Settle or Litigate? Consequences of Institutional Design in the Inter-American System of Human Rights Protection

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Abstract

Why do states engage in settlements with victims of human rights violations? Although the friendly settlement procedure has been on the books at the Inter-American Commission on Human Rights since 1992, states did not begin utilizing the procedure in earnest until nearly ten years later – why? I argue that state behavior – the choice to settle or litigate – at the Inter-American Commission is driven in part by two features of the institution's design: (1) optional jurisdiction of the Inter-American Court and (2) a 2001 rules change that reduced the level of discretion over submission of cases to the court. Using an original dataset of petitions at the Inter-American Commission, I show that states engaged in more settlements in response to the increased cost of litigation, but that these changes are limited to states under the Inter-American Court's jurisdiction. Moreover, as a positive, perhaps unintended, consequence, states' levels of compliance with the Commission's non-binding recommendations also increased after the rules change. My findings indicate that it is possible for institutions to achieve more desirable or efficient outcomes by changing the rules of the game.

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1. Introduction

Why do states engage in settlements with victims of human rights violations? While some scholarly work has been done on states' decisions to negotiate or litigate at institutions like the International Court of Justice (Gilligan, Johns and Rosendorff, 2010) and World Trade Organization (Guzman and Simmons, 2002; Ahn, Lee and Park, 2013; Gray and Potter, 2020), there has been relatively little work done on the strategic incentives of states to engage in settlements with individual petitioners (as opposed to other states). Although many human rights institutions exist in which individuals can bring allegations of abuses against their own state, few of these institutions have an established mechanism for facilitating friendly settlements. Since 1992, the Inter-American Commission of Human Rights has had the authority to facilitate friendly settlements between petitioners and the accused state. However, the procedure was not commonly initiated until 2001, and even then, only by certain states. What explains this variation?

I argue that states' decisions to settle or litigate are driven, at least in part, by the institution's design. Settlement decisions are always made in the shadow of a tribunal; in other words, with the knowledge, on the part of both parties, that failure to settle will result in a tribunal evaluating the claims of both sides and determining which party prevails (Bebchuk, 1984). Unlike many domestic courts, however, international courts do not always exercise their jurisdiction, and as such may decide not to rule on the merits of a case (Conti, 2008; Gilligan, Johns and Rosendorff, 2010). This creates some uncertainty on the part of the negotiating parties about how long the tribunal's shadow extends. Thus, one institutional design feature that states and/or institutions can change is the set of rules over how and which cases are submitted to the tribunal for judgment.

Two features of the Inter-American system's design help explain variation in states' decisions to engage in the friendly settlement procedure. The first is the fact that the Inter-American Court's jurisdiction is optional, not compulsory. As I explain in Section 2, the

Inter-American system is comprised of two institutions: the Inter-American Commission, which has compulsory jurisdiction over all states in the Organization of American States (OAS) but cannot issue legally binding rulings, and the Inter-American Court, which has optional jurisdiction over OAS states that ratify the American Convention on Human Rights and accept its jurisdiction, but can issue legally binding judgments. The shadow of a court looms much larger when states are under the Court's jurisdiction; in other words, not all states are negotiating under the shadow of a tribunal.

The second feature is the Inter-American Commission's level of discretion over submitting cases to the Court, which was restricted by a Rules of Procedure change in 2001. Since then, the probability of a case being taken up by the Court increased dramatically for states under the Court's jurisdiction (Cavallaro and Brewer, 2008). This in turn decreased the expected value of continued litigation to the state, making settlement more attractive. Because the probability and cost of losing at the Court are so high, the expected value of litigation was already low, but states could rationally opt to continue through the process because there was a good chance of avoiding a legally binding ruling on the merits. Once this chance was substantially reduced, however, litigation became less valuable than settlement, and states adjusted their behavior accordingly. The percentage of petitions resulting in friendly settlement doubled, from 12.5% to 25%.

Additionally, the procedural change reducing the Commission's discretion over submission had the positive, possibly unintended, consequence of increasing compliance with the Commission's non-binding recommendations in cases that were not submitted to the Court. Because non-compliance with the Commission's recommendations became grounds for submission to the Court, the Commission had more power to obtain some level of compliance from the state, if the state wanted to avoid the Court's judgment. Thus, even rules meant to create only a more efficient process may also result in more socially desirable outcomes through the incentives that they create.

More broadly, this work suggests that institutional rules do matter. Institutional design

theories suggest as much (Voeten, 2019), but it is often difficult to show how and why rules matter, given that most rules are sticky and unlikely to change over time. By examining the specific instance in which rules *did* change, and assessing the impact of that change on subsequent state behavior, this work grants us an opportunity to assess just how consequential an institution's rules can be.

This paper proceeds as follows. In Section 2, I introduce the two institutions of the Inter-American system in greater detail. In Section 3, I lay out the incentives for the petitioner and state to settle and how institutional design might affect these incentives. In Section 4, I illustrate the effect of institutional design changes on petition outcomes using an original dataset of petitions from 1992 to 2018. I also address several alternative explanations for these patterns. The final section concludes.

2. The Inter-American System's Design

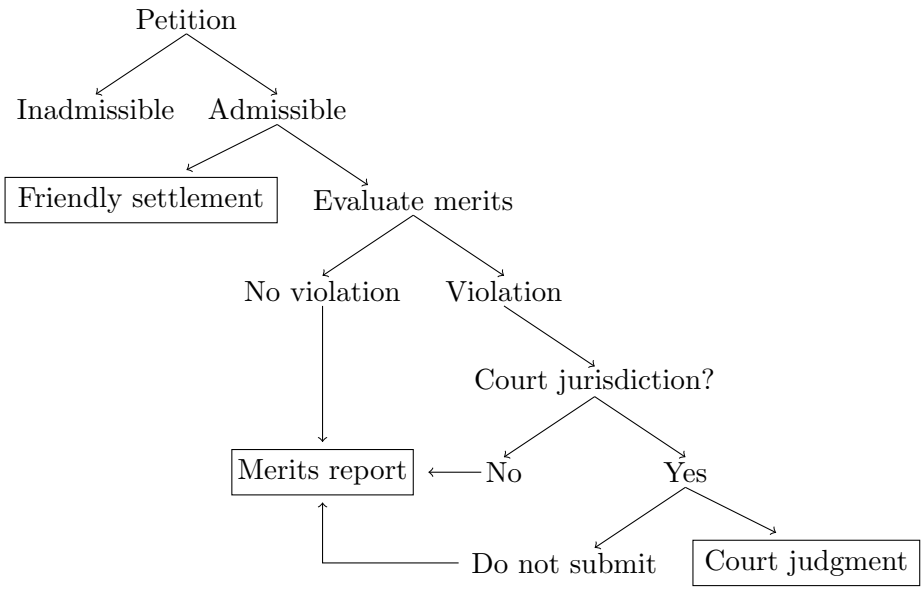
The Inter-American Commission and Inter-American Court of Human Rights were created in 1959 and 1979, respectively, and together form the Inter-American system of human rights protection. The relationship between the two institutions looks like that of the European Commission and Court of Human Rights prior to 1998, with the Commission acting as gatekeeper to the Court. This means that individuals are not able to petition the Inter-American Court directly, but must initiate all complaints at the Commission. As such, the Commission functions both as a court of first instance and also as a petitioner (Zschirnt, 2017). Although both institutions also promote human rights through non-adjudicative means, like thematic reports and on-site visits (Commission) and advisory opinions (Court), for the purposes of this paper, I will focus on the roles the institutions play in the individual petition process.[1]

The Commission has jurisdiction over all 35 states in the Organization of American States (OAS). It is empowered to hear alleged violations of the American Declaration on the

[1]See Shelton (2015) for more information about the non-adjudicative activities of the Inter-American Commission.

