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Court Performance Around the World: A Comparative Perspective

by Maria Dakolias[*†]

I. INTRODUCTION

¶1 Many countries around the world are undertaking legal and judicial reforms as part of their overall development programs. This has resulted from growing recognition that economic and social progress cannot sustainably be achieved without respect for the rule of law, democratic consolidation, and effective human rights protection;[1] each of which requires a well-functioning judiciary that can interpret and enforce the laws equitably and efficiently.[2] An effective judiciary is predictable,

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[†] Much of the material in this Article stems from the author's special expertise and practical experience working with reformers of national judiciaries around the world. Her direct personal knowledge, thus, at times, substitutes for formal citation to supporting written documents.

1. There is increasing recognition that the advancement of human rights is impossible without development, and that development is not achievable without respect for basic human rights. *See generally* WORLD BANK, DEVELOPMENT AND HUMAN RIGHTS: THE ROLE OF THE WORLD BANK (1998). Significantly, the European Union (EU) includes human rights, democracy and rule of law clauses in its development cooperation agreements. As established in a recent decision of the Court of Justice of the European Community, the EU has the ability to suspend such agreements for violations of human rights. *See* Portuguese Republic v. Council of the European Union, Case C-268/94, 1996 E.C.J I-6207; *see also* Juliane Kokott & Frank Hoffmeister, *Portuguese Republic v. Council*, 92 AM. J. INT'L L. 292, 295 (1998) (noting the Court's observation that a human rights clause may be important for the exercise of the right to suspend the agreement in the case of grave violations of human rights).

2. For an examination of the hypothesis that effective judicial systems are requisite for optimal market functioning, see Robert M. Sherwood, et al., *Judicial Systems and Economic Performance*, 34 Q. REV. ECON. & FIN. 101 (1994). The authors estimate that countries that attempt economic liberalization under a weak judicial system suffer "at least a 15 percent

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resolves cases in a reasonable time frame, and is accessible to the public. Many developing countries, however, find that their judiciaries advance inconsistent case law and carry a large backlog of cases, thus eroding individual and property rights, stifling private sector growth,[3] and, in some cases, even violating human rights.[4] Delays affect both the fairness and the efficiency of the judicial system; they impede the public's access to the courts, which, in effect, weakens democracy, the rule of law and the ability to enforce human rights.

¶2 To solve these problems, governments across the world are launching judicial reforms. With the aim of improving access to justice by increasing the fairness and efficiency of dispute resolution, they are searching for ways to understand both the current weaknesses of their judiciaries and the effects of past reforms. To do this, governments are demanding comparative court performance data to quantitatively and qualitatively monitor and evaluate reforms—and to design and plan future reforms. This monitoring involves both comparisons within a specific country over time as well as comparisons across countries. Both comparisons may be particularly useful in evaluating the prospects for judicial performance improvement in national systems.

¶3 In addition to governments, such performance evaluations are also increasingly being demanded by civil society and intergovernmental entities interested in promoting judicial accountability and transparency. Through this information, civil society is more able to effectively demand, and participate in, judicial policy reforms and the improvement of democratic governance. Similarly, multilateral lenders backing such reforms find they have little information to use in project evaluation. As the World Bank has become more involved in judicial reform projects, for

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penalty in their growth momentum." *Id.* at 113.

3. In Brazil, for example, it has been estimated that inefficient courts reduce investment by 10 percent, and employment by 9 percent. *See* Armando Castelar Pinheiro, The Hidden Costs of Judicial Inefficiency: General Concepts and Estimates for Brazil, Address at the seminar "Reformas Judiciales en América Latina: Avances y Obstáculos para el Nuevo Siglo," Confederación Excelência en la Justicia, Santafé de Bogotá, Columbia (July 29, 1998) (transcript on file with author).

4. The absence of independent and impartial tribunals is considered a violation of human rights. *See, e.g.*, International Covenant on Civil and Political Rights, art. 14, *adopted* Dec. 16, 1966, *entered into force* Mar. 23, 1976, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *reprinted in* 13 I.L.M. 50 (1974) (establishing the right of all persons to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of criminal charges or of rights and obligations in any suit at law); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, *signed* Nov. 4, 1950, *entered into force* Sept. 3, 1953, 213 U.N.T.S. 221, E.T.S. 5 ("In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."); American Convention on Human Rights, art. 8, *signed* Nov. 22, 1969, *entered into force* July 18, 1978, O.A.S.T.S. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev.6 (1979), *reprinted in* 9 I.L.M. 673 (1970) ("Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal, previously established by law in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.").

example, one of the important roles it has assumed is the collection of empirical information.[5] Without such efforts, reformers end up working in isolation, not benefiting from the past experiences of other reforms, and not knowing how other systems resolve similar problems.[6]

¶4 Despite this growing demand, there is, nevertheless, little quantitative data on judicial efficiency currently available, making assessment of judicial reforms difficult. There are two primary reasons for this. First, national judiciaries were not historically concerned with performance data; they are only now beginning to gather relevant information on a systematic basis. Second, comparative law scholars have not tended to show an interest in *quantitative* data on judicial efficiency, preferring *qualitative* comparisons instead. An exception to this trend was a 1979 study, headed by John Merryman, David Clark and Lawrence Friedman, compiling extensive legal data for six countries in Latin America and Europe over the period between 1945-1970.[7] Describing itself as founding an area of inquiry called "quantitative comparative law,"[8] the Merryman study aimed to describe the legal systems and legal cultures of the surveyed countries using *quantitative* data, rather than traditional *qualitative* data.[9] Unfortunately, this study[10] established a lonely outpost in the field of comparative law. While quantitative descriptions of individual country legal systems abound today,[11] studies using quantitative data to

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5. *See, e.g.*, EDGARDO BUSCAGLIA & MARIA DAKOLIAS, JUDICIAL REFORM IN LATIN AMERICAN COURTS: THE EXPERIENCE IN ARGENTINA AND ECUADOR, WORLD BANK (1996) [hereinafter "BUSCAGLIA & DAKOLIAS, JUDICIAL REFORM"]; MARIA DAKOLIAS, THE JUDICIAL SECTOR IN LATIN AMERICA AND THE CARIBBEAN: ELEMENTS OF REFORM, WORLD BANK (1996) [hereinafter "JUDICIAL SECTOR"].

6. Stephen Golub argues that the lack of project assessment is a symptom shared by all recent democratization efforts, not just judicial reform. He sounds a call for more studies assessing the democratic development projects of Western donor and exchange organizations. Stephen Golub, *Assessing and Enhancing the Impact of Democratic Development Projects: A Practitioner's Perspective*, 28 STUD. IN COMP. INT'L DEV. 54 (1993).

7. *See* JOHN HENRY MERRYMAN ET AL., LAW AND SOCIAL CHANGE IN MEDITERRANEAN EUROPE AND LATIN AMERICA: A HANDBOOK OF LEGAL AND SOCIAL INDICATORS FOR COMPARATIVE STUDY (1979) [hereinafter "MERRYMAN REPORT"].

8. *Id.* at v.

9. *See id.* at 22 (arguing that there was no strong tradition of empirical international studies at the time).

10. The Merryman study contained a broad range of quantitative data, including court data such as number of cases filed, cases resolved, and cases pending in certain courts. It also delved into legislative data and data describing the private ordering of legal relations, such as contracts and wills, as well as legal culture. The Merryman study did not, however, process the data gathered nor did it interpret it.

11. Some governments publish quantitative descriptions of their legal systems each year, and scholars and NGOs also gather such data. *See, e.g.*, COMMISSION ON TRIAL COURT PERFORMANCE STANDARDS, TRIAL COURT PERFORMANCE STANDARDS (1990) [hereinafter "TRIAL COURT PERFORMANCE STANDARDS"]; MINISTERIO DE JUSTICIA Y DEL DERECHO & INSTITUTO SER DE INVESTIGACIÓN, EVALUACIÓN CUANTITATIVA DE LA JUSTICIA, PERÍODO DE 1994 (1996) [hereinafter "EVALUACIÓN CUANTITATIVA"]; NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS, ANNUAL REPORT (1987); NATIONAL CENTER FOR STATE COURTS, EXAMINING COURT DELAY, THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS (1987) [hereinafter "EXAMINING COURT DELAY"]; SANTOS PASTOR PRIETO, ¡AH DE LA JUSTICIA! POLITICA JUDICIAL Y ECONOMÍA (1993); CARLOS CERDA FERNANDEZ, DURACION DEL PROCEDIMIENTO SUMARIO EN LOS JUSZGADOS DE SANTIAGO (1993).

draw comparisons *across* national legal systems are still rare. The Merryman study was never updated, and, until this paper, few studies resembling it were ever published.

¶5 A renewed interest in quantitative comparative law, however, appears to be emerging in response to changing global trends. The global expansion of international trade and investment, increasing regional economic integration, and spreading political democratization have all been central to this resurgence. On the one hand, the increasing internationalization of legal disputes has focused growing attention (particularly in the business community) on comparative legal standards—both substantive and procedural. It has also focused attention on issues of judicial efficiency, predictability and cost across borders. The growing trend toward regional economic integration has similarly led member states to concern themselves with issues of judicial compatibility and consistency. The recent East Asian crisis, for example, has brought with it a greater understanding that economic integration requires attention to law, accountability and transparency. Finally, increasing democratization within countries around the world has facilitated an expanded role for civil society in demanding democratic reform and judicial transparency. All of these global trends—both endogenously and exogenously—have led to a renewed demand for comparative statistics on judicial efficiency.

¶6 This Article aims to describe and explain court system performance in a sample of developing and developed countries to provide data to those designing or evaluating reforms. The study also aims to show areas in which international comparison of judicial performance can be fruitful, suggesting indicators that may be used. Finally, it aims to provide performance comparisons within individual countries over time.

¶7 Part I describes several methodological issues involved in the use of judicial performance measures, and explains how the measures used in this study were conceptualized, chosen, and gathered. Part II compares the judicial systems of eleven different countries in terms of this select set of indicators in order to identify trends in judicial administration. Part III examines, country by country, the relationship between variations in these performance indicators over time. In so doing, it focuses on a distinct set of circumstances within each country, including factors related to judicial independence, public confidence, legal reforms, and macro-economic changes. As a whole, the study endeavors to suggest means of identifying judicial areas in need of reform as well as the substantive nature of reforms that may be useful.

¶8 As a final introductory note, it is important to emphasize the preliminary nature of this Article; its data is not being used to defend hypotheses about judicial performance in different countries. It is a descriptive, rather than analytical, presentation; it is a way to make data available to those evaluating or designing judicial reforms, to suggest ways of using this data, and to propose further areas of research. It is a first step in what may be a resurgence of comparative quantitative research in law that builds on the recent trend to evaluate court performance at national

levels. There have been several efforts in the past few years to develop performance indicators for the judiciary as a basis for policy development.[12] In 1987, for example, a first set of national trial court performance standards were developed in the United States.[13] These standards[14] were designed to develop a common language to facilitate the evaluation of court performance as well as to encourage the creation of a conceptual framework that courts could use themselves to design performance improvements.[15] This trend reflects the growing demand for public institutions to be accountable for their use of public resources. The present study is offered in the same spirit—to assist governments, courts, and civil society in improving the efficiency and quality of justice in their countries.

II. METHODOLOGY

¶9 At a conceptual level, the measurement of efficient and quality justice requires attention to three elements: substantive law, the legal norms that government is expected to enforce; judicial decisionmaking, the manner in which courts find facts and apply substantive law to those facts; and judicial administration, the process and procedures by which courts take cognizance of disputes and present them to judicial decisionmakers for disposition. While these three areas are interrelated, and should be considered as a whole during reforms, the central focus of this study is judicial administration. Judicial administration is measured by concepts of efficiency, access, fairness, public trust, and judicial independence.[16] These categories are closely interdependent—a lack of efficiency reduces access as well as fairness and public trust. It is to be stressed that this study focuses on one dimension of performance: *efficient judicial administration*, as

12. Examples of such efforts are published in, *inter alia*, EVALUACIÓN CUANTITATIVA, *supra* note 11; TRIAL COURT PERFORMANCE STANDARDS, *supra* note 11; Stefanie Lorenzen, Impact Assessment of Legal Reform Measures (1997) (unpublished paper on file with author).

13. *See* TRIAL COURT PERFORMANCE STANDARDS, *supra* note 11, at 1. Performance standards are broad in scope; they include issues of decision-making quality (measured in terms of equality, fairness and integrity), as well as more easily quantifiable issues such as efficiency and timeliness. Together they include issues of access to justice; expedition and timeliness; equality, fairness and integrity; independence and accountability; and public trust and confidence. *See id.* at 5-21. These can be measured by structured observation by ordinary citizens, questionnaires, surveys, interviews, and review of documents, and more familiar measures such as clearance rates, pending cases, and incoming cases. *See id.* at 26.

14. The standards were developed for general jurisdiction state trial courts with an interest in monitoring and improving their performance. *See id.* at 23.

15. The United States trial court performance standards are some of the most ambitious in scope, encompassing performance in its widest sense—from assessing the quality of judgments to the more traditional measurement of clearance rates. Most other studies shy away from evaluation of such qualitative characteristics as "equality," "due process of law," and "integrity."

16. These areas are fairly consistent with the five performance areas outlined in TRIAL COURT PERFORMANCE STANDARDS, *supra* note 11. The difference is that this paper has expanded the performance area "expedition and timeliness" to "efficiency." Thus, it includes not only timeliness, but costs and number of staff. There are other ways that the administration of justice could be subdivided and labeled, but this method is both succinct and comprehensive.

measured by quality and time.[17] Given this narrow focus, future studies should expand to address some of the more qualitative issues involved in legal reform. This is particularly true as the question of improving a judicial system is ultimately a qualitative one.

A. Efficiency in Judicial Administration

¶10 Efficiency was chosen as the starting point for three reasons. First, because most of its assessment indicators can be quantitatively measured using objective data, efficiency provides a sound basis for comparison.[18] While public perception is essential to judicial reform efforts (as part of a "multi-method approach" to assessing efficiency[19]), it may be more difficult to compare on an international basis given that there are cultural and institutional differences.

¶11 A second reason to focus on efficiency is that congestion, cost, and delay are the problems most often complained about by the public in most countries,[20] and thus often perceived as the most pressing.[21] In recent years, moreover, market-oriented economic reforms and political democratization—most acutely in developing countries—have triggered demand for conflict resolution.[22] Courts are not all equipped to deal with the surge in demand caused by privatization, greater foreign investment, and other economic and political changes.

¶12 Finally, efficiency is a promising starting point for the study and

17. *See* National Center for State Courts, Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts 6 (1998) (unpublished report, on file with author) (proposing a conceptual framework for assessing court system efficiency based on quality and timeliness measures) [hereinafter Efficiency, Timeliness, and Quality].

18. Such comparisons are not perfect even here, however, since an objective comparative measurement requires both empirical data and similar objects of measurements. To measure delay in the resolution of cases, one needs a common operational definition of a case (a judicially cognizable dispute between two parties), of a resolution (final determination subject to appellate review), and of delay (still pending after a certain period of time). This may not be possible to obtain.

19. *See* Efficiency, Timeliness, and Quality, *supra* note 17.

20. *See* BUSCAGLIA & DAKOLIAS, JUDICIAL REFORM, *supra* note 5, at 4; Steven Gutkin, *Latin Americans Revamp Court Systems*, ASSOCIATED PRESS, May 31, 1998.

21. Even in the United States, over half of the federal judges, corporate counsel, and public interest litigators surveyed stated that the litigation costs of civil cases are a "major problem." In the words of one task force, "high transaction costs—manifested in high out-of-pocket legal fees and the time consumed by delay—are the enemies of justice." BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 6 (1989). The National Center for State Courts has also devoted many studies to issues of court delay reduction in the United States. *See* EXAMINING COURT DELAY, *supra* note 11, at 4 (discussing the effect of delay on the relative success of litigants). Western European countries have also focused on the issue of delay. *See, e.g.*, European Committee on Crime Problems, *Delays in the Criminal Justice System: Reports Presented to the Ninth Criminological Colloquium (1989)*, 28 CRIMINOLOGICAL RESEARCH 1 (1992).

22. For example, civil cases in limited jurisdiction state courts in the United States have increased by 37 percent since 1984 while the population has only increased by 12.4 percent. *See* EXAMINING THE WORK OF STATE COURTS 15, 18 (Brian J. Ostrom & Neal B. Kauder, Court Statistics Project eds., 1996) [hereinafter EXAMINING THE WORK].

design of judicial reform because of its relatively apolitical nature. The Colombian judiciary, for example, has many deeply rooted problems of judicial independence and corruption—as well as court congestion—but has chosen to begin with efficiency.[23] The former two issues are so political in nature that the judiciary alone cannot begin to tackle them without the concurrent undertaking of major political steps.[24] Efficiency is a more neutral area in which changes can begin without major alterations in the structure of government and, in Colombia, without directly challenging the drug trade.[25]

¶13 Making this study one of the broadest of its kind, first instance commercial courts in eleven countries and three continents provided data on the following areas:

1) number of cases filed per year;
2) number of cases disposed per year;
3) number of cases pending at yearend;
4) clearance rate (ratio of cases disposed to cases filed);
5) congestion rate (pending and filed over resolved);
6) average duration of each case;[26] and
7) number of judge per 100,000 inhabitants.

