, Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform, 10 Hum. RTS. Q. 372, 383 (1988). Where it is stated: "Some commentators have observed that review by the Commission and the Court may be particularly relaxed in the case of derogations by a democratic government. That is, a democratic government that is reputed to make good faith efforts to preserve human rights will be given a wider margin of appreciation than will a government with a lesser human rights reputation." see also Fionnuala Ni Aolain, The Emergence of Diversity: Differences in Human Rights Jurisprudence, 19 Fordham Int’l L.J. 101, 114 (1995). Where it is claimed that: "Where ostensibly democratic states have engaged in the suspension of certain rights guaranteed under the Convention, the Commission and Court are less exacting in their requirements. The leeway given to such states has been noticeably different." See also FREDÉ CASTBERG, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 169 (1974). Where it is claimed: “If a government is known to be basically sympathetic towards the principles of democracy and the rule of law, it is undeniably of significance that this government has found the situation to be such as described in Art. 15 of the Convention (Allowing permissible derogation – SD). Aolain, id, and Joan F. Hartman, Derogation from Human Rights Treaties in Public emergencies, 22 Harv. Int'l L.J. 1, 29 (1981). Stress that the European Commission on Human Rights showed greater activism against the Greek military government (in the “Greek” case [1969] Y.B. EUR. CONV. ON HUMAN RIGHTS (Eur. Comm. on Human Rights)) than the attitude showed by the European Court of Human Rights towards other states in similar circumstances. While it is possible that the difference in the attitude of the court and the commission in this and other cases may have resulted from other reasons, for instance disbelief of the depiction of the situation by the low reputation state, which led to a different perception of the facts by the court, such a difference may also result from reputational considerations by the court of the nature described above. While the assumption that courts will be more lenient towards high reputation states is not strictly necessary for the presentation of the incentives of courts and states presented in this article, later stages of this project, which are also concerned with the conduct of courts, will attempt to further support this assumption by examples and other sources.

36 Theoretically the court can also issue activist judgments against high reputation states but use more enforcement efforts against them, to counter the greater risk in case of non compliance. However such practice seems unlikely. Part of the reason this is true is that using enforcement mechanism is also costly for the court's reputation. If the court receives compliance only after the intervention of an enforcement mechanism compliance is a less potent signal of its reputation. The second reason courts will probably prefer issuing more favorable judgments against high reputation states is that most courts do not have a strong enough enforcement mechanism in reality, they therefore cannot rely on enforcement efforts to assure compliance. For these reasons the theory presumes that the preferred tactic of the court will be to use less activism against high reputation states.
sometimes states can be an active party as well and influence directly the reputation of other states.

One state can influence the reputation of another for instance by denouncing it or by praising it. A high reputation state can do more damage to the reputation of another state by criticizing it, or simply by terminating its relations with that state. Because a high reputation state has a greater impact on the reputation of other states, it can also make them abide by its will more effectively. The high reputation state can do that by threatening to damage the reputation of other states in return for non compliance with its wishes, or by promising to rebuild the reputation of another state in return for more beneficial conduct. This is the reason why a high reputation state will be able to have more power and influence in its relations with other states.

A fourth reason is that higher reputation makes it easier for states to form military and economic coalitions. This is true firstly because the high reputation state can commit more credibly as discussed above. Another reason is that tying a coalition with a high reputation state can help the reputation of its partner. On the contrary making a coalition with a low reputation state may damage the reputation of its partner.

A fifth reason is that high reputation states are more protected from attacks by other states. This is true because if a state acts aggressively towards a high reputation state its own reputation will be damaged. If a high reputation state is attacked it can respond more effectively because it will be easier for it to form a counter-coalition. A high reputation state is also less likely to be criticized for taking military measures to defend itself.

All these reasons suggest why, other things being equal, states have a real interest in preserving and increasing their legal reputation. States not only have an interest in having a high reputation, they have an interest in having a higher reputation than the other states, especially states which interact with them. This is true because in order to have a strong influence on another state, a state has to have a higher reputation than that state. Since reputation can be used to threat and coerce other states, it is an asset, like military might, which should be increased to surpass all other competing states.

States compete with each other on increasing their reputation also because it serves their interest to be the most credible business partner. A state will therefore try to have a higher reputation than its competitors in order to control the market.\textsuperscript{37}

This article claims that increasing legal reputation is an important interest of all states; however this does not eliminate other interests. A state may still choose to act in a

\textsuperscript{37} This article does not deal with the way states affect directly the reputation of each other. However, it could be presumed that states will be wary of damaging too much the reputation of their competitors. This is true because their competitors are often also their business partners and they would not want to damage their incentive to comply with their mutual commitments. Another important reason states would not want to damage too much the reputation of others is because reputation does not exist in void, it needs the international community to support it. If all states would lose their reputation except one, the reputation of that state will be useless, because it will no longer indicate a sense of membership in the international community. Despite these two reservations it is probably true that in the current state of the world every state stands to gain from a decrease in the reputation of another state. States stand to gain the most from a decrease in the reputation of their competitors and their enemies.
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way which will damage its reputation if it expects other benefits from such conduct. These benefits can be either direct, such as economical or political goods, or related to increasing other kinds of reputation for instance a reputation for aggression which may help a state sustain deterrence. In many decisions a state can be expected to balance the consideration of its legal reputation with its other interests.

III. REPUTATION OF INTERNATIONAL COURTS

A. How Do Courts Increase Their Reputation

The main focus of this article is the conduct of international courts; I therefore now turn to explain how courts can increase their reputation. The simple answer is that the reputation of a court is increased each time it receives compliance to one of its judgments and is decreased each time it receives non compliance.

The problem with this simple model is that some instances of compliance will have a greater effect on the reputation of the court than others. Looking simply at compliance rates will create a problem of selection effects, if high reputation courts receive more difficult cases, and therefore issue decisions which are harder to comply with, they may receive worse compliance rates than low reputation courts.

Similar to the reputation of states, the reputation of courts is also a result of signaling. As with states, the signals not only disperse information on the reputation of the court, they create the reputation of the court. Therefore what determines the level of loss or gain to the court’s reputation is whether compliance is expected.

What determines our expectation of compliance are again the four factors discussed in chapter IIA – the state’s preliminary reputation, the court’s preliminary reputation, the cost of compliance to the decision and the legitimacy of the court’s reasoning. The higher the reputation of the court and the higher the reputation of the state the more we would expect compliance. We would expect compliance for decisions which are easy to follow and which use legitimate reasoning.

The reputation of the court is therefore increased by sending potent signals that it has a high reputation. The more unexpected compliance is due to the factors listed above the stronger the signal that the court has a high reputation. If the court receives non compliance its reputation will be decreased, the more unexpected non compliance is it will serve as a stronger negative signal which will damage the court’s reputation.

38 For a clear explanation of this point see Guzman, The Limits, at 386-387.
39 For the problem of selection effects see Posner & Yoo, supra note 29, 28 (2005). The article mentions another problem with measuring compliance rates, how to deal with delayed compliance, with this problem and the problem of partial compliance I will deal in the chapter IIIIC. At Laurence R. Helfer & Anne-Marie Slaughter, Why States Create International Tribunals: A Response to Professors Posner and Yoo, 93 CAL. L. REV. 899, 918-919 (2005). The opposite case is presented, states create a court which demands them to do little more than their respective domestic laws already require, such a court will have high compliance rates, but we could not call it effective, or maintain that it has a high reputation according to my terminology. For this problem see footnote 47.
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The court garners reputation over time by sending such reputational signals. Each time the court receives compliance its reputation will be increased and each time it receives non compliance its reputation will be decreased, the change in the court’s reputation will be determined according to our initial expectation of compliance. Therefore the reputation of the court in a given time is determined according to the sum of the positive and negative signals it received over the years.\textsuperscript{40}

B. Why Do Courts Want to Increase Their Reputation

Most of the modern theories about courts motivation claim that courts (or individual judges) want to promote their preferences. Most theories differ only at the amount of sophistication they ascribe to the courts. The attitudinal model would claim that judges decide cases at precisely their ideal point; their judgments are therefore a straightforward reflection of their preferences. The common version of the strategic choice model claims that courts decide a case in a way which will lead to the best possible final result according to their preferences, after taking into account the expected response of other players\textsuperscript{41}.