Rights and Duties of Man and the American Convention on Human Rights. The substantive content of these rules is the same, but they differ in their legal authority. As a treaty, the American Convention on Human Rights is legally binding; as a declaration, the American Declaration on the Rights and Duties of Man is not. In the language of Abbott and Snidal's legalization (delegation, obligation, and precision), the American Convention requires greater obligation and allows for greater delegation via the creation of the Inter-American Court of Human Rights.[2] The Court presently has jurisdiction over 21 OAS states that have ratified the American Convention and recognized the Court's competence to hear alleged violations.[3]

Figure 1: Illustration of Case Progression in the Inter-American System



Note: The three possible outcomes of petitions are indicated by rectangles.

The progression of petitions in the Inter-American system is illustrated by Figure 1. Petitions are received from individuals alleging violations of their rights under the American

[2]See Abbott and Snidal (2000) for a further discussion of the dimensions of hard and soft law.

[3]Dominica, Grenada, and Jamaica are examples of states that have ratified the American Convention, but remain outside of the Court's jurisdiction. As such, they have undertaken the higher obligation, but not higher delegation. Venezuela denounced the American Convention in 2012 and left the Court's jurisdiction in 2013, but rejoined the American Convention in July 2019.

Declaration or American Convention, depending on whether the state that violated their rights has ratified the latter. Once the Commission receives the petition, it evaluates whether it meets the standards for admissibility. For a petition to be admissible, the individual must have exhausted all domestic remedies, submitted the petition within six months of the exhaustion of domestic remedies, and not have the same case pending before another international body.[4]

After the petition has been processed, the Commission places itself at the disposal of the petitioner and state to facilitate a friendly settlement agreement. This is the only opportunity for settlement in the petition process.[5] Although the friendly settlement procedure was mentioned in the American Convention, the Commission did not actively facilitate settlements until a procedural rules change in 1992.[6] In a friendly settlement agreement, the state admits to violating rights under international law and agrees to a set of remedies. Once a friendly settlement is signed and approved by the Commission, the litigation process ends. As such, petitioners give up any claim to future recourse under the Inter-American system. In other words, once a friendly settlement is in place, it is no longer possible to receive a judgment on the merits of the case from the Commission or the Court.[7]

If the state and petitioner(s) cannot reach an agreement, the case will proceed to the litigation stage. Here the Commission will evaluate evidence from the state and petitioner and reach a finding on the merits. If the Commission finds that the petitioner's rights have

[4]Admissibility criteria are set forth in Articles 26-36 of the Rules of Procedure of the Inter-American Commission on Human Rights, revised 2013.

[5]I do not consider compliance agreements, which are sometimes signed by the state and petitioner after the Commission issues a merits report, to be the same as settlements as they seek to clarify only the nature of the remedies, and come after the determination of state responsibility.

[6]Prior to 1992, the Inter-American Court interpreted Article 49 of the American Convention, which provides for friendly settlements, to mean that the Commission *may* provide for a friendly settlement proceeding, but is not legally required to (Standaert, 1999). This made sense when the institutions were young and states rarely responded to the Commission's request for information. In 1992, the Commission's new regulations provided that the Commission *shall* make itself available for friendly settlement proceedings. See Regulations of the Inter-American Commission on Human Rights, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 103 (1992).

[7]This is not explicitly stated in the American Convention, but cases can only be referred to the Court if procedures in Articles 48 and 50 have been fulfilled; Article 50 assumes that a settlement has not been reached.

been violated, it issues a set of recommendations. The Commission's recommendations tend to include both individual remedies (e.g. monetary reparations) and tangible guarantees of non-repetition (for example, changing domestic laws to prevent future violations of a similar kind). Note that the language here – recommendations – reflects the lower level of obligation as these are not legally binding orders. The Commission then transmits the report to the state and offers it a chance to respond and implement the recommendations.

After receiving the state's response (or if the time to respond elapses without a reply), the Commission must decide whether to publish the merits report, thus terminating the litigation process at the Commission, or submit the case to the Inter-American Court. For states outside of the Court's jurisdiction, the only option is to publish the merits report. If the state is under the Court's jurisdiction, the Commissioners decide whether to submit the case to the Court, taking into account the petitioners' wishes on the matter and to what extent the state has fulfilled its recommendations. The state can affect the probability of the case reaching the Court by complying with the Commission's recommendations. If the Commission decides not to send the case to the Court, it publishes the merits report and takes it upon itself to monitor compliance with the recommendations. If the Commission sends the case to the Court, it has ceded these responsibilities to the Court.[8]

Although the Court's proceedings come chronologically after the Commission's, it is important to understand the Court is *not* an appellate body. Rather, the process of adjudication begins anew. Unless the state fully accepts responsibility for the violation, the Court issues its own, separate ruling on the merits of the case and, if it finds a violation, issues a

[8]There is one exception, which is that if the Court rejects the case on jurisdictional grounds, the Commission resumes its responsibilities. In *Alfonso Martín del Campo Dodd v. Mexico*, Mexico argued after it won at the preliminary objections stage at the Court to exclude the case from the Court's temporal jurisdiction, the Commission was no longer competent to hear the case because "Articles 50 and 51 of the Convention establish mutually exclusive alternatives, and that if the Commission opts for one of these alternatives it cannot later purse the second without causing a situation of legal uncertainty for the states, petitioners, and victims" (Inter-American Commission on Human Rights, Merits Report 117/09 on Case 12.228, published November 19, 2009, para. 106). However, the Commission determined that it did have jurisdiction to hear the case because "pursuant to the principles of efficiency, utility, and good faith governing the human rights obligations of the States, in the event that the compliance does not satisfy the formal requirements of the Inter-American Commission for submission to the Court, the latter reassumes jurisdiction to implement the attributes set forth under Article 51 of the Convention" (Ibid., para. 110).

set of legally binding orders. Again, these are substantively similar to the Commission's recommendations, but carry a higher level of obligation on the part of the state. Given that the merits of the case have already been reviewed by the Commission, it is not surprising that the Court rarely finds in favor of the state.[9] All Court decisions are final, so the litigation process ends with the Court's judgment.