¶14 Each of these indicators measures some aspect of judicial efficiency, particularly as it relates to timeliness. Demand on court systems, for example, is measured by the number of cases filed each year.[27] The ability of the court to meet this demand can be assessed through the number of pending cases at the end of each year and the changes in pending cases. Another reasonable indication of system efficiency is found in the time it takes for cases to be resolved.[28] The clearance rate—the percentage of new cases resolved each year—measures court productivity in dispute resolution. A determining factor in the growth of pending cases,

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23. In Colombia, judicial performance indicators are extremely narrow in scope. The focus is on the traditional, quantifiable measures of congestion, budget, and human resources. These measures reflect a preoccupation with congestion in the courts—an escalating problem that is eroding public confidence and barring the judiciary from dispensing justice. With clearance rates at 60 percent or below, the situation is urgent and thus justifies focusing limited resources on this area.

24. This is not to say that the judiciary can act in isolation. Any major judicial reform has a higher likelihood of success if it enjoys the active commitment of both the executive and the legislature.

25. It is interesting to note that in Colombia, where corruption is high and judicial independence is low, the Colombian Ministry of Justice writes that congestion is, without doubt, one of the most serious problems the judiciary faces. *See* EVALUACIÓN CUANTITATIVA, *supra* note 11, at 9. This document makes no mention of some of the other serious problems with the administration of justice in Colombia. It should be noted, however, that civil defendants in Colombia have a lesser interest in efficiency, as delay is often beneficial to them.

26. This data was gathered for Chile and Germany only.

27. The number of cases filed per year may not reflect the full demand on the judiciary, however, as it does not account for those disputes not filed because of resource constraints of the parties and/or lack of confidence in the judicial system.

28. This data was gathered for Chile and Germany only. Data on the amount of time judges spend per case, however, is available for each of the eleven countries discussed in this article. Time can be measured by different methods—for example, by the termination rate for a specified period, inventory control, or the median time to disposition.

the clearance rate can also be useful in estimating future productivity. Although there are many additional indicators that could be used when evaluating a specific country, the indicators described above appear particularly useful when comparing different countries. This is true as long as one keeps in mind that each country has its own legal system, with different procedural requirements and individual characteristics.

¶15 Despite the emphasis on timeliness, certain data was collected relating to quality. This data includes the number of judges per 100,000 population; an analysis of judicial salaries and certain annual court budgets (for an initial assessment of costs[29]); and public perception (as a proxy for quality[30]). A separate study reviewed how much time judges devote to different judicial tasks—another potential basis for evaluating the quality of judicial performance.[31]

¶16 The preceding list of indicators is by no means meant to provide a comprehensive view of the judiciary. As already emphasized, this study is a preliminary step in building data sources on world judiciaries; it starts with the data that is most comparable and accessible. Important measures are missing from each category. Case management and judicial activism, for example, may also contribute to efficiency, but are left for a later study. Access to justice is another particularly complex concept for which many measures beyond the ones given here are relevant.[32] Although data was not

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29. For a study on how to calculate the costs of civil litigation, see J.S. KAKALIK & R.L. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES (1983).

30. *See* BUSCAGLIA & DAKOLIAS, JUDICIAL REFORM, *supra* note 5, at 4 n.11 (noting need for surveys and polls to assess population's overall confidence in the justice system as a proxy for court users' perception of quality).

31. Such information is crucial for reforms aimed at improving judges' efficiency. In Argentina, 70 percent of a judge's time is spent on nonadjudicative tasks, and in Brazil and Peru the numbers are 65 and 69 percent, respectively. That compares with zero percent in Germany and Singapore. *See* Edgardo Buscaglia & Maria Dakolias, Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account (unpublished paper on file with author, forthcoming). For more on measuring the use of judges' time, see generally Stephen A. Stripp, *An Analysis of the Role of the Bankruptcy Judge and the Use of Judicial Time*, 23 SETON HALL L. REV. 1329 (1993). According to one author, time lapse studies are the most helpful of the time-related statistics measuring judicial performance. *See* Peter Ford, *Judges as Managers: Some Recent Developments in Judicial Administration in the USA and Canada*, Report of SES Fellowship, Aug.-Nov. 1989, at 18.

32. A further study could include physical, language, procedural, substantive and psychological barriers to justice. The Commission on Trial Court Performance Standards, for example, names five standards for courts to strive for in the area of access to justice: (1) *Public Proceedings*: the court conducts its proceedings and other public business openly; (2) *Safety, Accessibility, and Convenience*: court facilities are safe, accessible and convenient to use; (3) *Effective Participation*: all who appear before the court are given the opportunity to participate effectively without undue hardship or inconvenience; (4) *Courtesy, Responsiveness, and Respect*: judges and other trial court personnel are courteous and responsive to the public and accord respect to all with whom they come into contact; and (5) *Affordable Costs of Access*: the costs of access to the trial court's proceedings and records—whether measured in terms of money, time, or the procedures that must be followed—are reasonable, fair and affordable. *See* TRIAL COURT PERFORMANCE STANDARDS, *supra* note 11, at 24-27; *see also* JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA TRIAL COURT FACILITIES STANDARDS (1991) (outlining the safety and other measures relating to the court building itself necessary for effective judicial access).

available for evaluation in this study, the use of alternate dispute resolution (ADR) could also be included.[33] As countries themselves begin to focus more on gathering these important statistics, it will be possible to build up a more comprehensive "quantitative description"[34] of the world's judiciaries. Until then, this Article—focused on efficiency of judicial administration—provides a first step in developing a transnational description of performance through an assessment of some basic comparative data.

B. Countries and Courts Surveyed

¶17 Eleven countries in different regions of the world were chosen to gather this information. They include Brazil, Chile, Colombia, Ecuador, France, Germany, Hungary, Panama, Peru, Singapore, and Ukraine. Many of these countries are undertaking judicial reforms,[35] others are contemplating reforms, and still others are studying their courts. The countries are at different stages of development and different stages of reform. France and Germany, countries of greater development, were selected given that many less developed countries have borrowed heavily from their systems in designing their own legal systems. Singapore was included because its recent judicial reforms have made a remarkable difference in efficiency.

¶18 Despite their many differences, the courts surveyed in the present study share three common characteristics: they are all first instance courts from capital cities having jurisdiction over commercial cases.[36] With the exception of Singapore, they all come from the civil law tradition. These common characteristics facilitate drawing comparisons across countries as well as drawing insight about what is feasible in different areas of performance.

¶19 First instance courts were chosen because, as the point of first access, they have a tendency to be more congested than the higher level courts. Courts with jurisdiction over commercial cases[37] were chosen given

33. Systematic data on the use of ADR was not available for most countries. For a study of ADR in Colombia and Peru, see Francisco Gutiérrez Sanín, *Gestión del Conflicto en Entornos Turbulentos: El Caso Colombiano*, and María Teresa Revilla, *La Justicia de Paz y las Organizaciones Sociales en el Perú*, *in* CONFLICTO Y CONTEXTO: RESOLUCIÓN ALTERNATIVA DE CONFLICTOS Y CONTEXTO SOCIAL (Adriana E. Barrios Giraldo ed., 1997). For a study of ADR and mediation efforts in Ecuador, see generally MEDIOS ALTERNATIVOS DE SOLUCIÓN DE CONFLICTOS (Alvaro Galindo ed., 1997). For a general discussion of ADR in Latin America, with a focus on Argentina, see Gladys Stella Alvarez, *Acceso a la Justicia e Resolución Alternativa de Disputas*, *in* ACCESO À JUSTIÇA: ADMINISTRAÇÃO DA JUSTIÇA NAS AMÉRICAS NO CONTEXTO DA GLOBALIZAÇÃO (Tribunal de Justiça do Estado do Rio de Janeiro ed., 1997).

34. This term is borrowed from MERRYMAN REPORT, *supra* note 7, at v.

35. Here, special mention should be made of Peru, which has undertaken significant judicial reforms.

36. In the case of Germany and Colombia, choices had to be made as to which courts handle larger types of commercial disputes.

37. Some of the surveyed countries have separate commercial courts while others handle commercial cases in their civil courts. In cases where there were only civil courts, the data

that comparability is particularly high in the area of commercial law. Indeed, given the growth of international standards governing commercial transactions, the needs and expectations of parties are often similar across countries—making comparisons easier. The number of commercial cases filed in courts around the world has, moreover, increased rapidly in recent years.[38] A focus on commercial law also facilitates an understanding of the relationship between judicial performance and economic integration as well as the effects that courts have on business and commercial transactions. In this regard, the study focuses on courts in major capital cities, as they are generally the locus of major business transactions.[39] Finally, countries in the civil law tradition were targeted in order to maintain a minimal consistency in legal culture and history.

C. Sources of Data

¶20 The data gathered for this study was obtained from the courts themselves or national statistics offices for the years 1990-1996—although in some cases all the data was not available for all the years.[40] In addition, it should be noted that there is no universal definition of a case filed, case resolved or case pending and, therefore, the data gathered is based on each country's understanding of the respective term. Likewise, particularly in many developing countries, statistics are not always maintained in a systematic fashion and sometimes can be unreliable. This should be taken into account when some of the changes in the numbers cannot otherwise be explained.

III. COMPARISON ACROSS COUNTRIES

¶21 Although each country has its own legal framework and legal culture, comparing indicators across countries can be useful to provide an understanding of trends around the world. As mentioned above, the

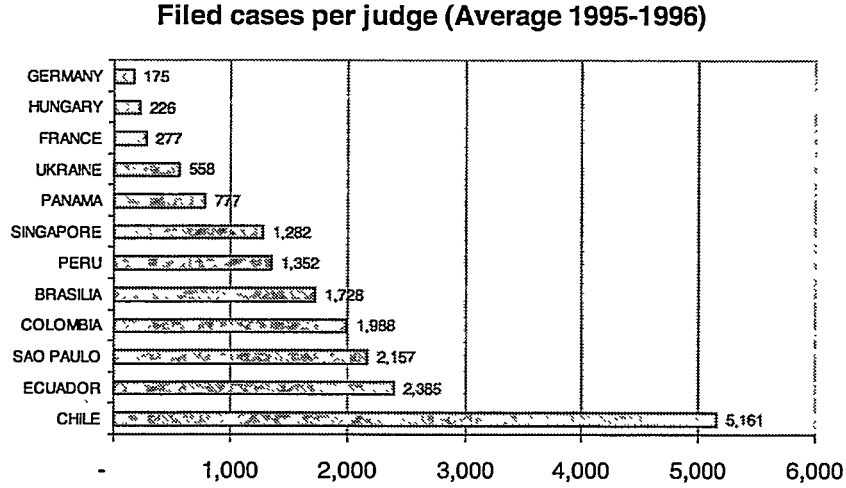
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reflects all the cases in the caseloads since many courts are not able to maintain such specific data. This is another example of why the study is a first step.

38. *See, e.g.*, Kahei Rokumoto, *The Social Role of the Legal Profession*, PROC. INT'L COLLOQ. INT'L ASS'N LEGAL SCI. 119 (1993).

39. In Brazil, for example, the study looked only at first instance courts in Rio de Janiero, the political capital, and Sao Paulo, the business capital.

40. See individual country sections, *infra* Part IV, for years in which data was available for each country. Such data was collected from each institution from June 1997 through July 1998. The statistics included in this paper are from official judicial sources: Brazil: State Courts in Sao Paolo and Brasilia; Peru: Unit for Judicial Reform within the Supreme Court; Ecuador: Supreme Court; Colombia: Judicial Council; Panama: Office of Statistics, Planning and Budget Department of the Judiciary; Chile: Administrative Cooperation of the Judiciary; Singapore: The High Court; Germany: Statistic Office of the Landgericht in Berlin; France: Ministry of Justice and the Tribunal de Commerce; Ukraine: Financial Department of the Higher Arbitration Court in Kiev and the Kiev Oblast Arbitration Court; Hungary: Office of Statistics of the Ministry of Justice. The statistics gathered for this study are the basis for creating the World Bank Judicial Indicators Database, which will soon be available at <http://www-worldbank.org/legal/legal.html>.



indicators compared in the present study include annual statistics on the number of cases filed, cases disposed, and cases pending; the clearance rate; congestion rate; average duration of each case; and number of judges per 100,000 inhabitants. These indicators are commonly referred to when reviewing the performance of courts;[41] they are inputs for reviewing court efficiency. Issues of efficiency may be affected by the kind of process that is followed in the courts. That is, whether responsibility for case processing is staff- or judge-intensive. In addition, it is arguable that written procedures require more person-days than oral procedures. Although these indicators may not have an effect on the time to process a case, they are important statistics for monitoring, learning, and planning in the judiciary. They are essential in the evaluation of the effects of reforms that have been implemented in the courts. As such, they deserve special attention and careful monitoring. A discussion of each indicator in the study follows below.

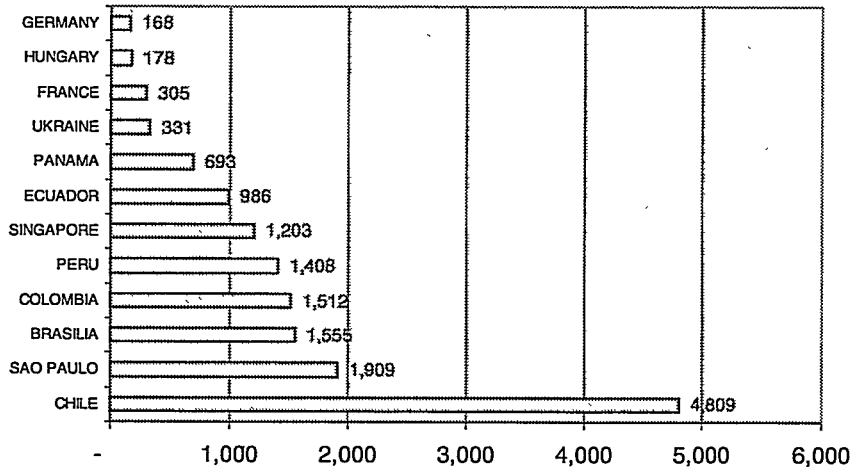
A. Filed Cases Per Judge

¶22 The number of cases filed per judge was compared across eleven countries to determine the kind of judicial demand that each country

41. Court performance is divided into two main categories: efficiency and effectiveness. Efficiency is defined as inputs per output, and the indicator used to measure it is cost per case. Effectiveness divides into three main performance areas: quality, access, and enforcement. The indicators that measure quality are client satisfaction, alternative dispute resolution services, and appeal rates. The indicator that measures enforcement is generally enforcement of search warrants. Access itself divides into three main areas: affordability, timeliness and delay, and geography. Affordability is measured by average court fees per lodgment (case filed). Case completion rates and adjournment rates measure timeliness and delay.

experiences. This demand reflects the expected caseload of each judge and, accordingly, the ability of the court system to manage the national docket. When considered in light of the number of judges per population, it also reflects the relative tendency of the population to resort to the judicial system for dispute resolution. In all of these manifestations, it allows the courts to plan for future needs. The present review shows a wide range of filed cases per judge. The Chilean courts have the highest workload, reporting over 5,000 cases per year per judge. In contrast, German judges receive only 176 cases per year, Hungarian judges about 226, and French judges about 277. The average number of cases per state court judge in the United States, by comparison, is 1,300 cases. This is comparable to the survey's average of 1,400.

Resolved cases per judge (Average 1995-1996)



¶23 Even as compared to the United States, France, Hungary, and Germany have far fewer cases per year per judge than the other countries surveyed. The number of cases filed, however, does not seem to affect the clearance rate; Chile has an impressive clearance rate despite the high demand of filed cases per judge. One study in the United States, moreover, shows that fast and slow courts have similar numbers of cases filed per judge.[42] Indeed, it has been found that, in some courts, an increase in filed cases causes the courts to internally adapt to the change to maintain its rate of case resolution. If the courts are well-managed, the increase in filings may even result in cases being resolved more quickly.[43]

42. *See* EXAMINING COURT DELAY, *supra* note 11, at 28.
43. *See id.*

B. Cases Resolved per Judge

¶24 The number of resolved cases per judge is also an indication of the ability of the courts to meet the national demand for dispute resolution. The significance of this number is related to the number of cases filed and the clearance rates; it is an indication of how judges respond to the demand of cases filed. Only two countries, France and Peru, resolve more cases per year than are filed. The cross-country average number of cases resolved per judge is about 1,255 (ranging broadly from 168 to 4,809), while the mean in U.S. state courts is 1,233.[44]

¶25 Importantly, given current reform efforts, Peruvian judges have significantly increased the annual number of cases they resolve over the past few years.[45] It is also interesting to note that Ecuador, which has the second largest number of cases filed per year (2,385), is resolving less than 1,000 cases per judge. The effects of the number of cases resolved will be more evident when analyzing the clearance rates below.

