Instead, the research group proposed to evaluate judicial effectiveness on the basis of a goal-based approach that was developed from organizational studies in sociology positing that an effective organization is one that fulfills its goals within a defined period of time. We then moved to identify some generic goals of adjudication, such as supporting legal norms, implying law implementation and development, resolution of disputes and problems, support of institutional regimes and legitimization, and court-specific goals such as promoting reconciliation or harmonizing law across regimes. For that purpose we studied the constitutive texts of treaties which reflect the goals set by the member states and/or sponsoring international organizations—the mandate providers—as well as goals implicitly derived from the court’s structure and procedure. Perhaps our main conclusion was that one cannot speak in general terms about effective international courts. Instead, we should talk about effectiveness in attaining certain goals—which may come at times at the expense of other goals.

We move on now to our panel presentations, which are not wedded to the goal-based model, but which will, I hope, take it into account when considering the question of effective international adjudication, which is court-specific or focused around a family of courts.

**The Effectiveness of the International Court of Justice**

*By Joan E. Donoghue*

My focus on today’s panel is the effectiveness of the International Court of Justice (ICJ), where I serve as a judge. When I give lectures about international adjudication in the United States and elsewhere, I am often asked how states have responded to judgments of the ICJ. Does the losing state usually comply? And if it does not do so, what are the consequences?

A partial answer to these questions is that scholarly studies indicate that compliance with ICJ judgments is quite good: there has been compliance with perhaps three-fourths of the Court’s judgments, depending on how one categorizes various situations. One can also point to Article 94 of the Charter of the United Nations, which provides for recourse to the Security Council action in the event of non-compliance with an ICJ judgment, but it is necessary to add that in practice this mechanism is not used by prevailing states.

When I give these sorts of answers, audience members often look unsatisfied, and so am I. This unease has increased my interest in looking more deeply into questions about the effect of the Court’s judgments on state behavior. For example, are ICJ judgments effective in bringing about the peaceful settlement of disputes between the two states that are before the Court in a case? And, looking beyond the parties to a particular case, what do we know about the more general effect of ICJ judgments on the behavior of states? Do states that are

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1 For a fuller account of these and other conclusions, the methodological problems we encountered, and the building blocks of effective adjudication, I refer you to the book I have written, with the help of six members of my research group, on assessing the effectiveness of international adjudication, *Assessing the Effectiveness of International Courts*, Oxford University Press, 2014).

* Judge, International Court of Justice.

not parties to a case take account of ICJ legal pronouncements? To what extent does the spectre of ICJ adjudication shape state behavior?

My reflections about these questions and my forays into the existing literature have led me to conclude that, at present, we practitioners and scholars of international law are not well-equipped to answer these questions. Too much of what we have to say sounds simply like truisms. For example, I am among those who have asserted that states that are not parties to a particular case take account of ICJ pronouncements on the law, but to what extent is such an assertion a product of a broader belief system about the influence of international law on state decisionmaking? An attempt to prove or disprove the assertion might point towards empirical analysis, but there we encounter a number of difficulties, including the non-transparency of state decisionmaking and the fact that sample sizes for a study of adjudication in a court like the ICJ are very small.

So, as you can see, the questions I get from audiences might at first blush seem to call for a simple ‘‘yes or no’’ answer: Do or don’t states comply with ICJ judgments? However, they lead us into something of a thicket, at the center of which is the question about how effective the ICJ has been in shaping state behavior. To avoid disappointing you, I shall tell you now that I am not going to answer this question today. Rather, I am going to pose four specific questions to the audience, in the hope that I can motivate some of you to pursue the answers as part of your own research agendas.

Like other members of the panel, I am going to frame my remarks with reference to the goal-based approach to the effectiveness of international courts developed by Professor Shany.2 Before I do that, however, I offer three comments about the context in which the effectiveness of the ICJ should be considered.

First, when we evaluate the effectiveness of an international court, we must be careful to set aside expectations that derive from training in our respective national legal systems. Members of U.S. audiences who ask me about compliance with ICJ judgments are familiar with a legal system in which the incentives to comply with a judicial decision are high and in which there are robust mechanisms to address non-compliance. Expectations derived from experience in that system, however, do not translate easily to an assessment of an international court. The ICJ has not been assigned a role comparable to that of national supreme court, most notably because it has jurisdiction only to the extent that states consent to it. But the dissimilarity is much deeper. The institutions that exist alongside a national court, which influence our ideas about a court’s role in shaping behavior, simply do not have international corollaries. The ICJ may be known by the nickname ‘‘World Court,’’ but it cannot be said that there is a world government. There is no world legislative or executive branch and, as is often said, there is no international sheriff. It follows that the mechanism whereby ICJ judgments influence state behavior must be different from the mechanisms operating within a national legal system.