It is important to note that, on the whole, the Inter-American system is designed to resolve cases before they reach the Court. Friendly settlements encourage negotiated ends to disputes and ensure quicker access to justice for victims. The Commission's merits reports clarify the state's legal obligations, make declarative statements about whether a violation has occurred, and offer suggestions for how the state can remedy the violation, if appropriate. At each step in the process, the state can choose to end litigation through either settlement or compliance. Yet, many cases end up at the Court. This is not necessarily because states are "off the equilibrium path" but because the institution's rules create incentives for states to behave in certain ways.

3. Theoretical Expectations

Although the Commission facilitates friendly settlements, the decision to settle is ultimately one taken by the state and petitioner(s). Petitioners may prefer settlement because it means faster access to justice: the state admits responsibility for the violation and pledges to take measures to remedy the violation. Throughout the adjudicative process, states seek to minimize costs to themselves, be they financial or reputational, present or future. Settlement may resolve a case faster, which can benefit states when dealing with controversial issues they would rather keep out of the press. However, it could also encourage other petitioners to submit petitions for the same kind of violation, thus requiring the state to pay out more in the future. All of these are issues to consider as the state considers its position on settlement.

[9] If the decision goes in favor of the state, it tends to be because the Court accepted one or more of the state's preliminary objections, which preclude jurisdiction.

In addition to the desires of the petitioner and state, aspects of an international institution's design can also affect decisions to settle. For example, states might choose settlement if the terms of such an agreement are kept secret, as in international investment dispute settlement (Hafner-Burton, Steinert-Threlkeld and Victor, 2016; Hafner-Burton and Victor, 2016).[10] Likewise, states' settlement decisions might be affected by the presence of third parties to the dispute (Busch and Reinhardt, 2006; Johns and Pelc, 2014). Perhaps most consequentially, the presence of an international tribunal to adjudicate the dispute if settlement negotiations fail can affect the likelihood of settlement (Gilligan, Johns and Rosendorff, 2010; Johns, 2015).

While there are similarities, there are also a few meaningful differences between human rights settlement negotiations and those in other areas. First, the settlements are not secret. The Inter-American Commission, for example, publishes full texts of settlement agreements once they have been approved. Settlements facilitated by the European Court of Human Rights are likewise made public and published as case reports.[11] Thus, any political incentive to engage in settlement to avoid publicly admitting fault is negated. Second, while some courts, like the International Court of Justice, allow for additional bargaining after the initial judicial decision, neither the Inter-American nor the European Court allows this.[12] As such, parties only have one settlement opportunity, increasing the importance of pre-trial negotiations.[13] This also means that once the petition is beyond the settlement phase, the petitioners cannot influence how the case proceeds.

Additionally, the shadow of a tribunal is crucial to models of settlement. This creates

[10]Many have criticized this lack of transparency; see Fiss (1984)'s strongly titled "Against Settlement" and the equally clear directive of Hafner-Burton, Puig and Victor (2017)'s "Against Secrecy." Likewise, Kucik and Pelc (2016) argue that private negotiations during settlement of World Trade Organization disputes create negative externalities for other members.

[11]For a detailed discussion of friendly settlements at the European Court, see Keller, Forowicz and Engi (2010).

[12]The Inter-American Commission has a procedure for "compliance agreements" to merits reports. However, these are negotiations only over remedies, in line with the Commission's original recommendations; there has still been a judgment against the state, which keeps compliance agreements as extensions of merits reports.

[13]In this way, human rights courts play the role of "decider", rather than information revealer or coordinator (Johns, 2012).

a clear alternative to settlement (litigation) and a default procedure if the parties cannot agree on a solution.[14] However, international tribunals – including human rights courts – may not necessarily receive the case just because a settlement is not reached. Even where an international court with adjudicative powers exists and can receive a petition, it might refuse to rule on the merits of the case (Johns, 2015). Thus, there may be some uncertainty over how long the shadow of the tribunal extends.

As described in Section 2, the Inter-American system has two tribunals that evaluate merits of petitions, resulting in two kinds of litigation outcomes. When the Commission is the sole arbitrator of the merits, the result is a *merits report*. When the Court evaluates the merits as well, litigation results in a *Court judgment*.[15] All else equal, a merits report is less costly than a Court judgment for two reasons. First, the legal obligation to comply with the Court's orders is higher than the obligation to comply with the Commission's recommendations. This may mobilize domestic advocacy groups to campaign for compliance in a way that the Commission's non-binding recommendations do not (Haglund, 2019). For whatever that increased legal obligation is worth (and it may vary by state), the obligation is stronger at the Court than at the Commission. Second, in terms of monetary compensation, which is ordered in nearly every case, the awards from the Inter-American Court are orders of magnitude higher than those awarded by the Commission.

Why, then, do states keep litigating once the Commission finds a violation? It must the case that the state believes the Court will either not find a violation or that the case will not reach the Court. The first of these notions can be disabused right away: the Court ruled against the state in 98.2% of cases between 1989 and 2018.[16] In contrast, it is not unreasonable for the state to question whether the Court would actually evaluate the merits

[14] In the parlance of Figure 1, settlement refers to the left direction, resulting in the "Friendly settlement" node, while litigation refers to everything after the "Evaluate merits" node.

[15] In these cases, the Commission has also written a preliminary merits report finding a violation. However, the report is not published as such. Rather, it becomes part of the submission to the Court for judgment. Thus, I treat merits reports and Court judgments as mutually exclusive outcomes.

[16] This is even worse than the rate at the Commission, in which (only) 95% of rulings went against the state. All calculations of win percentage come from the author's original data on petitions.

of the case. Two sets of institutional rules determine whether the Court will have the chance to rule on the merits. First, the jurisdictional requirements for Court adjudication must be met: the state must have ratified the American Convention on Human Rights and must have recognized the Court's jurisdiction to hear cases against it. This excludes three sets of cases: those from states that have not ratified the American Convention; those from states that have ratified the American Convention but not accepted the Court's jurisdiction; and those from states that are currently under the Court's jurisdiction, but in which the violation took place prior to the acceptance of jurisdiction.[17] The second set of institutional rules governs the process by which Commissioners refer cases to the Court. If Commissioners have full discretion over which cases are referred to the Court, the Court has less of a chance to rule on the merits. When this was the case in the early years of the Court, there was often no articulation of the Commission's rationale for non-referral of a case. Based on the Commission's practice, states could attach a low probability to unsettled petitions ever reaching the Court: between 1992 and 2000, nearly 75% of all petitions resulted in published merits reports (see Figure 3, below).