C. Clearance Rate

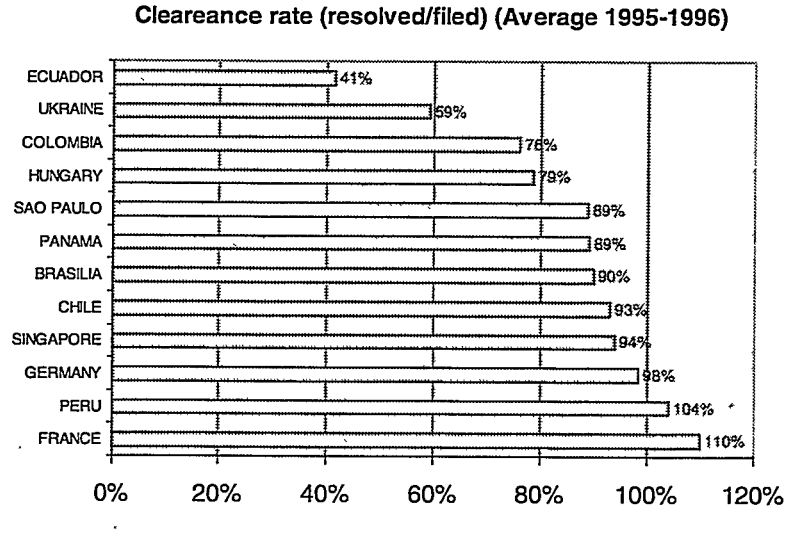
¶26 The supply of services by the courts in response to the demand of cases filed can be seen from the clearance rate—the percent of filed cases that are actually resolved. Only when the clearance rate is greater than one hundred percent—as seen in France and Peru[46]—are the courts able to catch up on case backlogs. It appears, however, that even the most efficient systems, such as Germany and Singapore, are not always able to reach beyond the hundred percent level. When the clearance rate is much less than one hundred percent, the case backlog grows. This backlog then enlarges the overall caseload of each judge, which may create additional delays in the case processing system.[47] The clearance rate, thus, can measure both the productivity of courts in resolving disputes and the productivity per judge. It is important to follow clearance rates over time to determine how judges react to changes in demand. Very often,

44. *See* NATIONAL CENTER FOR STATE COURTS, REEXAMINING THE PACE OF LITIGATION IN 39 URBAN TRIAL COURTS 43 (1991) [hereinafter REEXAMINING THE PACE].

45. *See infra* Part IV (Peru).

46. The data for France and Peru represents an average between 1995 and 1996.

47. *See* REEXAMINING THE PACE, *supra* note 44, at 42. Caseload size may contribute to the pace of litigation.



clearance rates decrease when caseloads grow. This means that judges are not always able to adapt their productivity.[48]

¶27 The two industrialized countries examined here have a clearance rate above ninety-seven percent. This is similar to the United States, which has a median clearance rate of ninety-eight percent in its state courts.[49] This stands in sharp contrast to some of the developing countries surveyed. Peru may be distinguished in the sample because, as previously discussed, its courts are experimenting with major reforms—whose success can be seen in its clearance rate of 104 percent. Chile, boasting by far the largest number of cases filed (5,161), is almost able to meet the demand for judicial services with a clearance rate of ninety-three percent. This confirms the theory that the number of filed cases per judge does not affect the clearance rate.[50]

¶28 Only two of the countries examined, France and Peru, were able to resolve part of their pending caseloads. As most of the survey countries have been unable to dispose of their backlogs, it is necessary for these legal systems to experiment with additional reforms. Some reforms could include hiring temporary judges to resolve backlogged cases (which has been done in Peru), introducing alternative dispute resolution mechanisms, applying case management techniques, and/or purging inactive cases from the files. In this regard, experience shows that a *set* of reforms is generally

48. *See* EXAMINING THE WORK, *supra* note 22, at 23.

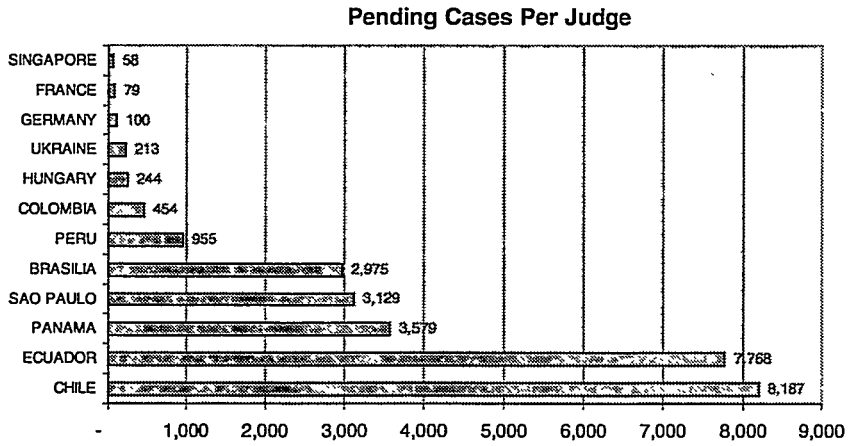
49. Clearance rates in U.S. state courts vary between 35 and 226 percent.

50. In comparison, the number of filings per court in the United States is not found to be related to the pace of litigation. In fact, some courts with the highest caseloads per judge are among the fastest. *See* BARRY MAHONEY ET AL., IMPLEMENTING DELAY REDUCTION AND DELAY PREVENTION PROGRAMS IN URBAN TRIAL COURTS 12 (1985).

necessary—rather than any single reform. In many countries there are inactive cases that should be removed from the court docket;[51] the purging of inactive cases should be undertaken simultaneously with other reforms.

D. Pending Cases per Judge

¶29 The growth rate of pending cases is determined by the clearance rate. With the numbers of cases pending per judge varying widely from fifty-eight (Singapore) to 8,187 (Chile), the median across the sample is about 700; in U.S. state courts the mean is 1,164.[52] Dealing with pending cases is crucial, as they will continually increase if there is no improvement in the clearance rate. The number of pending cases per judge is strongly associated with the time it takes to fully resolve a case.[53] It should be expected then that Ecuador and Chile take more time to resolve cases than Singapore. Courts should make reduction of pending cases a priority during the reform process. This is particularly true as many pending cases



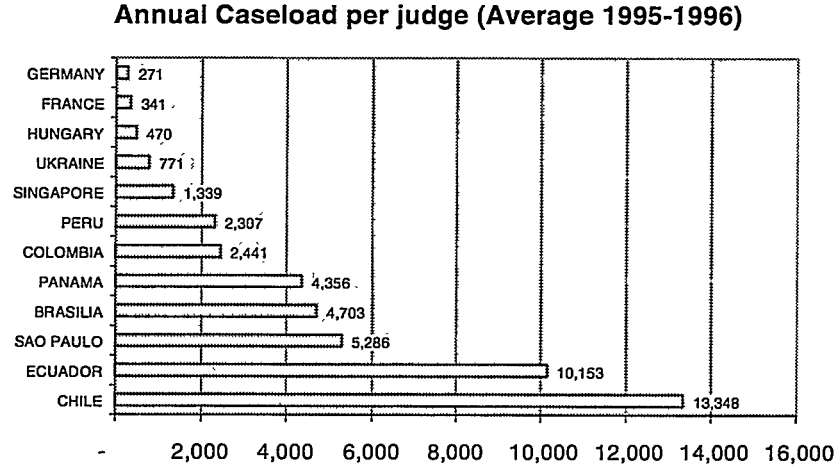
may simply be inactive.[54]

51. As part of judicial reform efforts in Ontario, Canada, for example, pending cases were reviewed to confirm their status. As many had already been closed by the parties, they were "purged." This simple step reduced the backlog of cases by ninety percent.

52. In the U.S., however, the majority of cases settle with little of no judicial involvement. The common view is that, because most cases settle out of court, U.S. courts can absorb more filings.

53. *See* REEXAMINING THE PACE, *supra* note 44, at 36, 49.

54. *See generally id.* at 40 (noting that some courts wait three to ten years to dismiss inactive cases, but also suggesting that inactive case management is generally a sign rather than a cause of slow case processing by courts).



E. Caseload per Judge

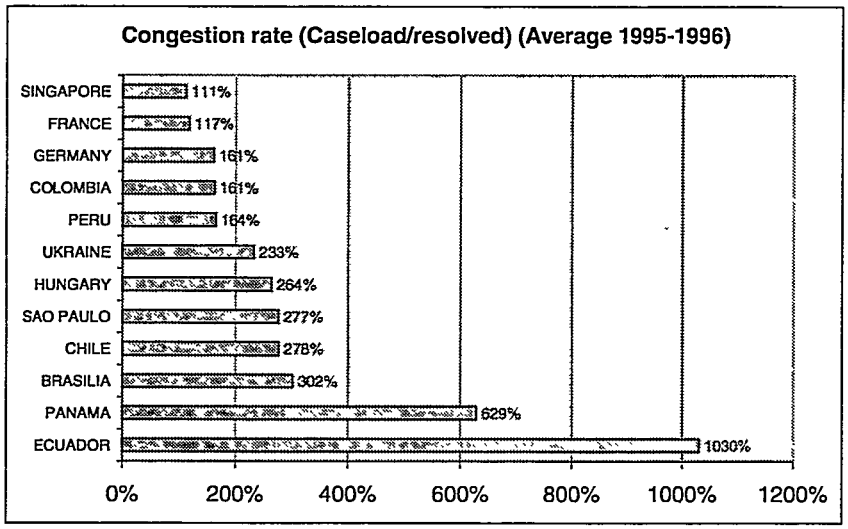
¶30 Taking into account the cases filed, those resolved and those pending, it is possible to compute the annual caseload per judge. As an example, Panama, which has a relatively small number of cases filed per judge each year (777), has a disproportionately large caseload per judge—over 4,300. While some studies have found that caseloads have an effect on clearance rates,[55] others have found that the individual caseloads of judges do not have an affect on time to disposition.[56] Regardless, caseloads need to be monitored over time given the variety of potential effects that changes in caseloads can have on clearance rates. For example, it has been suggested that there is a saturation point beyond which a judge cannot handle additional cases.[57] Courts must be able to determine this point to know when additional judges or court personnel are needed.[58]

55. *Cf. id.* at 42 (remarking that while the relationship between caseloads and clearance rates is not agreed upon, caseload statistics are still considered an important indicator).

56. *See* NATIONAL CENTER FOR STATE COURTS, DIVORCE COURTS: CASE MANAGEMENT, CASE CHARACTERISTICS, AND THE PACE OF LITIGATION IN 16 URBAN JURISDICTIONS 19, 80 (1992); *see also* EXAMINING COURT DELAY, *supra* note 11, at 46.

57. *See* EXAMINING COURT DELAY, *supra* note 11, at 47 (finding some evidence of a saturation point even in very efficient courts, but noting that such an effect may not be inevitable).

58. *See generally* NATIONAL CENTER FOR STATE COURTS, ASSESSING THE NEED FOR JUDGES AND COURT SUPPORT STAFF (1996) (describing the problems for courts and legislatures in determining judicial staffing needs and suggesting a variety of possible approaches to resolving those difficulties).



F. Congestion Rate

¶31 The congestion rate is the caseload divided by the number of resolved cases. It reflects the time it would take a court to dispose of its pending and incoming cases given its current efficiency and clearance rates. For example, given the current productivity of the courts in Ecuador, it would take ten years for them to dispose of their caseloads, while it would take Singapore just one year.

¶32 Delay reduction programs are essential in courts where there is a high congestion rate. This indicator allows the courts to design realistic goals for themselves when implementing reforms. It may also indicate that procedural reforms may not be adequate to resolve the current caseloads, and that other options should be considered—such as adding more courts or temporary judges.

G. Time to Resolve a Case

¶33 The time needed to dispose of a case at the first instance level is an indicator of efficiency. In many developing countries, the public considers the time required to resolve cases excessive,[59] and a large majority of judges surveyed agree that it is too long.[60] Not all countries measure the duration of cases regularly. It has been found, however, that the accrual of pending

59. This is true, for example, in Argentina. *See* BUSCAGLIA & DAKOLIAS, JUDICIAL REFORM, *supra* note 5, at 1.

60. Additional research is needed to determine whether the time needed to resolve cases meets procedural limitations set by the national legal codes, and what time periods are considered to be reasonable. Judges from most of the countries sampled indicated that legal time standards are not adhered to in the cases that come before them.

cases is related to the time needed to resolve a case. Thus, a "backlog index," determined by the number of cases pending at the start of the year divided by the number of cases resolved during the year, can be used where specific "duration" data is not available.[61] Given this index, Ecuador and Panama should be expected to have the slowest times to disposition of a case while Singapore and France should have the fastest. Countries with the lowest growth rates of pending cases tend to take less time to dispose of cases. In Germany, for example, the average duration of a case in the courts sampled is five months: approximately forty percent of the cases are disposed of in under three months and only three percent last longer than twenty-four months. In Chile, the average duration is sixteen months. While the United States' median time for the resolution of civil cases is approximately eleven months,[62] the trend in the past decade is to take longer to resolve a case.[63] The use of Alternative Dispute Resolution (ADR) mechanisms may assist courts in addressing the backlogs; it is not, however, clear that such mechanisms actually decrease case disposition time, as opposed to simply increasing user satisfaction.[64]

H. Number of Judges

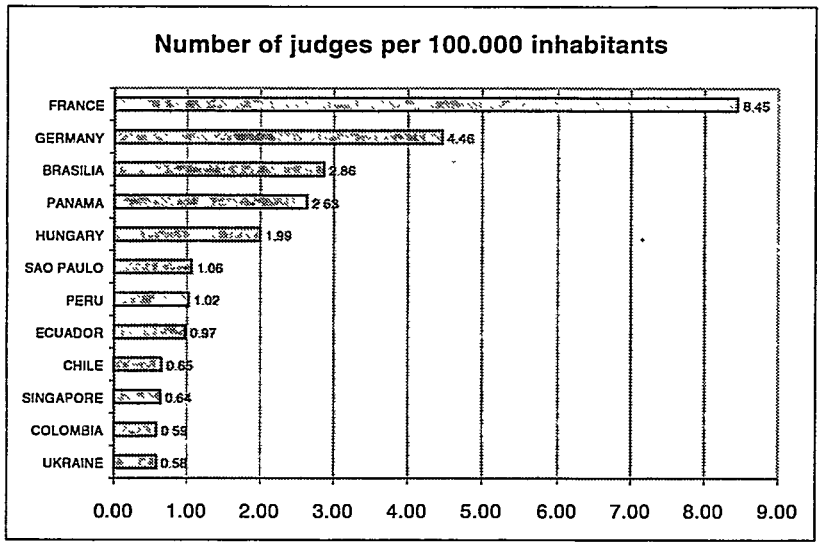
¶34 The number of judges per capita is another important element in efficient judicial administration; it can bear directly on the issue of public access to the courts. One way to look at access issues is to review the number of judges per 100,000 inhabitants. France has the greatest number of judges per capita (8.45). It should be noted, however, that the judges in the French courts surveyed are not paid and do not work full-time in the judiciary. It is also significant that, while Singapore is among the countries with the fewest judges per 100,000 capita (0.64), it has one of the highest clearance rates of all the surveyed countries (ninety-four percent). In comparison, the United States has about 1.2 judges for every 100,000

61. *See* EXAMINING COURT DELAY, *supra* note 11, at 37-38. A higher backlog index suggests a longer civil case processing time. If the index number is greater than one, the court did not dispose of as many cases as it had pending at the start of the year. The mean in the United States is .98; Germany is .5; Hungary is 1.37; France is .25; Ukraine is .64; Panama is 5.1; Ecuador is 7.87; Singapore is .04; Peru is .67; Colombia is .3; Brasilia is 1.9; Sao Paulo 1.6; and Chile is 1.7.

62. *See* EXAMINING COURT DELAY, *supra* note 11, at 11 (noting that while the median is eleven months, the time for resolution of civil cases varies from 177 days to 1,105 days). Again, this may be affected by the fact that the majority of cases settle.

63. *See id.* at 48 (noting that only two courts out of 25 sampled are close to the ABA standard that 100 percent of all cases should be resolved in two years).

64. *See* RAND INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 5 (1996). By way of comparison, at the international level, the dispute resolution mechanisms of the Court of International Trade, ICSID, US-Canada Free Trade Agreement, and World Trade Organization take an average of 24 months, 27 months, 315 days, and 395 days, respectively, for an initial decision. *See* Gary N. Horlick & F. Amanda DeBusk, *Dispute Resolution under NAFTA-Building on the U.S. -Canada FTA, GATT, and ICSID*, 10 J. INT'L ARB. 59 (1993).



people;[65] it too has a high clearance rate of ninety-eight percent.

¶35 The number of judges is always a delicate topic for reformers, because hiring more judges is often a favorite solution for problems of inefficiency. Lack of judges has historically been cited as the main reason for delay.[66] This perception, however, relates primarily to those courts that are not *well-managed.*[67] Improving the performance of these courts may change perceptions of the problems of delay. This is not to say that in some cases there is not a need for additional judges, but additional research is needed to justify the increase, as increasing the number of judges may not always solve the problem.[68]

¶36 It is undeniable, however, that the number of judges per capita is decreasing. This is occurring at the same time that the number of cases filed is increasing—causing greater demands on judges from both ends. For example, in the early part of the century, Germany and Hungary had approximately 15.6 and 15.3 judges for every 100,000 inhabitants, respectively. In ten of the eleven countries included in the present survey (all but the Ukraine), moreover, the number of judges per 100,000 has decreased over the period from 1990 to 1996, placing increased demands on judges. It is to be noted, however, that even with fewer judges, the clearance rates in Germany have not seemed to suffer. Finally, the issue of the number of judges should be distinguished from the location of the courts—a separate and important access issue.

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65. The number of district court judges doubled from 1900 to 1960 and then again between 1960 and 1980. *See* Frank K. Upham, *Contemporary Problems of the Judiciary in the USA*, Proc. INT'L COLLOQ. INT'L ASS'N LEGAL SCI. 243, 244 (1993).

66. *See* EXAMINING COURT DELAY, *supra* note 11, at 41.

67. *See id.* at 41-42.

68. For a study assessing judicial resource-allocation models, see *How Many Judges Do We Need Anyway?*, NAT'L CENTER FOR ST. CTS. REP., Mar. 1993, at 1.