The theory presented in this article agrees that courts want to promote their preferences. The difference between this theory and previous theories is only that it claims courts take into account a longer time span, they act in ways which will allow them to better promote their preferences over time. By acquiring a high reputation a court insures itself that in each case in the future the final result will be closer to its preferences.\textsuperscript{42}

An international court with a higher reputation has a higher chance that each one of its decisions will be complied with more fully by the state, than a lower reputation court issuing a similar decision. This means that if the high reputation court would give the same decision, the final result will be closer to its decision, since the state would comply more fully. Since the court’s decision is close to its preferences the final result will be closer to the preferences of the high reputation court.

Alternatively the high reputation court can decide the case closer to its ideal point and give a decision which is harder to comply with; in that case the high reputation court would have a greater chance of achieving compliance than a low reputation court giving the same decision. Whether the high reputation court will decide the case closer to its ideal point, or will simply achieve better compliance to a similar decision, the final result will be closer to the preferences of the high reputation court.

It may be claimed against my theory that the complexity of calculations needed to promote the court's long term interests make it unlikely the judges will undertake those calculations. My response to this claim is that this process is not acknowledged

\textsuperscript{40} However a court may have an initial reputation before its first decision was given. Such reputation will be determined by other factors such as the prestige of the judges on the court, its political supporters etc. Other factors, which are not to be discussed in this article, may also later affect the court’s reputation. For instance personal changes on the court, or certain declarations made by states or other courts may also affect the court’s reputation.

\textsuperscript{41} For some more information on these models see the introduction to this article.

\textsuperscript{42} For previous theories of long term strategic choice see \textit{supra} note 6.
by the judges, it is a result of natural selection. Tactics which over time helped the court's reputation are repeated and considered as good judicial practice, while tactics which damaged the court's reputation are abandoned\(^43\). This article is focused on the external point of view, that of the court as a unit, the court as a whole is probably more likely to act over time in ways which will increase its reputation than each individual judge. Individual idiosyncrasies will balance themselves out and the process of selection will yield better results for courts as a unit.

Both the attitudinal model and the strategic choice models can explain many of the courts’ behaviors; furthermore the model presented here probably cannot explain every judicial conduct. The contribution of the model presented here is that it can probably explain certain judicial behaviors the other models cannot explain.

The central behavior other models cannot explain is judicial reasoning. Courts can issue judgments which are less or more convincing. Every lawyer probably faced numerous times judgments which did not seem to use all the resources of the court's legitimacy. A judgment may be less legitimate because it exposes the discretion employed by the judges, a phenomenon I call progressive reasoning\(^44\). Since judges are not representatives of the people, their own discretion is a less potent source of legitimacy than the law which reflects the public will.

Why would the courts issue a reasoning which only damages the prospects of compliance? Arguably the reason is not that judges want to expose their real and authentic reasons for deciding a case. It may be assumed that judges are, and should be, more concerned about promoting their preferences regarding the final result. Judicial reasoning is not meant to show the judge's creativity it is meant to have a real effect on the world, therefore the reasoning is instrumental, and its goal is to promote the judge's preferences.

Furthermore judicial reasoning is not a result of the judges' individuality; it is a result of a long period of socialization and legal training, which makes the judges accustomed to certain types of legal reasoning. Therefore even if the reasons presented by the judge present accurately her thoughts on the matter, the reason she has those thoughts is a result of judicial training and precedent which evolved as efficient judicial tactics.

\(^{43}\) At AXELROD, supra note 11 at 50, three reasons are offered for the elimination of bad strategies in favor of better strategies: learning (repeating strategies which yield better results), imitation (copying the successful strategies of others) and selection (elimination from the game of those using unsuccessful strategies).

Those three mechanisms probably operate on the practice of courts. Judges will learn from their former successes and failures. Judges will study the successful strategies of other courts and imitate them. It is even probable that unsuccessful courts will be used less and may even cease to operate, leaving in operation only the courts using the better strategies.

\(^{44}\) A judgment can be less legitimate for other reasons as well, for instance a national court relying on international law is usually issuing a less legitimate decision than a court basing its decision on domestic law. The reason for this is that domestic law is representative of the will of the people and therefore enjoys higher legitimacy in the domestic arena. For a presentation and criticism of a similar consideration see Eyal Benvenisti, Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts, 4 EJIL 159, 174-175 (1993).
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It also seems unreasonable that judges cannot contrive more convincing reasoning to support their preferences. The multitude of legal rules makes it possible to support almost any decision by more legitimate sources.

If we accept this claim that judges do not have a distinct preference for a certain type of reasoning the attitudinal model cannot explain the practice of issuing unconvincing reasoning.

The use of less legitimate reasoning cannot be explained by the strategic choice model, since in a given case that practice only damages the prospects of compliance. The use of that reasoning will therefore put the final result further from the court's preferences.

The practice of using unconvincing reasoning can only be explained by a theory which claims there is a long term benefit for judicial risk taking, a claim which is raised in part VI of this article. My basic argument is that unexpected compliance will yield a bigger benefit for the court; therefore the court can strategically give judgments which are risky since they involve a lower probability of compliance. Furthermore giving risky judgments serves as an independent signal which increases the court’s reputation, since it will be undertaken only by high reputation courts.

By stipulating that courts are long term strategic planners which think not only on the case at hand but on increasing their reputation over time we can explain seemingly irrational behavior like issuing non convincing reasoning.

This theory can also better explain judicial activism, which many times may seem ill calculated when taking into account only the final result in a given case. If judges can increase their reputation by risk taking, and activist judgments involve a greater risk of non compliance, the practice of judicial activism can be explained by looking at the court's long term interest in increasing its reputation.

C. Methods for Measuring Courts’ Reputation

1. Compliance

I have defined the reputation of the court according to its ability to make states and other actors comply with its wishes. The state will comply with the court's judgments because it fears a loss of its reputation in case of non compliance, therefore the expected loss to the state's reputation is a good way to measure the court's reputation. The higher the reputation of the court, the greater the damage to the state's reputation should it not comply.

45 Activism can always be explained by issuing the case closer to the court's ideal point; it can therefore be explained by the attitudinal or the strategic choice models. The problem with looking at judicial activism is that it is hard to assess what is the real ideal point of the court. The claims of all theories regarding judicial activism cannot be falsified; it is therefore hard to promote theoretical claims based on the issue of activism.
A good way to measure the reputational cost that each state fears in case of non-compliance is by assessing the material cost of complying with the court's judgment. A state will comply with the court's judgment only if it expects the reputational cost for non-compliance to be higher than the material cost of compliance. Therefore I think the most accurate way to measure the court's reputation is to assess how much a state is willing to pay to avoid non-compliance. To get a better estimate of the court's reputation we would need to have an estimate of all four factors influencing the state's reputational loss discussed in chapter IIA.

I know of no accurate way to assess the cost of complying with a judgment. The costs of compliance vary. Some costs, such as payment of reparations are easy to measure. However some orders of the court, especially taking general measures such as changes to legislation, involve costs which are impossible to measure financially. These may entail a loss in security or in the efficiency of government or even forfeiting ideological preferences.

Since we have no effective tool of assessing the cost of compliance to the court, we have to rely on the intuition that if the reputational cost of non-compliance is higher states will comply more often. Therefore, high compliance rates, measured by the ratio of cases which were complied with to the cases which were not complied with will serve as an indication to the court's reputation.

However when you assume the court acts strategically and anticipates the behavior of the states, compliance rates become a problematic proxy for reputation. We can never know if compliance is due to the fact that the court adapts its rulings to the interests of the states to avoid non-compliance, or if compliance is due to the high reputation of the court.

There are several more problems with this measurement of reputation, which result from the fact that compliance is very hard to define. One problem is how to deal with delayed compliance. Sometimes judgments are complied with after many years when the conditions are completely different, it is difficult to decide how to deal with such behaviors.

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46 Of course you may also use the method offered at Posner & Yoo, supra note 29 at 28 – divide the number of complied-with judgments by the number of judgments.

47 See Schulz, supra note 28 at 134. According to the terminology used in this article and explained in chapter VIC we can rewrite Schulz’s claims to state that we cannot know if the high compliance rates are a result of the court’s conservative judgments, and therefore serve as a weaker signal of the court’s reputation. For this problem see footnote 39.