When the state could reasonably expect litigation to result only in a non-binding merits report, its decision about whether to settle or allow the Commission to evaluate the merits is driven by the relative costliness of settlement to a merits report. For most states, it is probably the case that merits reports are less costly than settlement agreements: friendly settlements require states to accept responsibility for the violation, whereas merits reports do not. Even if the Commission finds a violation in the merits report, the state could continue contesting the finding. Thus, if the probability of the Court evaluating the merits is sufficiently low, states will avoid settling because doing so is costlier than the litigation outcome of a merits report. This logic implies, however, that if the probability of the Court

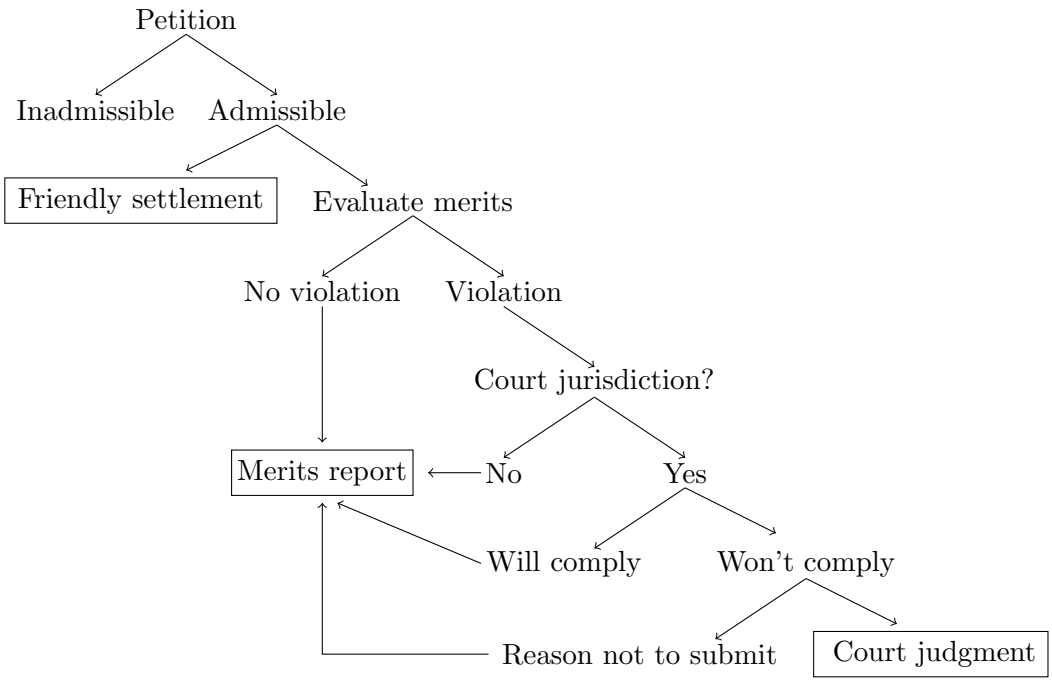
[17] In this case, the Court would lack competence *rationae temporis*. Several states ratified the American Convention in the 1970s and 1980s but did not recognize the Court's competence to hear cases until the 1990s. In these instances, the petitioner may allege a violation of the American Convention on Human Rights for an incident that took place after the state's ratification of the treaty, but may not be able to take the case to the Court if the incident took place before the recognition of jurisdiction.

evaluating the merits increased, the state might change its behavior.

This probability in fact did change with the adoption of a new Rules of Procedure in 2000, to take effect in 2001. The procedural change provided that:

> the cases of those member States that have accepted the contentious jurisdiction of the Inter-American Court and have failed to implement the recommendations in the report approved by the Commission in accordance with Article 50 of that instrument *shall be* submitted to that organ, except where a well-founded decision to the contrary is adopted by an absolute majority of its members *based upon prescribed criteria*, including the position of the petitioner, the nature and gravity of the violation, the need to develop or clarify the case law of the system, the possible effect of the decision on the legal systems of member States, and the quality of the evidence available... (emphasis mine)[18]

Figure 2: Illustration of the Effect of Procedural Rules Change, 2001



The rules change affected referral in two ways, as illustrated by Figure 2. First, by stating that the Commission shall send cases to the Court, it effectively made the default procedure to be referral in cases of non-compliance (Cavallaro and Brewer, 2008; González,

[18]Inter-American Commission on Human Rights, 2000 Annual Report, Chapter II, para. 26.

2009). If the Commission determines that the state will comply with its recommendations, it can publish the merits report and end the litigation process. Second, the rules change clarified the circumstances under which cases might not be referred by specifying particular criteria for non-referral. This removed much of the uncertainty around whether a case would be taken up by the Court by curtailing the Commissioners' discretion.

Although friendly settlements are costlier than merits reports, they are probably less costly than Court judgments. The legal authority of the Court might make contesting the legitimacy of its judgments less credible. Moreover, if the state knows it will be required to comply, it ought to prefer negotiating a settlement because it will have some say over the remedies it pledges to undertake. Unlike at the European Court of Human Rights, the Inter-American Court does not grant the state any discretion over how to implement its ordered remedies. In other words, the Court does not tell the state to "guarantee non-repetition" but spells out specific orders like "provide training in human rights to the police" and "distribute information about due process rights to prisoners" aimed at achieving the more general goal of non-repetition, often without regard for domestic or political barriers to implementation. This means that fulfilling the terms of a friendly settlement agreement may be less costly than complying with the orders in a Court judgment. Thus, I expect that as the probability of the Court evaluating the merits increases, the expected value of litigation decreases, making settlement more attractive to the state.

4. Empirical Analysis

To illustrate how institutional design affected states' behavior at the Commission, I constructed an original dataset of all friendly settlements, merits reports, and submissions to the Court from 1992 to 2018.[19] Table 1 summarizes the observed outcomes of petitions from 1992 to 2018, for states under the Court's jurisdiction and outside of the Court's jurisdiction.

[19]I use submissions to the Court and Court judgments interchangeably because the Court does not refuse any submissions. The uncertainty is over whether the Commission will submit the case to the Court, not whether the Court will evaluate the merits, conditional on submission.

Table 1: Outcomes of Petitions by Court Jurisdiction, 1992–2018

	Under Court's jurisdiction	Outside Court's jurisdiction
Friendly settlement	137	0
Merits report	179	61
Court judgment	274	—

Note: Trinidad and Tobago and Venezuela are counted as under the Court's jurisdiction even though they denounced the American Convention in 1998 and 2012, respectively. The Court maintains jurisdiction over them for crimes that took place prior to the year the denunciation entered into force. The vast majority of cases from both states address crimes that are still under the Court's temporal jurisdiction.

Table 1 illustrates the importance of the first institutional design rule on petition outcomes, namely whether the jurisdictional requirements for Court adjudication are met. Comparing across the two columns, it is clear that states outside of the Court's jurisdiction never settle: all 137 settlements between 1992 and 2018 came from states under the Court's jurisdiction. Given that the probability of a case from a state outside of the Court's jurisdiction reaching the Court is exactly zero, it is unsurprising that these states never settle. Again, for most states, settlement is costlier than the merits report, but cheaper than a Court judgment. Thus, if the choice is between friendly settlement and merits report only, they will opt for the latter. The fact that, through 2018, no state outside the Court's jurisdiction has ever settled is striking in this regard.