I. Cost

¶37 The government's cost per case, relative to the total cost of operating the courts, is also an important indicator of the efficient use of resources.[69] Clearly, quality includes affordability. Many systems pass higher case costs to users through court fees. This is certainly true in Singapore where the system "taxes" days in court exponentially as an incentive to complete trials in a single day.[70] High user costs can, however, impede access by limiting who can bring a case to court and the time that is devoted to the case by the court. Access in commercial cases can be particularly important for small businesses; they may, nevertheless, forego judicial recourse because of the high costs.

¶38 Although France has extremely low costs in comparison to other developed countries, it is not representative given that the judges are unpaid. It is an example, however, of efficient resource use and adequate access (though low costs are not common for commercial cases[71]). Judicial salaries are an obvious factor affecting cost in court budgets. In some countries, especially those in Latin America, the majority of the budget is spent on judicial salaries. Significantly, the judges in Singapore are paid as generously as those in Germany and Brazil. While this may drive up costs, it may also have a positive effect on issues of independence and transparency. Adequate salaries are more likely to attract qualified candidates to the judiciary. Relatively high salaries may also help insure against corruption.

J. Comparing Efficiency

¶39 As seen from the data, even the courts with the best clearance rates are not able to consistently keep their backlogs low; they are not addressing their pending cases. Indeed, during the period between 1990 and 1996, surveyed countries tended to adjust their productivity only to the number of cases filed, not to their full caseloads. For example, fewer

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69. National average government expenditure for contract and other commercial cases filed in the United States federal system in 1982 was about $1,900, and was $378 in state courts. The cost per case is measured by the operational and sometimes capital cost of running the court.

70. For example, in Singapore payments for hearings have been imposed in order to provide incentives for the parties to finish a trial within one day. The first day is free for a trial in the Supreme Court and in the Court of Appeals, but days two through five cost $1,500 per day, days six through ten cost $2,000, and day eleven and beyond is $3,000 per day. In 1992, 80 percent of the cases took one day or less for trial. Cases that took longer than one day were commercial cases involving corporate and individual litigants with financial means. This approach severely limits access based on income. *See* SUPREME COURT OF SINGAPORE, SUPREME COURT SINGAPORE: THE RE-ORGANIZATION OF THE 1990S 66-67 (1994). Expanding access, however, can also contribute to longer times to disposition. For example, one study has concluded that the use of more interpreters slows the pace of litigation. *See* MINISTRY OF ATTORNEY GENERAL, PROVINCIAL COURT, ADULT CRIMINAL COURT BACKLOG STUDY 26 (1994).

71. In the United States as well, of all U.S. federal court cases, commercial cases have been found to be the most costly.

cases were filed with the courts in France, Germany, Hungary and Ukraine over the surveyed period. Yet, fewer cases were also resolved. Meanwhile, as the number of cases filed with the courts *increased* in Chile, Colombia, Ecuador, Peru and Panama, so did the number of cases resolved. Each of the court systems adjusted its productivity merely to the number of filings.[72] Such measures make it difficult to reduce the number of pending cases.

¶40 Even though courts across the globe are constantly engaged in reforms to become more efficient, the benefits, if any, are not always clearly evident. George Priest argues that there is some equilibrium level of court congestion and that when reforms are implemented and delay decreases, more cases are filed in the courts thereby bringing congestion back toward an equilibrium level.[73] In Colombia, for example, as the courts increased their efficiency more cases were filed—making it difficult to measure delay reductions resulting from judicial reform.[74] The level of equilibrium will be different for each country. Judicial systems with higher litigation costs or lower settlement costs will have relatively lower congestion equilibria. In Singapore, for example, where costs for litigation are high, congestion is low. As a result, reforms may not always have the desired effect on backlogs in the courts.[75] Priest suggests that measuring the success of reforms should be done through the volume of cases resolved. As he suggests that the number of judges is significantly related to delay,[76] the equilibrium level may change if the number of judges is increased. A careful analysis, however, is needed to determine whether additional judges are needed in a particular system.[77]

IV. COUNTRY REPORTS

¶41 Although we can observe that some judicial systems are more efficient than others, we have not been able to conclude why they are. *The National Center of State Courts 1988 Report* concluded that local legal culture and the amount of litigation have significant influence over delay, but as George Priest indicates, no study has identified the characteristics of legal cultures where there are few delays in the judicial system.[78] In an effort to detect the aspects of legal culture that may be attributed to delays or quality, a brief description of each country surveyed is included below. Such a comparison of cultures may assist courts in various countries in

72. It has been found that some U.S. courts resolve cases faster when filings increase. *See* EXAMINING COURT DELAY, *supra* note 11, at 46.

73. *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. Rev. 527, 535 (1989).

74. *See id.* at 554.

75. *See id.* at 538.

76. *See id.* at 555.

77. Adding a judge may have different effects on different courts, and a comparative approach can shed light on the kinds of effects that can be expected. *See* Dorothy Toth Beasley et al., *Time on Appeal in State Intermediate Appellate Courts*, JUDGES' J., Summer 1998, at 12.

78. *See* Priest, *supra* note 73, at 530.

addressing legal culture. The legal culture is affected by the structure of the judiciary, the historical and economic context, public perception,[79] and issues of independence. The appointment process, terms of appointments, salary levels and evaluation systems are related to the quality of judges and therefore the quality of justice.[80] Each country has different mechanisms for each of the above. France, for example, elects lay judges who serve in the court. Additionally, Panama and Colombia still maintain the procedure of having the next higher level court appoint the lower judges; this may encourage a culture of nepotism. The institution responsible for judicial discipline also determines the incentives for judges to abide by ethics rules, while term lengths affect judges' sense of independence. Colombia, France and the Ukraine have limited terms, which implies that judges maintain other job possibilities for the future.[81]

¶42 Local culture may also be influenced by the budget provided to the judiciary, and how that budget is determined. Where judicial budgetary decisions are free from political pressure, judicial independence is strengthened. Indeed, the issue of which political institution manages the judicial budget may be of critical importance to independence, particularly when the judiciary is weak. In this regard, it is important that the judiciary have sufficient budgetary experience to forecast its own budgetary needs. It is also clear that judicial accountability depends on a free press.[82] Freedom of the press is central to democracy as well as human rights. In countries where press freedom has been identified as less than good or poor, the public often perceives judicial independence as questionable.[83] Judicial salaries also play a role in determining the incentives for decisionmaking. For the Latin American region, Brazil maintains respectable salaries for its judges. Salaries of judges in Colombia, however, may be inadequate given the personal risks involved in the job. Comparing judicial salaries to average per capita income provides insight into the incentives that judges

79. Public perception about the U.S. legal system is the focus of a recent ABA survey, the results of which are discussed in the February 1999 *A.B.A. Journal*. Although a national ABA survey has not been undertaken since 1983, a recent state court survey shows that ninety-one percent of those surveyed in Louisiana agreed that persons with political connections are treated differently in the courts. *See* A.B.A. J., Dec. 1998, at 8, 26. At the same time, a 1997 survey indicates that citizens think that the U.S. Supreme Court is doing a better job than Congress (47 percent say that the Supreme Court is doing a good or excellent job while only 25 percent say the same for Congress). *See* John M. Scheb II & William Lyons, *Public Perception of the Supreme Court in the 1990's*, JUDICATURE, Sept.-Oct. 1998, at 66, 67.

80. Again, this is an incomplete measure of judicial independence. An important aspect of judicial independence, and one difficult to compare across countries, is judicial training, which is discussed below on a country-by-country basis. Poorly trained judges in an overburdened legal system are susceptible to corrupting influences. The use of *ex parte* communication, in particular, contributes to the public perception of a non-independent judiciary.

81. For a description of the way Ecuadorian judges are appointed, see MARIA DAKOLIAS, ECUADOR SECTOR JUDICIAL ASSESSMENT 17 (1994).

82. For evaluations of press freedom in various countries, see Committee to Protect Journalists, *Regional and Country Reports* (visited Feb. 15, 1999) <http://www.cpg.org/countrystatus/reports index.html>.

83. *See* discussion *infra* Part IV (in individual country reports).

have for corrupt behavior. In Brazil, for example, the salary of judges is over thirty times that of the average salary, decreasing the incentives for corrupt behavior.

¶43 In countries where the courts are well managed, as evidenced by timely and effective dispute resolution, a legal culture exists that supports such performance. The question then is how to promote such cultures in different legal systems. Given different legal frameworks and cultural understandings this may be difficult, but it appears that changing the legal culture is one of the key elements of the reform process. A change in legal culture is a necessary complement to administrative and procedural reforms.[84] As a result, knowledge of the legal culture is key to adopting culturally adequate reforms. If the reforms that are being contemplated require a different legal culture then the one that prevails, they will likely fail absent parallel efforts to adopt the legal culture. This is by no means an easy task, but one that should be kept in mind when contemplating judicial reforms.

¶44 Individual courts must also compare their own efficiency over time. For this reason, the following discussion will review the performance of the courts in each country surveyed from 1990 to 1996. The aim is to help courts to better understand the changes that have occurred in their performance, and to attempt to explain why those changes have occurred. It should be noted here that this paper does not try to explain the reasons for the changes in detail, but rather to provide evidence of whether reforms have taken place. One should also keep in mind that changes may occur because of inaccurate data collected by the court or inconsistent data provided to the official statistics office in the country. In either case, it is safe to say that statistical records in the developing countries are far from perfect.

A. Brazil[85]

¶45 *Public confidence:* The biggest problems facing Brazil's legal system are a lack of public confidence and slow processing times. A recent poll shows that over ninety percent of Brazilian businesses view delay as the judiciary's main problem.[86] Half of the businesses polled agreed that the

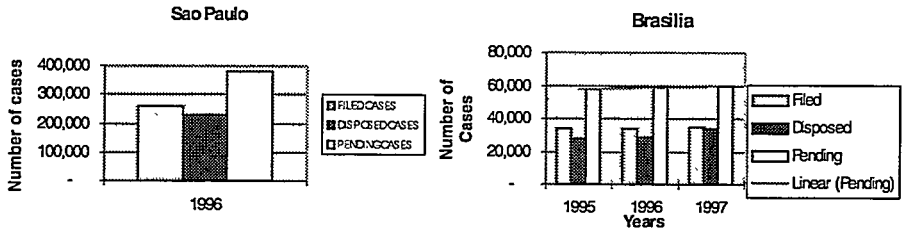
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84. *See generally* Maria Dakolias & Javier Said, *Judicial Reform: A Process of Change Through Pilot Courts*, EUR. J. LEGAL REF. (forthcoming Spring 1999) (discussing the role that culture plays in implementing judicial reforms).

85. The Brazilian judiciary is divided into federal and state court systems. Both are subordinate to the Federal Supreme Court, which is the court of last instance in cases involving constitutional law. The federal system is composed of the courts of appeal, and, at the first instance, superior courts. Each state has its own constitution and establishes its own judiciary, and each has a court of appeals and courts of first instance. For this study, the state level courts in Brasilia and São Paolo with jurisdiction over commercial cases were examined. Federal courts only have jurisdiction over commercial cases that involve the government, and therefore were not included for the purposes of this study.

86. *See* Armando Castelar Pinheiro, The Judiciary and the Economy: Estimates for Brazil 2 (Apr. 1998) (unpublished paper, on file with author).

judiciary's inefficiency affects the economy, and two-thirds say that it directly harms their business.[87] These perceptions find support in the quantitative data. In 1997, the backlog of cases in Brazil stood at six million, meaning that each judge had a backlog of roughly 700 cases.[88] Only one-third of those who admit to being involved in a conflict, however, use the courts to resolve their problems.[89]



¶46 *Institutional Efficiency:* Since 1996, São Paulo's state courts have begun to measure case statistics. While the 1996 clearance rate was eighty-nine percent, no other years of comparison are available for these courts.[90]

¶47 The clearance rates in Brasilia have improved over the 1995-96 period, rising from eighty-two percent to ninety-five percent,[91] even though the number of filed cases remained steady. Entrenched procedures that slow processing times further exacerbate the backlog problem. Litigants are allowed to appeal all first instance judgments and are granted the equivalent of a *de novo* judgment at the second instance, despite the fact that, in nine out of ten cases, the second instance court upholds the earlier ruling.[92] Further, lawyers have at their disposal an array of special appeals, actions, and writs that tend to delay cases.[93]

¶48 The problems facing the judiciary are not new.[94] In 1980, a survey showed that nine of ten lawyers believed the judiciary to be in a state of crisis.[95] They cited delays, excessive formalism, and corruption as the main

87. *See id.*

88. *See* Keith S. Rosenn, *Judicial Reform in Brazil*, NAFTA: L. & BUS. REV. AM., Spring 1998, at 24. For a more dramatic estimate, see Maria Luiza Vianna Pessoa de Mendonca, *Comment*, *in* GOOD GOVERNMENT AND LAW 256, 256 (Julio Faundez ed., 1997) (estimating that there are 50 million cases pending in Brazil, an average of 6,000 per judge).

89. *See* Maria Tereza Sadek & Rogerio Bastos Arantes, The Crisis of the Brazilian Judiciary: The Judges' Perspective, Remarks at the International Political Science Association, XVI World Congress 9 (Aug. 1994).

90. At the time of this study, the statistics for 1997 were not yet prepared.

91. These figures are based on a survey of twenty judges in the first instance courts of Brasilia and São Paolo with jurisdiction over commercial cases.

92. *See* Rosenn, *supra* note 88, at 30.

93. *See id.*

94. *See id.* at 19 (noting that Brazil's judiciary has been in crisis since the colonial period, despite many efforts at reform).

95. *See* Keith S. Rosenn, *Brazil's Legal Culture: The Jeito Revisited*, 1 FLA. INT'L L.J. 1, 35 n.111 (1984). Rosenn wrote in 1984 that "[t]he rapid growth of the population and the economy has

causes.[96] Over ninety of companies now say these deficiencies harm their performance.[97] Since then, however, the crisis has become more acute: Brazilian courts in general experienced a tenfold increase in the number of cases filed per year over the 1988-96 period.[98]

¶49 *Historical and Economic Context:* As in many Latin American countries, the liberalization of the Brazilian market has increased caseloads, and has fueled the urgency of the need for reform. Recent market changes include the privatization of large state companies, and the opening of the market to foreign competition. Companies do not, however, appear to be avoiding the courts in their contract negotiations—sixty-six percent of firms say that their contracts do not include arbitration or mediation clauses.[99]

¶50 Reforms under discussion include the introduction of binding precedent in Supreme Court jurisprudence, and the creation of a National Judicial Council to supervise and manage the judiciary.[100] Past reforms have failed to address the main problems facing the judiciary. The 1988 reform, in particular, was a mixed success, resolving some problems while creating others. It contributed to the independence of the judiciary by putting it in charge of its administration and granting it the autonomy to manage its own budget (more than twice that of the legislative and executive branches), which it submits to the Congress.[101] On the other hand, certain structural changes have embroiled the judiciary in political contests between congress and the executive.[102] As stated above, the reform also increased the scope of constitutional actions that could be filed; this has contributed to the inundation of the judiciary with cases, although it has also increased access. More recent efforts at reform have included the creation of the "*juizados especiais*," which hear small claims and minor criminal offenses.[103]

¶51 *Judicial Independence:* Beyond delay and lack of public confidence, problems with the Brazilian judiciary include a lack of access to justice, inadequate training and selection of judges, poorly written and outdated legislation, and a lack of binding precedent.[104] Further, many judicial posts simply go unfilled. In contrast to other Latin American countries, however,

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overcrowded court dockets. In some courts delays are so long that the often heard lament—'What enters, never leaves!'— appears justified." *Id.* at 35-36.

96. *See id.* at 35.

97. *See* Pinheiro, *supra* note 3.

98. The number of cases filed in 1988 was 350,000. In 1996, it was 3.7 million. *See* Rosenn, *supra* note 88, at 24. This deluge of cases is due in great part to a 1988 reform that multiplied the number of causes of action for which one could file a constitutional claim. Previously, only the attorney general could initiate such actions. Currently, nine entities may bring constitutional claims, including unions and national level class organizations. *See* Sadek & Arantes, *supra* note 89, at 7.

99. *See* Pinheiro, *supra* note 86, at 2.

100. *See* Rosenn, *supra* note 88, at 24.

101. *See* Sadek & Arantes, *supra* note 89, at 4-5.

102. *See id.* at 5.

103. *See Appendix, Legal System of Brazil*, 40 ST. LOUIS U. L.J. 1451, 1455 (1996).

104. For a more thorough description of the various problems facing the judiciary, see generally Rosenn, *supra* note 88; and Sadek & Arantes, *supra* note 89.

corruption does not seem to be a major problem.[105] This may be because salaries of judges are respectable (about US$120,000 per year); in fact, they are thirty-three times the average net salary.[106] Judges also enjoy lifetime appointments with retirement at age seventy and, while federal appellate judges are appointed by the President of Brazil, all state and federal first instance court judges must pass through specific public testing processes. In addition, the free press in major cities assists somewhat in ensuring accountability and transparency in the system.[107]

B. Chile[108]

¶52 *Public confidence:* Of the developing countries studied in this report, Chile's court system is faced with one of the most challenging caseload demands in Latin America. Its courts, nonetheless, enjoy greater public trust than most legal systems in Latin America (although its trust rating is low in comparison to most developed countries).[109] This may be helped by the freedom the press enjoys in Chile.[110] As this study shows, the system is experiencing the same pressures of increasing demand as judicial systems in other Latin American countries, and it suffers from some of the

105. *See* Rosenn, *supra* note 88, at 20.