48 For this problem see id. My friend Olga Frishman remarked that delayed compliance may serve as a more potent signal for the high reputation of courts for the following reason: As mentioned in chapter IB the reputation of states is affected in several stages, this article is focused on the fourth stage, which means it is only interested in the question how compliance or non-compliance affects the state’s reputation. However in the third stage the very fact that the state was found in violation of international law damages its reputation. When a state obeys a judgment after a long time it only rehabilitates part of the reputation it lost in the third stage, the more it delays its compliance the smaller the part it can save of its reputation. Therefore if a state obeys a judgment which costs it 1,000,000$ after a long period and manages to save only 10% of its reputational loss, this means it values its entire reputational loss at the third stage at 10,000,000$. As you can see the smaller the fraction of the reputation which is saved the more we would think the state values its own reputational loss. The reputational loss is a factor both of the reputation of the state and of the reputation of the court, therefore delayed compliance is a signal that the state and the court have a high reputation.
Another problem is that of partial compliance. Different courts usually demand several different kinds of actions to be taken by the states, sometimes some of these orders are complied with while some are ignored. For instance to comply with the IACHR states need to pay monetary compensation, to try and punish offenders within the state and to change domestic law. Posner and Yoo found that states usually paid the compensation, but ignored the other measures which were ordered. When several parts of the same judgment are complied with and others are ignored, it is difficult to decide how to classify the conduct of the state.

Another problem is that of selection effects. If higher reputation courts receive more difficult cases in which compliance is harder than they may receive overall lower compliance rates than low reputation courts.

All these problems render compliance rates an imperfect tool to measure the reputation of the court. However presumably large differences in compliance rates may teach us a lot about a court’s reputation. In order to mitigate some of the problems in checking compliance this article proposes some other tools to study the court’s reputation.

2. Usage Rates

In order to overcome the problems of checking compliance rates, Posner and Yoo offer two other measurements of the court's effectiveness, both can also serve as indication of the court's reputation, but both suffer from their own problems.

The first method is looking at usage rates of the court; this measurement is based on the assumption that if a court is ineffective states will stop using it. Based on the same intuition if the court has a low reputation, and states are not expected to comply with it, than states and other actors will stop using it. One problem with this tool is that there is probably great merit to this intuition, however three countervailing intuitions could be offered.

First, although the act of compliance may serve as a strong positive signal for the courts reputation, the continuing act of non compliance which lasted until the state finally complied is a negative signal damaging the court’s reputation. Second, if compliance is done in different circumstances and is therefore less costly for the state to achieve than it serves as a weaker signal for the court’s reputation. Third, sometimes delayed compliance is a result of political changes within the state or in the international arena, if such changes are what caused compliance it may not be a result of a high assessment of the court’s reputation.

49 Id, at 43.

50 For this problem see id at 28.

51 Posner and Yoo measure effectiveness as the result of the three factors: compliance rates, usage rates, and the success of the treaty regime, Helfer & Slaughter, supra note 39 at 918 correctly claim that this begs the question what effectiveness actually means. You will note that this article gives an accurate definition of reputation as the asset determining the ability of the court to affect the conduct of states (a court with a high reputation will cause a higher reputational loss to the state in case it does not comply), this chapter is only dedicated to ways to measure that reputation. As I explained in footnote 18 my definition of the reputation of courts is similar to the definition of effectiveness used at Helfer & Slaughter, supra note 18.

52 Posner and Yoo, supra note 29 at 28 offer several suggestions for refining the tool of usage rates: “One might look at the number of states that use a tribunal, the number of cases, the number of cases per year, the number of cases per state per year, and so on, depending on the importance of a precise measurement”.

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usage rates can be a result of the number of conflicts in a given field, rather than the reputation of the court.  

Perhaps in order to mitigate the problem of the bias caused by different numbers of conflicts it can be beneficial to look at growth in usage over years rather than the level of usage in a given year. Growth in usage is a better indication of the court's reputation because presumably the number of conflicts will normally not change dramatically in the same court, and the change in the number of the cases litigated will therefore be the result of the court's reputation. Of course in some cases the number of conflicts might change dramatically as a result of other reasons, rendering this measure inaccurate.

3. Success of the Treaty Regime

The second method Posner and Yoo propose is looking at the success of the treaty regime. This method may tell us even more about the court's reputation, since it takes into account not only the cases in which states complied with a direct judgment of the court, but also the cases in which states were deterred by the court and changed their practice without the need of a direct judgment. The problem with this method is that such success is almost impossible to measure, and can never be ascribed solely to the practice of the court.  

4. Public Opinion Surveys

Public opinion surveys may be instructive in learning about the reputation of national courts, which will be dealt with in chapter VA. If a national court is believed by the public to enjoy a higher reputation, the executive can expect to suffer more criticism if it disobeys the court; therefore its reputational cost for non compliance will be higher. Other branches of government are expected to have similar calculations.

Public opinion surveys can ask many different questions and teach us about many different characteristics of the court. Our only interest here is the reputation of the court in relation to the other branches of government. Therefore we will not be interested in the question whether the public thinks the court's judgments are just or

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53 See id.
54 Id, at 29.
57 The causal arrows also work the other way, in Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 130 (2001) at footnote 21 it is claimed that if the court achieves compliance from the other branches of government its public support will grow.
correct, but only if they will demand compliance. The higher the compliance that the court achieved in the past the more compliance will be demanded by the public in the future.\textsuperscript{58}

Paradoxically the public may demand compliance to judgments it considers less just. This will happen if the court is considered to be dependent on the executive, and its judgments are considered to conform to the executive's wishes. The public will demand greater compliance to the judgment of such a court, since non compliance will be considered as ignoring even the ruling of a moderate and conservative court.\textsuperscript{59}

International courts may be less concerned about public opinion within states. It is true that appreciation of the court by the public within a state may make that state more likely to comply with the court. However it seems probable that normally the public will be more concerned by non compliance to a national court, than to an international court. Public opinion in other states, besides the state receiving the court’s decision will have an even weaker effect on the decision of the state whether to comply or not.

5. Cites

Research was conducted about the amount of cites a state court in a federal system receives from other state courts within that system\textsuperscript{60}. This may serve as a good indication of the reputation of the courts in a federal system since it shows the prestige this court enjoys by other courts within that system. Presumably this may also affect the incentive of the other branches of government to comply with this court.

However this tool may be effective only regarding state courts in federal systems because the amount of cites by courts across countries will be too small to give sound results about the court's reputation\textsuperscript{61}. Another problem is that courts are a different reference group than states. A court may enjoy high levels of prestige by other courts (for instance due to the quality of its legal reasoning) but have low levels of reputation towards states.

Because all the measures presented above are hard to calculate and to quantify it may be hard to determine the exact level of a court's reputation. However even an intuitive use of some of these tests can easily teach us about substantial differences in the reputation of different courts.

\textsuperscript{58} A similar claim is raised at id, the authors there claim that the court increases its public support not by issuing decisions which are similar to public preferences but by achieving compliance from other branches of government.

\textsuperscript{59} This phenomenon will be dealt with in later stages of this project.


\textsuperscript{61} However for the growing phenomenon of citing the ECHR by national courts not under its jurisdiction see ANNE-MARIE SLAUGHTER, \textit{A NEW WORLD ORDER} 80-81 (2004). For the phenomenon of national courts citing each other see Eyal Benvenisti, \textit{Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts}, 102 AMER. J. INT'L L. (forthcoming 2008). Even if these phenomena are not widespread enough to assist in empiric research we can still learn a lot about the reputation of a court by looking at specific examples of citing its judgments by other influential courts. For instance the phenomenon of citing the ECHR described by Slaughter is a good signal of the high reputation of that court.
IV. THE INTERPLAY BETWEEN THE COURT AND THE STATE

In the previous parts it was claimed that the changes in the reputation of the court and the state as a result of compliance or non compliance are a factor of the preliminary reputation of the court and the state. The costs and benefits of non compliance for the state in turn influence the expected probability of compliance by the state. The purpose of this chapter is to concentrate my predictions about the reputational incentives of the courts and the states, and the expected compliance of states, depending on different degrees of preliminary reputation of the relevant actors.

These predictions are highly intuitive; they are based on a common sense application of the concept of reputation as discussed in the previous parts. The merit of these predictions is that they can consistently explain the incentive of the courts and the states.