To illustrate the effect of the second institutional design rule, I divided the petitions by year of the initial merits report.[20] If the 2001 rules change affected behavior, there should be a noticeable change in petition outcomes in the two periods. Because states outside of the Court's jurisdiction were unaffected by this change, their petitions are excluded. As Table 2 shows, there is a clear difference in terms of outcomes for states under the Court's jurisdiction. From 1992 to 2000, merits reports were by far the most frequent outcome, with

[20]This is the year that the preliminary report was sent to the state and petitioners. It is not necessarily the same year as the year in which the merits report was published. On Figure 2, this is represented by the "Violation" and "No violation" nodes, as this is the information communicated to the state.

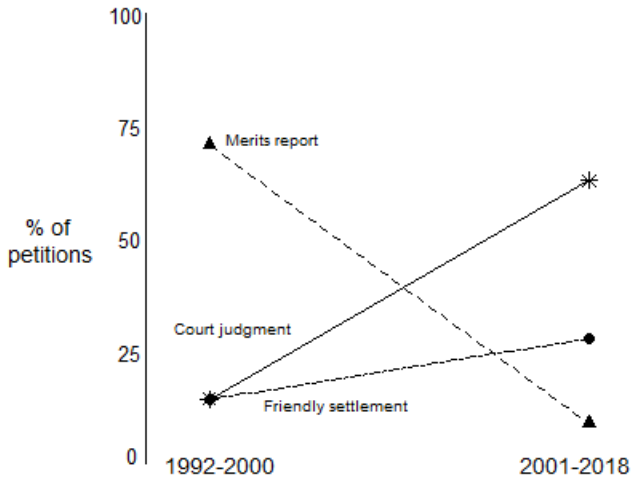
the same number of petitions resulting in friendly settlement or referral to the Court. After the rules change, however, merits reports become the least frequently observed outcome. In other words, the frequency of settlements increased and the litigation outcomes shifted from merits reports to Court judgments. Note that these numbers are not the result of the latter period merely covering more years: between 1992 and 2000, the settlement rate was three per year; between 2001 and 2018, the rate was six agreements per year.

Table 2: Outcomes of Petitions for States under the Court's Jurisdiction, 1992–2018

	1992–2000	2001–2018
Friendly settlement	27	110
Merits report	133	46
Court judgment	27	247

Note: These are petitions from states under the Court's jurisdiction only (see the first column of Table 1).

Figure 3: Change in Petition Outcomes from Before and After the 2001 Rules Change



Note: Only petitions from states under the Court's jurisdiction are included in these calculations.

Figure 3 illustrates the relative frequency of the three outcomes. Between 1992 and 2000, nearly 75% of petitions resulted in merits reports. This indicates that both settlement and submission to the Court (Court judgment) were relatively rare. After the rules change,

the frequency of Court judgments and friendly settlements increased, particularly the former. This illustrates the shift in litigation outcomes from merits reports to Court judgments. In turn, the fact that litigation was costlier – in that it was likely to result in a Court judgment instead of a merits reports – increased the value of settlement.

4.1. *Alternative Explanations*

While the patterns of petition outcomes are suggestive, in the absence of clear causal evidence of the rules change driving the changes, it is important to consider and exclude several alternative explanations as sources of the behavioral change. First, perhaps states believed they were more likely to get a favorable ruling from the Court after 2001, thus justifying further litigation. Technically, they were not wrong: states lost every one of the 27 cases between 1992 and 2000, but prevailed in five of the 247 cases between 2001 and 2018. However, the increase in winning percentage from 0% to 2% is insufficient to explain the dramatic increase in Court judgments relative to merits reports, especially given that the likelihood of victory was still extremely low after the rules change.

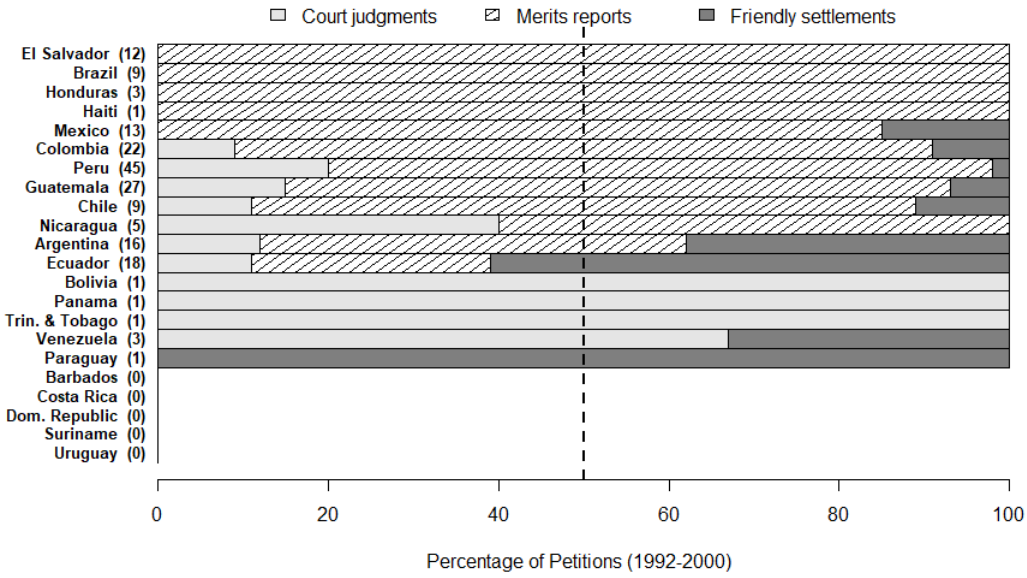
Second, if certain states have more petitions before the Commission and also are more likely to choose settlement, this could explain the rise in friendly settlements relative to merits reports. Particular states may be better able to continue litigating because they have the administrative capacity to do so (Kim, 2008) or are more experienced at being the respondent (Conti, 2010). However, as shown in Figure 4, the difference in outcomes is not driven by any one state. All states that had at least two petition outcomes pre-rules change (1992–2000) had a lower percentage of petitions result in merits reports after 2001, compared to their pre-2001 level.[21]

Third, the change in outcomes may be driven by a change in the types of violations