106. The average net salary in Brazil is US$3,640. *See* WORLD BANK, WORLD DEVELOPMENT REPORT, THE STATE IN A CHANGING WORLD, 1997, at 214-15 tbl. 1 (1998).

107. "With a reputation for investigative reporting and the resources of huge media conglomerates behind them, Brazilian journalists in major cities such as Rio de Janeiro and São Paulo enjoy widespread public support and growing political power. Their biggest problems are a lack of legal safeguards and increasing collusion between media moguls and Brazilian politicians. But away from the sophisticated urban media environment, journalists in the poor interior states work under some of the worst conditions in Latin America." Committee to Protect Journalists, *Country Report: Brazil* (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Americas/Brazil.html>; *cf.* Reporters sans frontiers, *1997 Annual Report: Brazil* (visited Feb. 15, 1999) <http://www.rsf.fr/ACTUALITE/rapport/UK/Amerik_VA.BREA.html>.

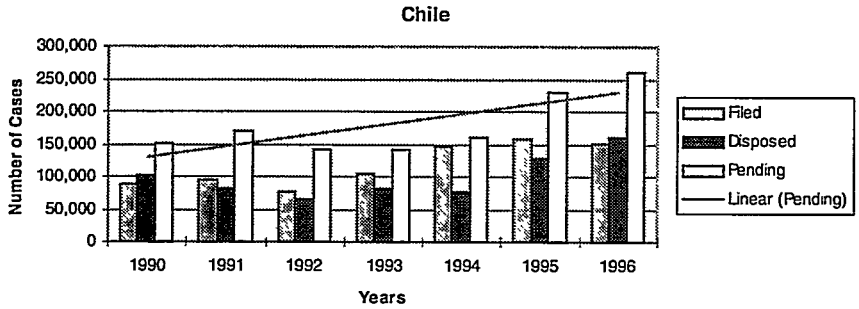
108. At the top of Chile's judicial hierarchy sits the Supreme Court, which has original jurisdiction over certain constitutional and international claims, and acts as a court of cassation for the lower courts. Below it are the courts of appeals (*corte de apelaciones*). The courts of first instance are the *Juzgados de letras*, which have general jurisdiction over civil and criminal claims, and the specialized courts, which include labor, juvenile, police, and military courts. In the larger cities, the *Juzgados de letras* specialize by subject matter into criminal and civil courts, while in smaller towns they act not only as criminal and civil courts, but also as labor and juvenile courts. Chilean law mandates that each community or local administrative district have at least one court, but this is not the case in some of the more remote areas. *See Appendix, Legal System of Chile*, 40 ST. LOUIS U. L.J. 1349, 1350 (1996).

109. The *World Competitiveness Yearbook* ranks Chile as 32 out of 46 surveyed countries in terms of public confidence in the fair administration of justice. Users gave it 3.63 out of 10 possible points. *See* WORLD ECONOMIC FORUM, THE WORLD COMPETITIVENESS YEARBOOK 1998 app. 3.41 (1998).

110. The freedom of the press has been rated as "good" in Chile. *See* Committee to Protect Journalists, *Country Report: Chile* (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Americas/Chile. html>. *But see* Reporters sans frontiers, *1997 Annual Report: Chile* (visited Feb. 15, 1999) <http://www.rsf.fr/ACTUALITE/rapport/UK/Amerik_VA/CHIA.html> (suggesting that freedom of the press is limited in Chile).

same symptoms of congestion and inefficiency.

¶53 *Institutional Efficiency:* From 1990 through 1996, the number of cases filed in the thirty Santiago courts sampled increased by seventy-three percent. This increase is probably a reflection of the steady expansion of the consumer economy. The number of cases disposed fluctuated during



the period but showed an overall increase, with a rise of sixty-eight percent in 1995. The courts underwent a period during which they could not meet demand. The number of cases pending also rose steadily after an initial seventeen percent drop in 1992. Meanwhile, the clearance rate dropped from 115 percent in 1990 to fifty-two percent in 1994, but soon recovered to reach 106 percent in 1996. The drop was likely due to the steady rise in cases filed, and, specifically, to the sudden flux of cases filed in 1995. But the courts showed that they were able to re-adjust their productivity regardless of the number of cases. The 1996 budget estimates that each court needs about US$246,000 per year to operate. These funds are managed by the administrative corporation in the judiciary.

¶54 Although the Chilean judiciary has a strong reputation relative to other Latin American systems, there is still a need for further reform. One study showed that the average case takes 513 days to reach resolution in Santiago.[111] Remarkably, case disposal time grew over the period from 1979 to 1992, despite two laws that quadrupled the number of civil courts in Santiago.[112] The time delays may be the result of the high number of pending cases.

Judicial independence: Another area of needed reform is in the culture of

111. This study considered the length of time it takes a civil case to proceed to resolution through first and second instances. *See* FERNANDEZ, *supra* note 11, at 8.

112. *See id.* at 8. Although no studies have been done to determine the cause of this increase in processing time, one possible explanation is that the greater supply of court services triggers greater demand for such services. *See* Priest, *supra* note 73, at 530. Other studies, however, show that the number of courts does not affect the pace of litigation. *See* EXAMINING COURT DELAY, *supra* note 11, at 26.

the judiciary itself.[113] Despite the Chilean judicial system's reputation for honesty, certain practices speak of influence peddling. Observers note that judges from the Supreme Court and Courts of Appeals call lower court judges and weigh in with their opinion on certain cases.[114] *Ex parte* communication is common practice, and some lawyers have more access to judges than others.[115] Finally, the official working schedule of judges is flexible: judges have mornings off, and many use the time to teach and perform other non-judicial tasks.[116] Judicial salaries, however, are quite respectable given their flexible work schedules (approximately US$43,000 per year) and are ten times the average salary in Chile. This may be one reason for the overall reputation of the judges for honesty. In addition, the terms of appointment are for life, which may also contribute to the independence of judges. Chilean judges are appointed by the President from a list created by the Supreme Court. The Supreme Court also manages the disciplinary

¶55 *Historical and Economic Context:* Last year, the government passed a law that is beginning to address both the issue of time to disposition and judicial work culture by improving incentives for court employees, including judges. Under the new law, the Supreme Court sets performance goals for courts across the country. It then measures the performance of each court against these performance goals and awards a five percent bonus to the employees of the courts that rank in the top forty percent. From 1991 to 1996, reacting to the low investments made in the judiciary under the military regime, the new government introduced many changes, including the creation of new courts, investments in infrastructure, improvements in information technology, and increases in salary.[117] In addition, a school for judges has been established. Although these reforms have had a positive impact, further reform is needed to deal with the immense caseload in the courts.

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113. *See* Yves Dezaley & Bryant Garth, Chile: Law and the Legitimation of Transitions: From the Patrimonial State to the International Neo-Liberal State 39 (1998) (unpublished paper, on file with author).

114. *See, e.g.*, Sergio Urrejola, *Cambios requiridos en Chile, in* LA EXIGENCIA DE JUSTICIA EN EL MUNDO ACTUAL 38, 40 (1996).

115. *See id.*

116. It is expected that next year the Supreme Court will change judges' work schedules to include more hours in court. *See id.*

117. The current focus of the Congress is reforming the procedural code for the penal system. The reform involves switching from an inquisitorial to an adversarial procedure with oral hearings. Further, it will put defense work in the hands of private firms through a competitive bidding procedure, a practice unique in the civil law world. There are still no plans for reform of the civil procedural code, though there is consensus that this will be next, and it may borrow concepts from the reform of penal procedure.

C. Colombia[118]

¶56 *Judicial Independence:* A constitutional change in 1991 created the *Consejo Superior de la Judicatura* and put it in charge of discipline and administrative matters such as human resources, operations, finance, and designing career tracks for judicial employees. The Ministry of Justice thus no longer controls the budget and administration of the judiciary. The reform also created a separate public prosecutors office, directed by the attorney general.

¶57 *Public Confidence:* Despite these reforms, the Colombian judicial system suffers from inefficiency in case processing, from an intimidated media,[119] and from low public confidence in the judiciary. Colombia ranked forty-fifth out of forty-six countries in a 1998 study of public confidence in the fair administration of justice.[120] One public opinion poll showed that eighty-nine percent of the public thought that judges were susceptible to bribes, and eighty-five percent thought that judges did not apply the law evenhandedly.[121] Another survey showed that fifty-seven percent of those asked thought the judicial process was slow.[122] The Ministry of Justice shares the perception that the court system is overly congested,[123] and many writers have deemed the 1991 reforms a failure as courts were less productive in input/output terms five years after the reforms were initiated.[124] The time standards for case resolution established by law are seldom met, with cases exceeding time limits by up to 200 percent.

¶58 *Institutional efficiency:* While the first instance civil courts in Bogotá seem to face growing demand, extreme fluctuations in each year's data bring data reliability into question. In 1995, the number of cases filed

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118. The Supreme Court occupies the highest rank of the Colombian judicial hierarchy. It is followed by the Superior Tribunals, the District Superior Courts, which are located in each of the twenty-seven judicial districts, and, at the first instance, the circuit courts, municipal courts, and specialized courts. The 1991 constitutional reforms also created a Constitutional Court, which reviews the constitutionality of laws.

119. "While Colombia has long been the most dangerous country in the hemisphere for journalists—forty-five have been killed in the line of duty since 1986—the Samper government's response has deepened Colombian journalists' sense of isolation and vulnerability." Committee to Protect Journalists, *Country Reports: Columbia* (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Americas/Columbia.html>.

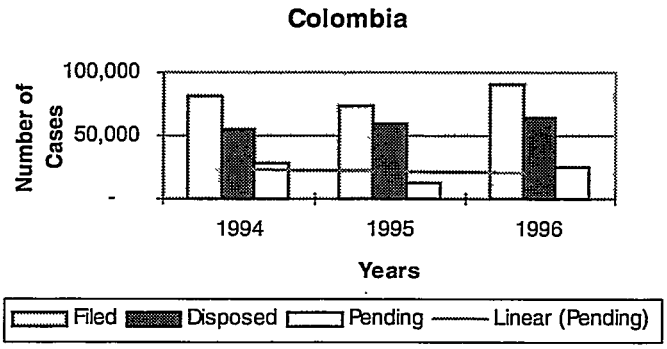
120. The survey results show that Colombia's judicial system is considered one of the worst in the world, trailed only by Venezuela in the forty-six country survey. *See* WORLD ECONOMIC FORUM, *supra* note 109.

121. Interview with Alfredo Fuentes Hernández, Executive Director of *Corporación Excelencia en la Justicia*, in Bogotá, Colombia (July 28, 1998).

122. CONSEJO SUPERIOR DE LA JUDICATURA, UNIDAD DE DESARROLLO Y ANÁLISIS ESTADÍSTICO, TIEMPOS PROCESALES Y OPINIÓN EN EL SERVICIO DE JUSTICIA (1996).

123. In a recent internal quantitative evaluation, the Colombian Ministry of Justice stated that court congestion constitutes, without any doubt, one of the greatest problems of the Colombian judiciary. *See* EVALUACIÓN CUANTITATIVA, *supra* note 11, at 9 ("La congestión de los Despachos Judiciales constituye, sin duda alguna, uno de los más sentidos problemas de la Justicia en el pais.").

124. *See, e.g.*, J. Giraldo Angel, *El Fracaso de la Reforma Constitucional de la Justicia*, *in* COYUNTURA SOCIAL 103 (1996).



dropped eleven percent, while the cases disposed of grew by eleven percent. The next year, cases filed grew by twenty-three percent, while the number of those disposed of rose by seven percent. This implies that the courts are adjusting their productivity to demand. The number of cases pending dropped by fifty-seven percent in 1995, only to rise by 110 percent the next year. From 1994 to 1996, clearance rates fluctuated from sixty-six to eighty-two percent. Operational costs remained the same during this period.[125]

¶59 There are many reasons behind the delays. The number of cases filed has steadily increased, while resources have remained scant. At the human resources level, the judicial staff is not well trained, hiring processes are deficient, and there is no sense of teamwork, motivation, or creativity. Rather, there is a formalistic culture loath to change; this is true despite a fifty-five percent increase in personnel since 1991.[126] Partly because there is no judicial career system, judges often move into the private sector later in their career.[127]

¶60 *Historical and Economic Context:* These problems are the very same issues that the 1991 reforms were designed to address.[128] The lines of authority in the reforms had, however, been drawn among different entities, and national balance of power problems, along with local mafia and rebels, sapped the vitality and credibility of the reforms. Serious procedural errors and misinterpretations of new legislation have further

125. From 1991 to 1996, however, growth in spending averaged 9.8 percent, reaching a total growth for the period of .75 percent of GDP, or $750 million. These greater costs were created by a fifty-five percent increase in personnel, and the creation of the three new institutions by the 1991 constitutional reform.

126. As the Colombian Justice Minister Nestor Humberto Martínez has underscored, the Colombian justice system doesn't require more judges or financial resources, only better management. *Plan Aims at Improving Justice System*, TIEMPO, Dec. 1, 1994, at 16A.

127. *See* MODERN LEGAL SYSTEMS CYCLOPEDIA Ch. 3B, § 1.6(B) (Kenneth R. Redden & Linda L. Schlueter eds., rev. 1993).

128. Entities that were created through the 1991 constitutional reform include the Judicial Council, the Constitutional Court, the Prosecutor's Office and the Public Defender's Office. *See* Alfredo Fuentes Hernandez, *Justicia para el Nuevo Siglo: Aportes a la Agenda de Gobierno 1998-2002, in* CORPORACIÓN EXCELENCIA EN LA JUSTICIA, REFORMA JUDICIAL EN AMÉRICA LATINA: UNA TAREA INCONCLUSA 107, 108-109 (1999).

discredited the judicial sector. Finally, the Colombian judiciary cannot be described without a discussion of the effect of the drug trade and drug cartels. Although some agreements were made in the late 1980s with rebel groups, violence is prevalent in Colombia, and particularly in the courts. Many judges have been murdered, and many others choose to resign rather than run risks. Polls indicate that there is a perception of ninety-nine percent impunity in the courts,[129] and that seventy-one percent of the population thinks that corruption is growing.[130]

¶61 Before the 1991 constitutional changes, other reforms included the 1987 creation of the Clerks Office (*Secretaria Comunes*), the introduction of technology to the courts, and, in 1989, the creation of the Judicial Offices (*Oficinas y Unidades Judiciales*), which lend technical, systems, and judicial support to the courts. Despite these efforts, however, Colombia is still struggling to find ways to improve efficiency and other aspects of its judicial system.[131]

D. Ecuador[132]

¶62 *Historical and Economic Context:* In December 1992, Ecuador's legislature passed a series of constitutional and statutory changes to the judicial system, which doubled the size of the Supreme Court, created a Judicial Council, redefined the jurisdictional role of the Supreme Court, created a new mechanism for the selection of judges, and increased the judicial budget and salaries. These changes marked the first significant effort to address the systemic problems that have plagued the judiciary for years, and were aimed at creating a more accountable administrative structure capable of addressing the pressing problem of delay. In late 1995, Congress passed other constitutional provisions mandating the decentralization of the judiciary and the use of ADR mechanisms. The Judicial Council, responsible for the budget, appointment and disciplinary process, was appointed just recently appointed and is now trying to define its activities which necessarily implies some tensions with the Supreme Court.

¶63 *Public Confidence and Judicial Independence:* Despite these efforts, there is widespread recognition by civil society in Ecuador that additional

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129. For a discussion of impunity in Colombian courts, see SERGIO CLAVIJO, SITUACIÓN DE LA JUSTICIA EN COLOMBIA: INCIDENCIA SOBRE EL GASTO PÚBLICO E INDICADORES DE DESEMPENO 40-46 (1997).

130. *See* FERNANDO CEPEDA ULLOA, LA CORRUPCIÓN EN COLOMBIA 141 (1997).

131. One study that outlines the main areas that should be targeted for change is Corporación Excelencia en la Justicia, Misión Justicia Para el Nuevo Siglo (June 1997) (unpublished report, on file with author). The Corporación is an NGO created in 1996.

132. The Ecuadorian judicial system is composed of the Supreme Court, the Administrative and Tax Courts ("Tribunales Distritales"), Superior Courts, Tribunals, First Instance Courts and the National Judicial Council ("Consejo Nacional de la Judicatura"). The first instance courts are divided into civil, penal, landlord/tenant, labor, traffic, customs, administrative and tax cases. This study reviews the civil first instance courts in Quito, which have jurisdiction over commercial cases.

reforms are necessary to support a complete modernization plan for the legal and judicial system. Public confidence in the judiciary remains low.[133] One survey, conducted in the course of the instant study, found that sixty-one percent of the public has no confidence in the honesty of judges. This may be surprising since judicial salaries are about eighteen times that of the average net salaries in Ecuador.[134] Given that the terms of appointment for these judges are four years, the salaries may not be able to overcome the job insecurity.[135] The media has continued to cover the reforms in the judiciary, but their role is limited.[136]

¶64 *Institutional efficiency:* This study of the seventeen Quito courts of first instance reveals that the judiciary faces problems of efficiency and efficacy. From 1990 to 1996, the number of cases filed increased by almost 100 percent, with a twenty-seven percent jump in 1995 alone. While the number of cases disposed increased by forty-eight percent, the number of pending cases increased by 178 percent, with a forty percent jump in 1994. The clearance rate decreased from fifty-one percent to forty percent over this period because the courts were unable to adjust to the increase in demand. Relative to the substantial increase in cases filed, however, the courts have shown the ability to increase some productivity, though it is not enough to reduce the pending caseload.