A. The Impact of the Court’s Reputation on the State’s Reputation

The higher the reputation of the court, the more the state is expected to lose if it fails to comply with its judgment. Reputation is defined in this article as the asset which makes the court able to make states comply with its wishes, because they fear a reputational loss in case of non compliance. Since the state will lose more by non compliance to a high reputation court, such a court has greater ability to make the state comply with its wishes.

Courts increase their reputation by receiving compliance, this means that if a court has a high reputation most of the states do comply with its judgments and are expected to comply with its judgments. If a state would not comply with a high reputation court it would be acting unexpectedly and would therefore suffer a big reputational loss. The loss of reputation will entail all the costs described above – less ability to make credible commitments, less ability to affect the conduct of other states, etc.

On the other hand, the higher the reputation of the court, the less the state is expected to gain to its reputation in case of compliance with its judgment. This happens because all the other states are aware of the court’s reputation and of the fact that non compliance to a high reputation court will damage substantially a state’s reputation. Therefore compliance to a high reputation court is expected and it serves as a much weaker signal of the importance a state ascribes to its reputation than compliance to a low reputation court.

Since non compliance to a low reputation court carries with it a smaller sanction to the state’s reputation, if a state nevertheless chooses to comply to a low reputation court it sends a more potent signal of its commitment to international law. Compliance which is unexpected is a signal of the commitment of the state, and will therefore have a greater benefit for its reputation.

62 Besides my predictions about compliance rates, which as I mentioned are very hard to determine this chapter is not concerned with predicting behavior, it is focused on explaining incentives. Predictions of behavior based on these incentives will be provided in later stages of this project.
To give a different explanation, if a court has a low reputation it means that some or even most of the states do not comply with its judgment. If a state complies with the ruling of such a court it is showing that it is more loyal to international law than all the other states.

Of course, all these predictions are correct only if you accept my stipulation that courts uphold international law and therefore the reputation of a state can never be damaged by compliance. This article assumes no possibility of an evil court, and because of this complying with a court which receives non compliance from the other states will only benefit the reputation of the complying state.

Based on these stipulations a high reputation court is expected to receive a higher probability of compliance from states. This means that states give greater importance to the fear of loss of reputation rather than the possibility of gain. Therefore the states will be more cautious in avoiding non compliance to high reputation courts to avoid the possible loss to their reputation. The assumption that states are more concerned with the possibility of loss of reputation is strengthened by the fact that courts which achieved higher compliance rates in the past are expected to achieve higher rates of compliance in the future as well.

As the reputation of the court grows its compliance rates will grow as well, because states will be motivated by the fear to lose more for non compliance, more compliance will in turn increase the court’s reputation even further. This explains why some courts will gather a very high reputation. On the other hand when a court has a low reputation states will fear less reputational loss and chose not to comply, non compliance will again damage the court’s reputation. This explains why some courts will deteriorate to almost insubstantial rates of compliance. The claim that states are more concerned by reputational loss than by reputational gain is therefore supported by the fact that courts gather around the ends of the spectrum – very high or very low reputations, instead of centering around the middle with an average reputation.

There is another reason to believe that states will be more concerned with loss than with gain. Losses can grow unexpectedly, sometimes a single act of non compliance can damage a reputation built over many instances of compliance. This is true because

63 For the assumption that compliance to norms which are less certain and not universally held may serve as a stronger signal to the commitment of the state to the international community see Geisinger & Stein, supra note 21 at 96. The logic here is the same, compliance to courts, as to international law burdens the state and does not serve its material interest, compliance is therefore a signal of commitment to international law. If the norm is uncertain, or the court has a low reputation and the state can expect to lose only little reputation from non compliance, compliance will serve as a better signal for its commitment.

64 This claim has to be supported empirically which is difficult due to the problems with assessing the court’s reputation. However compliance rates are a good proxy for the reputation of the court. Take for instance the data regarding the full compliance rates of some of the courts presented by Posner and Yoo, supra note 29 at 53: GATT 38% ECJ 82% ECHR 80% IACHR 4% WTO 66%. As you can see the IACHR has extremely low compliance rates while the ECHR and the ECJ have very high compliance rates. Although the GATT and the WTO seem to have intermediate compliance rates the very fact that the differences in compliance are substantial indicate that courts do tend to move towards the ends of the continuum instead of gathering around the center. This supports my theory that states are more concerned with reputational loss and will therefore continue to comply more often with high reputation courts.
the norm in international relations is believed to be that of compliance\textsuperscript{65}, therefore since compliance is expected each act of compliance will result in a little gain but each act of non compliance will send a strong negative signal and result in a big loss.

B. The Impact of the Court’s Preliminary Reputation on the Court

A high reputation court will earn less reputation for each instance of compliance and lose more reputation for every instance of non compliance, than a low reputation court. Therefore the higher the reputation of the court the harder it is to maintain it.

The reason for this phenomenon is that if a court already has a high reputation compliance is expected, it therefore does not serves as a potent signal which will affect the court’s reputation significantly. If a low reputation court would achieve compliance in the same case, this would be a far more powerful signal, since compliance was initially unexpected, such a signal will increase the court’s reputation substantially.

For the same reason non compliance would cause a greater drop in the reputation of a high reputation court. Such non compliance is unexpected; it will therefore have a strong negative effect on the court’s reputation. A low reputation court is expected to suffer non compliance, and therefore when non compliance happens it does not serve as a powerful negative signal to the court’s reputation.

Apparently this gives the courts a certain interest to have a low reputation, so that they can earn more for every case of compliance and lose less for every case of non compliance. This is not the case. Courts have an interest in having a high reputation so they can achieve better compliance and promote their preferences. Courts are not interested in the increment to their reputation for its own sake; they are interested only in the total level of reputation which will help them to better affect policy.

Similarly a rich person will gain less utility for every new dollar he earns than a poor person because of the rule of diminishing marginal utility. Nevertheless overall the rich person will have higher utility than the poor person; it therefore pays to be rich. With reputation it is the same, courts (and states) want a high reputation because it serves as a means for another end, they are not interested in the rate of increasing it for itself.

C. The Impact of the State’s Reputation on the Court’s Reputation

All things being equal, the higher the reputation of a state the lower the benefit to the court’s reputation in case of compliance and the higher the loss to the court’s reputation in case of non compliance.

\textsuperscript{65} See the famous stipulation at LOUIS HENKIN, HOW NATIONS BEHAVE – LAW AND FOREIGN POLICY (2\textsuperscript{nd} ed. 1979) 47 – “…almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time” [emphasis at the original – SD]. Based on this stipulation this article assumes compliance to be the norm.
A state with a high reputation generally complies with international judgments; therefore it is expected to comply with the court’s judgment as well. If that state would fail to comply this sends a stronger negative signal about the court’s reputation than non compliance by a lower reputation state.

On the other hand if the court will achieve compliance from a high reputation state, such compliance is expected, it therefore does not serve as a strong positive signal to the court’s reputation. The court will stand to gain much more from compliance by a low reputation state, which is initially less expected to comply\textsuperscript{66}.

An example may illustrate this intuition. If the ECHR would receive non compliance from Germany (as a state with a high reputation) its reputation will suffer greatly, if it will receive compliance its reputation will be only slightly increased. If on the other hand the ECHR will suffer non compliance from Turkey (as a state with a low reputation), this practice is expected and therefore the court will lose less reputation. If the court will succeed in achieving compliance from Turkey its reputation will be substantially increased.

\textit{D. The Impact of States’ Preliminary Reputation on the State}

All things being equal high reputation states will gain less reputation for every instance of compliance and lose more reputation for every instance of non compliance.

This prediction is explained in a similar fashion to my predictions regarding the court’s incentives. If a state already has a high reputation it is expected to comply, therefore compliance by it does not serve as a powerful positive signal. A low reputation state can gain much more reputation, by complying against the expectations of the other states.

On the other hand if a high reputation state would fail to comply with the judgment, it will be acting unexpectedly and sending a strong negative signal which will seriously damage its reputation. I expect states to be motivated by fear of this decrease in their reputation more than by the possibility of increasing their reputation.\textsuperscript{67} Therefore a high reputation state, which complied with judgments in the past, is also more likely to comply with judgments in the future.