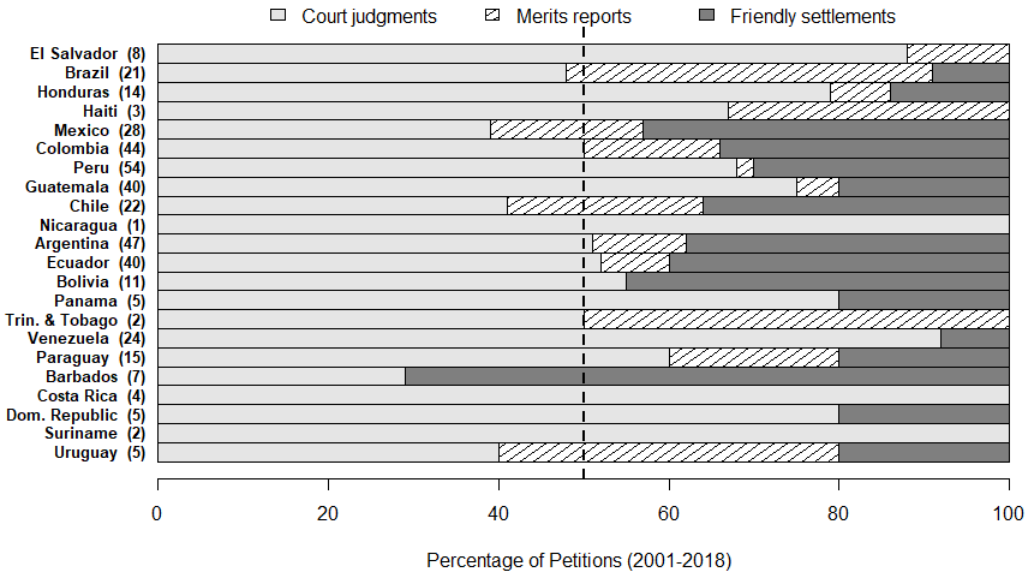
[21] Trinidad and Tobago had only one petition outcome between 1992 and 2000, which was a Court judgment. After 2001, there were two outcomes, one of which was a Court judgment and the other of which was a merits report. While the percentage of cases resulting in merits report did technically increase after 2001, this is the result of having only three observations total, rather than a suggestion that Trinidad and Tobago behaved substantially differently from all other states.

Figure 4: Outcomes of Petitions, 1992–2000 and 2001–2018

(a) State Behavior Pre-Rules Change

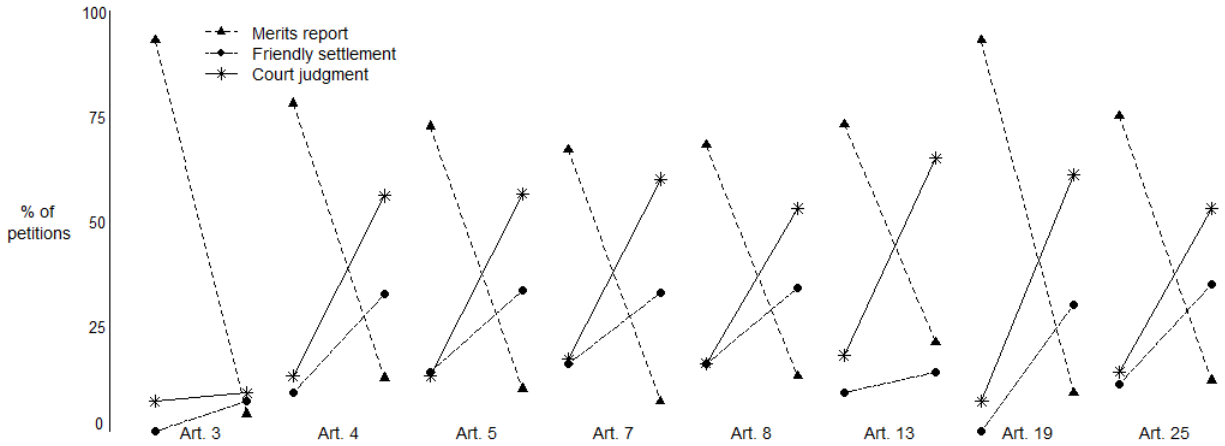


(b) State Behavior Post-Rules Change



Note: The number in parentheses represents the total number of petitions that reached one of the three outcomes. The dashed line is at the 50% mark.

Figure 5: State Behavior Does Not Change Depending on Which Article is Violated

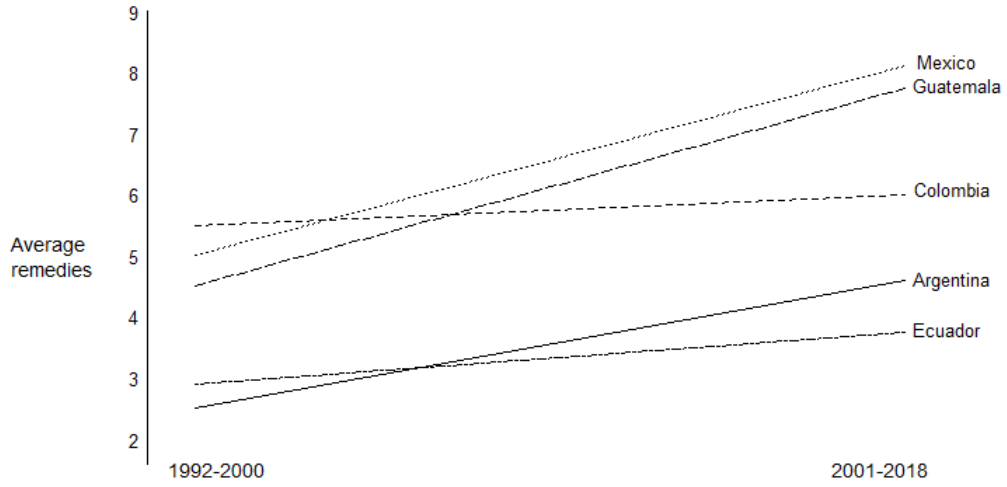


Note: Articles include physical integrity rights (Article 4: right to life; Article 5: right to humane treatment; Article 7: right to personal liberty); civil and political rights (Article 3: right to juridical personality; Article 8: right to a fair trial; Article 13: freedom of thought and expression; Article 25: right to judicial protection) and rights for a protected class (Article 19: rights of the child). Petitions can fall into more than one category if more than one article is violated.

alleged in the petitions filed in the two periods, if those violations were also more likely to result in settlement. For example, if cases involving a violation of the right to life (Article 4) were more likely to result in settlement and there were more Article 4 cases after the rules change, this could explain the apparent pattern. To see if the changes in friendly settlements, Court judgments, and merits reports were driven by petitions of any one type, I disaggregated the cases by violation(s) alleged and plotted the change in outcome between the two periods. If states' behavior in terms of settlement or litigation (or whether litigation takes place at the Commission or Court) depends on the nature of the case, the patterns depicted in the graphs in Figure 5 ought to differ depending on which article was violated. However, the patterns of change are remarkably consistent across the articles and in line with Figure 3: no matter the type of violation, the percentage of merits reports declines after the rules change, while the percentage of friendly settlements and Court judgments both increase.

Fourth, the increase in friendly settlements could be attributed to a change in the nature of settlement terms after 2001: perhaps settlements were cheaper for the state in

Figure 6: Increase in Remedies is Common Across Settling States



Note: Only states that engaged in at least two settlements in both periods are included.

the 2001–2018 period compared to 1992–2000. It turns out, however, that the opposite is the case. The cost of friendly settlements to the state actually increased after 2001. The average number of agreed upon remedies per case increased from 3.6 between 1992 and 2000 to 5.5 after 2001. This increase is common across all states, as shown in Figure 6. To avoid outliers, only states that engaged in at least two settlements in both periods are included.