Second, in the years since the establishment of the first World Court (the Permanent Court of International Justice), many other international courts and tribunals have been created and have thrived. The menu of judicial options for settling disputes arising under international law is much more varied than might have been expected at the time when the idea of a single World Court first emerged. Non-judicial third-party mechanisms also abound.

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Third, even with the expansion in the number of international courts and tribunals and the creation of standing and ad hoc quasi-judicial bodies, it remains the case that, by and large, state-to-state disputes are addressed directly between the parties.

Given the availability of these other paths towards the peaceful settlement of disputes, it is difficult to give serious consideration to the effectiveness of any one international court without running into questions of comparative effectiveness among institutions.

With this background, I turn back to the application of Professor Shany’s framework for considering the effectiveness of a court. The starting point for examining the effectiveness of any institution must be the identification of the goals against which effectiveness is measured. Professor’s Shany’s approach is to begin by articulating the goals of the mandate-providers of a particular court.

There are various ways in which one might frame the goals of those who established the ICJ. For today’s purposes, I propose to derive four goals from the functions and structure of the Court, as specified in the UN Charter and the Statute of the Court:

- The settlement of particular state-to-state disputes, peacefully and in accordance with international law;
- A contribution to the operation of institutions in the UN family, through advisory opinions;
- The development of international law in a manner that reflects the views of judges coming from diverse backgrounds, in the course of deciding contentious cases and rendering advisory opinions;
- The shaping of state behavior as a result of the prospect of adjudication in the World Court. The expectation and hope was that states would consent to the Court’s jurisdiction and that the prospect of ICJ jurisdiction would percolate in the background of national decisionmaking.

Clearly, to measure the ICJ’s effectiveness in a serious way, one has to evaluate the Court with reference to all four of these goals, individually and collectively. Today, however, I am not going to address the Court’s advisory opinion role. I am also going to set aside the third and fourth goals—the development of international law and the shaping of the behavior of states that are not parties to a particular dispute. I do not wish to leave the impression that I believe that those who established the ICJ considered these last two goals to be less important than the first two goals. On the contrary, it seems quite likely that those who established the PCIJ, and later the ICJ, gave great weight to these goals, which extend the reach of the Court beyond the particular dispute before it, and thus serve to distinguish a standing court from ad hoc arbitral tribunals.

Despite the importance of these other goals, on today’s panel I focus only on the Court’s effectiveness in settling the particular disputes brought before it. Of course, one aspect of this inquiry is the question of whether the losing state complied with a judgment. However, the inquiry into the effectiveness of a particular judgment is broader. For example, suppose that we can establish that the losing state’s behavior conformed to a judgment of the Court, and thus that it complied with the judgment. How do we know whether the change in behavior is attributable to the judgment? Skeptics of the role played by international law in shaping state behavior might suggest that any change in state behavior was largely driven by other factors. Others, of course, would staunchly disagree with that proposition.

This leads me to the first of my four specific requests to scholars: What motivates states to change their behavior in the wake of an ICJ judgment?
For decades, scholars have advanced competing views about the relationship between international law and state behavior, asking, for example, whether and why states comply with international law and through what mechanisms international law influences state behavior. Most of this rich and interesting literature, however, has focused on the relationship between state behavior and primary, substantive norms of international law. I urge greater effort by scholars to apply their disparate notions about adherence to international law to the relationship between behavior and judicial decisions, as distinct from substantive norms.

My second question for scholars moves from the abstract and theoretical to the very concrete. What are the facts about the effect of ICJ judgments? What have the parties done after each ICJ judgment?

An observer might wonder why a member of the ICJ does not know the answer to this question. Once the ICJ has rendered a judgment, the legal dispute before the Court is considered settled, and our Court no longer has jurisdiction. The ICJ is not a monitoring body; once a case is removed from our docket, we do not receive information from the parties in any systematic way. And it is not always possible to discern the responses of the parties from public sources.