This prediction is supported by previous literature. Hathaway predicts the states with high reputations will have more to lose and less to gain from ratifying a treaty, and that states with low reputation can suffer less reputational damage from non compliance.

\textsuperscript{66} It is easy to see that if a court decides a case against a low reputation state it should expect lower chances of compliance on the one hand, but on the other hand it will suffer less in case of non compliance and earn more in case of compliance. In footnote 35 this article assumes that these incentives will render the court more lenient towards high reputation states or more activist against low reputation states. Further support for this assumption will be given in later stages of this project.

\textsuperscript{67} I explain this phenomenon at chapter IVA.
compliance. Guzman predicts for similar reasons that states will have a stronger incentive to comply in areas in which they already possess a strong reputation.

Geisinger & Stein seem to offer an opposite prediction. They predict that emerging democracies, which probably have low preliminary reputations, will evaluate the reputational loss from non-compliance as greater, because they will value their acceptance to the international community as more crucial for their international standing. However the predictions of my theory better explain the consistency in states’ compliance records, states which complied in the past are more likely to comply in future cases.

Perhaps states which are dependent on foreign aid or fear foreign sanctions may have another, material, interest driving them in some cases to comply more, which may explain why sometimes low reputation states will comply. However presumably as far as the consideration of legal reputation is considered, the more reputation a state has, the more it is motivated to comply with international judgments to preserve it.

My claim that high reputation causes future compliance by increasing the cost of non-compliance is inline with a world in which some states consistently comply while some states consistently do not comply. The opposite claim, that low reputation states have more to lose will cause all states to center around the same level of compliance. In such a state of the world when a state will start to develop a high reputation it will have a lower incentive to comply and will therefore lower its compliance rates, thus decreasing its reputation. When a state’s reputation will fall below the average it will have a higher incentive to comply and will therefore increase its compliance rates and gather more reputation until it will reach the same average point.

It seems more probable that in reality states do position themselves near the ends of the spectrum in terms of compliance instead of gathering around the center. If we accept that compliance with judgments is a good indicator of compliance with international law, my prediction better explains why more developed states comply

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68 See Hathaway, supra note 25 at 510-511. In a sense Hathaway’s model for explaining ratification can give more clear cut predictions. Since high reputation states are expected to earn less and to potentially lose more from the same conduct – ratifying a treaty, they are less likely to ratify. I expect the high reputation state to earn less from compliance and lose more from the opposite conduct – non compliance. We therefore need to decide what incentive will motivate the high reputation state, the fact that it has less to gain from compliance or the fact that it has more to lose from non compliance. This article proposes, for the reasons presented in chapter IVA, that states will be more motivated by the possibility of loss than by the possibility of gain. Hathaway’s model may make my predictions harder to observe because of the problem of selection effects. If high reputation states are less likely to ratify treaties and more likely to comply with them if they do, they have a much lower chance of being found in violation of the treaty by a court. Presumably in those few cases where high reputation states will be found violating the cost of compliance will be higher and therefore the rates of compliance will drop. In order to counter this problem we should take into account the material cost of complying with the judgment, rather than simple compliance rates. Looking at the court’s activism takes into account the material cost of the judgment, as I explain in chapter V/C.

69 Guzman, The Limits, supra note 1, at 382.

70 Geisinger & Stein, supra note 21, at 95-96.

more often with international law\textsuperscript{72}. Developed states are usually higher reputation states and according to my model they comply because they fear more reputational loss.

Regardless of the connection between the stage of development and the rate of compliance, the very fact that a group of states consistently complies more, reinforces the claim that when reputation grows so does the effort of the state to preserve it by more compliance. Since the same group of states which complied in the past can lose more for future acts of non-compliance they will continue to comply more and create a stable group of states with a high reputation and high compliance rates.

\textsuperscript{72}Downs & Jones, supra note 23 at 118-121 claim that developed states comply more often with international law than developing states. They offer several other reasons for this phenomenon focused on the greater ability of developed states to comply. Even if those reasons are correct, the same phenomenon may also arise in part because of the greater fear of developed states, as high reputation states, from reputational loss.
All the predictions presented above are concentrated in tables 1 and 2 below:

**Table 1: Loss in case of non compliance**

<table>
<thead>
<tr>
<th></th>
<th>High reputation court</th>
<th>Low reputation court</th>
</tr>
</thead>
<tbody>
<tr>
<td>High reputation state</td>
<td>6 3 6</td>
<td>4 2 4</td>
</tr>
<tr>
<td>Low reputation state</td>
<td>4 2 4</td>
<td>2 1 2</td>
</tr>
</tbody>
</table>

Losses are arranged from 2 (the lowest) to 6 (the highest)
The losses are doubled compared to the benefits in order to indicate that loss is more substantial than gain. This helps you to see that compliance by a high reputation state to a high reputation court is worth 7 points (avoiding a loss of 6 and gaining 1) which is more that the 6 points which can be earned by a low reputation state facing the same high reputation court (avoiding a loss of 4 and gaining 2) therefore high reputation states are more likely to comply.

Probabilities are arranged from 1 (the lowest) to 3 (the highest).
This table gives the probability of compliance so if the probability is high there is a small chance of non compliance which will result in suffering the loss indicated in this table.

**Table 2: Benefits in case of compliance**

<table>
<thead>
<tr>
<th></th>
<th>High reputation court</th>
<th>Low reputation court</th>
</tr>
</thead>
<tbody>
<tr>
<td>High reputation state</td>
<td>1 3 1</td>
<td>2 2 2</td>
</tr>
<tr>
<td>Low reputation state</td>
<td>2 2 2</td>
<td>3 1 3</td>
</tr>
</tbody>
</table>

Benefits are arranged from 1 (the lowest) to 3 (the highest)
Probabilities are arranged from 1 (the lowest) to 3 (the highest)
V. APPLICATIONS OF THE THEORY TO DIFFERENT INTERACTIONS

A. National Courts

This article was dedicated to studying the interaction between international courts and states. Another important interaction which has several similarities to this one is the interaction between national courts and other branches of government.

A national court interacts with the other branches of governments. Its judgments may be obeyed or disobeyed by the executive branch, accepted or overruled by the legislative branch and followed or ignored by lower courts within the judicial branch.

National courts have a reputation which is similar to the one of international courts discussed in this article. When national courts receive cooperation or compliance from other branches of government their reputation is increased and when they receive non compliance their reputation is decreased.

The national court has the same reason as the international court for wanting to increase its reputation; it wants to be better able to promote its preferences in future cases. A high reputation national court knows it can expect higher levels of cooperation by other branches of government for whatever decision it will give, it therefore has a better chance of promoting its preferences over time.

For instance if the judgments of a high reputation national court will not be overruled by the legislature, its judgments, which are close to its preferences, will be accepted as the law. A high reputation national court may also calculate that since it has a better chance of not being overruled by the legislature it can move its judgments even closer to its preferences and still prevent overruling by the legislature where the judgments of low reputation court would have been overruled.

A similar scenario will be repeated with each of the branches discussed above. A higher reputation court will get better compliance from the executive, and its precedents will be followed more fully by lower courts.

Each of the branches of government has its own interest in increasing its reputation. The branches of government rival each other for public support, which is influenced by their reputation relative to the court. Branches of government can increase their legitimacy and public support by obeying the court.

In order for the executive to function effectively it must have the support of the public, in order to receive this support the executive will try to increase its legitimacy by obeying the judgments of the national court. An executive with a high reputation, which indicates it obeys the court, will have higher legitimacy and more public support.

Another reason the executive has an interest in having a high reputation, which it can increase by compliance with the national court, is because the national court will suffer more reputational damage by disobedience of a high reputation executive. Since the national court is cautious not to damage its own reputation it will avoid
giving decisions which may be disobeyed by the high reputation executive branch. Therefore an executive branch with a higher reputation will receive judgments which are more accommodative to its interests.\(^{73}\)

The legislator has very similar incentives; it knows that by not overruling the court’s judgments it can increase its public support and legitimacy. The legislator also knows that if it will garner a high reputation the court will show it more deference since it will fear more the reputational loss in case the legislator does not comply.

Lower courts in the judicial branch also have a good reason to increase their reputation for adherence to judgments of higher courts. Lower courts will be motivated to increase their reputation for compliance with higher courts by their aim to achieve legitimacy and public support. Presumably higher courts will be more accommodative to the interests of high reputation lower courts, since they will not risk a dangerous confrontation with a high reputation lower court.