A second way of measuring cost to the state is in terms of the actual monetary award granted to the victim. This is harder to measure because most friendly settlements redact the monetary award to protect the petitioner when the reports are published. However, as a suggestive test of this question, I examined the average monetary award per person in Ecuador's settlements.[22] Between 1992 and 2000, Ecuador's average monetary award per victim was $65,476. After 2001, the average monetary award nearly doubled, to $120,714.[23]

The fact that petitioners were able to get more from the state after 2001 reflects

[22]Ecuador is the only state for which I had monetary award values for all settlements. Ecuador also engaged in many settlements in both periods, which helps avoid dragging the average award up or down due to extremes or outliers.

[23]Note that these are not awards per case, but per victim. Each settlement usually corresponds to a single victim, but in a few instances, the settlement encompasses multiple victims, usually two or three, but sometimes as high as 11. Cases with more victims might necessarily entail larger awards, so taking the average across settlements instead of victims would bias the average upwards.

their improved bargaining position. Because states were more motivated to settle after the rules change, petitioners could demand more from the state in terms of remedies. However, demanding more of the state may also backfire, if it makes agreeing to terms less likely. In other words, if petitioners demand too much of the state, the cost of settlement increases, making litigation look relatively more attractive. Indeed, although the settlements agreed upon were more favorable to the petitioner, there were also more bargaining failures after 2001.[24] Between 1992 and 2000, at least one side indicated it wanted to negotiate a friendly settlement in 37 cases; of these, both sides tried to settle about 19% of the time (7 of 37).[25] Between 2001 and 2018, at least one side wanted to settle in 20 cases, with both sides trying and failing to reach a friendly settlement agreement in 30% of these instances (6 of 20).[26]

4.2. *Positive Externality: Increased Compliance*

Thus far I have shown that clarifying rules around how cases would be submitted to the Court affected the probability of friendly settlement. This analysis has side-stepped the question of what happens in those petitions that do not reach the Court. Although Table 2 and Figure 3 illustrate that most petitions resulted in either friendly settlements or Court judgments after 2001, there were still 46 merits reports after the rules change from states under the Court's jurisdiction.

First, it is important to note that these merits reports do not indicate that the Commission had full discretion over what cases move onto the Court; in fact, the rationale for non-referral illustrates just how limited the discretion was. In six of the cases, the Commission found no violations of the American Convention on Human Rights; in other words, it found in favor of the state. In another 20 cases, the state substantially complied with the

[24]By bargaining failure I mean instances in which both sides expressed a willingness to settle, but a settlement could not be reached.

[25]In other words, there were seven instances where the petitioner and state both indicated a willingness to settle, but a settlement could not be reached. In the other 30 instances, only one side indicated a willingness to settle, so no negotiations took place.

[26]Notably, there were also more instances in which at least one side wanted to settle after 2001 (20 of 46 cases, or 43%, compared to 37 of 133 cases, or 28%).

Commission's recommendations (11) or signed a compliance agreement with the petitioners (9). In the remaining 20 cases, the Commission's rationale for not submitting the case to the Court is clearly articulated, which centered around a reasonable belief that the Court would not hear the case (12 cases)[27] or indications by the petitioners that they were unable or unwilling to pursue the case further (8 cases).[28]

Second, it is significant that the Commission observed some willingness on the part of the state to comply in half of the merits reports that found violations by the state. I would argue that this, too, is a consequence of the change in rules of referral. As described in Section 2, states under the Court's jurisdiction can end the litigation process either at the Court or at the Commission.[29] To the extent that Court judgments are costly and states wish to avoid them, the Commission has power over the level of compliance it can demand with its recommendations prior to publication of the merits report. Although the rules change was intended only to clarify the procedure for referral, one (possibly unintended) consequence of

[27] In nine of these cases, the violation occurred prior to the state's ratification of the American Convention and/or acceptance of the Court's jurisdiction. One case was *Alfonso Martín del Campo Dodd v. Mexico*, which the Court rejected in the preliminary objections stage because Mexico had not been under the Court's jurisdiction when the violations took place; the Commission subsequently took up the case again. In another case, the Commission felt that there was insufficient evidence for the Court to find a violation of the American Convention, and as such, elected not to submit the case to the Court for consideration. In one last case, it seems the Commission felt it unnecessary to refer the case to the Court as the state had already revoked the domestic law that had been ruled incompatible with the American Convention, therefore eliminating the necessity for the Court to rule on the same question.

[28] In some cases, the Commission could not locate the petitioners, and so decided to keep the case at the Commission. In other cases, the petitioners could be found, but did not wish for the Court to take up the case. For example, in the case of *James Zapata Valencia and José Heriberto Ramírez v. Colombia*, the petitioners did not want the case submitted to the Court. As the Commission wrote in the publication of its merits report: "The petitioners felt that to submit the case to the Court would mean further delay for the relatives of James Zapata Valencia and José Heriberto Ramírez in obtaining an international ruling that would uphold their rights and deliver justice 23 years after the deeds occurred." See Inter-American Commission on Human Rights, Merits Report No. 79/11 on Case 10.916, published July 21, 2011, para. 193.

[29] Once the merits report from a case has been published at the Commission, the matter cannot be referred to the Court even if the state has failed to comply with the Commission's recommendations. For example, in the case of *Jorge, José and Dante Peirano Basso v. Uruguay*, the Peirano Basso brothers contended in 2015 that because the recommendations had not been implemented, the Commission ought to reconsider "its decision not to refer the case to the Inter-American Court of Human Rights." The Commission refused, as it noted its prior decision in 2009 to publish the merits report. See "Inter-American Commission on Human Rights, 2016 Annual Report, Chapter II (D), para. 1983-1984." The fact that a case will not be reconsidered even if states do not fulfill the recommendations is significant because it creates an opportunity for states to "game" the system by promising compliance to get the merits report published, and then refuse to comply later once the threat of referral to the Court has subsided.

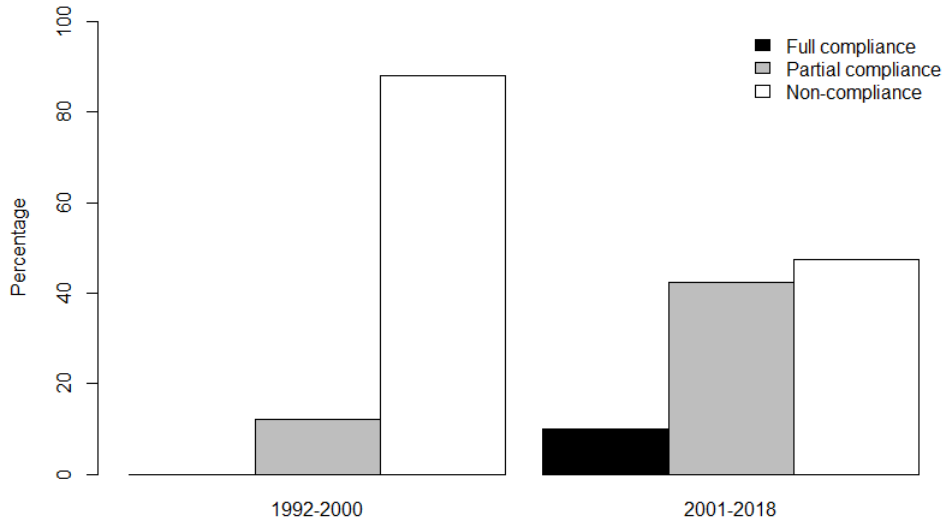
the clarification was that it gave the Commissioners more power to demand a higher level of compliance from states prior to publication of merits reports. Between 1992 and 2000, the probability of submission of a case to the Court was so low that the threat of non-compliance resulting in referral could not be credible. However, after 2001, Commissioners could utilize the fact that the rules now stated that instances of non-compliance *shall* be referred to hold out for greater compliance before publishing a merits report.