¶65 One might have thought that performance would have been aided by increasing the annual budget for the civil courts in Quito by 287 percent over 1990-96.[137] The fact that clearance rates did not improve despite an almost three-fold increase in budget illustrates the idea that budget growth may not be correlated with greater court efficiency. Capital costs rose seventy percent in 1995, and 162 percent in 1996 (although capital improvements have not been made to the courts included in this study). Each judge has, on average, seven assistants, and the annual cost for each court is approximately US$55,000. Meanwhile, the courts suffer from a lack

133. Further, when asked if they thought the judiciary had been improving, forty-nine percent said they did not, as opposed to thirty-seven percent who said they did. *See* Simón Pachano, Encuesta Sobre Administración de Justicia: Interpretacion Socio-Politica, ann. 14 (1997) (unpublished paper on file with author).

134. Judicial salaries are US$25,000 while the average net salary is US$1,390.

135. *See* DAKOLIAS, *supra* note 81, at 16-21.

136. "Bucaram frequently criticized journalists in public speeches and withheld government advertising from newspapers critical of the president. . . . The media climate has greatly improved since congress removed Bucaram from office for 'mental incompetence,' but problems remain." Committee to Protect Journalists, *Country Report: Ecuador* (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Americas/ Ecuador.html>. The media is rated as less than good. *See* Reporters sans Frontiers (visited Feb. 15, 1999) <http://www.rsf.fr/ACTUALITE/rapport/FR/index.html>.

137. Although the increase in judicial sector spending appears to have been substantial, most of this increase simply reflects the rising rate of inflation during the 1970s and 1980s. If the annual budget for the judicial sector is computed in 1975 *sucres*, expenditures increased modestly over the same period (1973-1989) from 121.4 million *sucres* to 197.5 million *sucres*. In addition, most of the increase in the judicial sector budget occurred during the period from 1973-1979 when the annual rate of increase was approximately 7.6 per cent. In contrast, from 1979 to 1989, judicial sector spending increased at an annual rate of less than 0.5 per cent.

of adequate case management,[138] poor planning and budgetary management, low hiring standards, lack of incentives for court employees to move cases through the system efficiently, and inadequate court procedures and technology.[139] The hours of work may also contribute to inefficiency and perhaps even the lack of access.[140]

¶66 The government is still grappling with how to improve efficiency. There have been preliminary efforts to reform the *Organic Law of the Judiciary* in order to implement some of the recent constitutional reforms, and to introduce other laws aimed at resolving judicial administration problems. Currently the judiciary is reforming several courts on a pilot basis to address many of the inadequacies. As public opinion polls show, however, there is a long road ahead.[141]

E. France[142]

¶67 *Public Confidence and Judicial Independence:* Although France's judiciary is efficient when compared to the Latin American and Eastern European courts surveyed, its legal system fails to meet the expectations of its users and, according to some, its ability to afford justice is threatened by congestion, delay, and lack of independence.[143] France's commercial court

138. The lack of a well defined case-flow management system in which cases are actively managed from filing to disposition is a serious problem in the Ecuadorian judiciary. The concept that judges are managers of their caseloads as well as dispute resolvers is not integrated into the system.

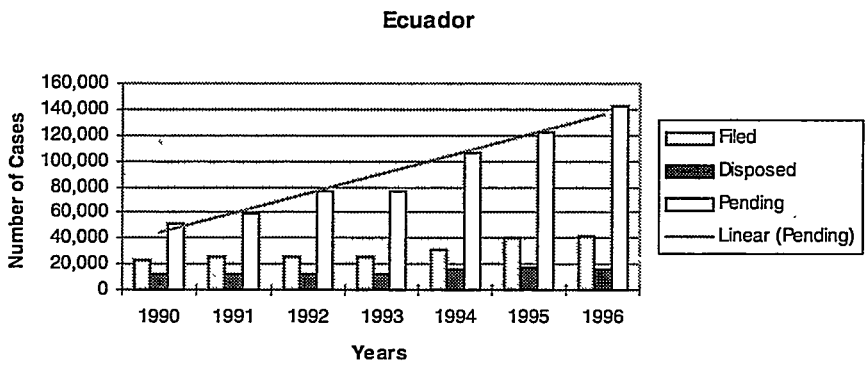
139. *See* BUSCAGLIA & DAKOLIAS, CASE STUDIES ON TIME DELAY (1996). According to statistics collected from the Supreme Court as of September 1993, the Supreme Court has a 12,000 case backlog, with 7,000 of those cases in the *Civil Sala* alone. Fewer cases are resolved in a year than the total number of cases that enter the system in that year.

140. Hours of work are from eight a.m. to noon and then from two to four p.m.

141. *See* Pachano, *supra* note 133 (noting low public opinion polls of judiciary and reform efforts).

142. The French judiciary comprises two separate and independent court systems: the administrative court system, headed by the Council of State (*Conseil d'Etat*), and the judicial, headed by the Court of Cassation. At the first instance level, the judicial system itself divides into two: the *Tribunal de Grande Instance*, the court of general jurisdiction that sees any matter not handled by a special court, and the special courts. This study focuses on a special court, the *Tribunal de Commerce*, which has exclusive jurisdiction over commercial disputes in which the parties are corporations, commercial partnerships, or individual proprietors. The cases included are those that follow the normal route (*judgments au fond*) and not those under the expedited route (*refere cases*), which take significantly less time to decide. Eighty-five percent of the case follow the normal process.

143. *See* President Chirac Announces Judicial Reform, FBIS, Jan. 20, 1997, *in* FBIS, Doc. No. FBIS-WEU-97-013 (stating, in a live address to the nation, that "[t]he situation [of the French judiciary] is unsatisfactory and the French feel this directly in their everyday life: [s]uspicions linger about the magistrates' independence from those in political office; [f]undamental human rights are sometimes disregarded; [t]he number of cases do not cease to increase, while the means to cope with them have not developed sufficiently. Justice is, so to speak, threatened with asphyxiation.").



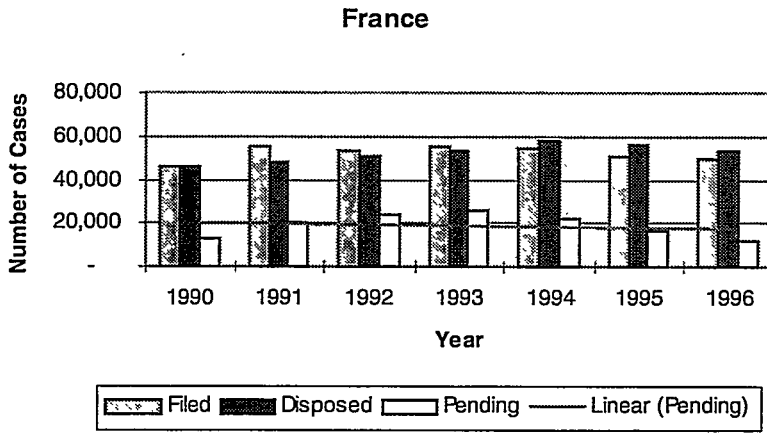
system is the subject of particular debate. What makes the *Tribunal de Commerce* unique is that its judges are lay persons elected by tradespeople in the jurisdiction.[144] The appointment, a voluntary, unpaid position, lasts for two years, and is renewable for up to fourteen years.[145] The disciplinary and budgetary process, however, are both managed by the Ministry of Justice.

¶68 *Institutional efficiency:* As in Germany and Singapore, the French commercial courts enjoy high clearance rates. From 1990 to 1996, the number of cases filed at the *Tribunal de Commerce* increased by only three percent, despite a twenty-one percent rise in 1991. The number of cases disposed also increased slightly, by approximately 7,000 cases, or seven percent over the same period. Overcompensating for the rise in demand has allowed the number of pending cases to decrease by about 1,000 cases from 1990 to 1996. There was a dramatic fifty-one percent rise in 1991 in the number of pending cases, however, which only began to drop as the clearance rate topped 100 percent in 1994. Clearance rates grew from 101 percent in 1990, to 108 percent in 1996, with a dip to eighty-seven percent in 1991. The operational budget grew consistently as well with a twenty-seven percent increase in 1994, after which the pending cases began to decline by sixteen percent in 1995, and then by twenty-seven percent in 1996. The Ministry of Justice manages the budget and appears to increase the budget according to the change in demands for judicial services.

¶69 The Tribunal de Commerce does not have its own personnel.

144. Such tradespeople include merchants, heads of business and past and present members of the Tribunal and the Chambers of Commerce and Industry.

145. After the first term, each subsequent term lasts four years.



Instead the separate Office of the *Greffier*, the clerks of the court, is responsible for filing and administering the cases for the *Tribunal de Commerce*.[146] A cooperative culture like this is being tried in many courts in developing countries.[147] The office does not handle secretarial work, however; judges are responsible for such tasks and normally use assistants from their place of work (i.e. the corporations). This in turn may mean that corporations employing judges are subsidizing the judicial system. On a national level, court administration is managed by the Ministry of Justice under the executive branch, which also sets promotion and salary standards.

¶70 *Historical and Economic Context:* The government has vowed that the *Tribunal de Commerce* will be reformed in the near future, and parliament has appointed a commission to study ways of improving the system. There are a number of complaints about the way it currently operates. One report indicates that out of 172 judges, 118 are chairmen or managers of corporations, and fifty-four were elected from corporations that have 500 employees or less.[148] As the judges are practitioners, they tend to render decisions based on economic rather than legal arguments. The decisions, therefore, may be fairer from a business than a legal point of view.[149] Although the judiciary is making efforts to improve the training of these judges, its time is constrained by the fact that judges tend to work multiple jobs. So far, the only organized training lay judges receive is a

146. The *greffiers*, civil servants who are appointed after undergoing training and passing an exam, are responsible for recording judgments and statements made by the parties, and for preserving court records. The Office of the Greffier has additional responsibilities, which include maintaining the local registries of companies.

147. For an example of a pilot project involving public-private partnership, see Javier Said, Modernizacíon de Juzgados de Itagui 9 (1998) (unpublished paper, on file with author).

148. Interview with Denis Bensaude, French attorney, in Paris, France (Aug. 15, 1999).

149. Interview with Eloise M. Obadia, Counsel at World Bank, ICSID, in New York (June 15, 1998).

one-week course for newly elected judges. By comparison, some lawyers have noted that a simple case can take at least six months to reach resolution.[150]

¶71 There are those, however, who think that while the system may need reforming, the volunteer judges should remain. There are fewer delays in the commercial courts than in other French courts, and the direct cost per case is a low thirty francs.[151] Moreover, no greater number of commercial court decisions are overturned on appeal than decisions of other courts in the French system, suggesting that the quality of judgments may not be as poor as some claim.[152] Paris has only one *Tribunal de Commerce*, consisting of twenty chambers with 180 judges. Hearings are oral, and both parties must be present. Parties filing cases in this court do not have to be represented by lawyers, though many prefer to be. Judges normally sit in panels of three, with one judge acting as president of the panel.[153]

F. Germany[154]

¶72 *Historical and Economic Context:* As a result of German reunification in 1990, the judiciary underwent a transition during which laws that conflicted with the laws of the Federal Republic of Germany were abolished. In addition, unification caused many economic adjustments that have affected the courts. Special committees were established to review whether sitting judges had the necessary training to work under the market economy. East German lawyers, however, enjoy full rights to practice law. The law schools underwent changes in the curriculum so that their preparation would be adequate for the new system.

¶73 *Public Confidence:* Although a 1994 survey showed that ninety-five percent of those sampled have confidence in the legal system, the State

150. *See id.*

151. *See* Jean-Louis Borloo & Henri Piagnol, *Réussir la réforme des tribunaux de commerce*, TRIBUNE, July 3, 1998, at 34.

152. *See id.*

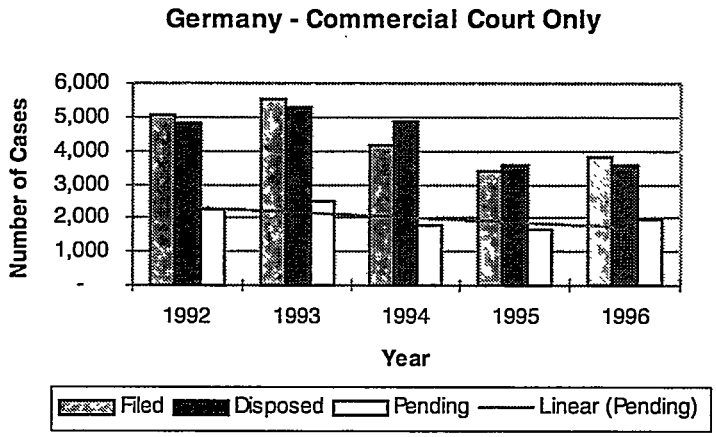
153. The president has special powers to deal with urgent cases.

154. The German judicial system includes three separate court systems: the ordinary courts, the specialized courts, and the constitutional courts. Within the ordinary court system, there are four levels of courts: the local court (*Amtsgericht*), the regional court (*Landgericht*), the higher regional court (*Oberlandesgericht*), and the Federal Court of Justice (*Bundesgerichtshof*). There is also the Federal Constitutional Court which is the Supreme Court that also rules on constitutional disputes. The ordinary court of first instance is the Amstgericht, which hears both criminal and civil cases, including commercial cases below a certain monetary amount (DM10,000). The *Landergericht* is the court of first instance for cases not specifically assigned by law to the *Amstergericht*, and the court of second instance for other cases. Similarly, the *Oberlandesgericht* functions as a court of both second and third instance in reviewing *Landergericht* decisions. This study focuses on the Berlin *Landgericht* because it serves as the court of first instance for commercial cases above DM10,000. Although there are no special commercial courts in Germany, some *Langericht* Courts, including the one in Berlin, have commercial chambers comprised of a professional judge and two lay judges from the business sector. Lay judges are appointed by nomination of the local Chamber of Industry and Commerce.

Advisory Council has prioritized the modernization of the judiciary. Council members have recommended a new fee structure, training with an emphasis on writing briefer judgments, mandated arbitration prior to filing an action, and, generally, encouragement for greater efficiency in litigation. The Council also indicates that greater emphasis should be accorded to the first instance civil court system and to moving toward a system where highly qualified judges render decisions alone rather than on a panel. Finally, it aims to improve the use of internal resources by requiring estimated budgets for each court.

¶74 *Institutional efficiency:* The study found that between 1992 and 1996, the number of cases filed in the civil courts in Berlin decreased, especially in 1994 (thirty-two percent) and 1995 (twenty-three percent). The number of disposed cases also decreased, with the largest drop in 1995 (thirty-eight percent). However the clearance rate grew, which resulted in a drop in the number of pending cases overall during this period. There was a seventeen percent increase in pending cases in 1996, which is explained by the declining clearance rate from 1995 to 1996. The clearance rate dropped during this period (from ninety-six percent in 1992 to ninety-three percent in 1996), although in 1994 the clearance rate was a remarkable 117 percent.

¶75 The clearance rate increase may be explained also by a seven



percent operational budget increase in 1994; the judiciary managed its own budget. The following year's budget, however, fell seventeen percent, and productivity declined. The operational costs for the court as a whole (commercial and civil) grew steadily from 1994 to 1996. In 1994 the regional court of Berlin added one commercial chamber to the fifteen it already had, although, due to budget constraints, the chamber has not been filled.

¶76 The number of judges in Berlin grew from 125 in 1992 to 156 in 1996, but only one of the new positions was that of a commercial judge. Today, the 156 judges who work in civil and commercial courts rely on a staff of 168. Three chambers share a registry office. Although the system has been quite efficient, cost per case and other access issues must also be considered. For example, a litigant often needs a different lawyer for each instance—increasing the cost of moving into different levels of the judicial process. In addition, there is no legal culture of ADR; it is taken for granted that once cases are filed they proceed to trial or settle. This may affect the time it takes for a case to be fully disposed. The fact that the average duration of a commercial case in Berlin is fifteen months, may be a result of a legal culture of strict enforcement of procedural time limits.[155]

¶77 *Judicial Independence:* Confidence in the judiciary is connected to the judiciary's independence. Judges are appointed for life terms with a five-year probationary period. Judicial salaries are only about twice that of the average net salary.[156] Even with the involvement of the Ministry of Justice in the appointment and disciplinary process, confidence in the judiciary is high.

G. Hungary[157]

¶78 *Historical and Economic Context:* 1989 brought the beginning of large scale privatizations and an influx of foreign investment as Hungary made the transition to a market economy, which led to an increase in commercial cases filed. More specifically, as a result of a 1993 procedural reform altering district court jurisdiction, there was a sharp increase of cases in the district court in Budapest. While there has been a proposal to install an appeals court to reduce court overload, no decision has yet been made.