In the domestic arena a similar schema to the one presented in part IV will occur. For instance if the executive has a high reputation compliance is expected, therefore the court will lose more in case the executive does not comply and will earn less in case it does comply. If a high reputation executive will comply it will earn less reputation and if it will not comply it will lose more reputation. According to the theory presented here the high reputation executive will be primarily motivated by the fear of losing reputation in case of non compliance; it will therefore have higher compliance rates.

If the court has a high reputation the legislator is expected to comply, the legislator will therefore lose more reputation if it does not comply and earn less reputation in case it does comply. According to the theory the legislator will be motivated by the increased magnitude of loss from non compliance to a high reputation court; it will therefore comply more often with high reputation national courts. If the high reputation court will suffer non compliance by the legislator it will lose more and if it will receive compliance it will gain less, and so forth.

The reputation of a national court relative to each branch of government is linked. A high reputation vis-à-vis a certain branch will normally signal high levels of public support and vice versa.\(^{74}\) Therefore the reputation determined in relation to a certain branch will affect the reputation regarding other branches, both indirectly through public opinion and directly by communication between the branches.

Of course each branch, and each segment of the public are different reference groups which may have other interests, but the high degree of linkage between the different

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\(^{73}\) Although the national court will suffer more reputational damage in case the high reputation executive does not comply the probability of compliance by a high reputation executive is higher. Footnote 35 assumes that the increased magnitude of loss will affect the court more than the decreased probability of non compliance rendering the court more lenient towards high reputation players. Further support for this assumption will be given in later stages of this project.

\(^{74}\) See Epstein, Knight & Shvetsova, supra note 57 at 130. In the model presented there the elected actors will allow a wider tolerance interval to a court with more public confidence.
sorts of reputation allows us to speak of a uniform measure of reputation for a national court.

B. International Courts and Two or More States

This article was dedicated to studying the interaction between an international court and a single state. This chapter presents some preliminary intuitions regarding the application of the theory to a scenario of a court and two or more states (for instance the ICJ deciding in a case between the United Kingdom and France).

The first intuition regarding this issue is that in situations where there is more than one state involved the high reputation court is even more likely to receive compliance than a low reputation court, compared to a scenario involving only one state. This is true because each state not only calculates that if it will fail to comply its reputation will be damaged more severely it also takes into account the fact that the other party is more likely to comply as well as a result of its own reputational calculations.75

An interesting question is what happens if the court faces two states, one has a high reputation and the other has a low reputation, will the court decide the case more favorably to the first or to the second.

One intuition may claim that only if the case will be decided closer to the ideal point of the low reputation state the court may achieve compliance. Since low reputation states are less likely to comply they will only comply if the case will be decided according to their interests. If we follow this intuition we would expect the court to decide the case closer to the ideal point of the low reputation state.

A contrary intuition is that the court fears so much the possibility of non compliance by the high reputation state, which will entail a higher magnitude of loss, that as a precautionary measure it will move the decision closer to the ideal point of the high reputation state.

As noted above76 in a one state scenario I assume the court will be more activist against low reputation states. I therefore assume the court will be more motivated by the smaller magnitude of loss associated with non compliance by a low reputation state, than by the increased probability of non compliance.

Consistent with the presumption presented above the second intuition will be closer to the truth than the first intuition. While it is possible that the court will use a different strategy at some cases which will sometimes lead to different results, the theory will usually expect the court to give decisions which are closer to the ideal point of the high reputation state.

Another question which will not be dealt with in this article is what happens if the court is dependent on one state appearing before it which is a rival of the other state

75 For the claim that courts’ ability to insure compliance depends on each state’s belief that the other state will comply, and therefore on the court’s reputation see Tom Ginsburg, Bounded Discretion in International Judicial Lawmaking, 45 VA J. INT’L L. 631, 649 (2005).
76 See footnote 35. Further support for this assumption will be given in later stages of this project.
appearing in the case. In such a case it is possible to claim that the court has different reputations towards the two states. The complex relationship between reputation and independence and the challenge it poses to my uniform measure of reputation will be dealt with in later stages of this project.

VI. HOW THE COURT TAKES CALCULATED RISKS

A. Challenges and the Handicap Principle

Reputation is a result of signaling. Since reputation is not a tangible asset, but rather exists in the beliefs that actors have about the reputation of each other, signals do not only disperse information about reputation, they create reputation. A positive reputational signal therefore does not only send information about the high reputation of a court, it actually increases the court’s reputation.

The reputation of the court grows by signaling that it has a high reputation. If the court gives a credible signal that it has a high reputation, its reputation will grow higher for future cases. If the court signals that state A expected in the past to suffer a great reputational cost from non compliance, state B will expect to suffer at least that cost in the future. For this reason if the court achieves compliance to a judgment costing the state X (which indicates the state expects a reputational cost of at least X for non compliance), it can be expected to receive compliance to judgments of the same cost in the future, all other things being equal.

The reactions of states to the judgments of the court can send a signal which affects the court’s reputation. However also the actions of the court themselves can serve as a signal which affects the court’s reputation.

I claim that by strategically issuing risky judgments, judgments which seemingly enjoy a low reputation of compliance the court can increase its reputation. The first reason for this is that if a state will comply with such a judgment, this compliance will be unexpected; it will therefore serve as a more potent positive signal which will increase the court’s reputation.

This intuition is elaborated in part IV where I claim that compliance by a low reputation state will create a higher reputational gain for the court. For the same reason if the court can increase the risk of non compliance by the contents of its judgment it can insure itself a higher gain in case of compliance.

Of course giving risky judgments comes at a price, there is a higher chance that the court will be disobeyed, in which case its reputation will suffer. Although if compliance is initially unexpected the reputational loss in case of non compliance will be less severe, some reputation will still be lost in case of non compliance. The court therefore pays for the possibility of achieving a higher gain by a higher probability of suffering a loss of reputation.

However the conduct of the court itself sends a signal as well which affects its reputation. If the court issues a risky judgments it sends a signal about its own belief
about the quality of its reputation. The court which deliberately takes the risk of suffering non compliance indicates that it has enough confidence in its own reputation to believe it can achieve compliance. If the court would believe its own reputation to be low, it would know it cannot achieve compliance to a risky judgment and will therefore avoid this conduct.

The signal the court sends about its own estimate of its reputation can increase the court’s reputation, just like the conduct of states relative to the court. In fact the court is believed to possess the best information regarding its own reputation; it can therefore send a highly credible signal which will substantially affect its reputation.

The theory that courts can deliberately take risky steps to signal their high reputation is an application of the Handicap Principle which was discovered by Amotz Zahavi by looking at phenomena in the animal kingdom. An example of such a phenomenon is the peacock which boasts a heavy and cumbersome tail which burdens it and makes it harder for it to escape from predators. By growing such a tail the male signals to the females that it is so fast and strong that it can still outrun its enemies despite the heavy tail. The peacock sends a credible signal of its strength, since this signal has a real cost for the peacock, a peacock which is not strong enough will be caught by predators with such a tail.77

By issuing risky judgments the court acts in a similar fashion to the peacock, it signals that it has such a high reputation, that it can allow itself to give a risky judgment and it will still achieve compliance.

Giving risky judgments is an activity which benefits the high reputation court, both because it will still achieve compliance and gain a higher reputational gain for it, and because the very act of issuing a risky judgment sends a positive signal of the court’s reputation. The same activity is devastating for a low reputation court, the low reputation court issuing a risky judgment will only achieve non compliance which will damage its reputation even further. The low reputation court cannot masquerade a high reputation court, if it will attempt to give a risky judgment to send a positive signal of its own reputational assessment, it will surely suffer non compliance which will cause far more damage than the reputational gain achieved by the false signal of issuing the risky judgment.

Therefore giving risky judgments is a way for the states to discern which court has a high reputation and which court has a low reputation. Since only high reputation courts will give risky judgments, giving risky judgments is a conduct which signals the court has a high reputation.