There are several indications of the Commission's increased power to insist on compliance before publishing a merits report. First, the average number of years between the initial merits report, in which the state is first made aware of the violation and necessary recommendations to remedy it, and publication of a merits report increased from 0.86 in the 1992-2000 period to 1.97 in the 2001-2018 period. The fact that the Commission took, on average, an additional year before deciding to publish a merits reports is indicative of its desire to ensure that the cases that did not move onto the Court were truly the ones in which the state would comply (barring any other principled reason to keep the case from the Court). As a comparison, the average number of years between initial merits reports and published merits reports for states outside of the Court's jurisdiction is 0.5.

Second, there was a clear increase in both partial and full compliance with merits reports recommendations prior to publication after the 2001 rules change. Figure 7 illustrates the level of compliance observed at the time of publication of the merits report. From 1992 to 2000, non-compliance was by far the most common outcome at the time of publication, with partial compliance observed in about 15% of cases and full compliance not observed at all. From 2001 to 2018, non-compliance was also the most frequent outcome, but occurred in only 45% of cases, down from 85%. It is worth noting that some form of compliance – either full (just over 10%) or partial (over 40%) – occurred in the majority of cases.[30]

[30]Note that these percentages do not exactly match up to the 20 cases that remained at the Commission because of substantial compliance or a compliance agreement. Even if there is a reason for a case to remain at the Commission, like the petitioners' unwillingness or inability to move forward to the Court, states might still choose to implement some of the Commission's recommendations, especially if they anticipate a case might move forward if non-compliance is observed.

Figure 7: Increased Compliance with Commission's Recommendations after 2001



Third, there is the suggestive evidence of the way that states outside of the Court's jurisdiction respond to merits reports. As they have a lower level of obligation, being held only to a non-binding declaration, it is perhaps unsurprising that they often do not comply. For example, a 2016 report found that the United States – which is not under the Court's jurisdiction – had a rather poor compliance record. Of the 27 merits reports issued against the United States at that time, the United States had fully complied in one case, partially complied in 10 cases, and not complied at all in 16 cases.[31] However, even states that do have a higher degree of obligation – namely, those that have ratified the American Convention on Human Rights, but not delegated authority to the Court – also have low levels of compliance with the Commission's recommendations. In 14 merits reports against Jamaica and Grenada, two such states with high obligation but low delegation, only one netted a mere response upon transmission of the report. Responsiveness is an incredibly low bar, as it indicates just the acknowledgement of receipt of the Commission's evaluation on the merits. Jamaica and Grenada have only done this once between them. Responsiveness is also a necessary but insufficient condition for compliance: the United States replies to every merits report,

[31]See Peter J. Meyer, "Organization of American States: Background and Issues for Congress," *Congressional Research Service*.

but only to contest the Commission's authority to evaluate merits of petitions at all. If the threat of submitting a case to the Court increased levels of compliance with merits reports, it is not surprising that states outside of the Court's jurisdiction were not affected. As their petitions could not reach the Court before or after the rules change, we should not expect their behavior to change after 2001.

5. Conclusion

My analysis of the patterns of friendly settlements and compliance with the Commission's recommendations reveals the importance of changes in institutional design on state behavior. When the Inter-American Commission changed its Rules of Procedure in 2001 to clarify the process by which cases would be submitted to the Inter-American Court — increasing the probability of litigation — states responded accordingly and began opting for more settlements. Petitioners also were able to get better terms in settlements because states were more motivated to settle, although there were also more bargaining failures after 2001. As the probability of litigation at the Court remained constant at zero for states outside of the Court's jurisdiction, this change only affected states negotiating in the shadow of the tribunal. Accordingly, to date, no state outside of the Court's jurisdiction has opted for settlement instead of a merits report.

The rules change affected incidences not only of friendly settlement, but also of compliance with the Commission's recommendations. The rule change removed the Commissioners' discretion over whether to send a case onto the Court and created a clear decision rule. This encouraged greater compliance at the merits report stage because all cases of non-compliance would be sent onto the Court if the case fell under the Court's jurisdiction. Both the increase in friendly settlements and in compliance with the Commission's recommendations allow for cases to be resolved sooner for petitioners. Rather than having to wait for the Court's final judgment, they can enter into a negotiated agreement or can receive a report on the merits with which the state is more likely to comply. By encouraging settlements and

compliance earlier, this procedural change increased access to justice for victims of human rights abuses. In this way, the rules change created both more efficient and more socially desirable outcomes.

These results suggest that if the Commission wanted states outside of the Court's jurisdiction to engage in friendly settlements, it should increase the cost of litigation by strengthening its recommendations in the merits reports. In some ways, the Commission is rather limited by the fact that it is a quasi-judicial body that cannot enforce compliance. However, if the Commission made a concerted effort to increase the cost of merits reports for states outside of the Court's jurisdiction – perhaps by engaging in more naming and shaming of states that fail to implement its recommendations – it might be able to decrease the expected value of litigation sufficiently for states outside of the Court's jurisdiction to start opting for friendly settlements.

Overall, my findings indicate that if institutions want to see states using the institution differently, they ought to change the rules. The Inter-American system is often criticized for being inefficient; the fact that both the Commission and the Court consider the merits of a case for states under the Court's jurisdiction is one glaring inefficiency (Shelton, 2015). Because of issues with temporal jurisdiction, it may not be the case that all litigation could be transferred directly to the Court; however, the Commission might be able to process more cases if it focused only on facilitating friendly settlements and judging the merits of cases that do not fall under the Court's jurisdiction. This would include cases from states that are not members of the Court, as well as cases from the Court's members that are outside of its temporal jurisdiction. By streamlining the litigation process and removing any trace of uncertainty over whether the Court would receive the case, states might opt to engage in even more settlements. Cases in which petitioners disappear or do not want to pursue the case at the Court because doing so would further delay justice would also be much less likely if the Commission did not act as court of first instance in cases that could reach the Inter-American Court.

Changing the rules will not always induce states to behave in the way the institution intends. Rules changes may sometimes have unintended *negative* consequences. However, the evidence from the Inter-American Commission is generally positive. In particular, the increase of friendly settlements after 2001 suggests that if human rights institutions can adequately change states' incentives to settle, they may be able to arrive at more efficient outcomes – and may even further their ultimate goal of compliance.

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