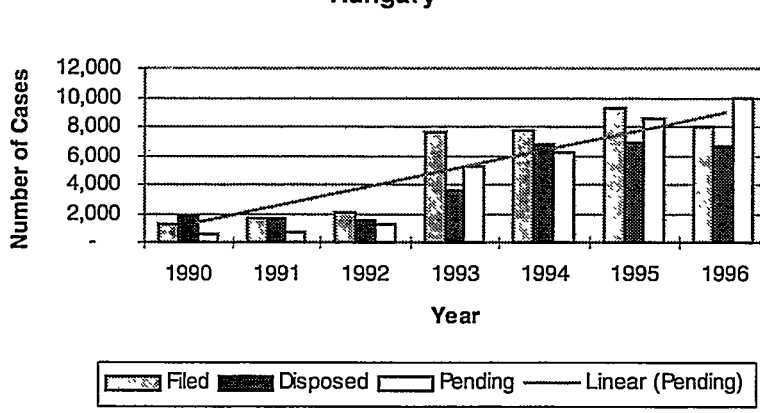
¶79 *Institutional efficiency:* The number of cases filed from 1990 to 1996 increased by 521 percent, with a 259 percent jump in 1993 alone. The number of cases disposed increased 263 percent, with the greatest growth spurts in 1993 and 1994 (125 percent and 93 percent, respectively), probably

155. In Germany, judges who responded to the survey noted that procedural time limits are enforced.

156. Average judicial salary is US$53,000 compared to the average net salary of US$27,510.

157. In Hungary, the judicial system includes a Constitutional Court, the Supreme Court, county courts, and local courts. Local courts, usually referred to as city or district courts, are courts of first instance with general jurisdiction over cases that the law does not specifically assign to the county courts. The county courts are courts of second instance for suits initiated in the local courts, while courts of first instance for suits assigned to it by law. The county courts hear cases in panels of three professional judges while the local court is composed of a three-member council presided over by a professional judge and two lay advisors, who have the same rights and obligations as the judges. Citizens without prior criminal records who are entitled to vote and are at least twenty-four years old may be elected as lay advisors. Since only five percent of the first instance commercial cases are filed in the county court, this study includes information from the District Court of Budapest, where the majority of cases are filed. Each county court has territorial jurisdiction over its own county, while the jurisdiction of the County Court of Budapest extends to the boundary of the city of Budapest.

in reaction to the rise in cases filed. The court, however, also experienced a steep rise in pending cases, with a 336 percent jump to 5,203 in 1993 and reaching 9,891 in 1996. This increase occurred because the rise of the filing rate outpaced the rise of the disposal rate. The clearance rate during this period steadily decreased from 144 percent to 47 percent in 1993, but has



since rebounded, reaching 84 percent in 1996. To compensate for the large demand on the courts, the budget was increased by 185 percent in this period and peaked in 1994 before it decreased in 1995 and 1996. The judges work with two to five clerks in the court,[158] and with a staff of seventy for administrative tasks. All in all, this shows a judicial system attempting to adapt to the change in the legal culture. Although the adaptation has been difficult for the courts, the pace has been rapid.

¶80 *Judicial Independence:* Hungary's judiciary is financially independent from the executive branch of the government. The president of the County Court of Budapest has authority and sole discretion to apportion the budget for the county and the six local courts. It is not clear, however, whether such data as that described in this study is taken into consideration in budgetary decisionmaking. There has also been a proposal to create a National Judicial Council that would administer court budgets and set standards for budgetary apportionment—thus, institutionally separating judicial power from the executive and legislative branches.[159]

¶81 Fifty-five percent of Hungary's appointed judges were appointed before 1989. Although most judges are respected as impartial and fair,[160]

158. Statistics were provided by the Statistics Department in the Ministry of Justice.

159. *See SZDSZ Official Views Election of Judicial Council Members*, FBIS, Oct. 31, 1997, in FBIS Doc. No. FBIS-EEU-97-304 (emphasizing that jurisdiction of Ministry of Justice over affairs of court bodies would cease in future, ensuring that domestic political scandals that have surrounded appointment of county judges since 1990 will not recur).

160. *See Hungary, in* NATIONS IN TRANSIT 185 (Adam Karatnycky et al. eds., 1997).

one complaint is that judges are often inexperienced and slow to adapt to the new system. There is a proposal to increase the amount of time a law graduate must serve as a junior clerk before being permitted to sit for the bar exam.[161] In addition, it is proposed that the term for judicial appointments be fixed, although it could subsequently be converted to life. In part because of low judicial salaries, approximately seventy percent of the judges are women.[162] Judges are currently appointed by the President upon the recommendation of the Ministry of Justice and with the consent of the Judicial Council. The judiciary has requested formal independence from the executive, which it received in 1989.[163] It has also recently sought a substantial raise in judicial salaries.[164] The average judicial salary is now about two times that of the national average.[165] As a result of such attempts to increase judicial independence, public and business confidence in the judiciary should increase correspondingly. Coupled with a free press, these factors should encourage the judiciary to keep pace with the rapid changes in the country's economy and their affect on judicial caseloads.[166]

H. Panama[167]

¶82 *Judicial Independence:* Panama's Supreme Court is charged with the administration of the judicial branch. In 1990, an administrative secretariat was established under the court to manage the administrative, financial, and personnel issues of the judiciary. In 1993, a judicial school was established under the Supreme Court with courses geared toward training newly appointed and current judges. Legal personnel who enter the judicial branch do so through a merit-based competition.[168] Such competition should not be surprising given that judicial salaries are ten

161. The period would be increased from two to three years.

162. *See generally* Andras Sagó, *Contemporary Problems of Judiciary in Hungary, in* SOCIAL ROLE OF THE LEGAL PROFESSION 132 (referring to the 'feminization' of the Hungarian judiciary).

163. *See id.*

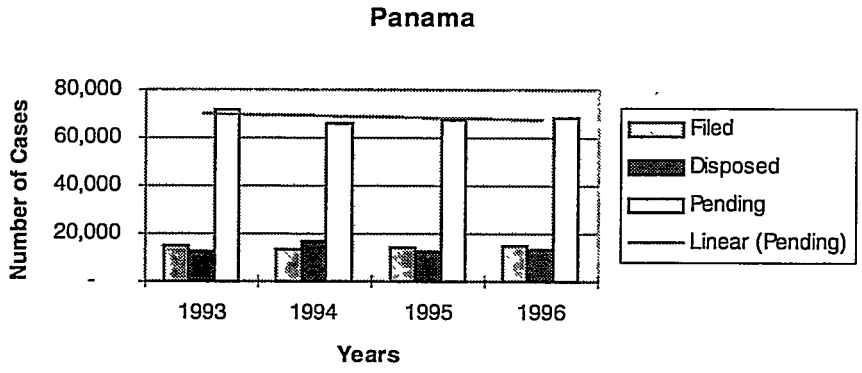
164. *See Government discusses Judiciary, Postabank*, FBIS, Apr. 4, 1997, in FBIS Doc. No. FBIS-EEU-97-094 (stating that the cabinet approved four judicial reform bills, including one on judges' legal status and payment).

165. The average salary for judicial employees (not necessarily judges) is US$10,000, while the average salary is US$4,120.

166. Freedom of press is rated as good. *See* Rapport 98, Reporters san frontieres (visited Feb. 15, 1999) <http://www.rsf.fr./ACTUALITE/rapportnew/FR/accueil_vf.html>.

167. The Panamanian judicial system is made up of the Supreme Court, four Superior Tribunals, the circuit courts, and the municipal courts. Supreme Court judges are appointed to ten-year terms by the President with the approval of the Assembly, and all other judges are appointed by the next higher level court. This study focused on the nineteen Circuit Courts (*Rama Civil*) in Panama City. The Circuit Courts handle all cases that involve more than PAB1,000. Further, they act as the court of appeal for municipal courts. Each Circuit Court judge has an average of eleven assistants.

168. *See Appendix, Legal System of Panama*, 40 ST. LOUIS U. L.J. 1393, 1394 (1996).



times that of the average net salary in Panama.[169] Under the Constitution, the judiciary is an independent branch of government, though there have been accusations that the judiciary lacks independence and is corrupt.[170] The fact that judges are appointed for ten-year terms by the next level court may contribute to this perception. Other obstacles to effective justice include a lack of court manuals on procedure, and a limited free press.[171]

¶83 *Institutional efficiency:* Over the period from 1993 to 1996, the number of cases filed in the Circuit Court in Panama City overall dropped by eleven percent, though the largest decline was in 1994 with a thirteen percent drop. The number of disposed cases fluctuated dramatically, with a thirty-nine percent rise in 1994, and a twenty-four percent drop in 1995. The number of pending cases dropped slightly during this period. The clearance rate increased from seventy-nine percent to eighty-eight percent, peaking in 1994 at 127 percent, causing a decrease of seven percent in the number of pending cases. This overall improvement may have been helped by the decline in cases filed, even though the number of judges in the circuit courts remained constant.[172]

¶84 The total budget increased over the period 1990-1996, with the major increases taking place in 1992 and 1995 (27 percent and 25 percent). The capital budget grew by 108 percent in 1992, only to drop between 1992 and 1993, and rise again by 748 percent in 1995. The 1992 investment

169. Judicial Salaries are US$28,000, while the average salary in Panama is US$2,750.

170. *See, e.g., Officials View U.S. Report Citing Judicial Corruption*, FBIS, Feb. 1, 1998, in FBIS Doc. No. FBIS-LAT-98-032 (referring to U.S. annual report on human rights situation around world, which states that Panama's judicial system "is prone to corruption and political manipulation.").

171. *See, e.g.*, Committee to Protect Journalists, *Country Report: Panama* (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Americas/Panama.html> ("Panama's reputation for respecting press freedom was severely compromised by the government's attempt to expel journalist Gustavo Gorriti from the country in response to his investigative reporting.").

172. There are 19 judges in the *Juzgados del Circuito* in Panama City. This number remained the same from 1990 to 1996.

period coincides with an improvement in clearance rate in 1994. Panama represents a country where the clearance rates are quite respectable given the demand on the courts, though the large number of pending cases may prevent the courts from improving efficiency.

I. Peru[173]

¶85 *Historical and Economic Context:* The 1990s have brought many judicial reform efforts. In 1992, for example, the Executive Board (*Consejo Ejecutivo*) and a judicial management office were created for the overall administration of the courts.[174] Similarly, the 1993 Constitutional Reform established the National Council of the Magistracy (*Consejo Nacional del la Magistratura*) to select, appoint, ratify, and remove judges and prosecutors at all levels.[175]

¶86 In 1995, the Peruvian government launched an emergency judicial reform that was to last until the end of 1998.[176] An executive secretary with full administrative power for the reform period was appointed, and the budget of the judiciary was increased by fifty percent to finance the modernization of the administration, which included an administrative team in the Supreme Court. The administrative team took measures to improve the management of human and financial resources, information technology, courtroom organization, and infrastructure.

¶87 *Judicial Independence:* Judges are appointed to the bench for life terms with retirement at seventy and review after seven years. As an incentive for judges to improve their performance, the reformers created a system of bonuses based on productivity. Further, they raised the salaries

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173. The judicial sector in Peru consists of the Supreme Court, Superior Courts, Specialized Courts (*Juzgados*), and Justices of the Peace. The Supreme Court is a national court, while the Superior Courts' jurisdiction is limited to their districts. Under the Superior Courts are the Specialized Courts and the Justices of the Peace. This study reviews the 33 Superior Courts in Lima.

174. The appointment of a court administrator with close ties to the military has raised questions about these reforms. *See e.g., Editorial Views New 'Meddling' in Judicial Branch*, FBIS, June 1, 1998, in FBIS Doc. No. FBIS-LAT-98-152 (questioning, in light of this appointment, "[w]hat kind of judicial reform is being undertaken when Congress and the executive branch are doing everything possible to adversely affect the independence of magistrates.").

175. Recent reforms have, however, spurred criticism. The Justice Committee of the Peruvian Legislature, for example, has proposed the modification of several articles of the Judicial Branch's Basic Law to give provisional magistrates the same rights and benefits of permanent ones and to authorize the Executive Commission of the Attorney General's Office to appoint "provisional" prosecutors. "The objective of this action is not improving the Judicial Branch, which is controlled through the large number of provisional prosecutors who have no stability[, but rather] . . . a way to manipulate the election of representatives from the Supreme Court of Justice and the Attorney General's Office to the [National Election Board], which eventually will be presented with Alberto Fujimori's unconstitutional candidacy for his second reelection. Does anyone doubt it will be approved by the plenum?" *Article Says Judicial Branch 'Submissive' to Executive*, FBIS, Dec. 11, 1997, in FBIS Doc. No. FBIS-LAT-97-345.

176. *See* José Dellepiane Massa, *La Reforma Judicial Peruana, in* REFORMA JUDICIAL: EXPOSICIONES DEL SEMINARIO TALLER 17, 17 (Ana Teresa Revilla Vergara ed., 1997).

of some judges by over seventy percent.[177] Salaries of judges are approximately fourteen times that of the average net salary, which should attract qualified lawyers.[178] Training for the judges was also improved, expanding to include computer courses and management courses in quality and productivity. The number of judges has risen as a result. On the judicial staff level, reformers targeted nepotism by, for example, prohibiting non-salaried clerical staff and not allowing judges' family members to work in the courts.[179]

¶88 *Institutional efficiency:* Pilot courts were established following a cooperative administrative model. New computers have been purchased for the courts in Lima. All courts in Lima now have photocopiers, and judicial information booths have been installed for public information. Further, to alleviate the backlog in the Lima courts, temporary courts were established,[180] including eighty first-instance courts. Temporary judges are also used during judges' vacations. A new civil procedural code passed in 1993 emphasizes judicial management of the trial process, and mandates conciliation in order to increase the judicial activity in settlement or conciliation cases. The code includes only six procedures, while the older version contained over one hundred.

¶89 The data gathered in Peru shows a steady improvement in clearance rates of the Superior Courts in Lima, suggesting that some of the reforms are having an effect. Between 1995 and 1997, the number of cases filed increased by six percent, but the number of cases disposed grew by over sixty percent. The number of cases pending grew by sixty-six percent in 1996, but dropped by twenty-three percent the following year, which may be because a program of disposing of old and inactive cases was implemented. However, the number of pending cases does not seem to be problem.[181] Reflecting the rise in cases disposed, the clearance rate grew steadily during this period, rising from sixty-six percent in 1995 to an incredible 126 percent in 1997. Operational costs increased by about 100 percent in 1996, and eighty-seven percent in 1997, which may have contributed to this increase.

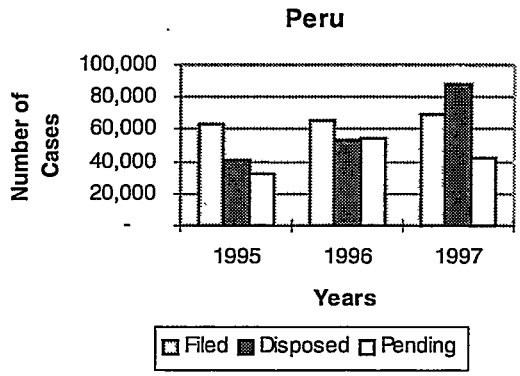
177. To attract more qualified judges, the reformers added a list of perks for judges, including life and health insurance, credit facilities for the purchase of cars, computers, personal loans, mortgages, travel loans, and cultural and recreational programs.

178. Judicial salaries are US$31,200 while the average net salary is US$2,310. As in many other Latin American countries, however, top law school graduates in Peru do not generally become judges given the low pay and prestige associated with such judicial positions, as compared to other legal career options. One aim of reform efforts is to attract stronger candidates to the judiciary.

179. Since the reform began there have been 440 resignations due to nepotism in the judiciary. Fifty-nine judges and close to 2,000 employees have been dismissed.

180. Thirty-five permanent judges in the courts sampled, while there are an additional 40 that are temporary.

181. The backlog index is .67 in Peru, while in the United States it is .98.



¶90 *Public Confidence:* Despite reform programs and improved clearance rates in the courts, however, distrust in the judiciary continues.[182] One poll shows that over seventy percent of the population does not trust the judiciary, making it less trusted than either the national police or intelligence services.[183] A poll of the business community shows that ninety percent of those interviewed would not use the judiciary for resolution of legal disputes, and that over sixty percent think that the judicial process takes too long. Delays remain a constant problem. It is said that an ordinary case takes approximately three years to reach resolution, even though the code of civil procedures defines the maximum length to be 300 days. A breach of contract case seeking $200,000 can take four years and cost over $27,000 to process.

¶91 Although training and an increase in resources allocated to the judiciary have shown some positive results so far, further reforms may be needed to improve confidence in the judiciary. With poor freedom of the press, the media is not necessarily free to assist in these difficult issues. Peru's experience confirms that improvements in clearance rates are not sufficient; quality in decisions and independence in the judiciary are equally important to the public's confidence in the system.

182. The press continues to cover the reform process with some skepticism as well. "Many Peruvians regard the media as a bulwark against government corruption and malfeasance in a country whose legislative and judicial branches are seen as in the thrall of the president." Committee to Protect Journalists, *Country Report: Peru* (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Americas/Peru.html>.

183. *See Peru: Poll Shows People Do Not Trust Most Government Institutions*, FBIS, Sept. 3, 1997, *available in* FBIS, Doc. No. FBIS-LAT-97-246.

J. Singapore[184]

¶92 *Public Confidence and judicial independence:* Singapore, having undertaken a concerted reform effort, can be said to have an efficient judicial administration system. The system enjoys broad public support.[185] One survey associated with this study indicates that ninety-seven percent of the public agreed strongly that the courts administer justice fairly. Some foreign and local observers, however, have been critical of Singapore's legal system,[186] which has been called paternalistic, and, some argue, lacks independence from the other branches of government.[187] Further, it has been known to restrict freedom of speech by holding in contempt of court those who speak out against it.[188] The freedom of the press is also restricted.[189] The judiciary has shown efficient management of the budget,

184. Singapore's judicial system consists of the subordinate courts and the Supreme Court, which is divided into two: the High Court and the Court of Appeals. The subordinate courts of Singapore include the District Court and the Magistrate Courts, which include both the Coroner and Small Claims Tribunal. The High Court of Singapore, the focus of this study, has both original and appellate jurisdiction for civil and criminal matters. In 1993, a single Court of Appeal was established; the link with the Privy Council, formerly the final court of appeal, was removed in 1994. The Supreme Court has roughly 12 full-time regular appointees who serve until retirement. However, there may be additional judicial commissioners, who may be appointed for one case or for a term of months or years. The government has the authority to appoint these judicial commissioners, who have the same responsibilities as the judges. *See* SUPREME COURT SINGAPORE, SUPREME COURT SINGAPORE: THE REORGANIZATION OF THE 1990'S (1994). Both because of the substantial reforms that Singapore has undertaken as well as the fact that it is the only common law system in this study, the outline of Singapore's legal system is presented here in greater detail.