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Signaling theory is based on the same logic of distinguishing between different types according to the cost they face when trying to engage in certain behaviors. For instance see David H. Moore, A Signaling Theory of Human Rights Compliance, 97 NW. U. L. REV. 879, 887 (2002-2003). Where it is claimed that nations with low discount rates are able to signal that fact more cheaply (by engaging in costly compliance) than nations with high discount rates.
The Reputation and Strategy of International Courts

The court can issue risky judgments, judgments with lower compliance rates, in several ways:
1. By issuing judgments against states which are less likely to comply (low reputation states).
2. By issuing judgments which are harder to comply with because they are more demanding (I term them activist judgments).
3. By issuing judgments with less convincing or less legitimate reasoning which are therefore less likely to be complied with (I give an example for such a reasoning which I term progressive reasoning).

I will discuss these three methods in the following chapters.

B. Finding a Challenging State

As it was shown in part IV the court has a smaller probability of achieving compliance from a low reputation state. Therefore issuing a judgment against a low reputation state is risky, it will entail a smaller chance of compliance.

According to the theory the low reputation court is less likely to issue judgments against low reputation states since such a conduct will only result in non-compliance. However for the high reputation court issuing judgments against a low reputation state may be beneficial. Firstly the court will gain by signaling that its own assessment of its reputation is high, it believes itself to have a high enough reputation to receive compliance. Secondly, if the court will receive compliance it will also receive a higher reputational gain.

This article tells us about the incentives of the court, it does not try to explain the actions of the court. Explaining the actions of courts is complex, for instance it is true that a high reputation court can gain from issuing judgments against low reputation states, but a low reputation court which will attempt this conduct and still achieve compliance will gain even more, since it will receive compliance when it is far less likely. The reputation of states and of courts is arranged on a continuum, it is not binary. It is easy to define that a high reputation court is the only court which can achieve compliance from a low reputation state if there are only two levels of reputations, high and low. In reality there are many intermediate levels of reputation, and it is hard to determine when the court is expected to achieve compliance.

Furthermore the problem with trying to predict the actions of the court based on this incentive is that courts may have a difficulty in strategically choosing which state to decide against, since they do not control their own agenda. Another problem which may bias the results is that low reputation courts usually have under their jurisdiction low reputation states. For instance the IACHR enjoys only marginal compliance and is therefore defined as a low reputation court, however it is forced to decide mainly against low reputations states which comprise its jurisdiction.

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78 According to Posner &. Yoo, supra note 29 at 43. The compliance rate of the IACHR is approximately 5%.
79 This problem may produce findings that it is low reputation courts which decide against low reputation states, when the theory would predict that primarily high reputation courts will decide against low reputation states.
National courts always decide cases against the executive of the same government, they therefore cannot choose against whom to issue a judgment. This means that the theory cannot check the influence of this incentive on the conduct of national courts.

Even if the court cannot control its agenda, it can be more activist against low reputation states. As the next chapter explains greater activism is another way to increase the risk of the judgment. A high reputation court can create a double risk, both by issuing a judgment against a low reputation state and by making this judgment activist. The use of such a tactic will be explored in later stages of this project.

C. Activism

When a court issues an activist judgment, which this article defines as a judgment which is harder to comply with, it stands to gain a greater reputational benefit from compliance. This is true because states are less likely to comply with activist judgments, if they do comply it serves as a more powerful signal of the court’s high reputation. For the same reason if the state will fail to comply with an activist judgment this will not send a powerful signal of the court’s low reputation and will therefore do less damage to the court’s reputation.

Furthermore, because only high reputation courts can attempt issuing activist judgments and still achieve compliance, giving an activist judgment is in itself a signal of the court’s high reputation. Therefore issuing an activist judgment will in itself benefit the reputation of the court.

States are less likely to comply with activist judgments. The first reason for this is because in an activist judgment they have a higher material cost to balance against their reputational considerations. If a judgment costs a state X it will only comply if the reputational cost of non compliance added to the reputational benefit from compliance is higher than X. therefore when X is high, in an activist judgment, the probability of compliance will drop.

The second reason is that the state knows it is less expected to comply with costly judgments and therefore its reputation will not be terribly damaged from non compliance to activist judgments. Though it is true that the state stands to gain more reputation from complying with an activist judgment, this article holds that the state will be more motivated by the decreased magnitude of loss, than by the increased

80 See Schulz, supra note 28 at 133 which suggests the following testable hypothesis: “the greater the domestic costs of an ECJ ruling to a litigant government, the lesser the likelihood that the government will abide by an ECJ decision that adversely affects its interests (and hence, all else equal, the lesser the likelihood that the Court will make such a decision)”. The theory presented in this article agrees with the first part of Schulz’s hypothesis, namely the more activist the judgment the lower the chances of compliance. On the other hand since, as this chapter explains, the court can gain reputational benefits from issuing activist judgments it has an incentive to issue such judgments. The theory presented here seems to better explain the fact the courts do sometimes issue activist judgments.
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magnitude of gain\textsuperscript{81}. Therefore reputational incentives as well render the state less likely to comply with activist judgments.

The schema of losses and benefits of issuing an activist judgment compared to issuing a conservative judgment is very similar to the schema I present in part IV regarding deciding against a low reputation state. Table 3 illustrates these incentives.

Table 3: incentives to issue activist judgments

<table>
<thead>
<tr>
<th>Benefits in case of compliance</th>
<th>Activist decision</th>
<th>Conservative decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss in case of non compliance</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>2</td>
</tr>
</tbody>
</table>

Benefits are arranged from 1 (the lowest) to 2 (the highest)
Losses are doubled to indicate that states and courts will be more concerned by loss than by gain they are therefore arranged between 2 (the lowest) and 4 (the highest)
Probabilities are arranged from 1 (the lowest) to 2 (the highest)
As you can see the state can gain more from compliance to a conservative judgment (5 points, avoiding a loss of 4 and receiving a gain of 1) than by compliance to an activist judgment (4 points, avoiding a loss of 2 and receiving a gain of 2) it is therefore more likely to comply with a conservative judgment. This is indicated by the higher probability of compliance to a conservative judgment. Of course states are also more likely to comply with conservative judgments because they have a lower material cost. If the material cost is lower than the reputational gains from compliance (composed of the gain earned from compliance minus the avoided reputational loss) the state would comply with the judgment.
To receive the expected utility of the court form issuing activist judgments we must double the expected gain by the probability of compliance and subtract the expected loss doubled by the probability of non compliance (1-the probability of compliance).

D. Progressiveness

The probability of compliance to the court is affected by the legitimacy of the court’s decision. By legitimacy I refer to qualities which make the judgments more convincing or more likely to be complied with. The greater the legitimacy the court gives its decision the higher the chances of compliance.

The chances of compliance go up with the legitimacy of the court’s decision, because the state may be expected to lose more by non compliance to a highly legitimate judgment. If a state disobeys a highly legitimate judgment it shows disrespect not only to the court but also to the legal system and the norms on which the decision is based, by doing this it sends a more potent negative signal of its low reputation. States expect

\textsuperscript{81} For the reasons why states will be more motivated by the fear of losing reputation than by the prospect of gaining reputation see chapter IVA.
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each other to comply to highly legitimate judgments, therefore if a state fails to comply with a legitimate judgment, it will be acting against the expectation of other states and damaging its own reputation substantially.

Since compliance is expected to be low for non legitimate decisions, compliance to such decisions is a better signal of the court’s high reputation. Furthermore since only a high reputation court will be able to achieve compliance despite the low legitimacy of its decision, issuing non legitimate decisions is in itself a credible signal of the court’s high reputation.

Another way to look at this phenomenon is to claim that when a state complies to a non legitimate decision, it is doing so not because it was convinced by the court’s reasoning, or because it values the norms the court promulgates, but only because it acknowledges the high reputation of the court. Although the state knows that non compliance to a non legitimate decision carries with it less damage to its reputation, it believes the court’s reputation is so high that it should still fear the reputational cost of non compliance and should therefore comply with its judgment.

How do we know if one decision of the court is more legitimate than the next? This question is very hard to answer since the legitimacy of a decision can be a result of many factors. For instance a decision given unanimously by the court, or at least showing a greater consensus among the judges may be more legitimate. National courts can probably gain more legitimacy for their decision by basing them on domestic law instead of international law, since domestic law represents the views of the public in that state.