Although there have been some commendable efforts to compile information regarding compliance with ICJ judgments, the information is not current and some studies of particular cases are incomplete. In particular, because the focus of information-gathering has been on compliance by the losing state, the information that is available does not always reveal what a prevailing state did in the wake of a judgment. To evaluate effectiveness, one would also want to know whether the prevailing state made use of the ICJ’s legal or factual conclusions in other fora. An assessment of the effect of a particular judgment could also take into account the impact of the Court’s judgment on other institutional players with a role in addressing a particular dispute, such as regional and UN bodies, mediators, or members of civil society.

A careful examination of developments in the wake of a judgment also could look beyond the convenient model of a state as a unitary actor, to see whether one can discern the process of decisionmaking within the governments of the two states. For example, perhaps institutions or officials made use of the judgment to argue in favor of a particular course of action.

In considering the facts that bear on effectiveness, one also confronts a limitation inherent in Professor Shany’s approach to goal definition. Any simplifying methodology can lead to valuable insights, but it can also mask other important conclusions. Professor Shany has made a good case for measuring effectiveness with reference to the goals of the mandate providers. However, as he recognizes, other constituencies might advance different goals that would lead them to other assessments of effectiveness. The two disputing states might accept in principle the goal of settling particular disputes in accordance with international law, but their appearance before the ICJ means that they have very different ideas about what kind of settlement of the dispute would conform with international law, and thus very different views on whether the particular judgment was effective in meeting their respective goals. Other less partisan observers may also have divergent views on whether the Court’s

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3 As Harold Koh has observed, the reason why nations obey international law “remains among the most perplexing questions in international relations.” Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2599 (1997). Koh’s essay offers his own views and provides a comprehensive overview of the vast literature related to this question. A more recent survey of the literature appears in Andrew Guzman, *How International Law Works* (2008), in which the author also offers his own ideas about how international law influences state behavior.
settlement of a particular dispute was in accordance with international law, and that will shape their respective views on the effectiveness of the Court.

So, as you can see, my first two questions are, on the one hand, very basic and, on the other hand, very difficult. I have asked for more analysis of the theory of international law as applied to judicial decisions, and for more examination of the nitty-gritty facts, i.e., what has happened after each judgment? My next two requests for research will build on these.

Thus, as a third question, I encourage the evaluation of the effectiveness of ICJ conclusions of law and fact, in contrast to other authoritative pronouncements on international law or facts, such as those emanating from other international courts and tribunals and from quasi-judicial entities (e.g., treaty bodies and ad hoc entities such as fact-finding commissions and special rapporteurs). To what extent do the pronouncements of these other institutions influence state behavior? Can we draw any conclusions about whether effectiveness is influenced by the binding or non-binding character of a pronouncement?

My fourth and final request is for scholarly inquiry into the relative effectiveness of specific characteristics of ICJ judgments. For example, a court can be very precise when it orders reparations, or it can give flexibility to the party that is required to make reparations under international law. Is one approach or the other likely to be more effective? Some judgments reflect a total victory for one party, while others can be portrayed as a mixed result. What effect does that have on outcomes? Does the size of the Court’s majority have an impact on the effectiveness of its judgments?

These are only a few examples of the kind of variation that one sees in the judgments of a court. One can assume that the natural inclination of judges is to craft a judgment in a manner that will contribute to its implementation and to the settlement of the overall dispute. It is desirable if judges have more than instinct and intuition to guide them.

Members of the audience can easily see why the answers to questions like these are of interest to me, as a judge on the International Court of Justice. However, more than the selfish interest of one jurist animates my requests to academics. As a world community, as international lawyers, we have choices to make every day about setting our priorities, about which institutions deserve the most support, about improvements that can be made. That is why we must constantly evaluate the effectiveness of existing institutions. I hope that I have whetted the appetite of some of you to contribute to such an evaluation.

**IS IT ALL ABOUT COMPLIANCE?**
**TOWARDS A MULTIDIMENSIONAL GOAL-BASED APPROACH FOR ANALYZING THE EFFECTIVENESS OF THE WTO DSS**

*By Sivan Shlomo Agon*

I would like to begin my remarks with a seemingly simple question: Is judicial effectiveness all about compliance?

When discussing the World Trade Organization (WTO) dispute settlement system (DSS), this question seems to capture the essence of existing debates on its effectiveness, particularly among jurists. To demonstrate this, it may be advisable to look at one of the most famous