However this article proposes that in all legal systems there is a characteristic of judgments which can render them less legitimate and this is exposing the fact that the judges employ discretion in the case. The judges are not representative of the people therefore their preferences enjoy less legitimacy. When a court reveals the fact that the decision is actually a result of the discretion and the preferences of its judges it is decreasing the legitimacy of its decision. On the other hand, when the court uses a reasoning which is based on existing norms, its decision draws legitimacy from those norms. It is important to stress that what matters here is not the amount of discretion the judges really have, but how much discretion they confess to employ in their judgment.

82See Epstein & Knight, supra note 6, at 106. Where it is claimed: “The value of unanimity was one of the lessons of Brown v. Board of Education; and it is also the moral of scholarly research on the Court, suggesting that rulings on which the entire Court agrees are less susceptible to overturning and more likely to be followed.” And WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY 66 (1964). where it is claimed: “In the judicial process a 5-4 decision emphasizes the strength of the losing side and may encourage resistance and evasion. The greater the majority, the greater the appearance of certainty and the more likely a decision will be accepted and followed in similar cases.”

However, on the effect of consensus among the judges on the ability of the decision to achieve acquiescence from the public see at James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment, 58 Pol. Res. Q. 187, 194 (2005). (The authors arrive there at the following conclusion: “A minimalist conclusion from this analysis is that consensus has no clear positive consequences for getting an unpopular decision accepted.”)

83 The concern that according to the separation of powers doctrine less significance should be accorded to the international norms which do not represent the public is dealt with and criticized in - Benvenisti, supra note 44, at 174-175.
This article terms the reasoning which exposes the discretion employed by the judges *progressive reasoning*, because when the court uses such a reasoning it admits it progresses the law and creates a new reality. Progressive reasoning is a less legitimate reasoning, therefore all the effects of non legitimate reasoning on the incentives of the states and the courts described above apply to progressive reasoning.

Issuing a judgment with progressive reasoning is risky and will create similar results to issuing an activist judgment. Therefore issuing a judgment with progressive reasoning will create a similar schema of interests to the one presented on table 3.

What constitutes progressive reasoning? This question is far too broad to be discussed fully in this article, what follows are only a few preliminary examples of such reasoning.

Basing a decision on standards instead of rules renders the decision more progressive. This is true because standards appear to allow the judges more room to maneuver their judgments according to their policy preferences. Regardless of the fact whether judges really have less discretion when they use rules, it is probably true that their discretion is more visible and confessed when they are using standards. What makes a decision progressive is not the fact that the judges giving it really have more discretion, but the fact that their discretion is more admitted in the judgment itself.

Certain legal instruments may be more progressive than others. For instance every decision which allows the state or the government a certain margin of appreciation is progressive. According a margin of appreciation to the state shows that the decision is not clear cut and mechanical, but rather involves discretion by the court. For similar reasons basing a decision on a balance between opposing rights or on tests of proportionality is also progressive. All these tests admit that there is more than one possible legal conduct, and therefore the court’s decision regarding the state’s conduct is a product of the discretion of the judges.

A system of evolutionary treaty interpretation which changes the stipulations of the treaty as times change is probably more progressive, since the judges admit of more discretion when they change their judgments as time progresses, instead of relying on previous precedents. Teleological interpretation is more progressive than textual or subjective interpretation, since establishing the purpose of the treaty admits of more discretion by the judge.

There are many characteristics of judgments which can teach us about the level of progressiveness although they do not constitute progressiveness in themselves. For instance longer judgments are normally more progressive, since they allow more room for the judges to expose their thoughts and discretion.

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84 See Lara M. Pair, *Judicial Activism in the ICJ Charter Interpretation*, 8 ILSA J. INT’L & COMP. L. 181, 195 (2001) suggesting a similar use of the word “progressive” as indicating a decision which is not a result of previously existing norms.

85 For the claim that shorter decisions are usually of stricter style see - Jean Louis Goutal, *Characteristics of Judicial Style in France, Britain and the U.S.A*, 24 AM. J. COMP. L. 43, 60 (1976).
The judges can also mask their progressiveness by signing the judgment together as one unit instead of specifying the opinions of the judges, or at least by assuring unanimous agreement. By the use of these tactics the judges hide the possibility of dissent to their judgment, presenting it as the only possible decision, rather than as a result of their own discretion.

Progressiveness is only one way to decrease the legitimacy of the court’s judgments, as mentioned above there are other ways, for instance a judgment of a national court based on international law is usually less legitimate. If using these other measures will indeed lower the legitimacy of the judgment, they will render similar incentives to using progressive reasoning.

E. The Optimal Strategy – Walking on the Brink

The best case scenario for the court is getting compliance where it is least expected. If compliance is unexpected the court will receive the highest reputational gain if it will nevertheless achieve compliance. Furthermore the very act of giving risky judgments, to which compliance is unexpected, serves as a signal which strengthens the court’s reputation.

Therefore the best strategy for the court is to walk on the brink, try and gain compliance to the riskiest judgment it can give. The court can increase the level of risk by deciding against low reputation states, by giving activist judgments, or by using progressive reasoning. Walking on the brink is risky, sometimes the court will miscalculate and will suffer non compliance. The court is willing to suffer this risk in order to be able to gain substantial reputational benefits from compliance, and from the independent signal generated by risk taking.

As in any type of investment, in order to earn you have to take calculated risks. If the court will avoid giving risky decisions its reputation will not grow. Furthermore, a reputation which does not grow will necessarily decline. A court which does not challenge itself will soon lose relevance, over time its reputation will decrease simply because the court gave not signals to maintain it. An overly timid court is also signaling, it signals its own poor assessment of its reputation, this signal will damage the court’s reputation in the long run. On the other hand the court has to limit the level of risk, it has to calculate the level of risk to allow itself a chance of getting compliance.

In order to walk on the brink the court has to manipulate the levels of risk, matching the relevant factors which generate the risk of non compliance to each other to generate the optimal level of risk. The four relevant factors determining the level of risk are: the court’s reputation, the state’s reputation, the activism of the judgment, and the legitimacy of its reasoning. Later stages of this project will attempt to explain specific judicial tactics which conform to the strategy of taking calculated risks, they will show how judicial conduct can be explained by the theory presented in this article. 86

86 In MURPHY, supra note 82 at 9-10. The author distinguishes between tactics and strategies. Murphy uses the title tactics to refer to “…maneuvering designed to obtain advantages…” and the title
VII. CONCLUSION

This article is based on a theory of courts as long term strategic planners. While agreeing with the prevailing literature that courts wish to promote this preferences, this article assumes that court act strategically and use a strategy which takes into account the long term abilities of the court to promote its preferences instead of the case at hand.

In order to explain the conduct of international courts, this article develops the concept of reputation. Reputation is an interactive asset, it is held by both international courts and states, both this type of actors act strategically to increase their reputation in order to gain certain other utilities.

Reputation is built by signaling, since it is not a tangible asset but rather a result of the beliefs of players regarding each other signals do not only disperse information about reputation, they create the asset of reputation. This article shows which factors determine the effects of the behavior of courts and states on the levels of reputation held by both of these players.

Four factors were discussed which determine the effect of behavior on reputation, the court’s preliminary reputation, the state’s preliminary reputation, the activism of the judgment and the legitimacy of its reasoning. Those factor determine the risk of non compliance by the state, since the level of risk determines the strength of the reputational signal, they determine the losses or benefits to the court’s and the state’s reputation.

The court can increase its reputation by taking calculated risk. Risk taking not only increases the benefits to the court in case of compliance, it also serves as an independent signal which increases the court’s reputation. Because only high reputation courts can take high levels of risk, risk taking is a credible signal of the court’s high reputation. This is an application of the Handicap Principle to the conduct of international courts.

This article is a part of a bigger project to study the tactics of national and international courts. The second step in this project is trying to learn how the incentives presented here will influence the actual behavior of courts. An important part of this step is supporting the theoretical explanations of behavior by the use of examples.

The third step after explaining the actions of the courts is studying the influence these actions will have on the international arena. The concluding part of this project will be explaining political phenomena by the use of the theory.

strategies to refer to “… over-all plans under which such maneuvering against specific obstacles are co-ordinated and for which scarce resources are allocated in order to further the accomplishment of the broad policy objective.” In this article I use a similar terminology and refer to strategy as a broader more basic plan to increase reputation which could be accomplished by the use of different tactics.