185. Singapore's judicial system has consistently ranked highly in the *World Competitiveness Yearbook*, published yearly by the World Economic Forum. In 1998, it ranked fourth out of 46 countries in a study on the confidence in the fair administration of justice in the country. *See* WORLD ECONOMIC FORUM, *supra* note 109. In 1993, Singapore scored 8.5 out of 10 for public confidence in the fair administration of justice, the highest of the countries ranked by the *World Competitiveness Report* that year. That compared with 6.9 for Japan and 6.4 for the United States. *See* HELENA H.M. CHAN, THE LEGAL SYSTEM OF SINGAPORE 182 (1995).

186. Singapore's use of corporal punishment, such as mandatory caning, has been particularly singled out for criticism, although the practice has wide public support in Singapore. *See* CHAN, *supra* note 185, at 173.

187. *See* Yeong Sien Sue, *Clarity or Controversy—The Meaning of Judicial Independence in Singapore and Malaysia*, 13 SING. L. REV. 85, 85 (1992); Anthony Lewis, *The One Thing Singapore Lacks: Justice*, JUDGES' J., Summer 1995, at 37, 37-38.

188. "Criticism which is unwarranted or discourteous or insulting may amount to contempt of court which is punishable under the Supreme Court of Judicature Act." CHAN, *supra* note 185, at 46; *see, e.g.*, *American Professor Guilty of Contempt for 'Scandalizing' Singapore Judiciary*, NEWS MEDIA & L., Winter 1995, at 18, 18-19. Outside the Parliament, the conduct of the Supreme Court may not be criticized except "in good faith." The Court justifies these actions in the name of upholding the reputation of the judiciary. *See* Yeong Sien Sue, *supra* note 187, at 98.

189. "Strict censorship and a tame press continue to characterize the press freedom climate in the city-state . . . . Using the threat of costly lawsuits, harsh national security legislation, and decades of indoctrination, Singapore's ruling People's Action Party, which has been in power since independence in 1959, has fashioned a predictably bland media culture." Committee to Protect Journalists (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Asia/Singapore.html>.

which provides judicial salaries at eighteen times the average net salary.[190]

¶93 A unique legal culture exists in Singapore: the right to bring legal actions carries with it the responsibility for timely and proper prosecution according to court rules and judicial direction. The system recognizes that citizens require a mechanism through which to test their disputes, but this service is available on strictly limited terms, with high standards for timeliness, cost, and appropriate procedure.[191] Parties are expected to observe strict adherence to time limits under penalty of costs or dismissal. In addition they are expected to make every effort to resolve their case under judicial supervision or with the help of a mediator.

¶94 *Historical and Economic Context:* The pre-trial conference was introduced in 1992 for all civil cases, and may be ordered at any time after commencement of proceedings. The conference provides the parties and the judge an opportunity to consider settlement and narrow the issues.[192] Hearings with the judges and those with the registrars were increased in 1992 and 1993 respectively. This change has been said to have reduced waiting time.[193] As part of the reforms, The Supreme Court has also doubled the number of judicial appointments[194]

¶95 *Institutional efficiency:* Court fees in Singapore have continued to rise to enforce these changes in the legal culture. The parties are no longer entitled to unlimited use of court time. Since 1993, the first trial day is free from added fee. Thereafter, each day of trial incurs a charge, which escalates with time in order to curb abuse.[195] As a result, over eighty percent of the cases take only one day to complete.[196] Like all their commonwealth counterparts, Singapore courts have authority to make cost orders against both the parties and their lawyers. A lawyer who abuses the civil process may be personally held liable for the costs incurred.

¶96 The data gathered confirms Singapore's reputation for strict adherence to case management. From 1992 to 1995 the number of cases

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190. Judicial salaries are about $500,000 while average net salaries are $26,730.

191. Parties are expected to make every effort to narrow the points at issue and to settle their claims wherever possible. Some scholars claim that the Singapore legal system's emphasis on extra-judicial dispute resolution reflects the country's traditional culture. *See, e.g.*, CHAN, *supra* note 185, at 175 ("Traditional informal modes of dispute settlement (e.g., mediation) are still much preferred. In recent years, this traditional attitude has received official support . . . .").

192. Although initially judges were present for pre-trial conferences, the conferences are now conducted by the Registrar. Judges were also relieved of other duties, such as bankruptcy petitions, which are now also heard by the Registrar. *See* SUPREME COURT SINGAPORE, *supra* note 184, at 44-45.

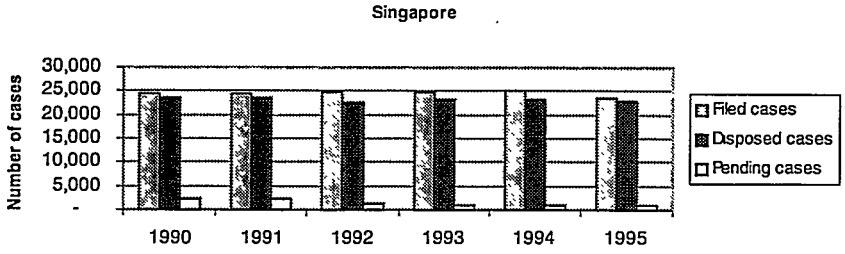
193. *See id.* at 58.

194. *See id.* at 56.

195. From the second to the fifth day, the fee is $1,500; from the sixth to the tenth day is $2,000, and each day thereafter $3,000. *See id.* at 67.

196. *See id.* at 66. The idea behind these fees is that they will not actually limit access, as might be expected, because most cases only require one day to complete anyway. Further, there are various exemptions, and the registrar has discretion to waive or reduce these fees in certain cases if warranted. Exemptions are provided for plaintiffs in cases involving damages for death or personal injury, family law, *habeas corpus* actions, and disciplinary proceedings of professional bodies. *See id.* at 68.

filed in the High Court of Singapore remained steady; in 1995 it decreased by six percent. The number of cases disposed also remained steady, but then decreased by six percent in 1995 as well. The clearance rate dropped from ninety-seven percent to ninety-one percent in 1992 and returned to



ninety-six percent in 1997. During this same period the number of cases pending decreased by over fifty percent, a change that cannot be explained by the clearance rate, but probably relates to other factors, such as case settlement. The number of pending cases decreased by thirty-nine percent in 1992 and then another thirty-six percent in 1993. Even though productivity did not increase, backlog reduction was a priority. This has resulted in Singapore's courts being the fastest of the group.[197] Operational costs increased steadily throughout the period at roughly twenty percent per year, showing that the reforms benefited from financial support. After a large investment in 1991, capital costs decreased during this same period. In 1996, however, there was a fifty percent rise in capital investment.

¶97 Judges of the High Court (and judicial commissioners) work with a registrar, deputy registrar and assistant registrars.[198] The staff have both judicial and administrative responsibilities.[199] Judges, who try an average of seven cases a year, play no direct role in case management, which is very different from many systems in Latin America. All of this work is managed by the registrar's staff and law clerks. Changes in the hours of the court were implemented in 1991, increasing court time by 10.5 percent.[200] This change also gave judges discretion to begin earlier in the day if necessary. In addition, the hours of the registrar's office have been extended, operating from Monday to Saturday.[201] The registry staff monitor time limits and hold the parties' lawyers to them strictly. The court has a strict policy of keeping set court dates.[202] Parties cannot agree to extend the time for setting a matter down for trial or for filing an appeal,

197. At 0.4, its backlog index is the lowest of the countries sampled; this should signify that it has the fastest courts.

198. The 20 judges that make up the High Court (12 judges and 8 commissioners) share personnel for administrative purposes. Judges are appointed by the President with the advice of the Prime Minister, who in turn consults with the Chief Justice.

199. *See* SUPREME COURT SINGAPORE, *supra* note 184, at 17.

200. *See id.* at 57.

201. *See id.* at 58.

202. To make sure cases are handled efficiently, the registrar's office schedules more cases than there are judges on the assumption that some cases will be settled. Some cases are, therefore, placed on a standby list. *See id.* at 53.

though they may by consent extend other time periods set out in the rules.

¶98 Singapore introduced electronic filing on a pilot basis in mid-1997 for lawyers whose offices are connected to the registry. Singapore has also introduced Technology Court, a video-conferencing system that allows lawyers to examine witnesses anywhere in the world.[203] Last autumn, the Singapore Academy of Law initiated a mediation project with the approval and support of the judiciary.[204] Changes in the way the courts work, the budget, and the increase in fees have all contributed to the increased productivity in Singapore—though some may argue it is at the cost of access.

K. Ukraine[205]

¶99 Under the new constitution of 1996, the judicial branch was deemed an independent branch of government. In addition, the constitution unifies the commercial courts with those of general jurisdiction. The Kiev Arbitration Court, which is part of the new legal culture, has been able to adapt more quickly than its colleagues in other neighboring countries. Perhaps this is because the demands on the courts were not as great and the courts were given time to adjust to the market economy.

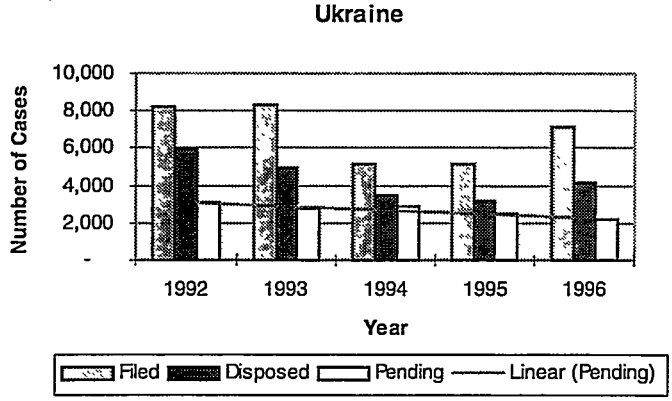
¶100 *Institutional efficiency:* This study found that over the period 1992-1996, the number of cases filed decreased by thirteen percent—there was a thirty-eight percent decrease, or a drop of 35,000 cases, in 1994, and a rise of thirty-nine percent in 1996. This rise may be due to the fact that in 1996 the court's jurisdiction was expanded to include cases involving individuals registered as entrepreneurs. In addition, the jurisdiction of the

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203. Each lawyer, the witness and the judge and court officials have a computer/television monitor. The courtroom is also outfitted with a large projection television. Documents can be shown on the monitors along with video material. Lawyers can also use the computer facilities for elaborate presentations if they wish. The fact that a witness is overseas or not available cannot be used to delay a trial.

204. Telephone interview with Neil Gold, Vice President of University of Windsor, Canada (July 20, 1998).

205. The Ukrainian judiciary consists of three separate systems: the courts of general jurisdiction, the arbitration courts, and the Constitutional Court. The general jurisdiction courts include the Supreme Court with 85 members, the *oblast*, and the *raion* courts. The arbitration courts, created in 1992 to hear cases between legal entities, consist of two levels: the high arbitration and the *oblast* arbitration court. This includes organizations, businesses, and government administrative bodies. The present survey included the arbitration courts, since the majority of the commercial cases now fall under their jurisdiction. Data was gathered on the Kiev Oblast Arbitration Court. In this court the main types of cases include bankruptcy, recovery of debts of contracts for goods and services, non-delivery, damages, lease agreements and breach of contract. The courts have 12 judges, and a staff of 17. There are 27 Oblast Arbitration Court Courts in the Ukraine, with 350 judges. In the capital city of Kiev, there are two courts of first instance: the Kiev City Arbitration Court and the Kiev Oblast Arbitration Court. The Kiev City Arbitration Court is designed to hear first instance cases from the residents of the city of Kiev, while the Kiev Oblast Arbitration Court has jurisdiction over the whole province of Kiev. Although prior to 1996 the High Arbitration Court heard certain first instance cases, it currently is only a court of appeal.



High Arbitration Court was limited to that of an appellate court. The number of cases disposed also fluctuated, dropping by eighteen percent in 1993 and thirty percent in 1994, but rising by thirty-three percent in 1996. The number of pending cases decreased by thirty percent, even though the clearance rate dropped from seventy-two percent in 1992, to fifty-eight percent in 1996, which may imply that a program of delay reduction was implemented.[206]

¶101 *Historical and Economic Context:* While the overall number of cases filed dropped, there has been an increase in the number of bankruptcy cases filed in the arbitration court, as well as in the number of cases involving state enterprises. It is also common for the arbitration court to hear problems involving the terms of lease contracts for buildings and apartments. [207] Further reform will follow in the future as the new 1996 constitution stipulates that, by the year 2001, the arbitration courts should be unified with the courts of general jurisdiction.[208] With Ukraine's push to open capital markets and stimulate business growth and investment—central to which is the closing of contracts between parties—the arbitration court system will likely move even further from the periphery of Ukraine's court system to a central position with an increasing docket.[209]

¶102 *Public Confidence:* The drop in the number of cases filed may be explained by a decline in economic activity, and by the lack of public confidence in the judicial system.[210] The judiciary is said to be the weakest

206. Alternatively, this could lead one to question the reliability of the pending case data.

207. *See* Roman Woronowycz, *Ukraine's Court System: "The court of contracts,"* UKRAINE WKLY, Feb. 16, 1997, at 1 ("To put it simply, the arbitration court of Ukraine is a court of contracts. Its function is to settle disputes between parties over disagreements on contractual responsibilities, payment of debts for products, services or properties.").

208. "[T]he Higher Arbitration Court will cease to exist and the functions of the lower arbitration courts will be assumed by commercial court divisions within the courts of general jurisdiction." CENTRAL & E. EUR. LAW INITIATIVE, AM. BAR ASS'N, JUDICIAL OVERVIEW OF CENTRAL AND EASTERN EUROPE AND THE NEW INDEPENDENT STATES OF THE FORMER SOVIET UNION 5 (1996).

209. *See* Woronowycz, *supra* note 207, at 1.

210. The press has been covering the reforms, but "[o]ver the past few years, press freedom conditions in Ukraine have gone from promising to precarious, if not dangerous. Although the number and variety of media outlets has continued to grow, attempts to

branch of government.[211] Judges are appointed for five year terms by the President, after nomination by the Supreme Judicial Council and approval of the High Arbitration Court. There have been complaints about procedural violations: 30,000 cases were completed with procedural violations in the *Oblast* courts in the first six months of 1994.[212] Public distrust also comes from the fact that it is difficult to enforce judgments: in commercial contracts, for example, the law is often not enforceable in court because essential terms may have been omitted in order to avoid tax liabilities.[213] In addition, the press is not perceived as having a great deal of freedom.[214]

¶103 *Judicial independence:* The courts themselves are riddled with problems. Judges do not have access on a timely basis to current laws, a difficulty exacerbated by the fact that there is a new constitution and code of civil procedure.[215] Physical infrastructure is lacking and space is limited. Many courts lack modern technology; some do not even have typewriters or photocopiers.[216] Judges' salaries, while comparable to salaries in the legislative and executive branches, are far below private sector salaries, and are not always paid on time.[217] Two or three months delay is not uncommon.

¶104 As in many Latin American countries, Ukrainian judges are responsible for the administrative work of the courts. It is common for judges to hear the grounds for filing a case, decide whether there are sufficient grounds, assign the case, and then go on to hear the case. Attending to the public takes up a large part of a judge's day.

¶105 As in many Eastern European countries, the administration of the courts is under the authority of the Ministry of Justice, which is responsible for the budget as well as the policy of the administration. Thus, any

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manipulate their content by the administration of President Leonid Kuchma, his political rivals, local officials, and related business interests have caused a profound erosion of press freedom in the country." Committee to Protect Journalists, *Country Report: Ukraine* (visited Feb. 15, 1999) <http://www.cpj.org/countrystatus/1997/Europe/Ukraine.html>.

211. *See* Viktor Shishkin, *Problems and Prospective Solutions for Establishing a Judiciary in Ukraine*, 3 PARKER SCH. J. E. EUR. L., 31, 31 (1996).

212. *See On the Reform of Judicial System*, FBIS, Oct. 20, 1994, in FBIS, Doc. No. FBIS-SON-94-208.

213. Interview with the Honorable Sandra Oxner, Canadian Provincial Judge and President of Commonwealth Judicial Training Institute, in Halifax, Canada (September 8, 1998).

214. The independent media received a 4.5 out of 7 rating. One law, for example, forbids damaging the honor and dignity of people, especially the President of Ukraine. *See* NATIONS IN TRANSIT, *supra* note 160, at 39.

215. *See, e.g.*, Memorandum from Sandra Oxner, Ukraine: Proposed Legal Reform Project ¶ 11 (February 14, 1997) (on file with author) (noting that judges do not have sufficient access to laws, decrees, higher court decisions and directions or scholarly articles and general judicial information necessary to do their work).

216. *See id.* at ¶ 9.

217. Salaries of judges have been compared to those of janitors. *See Official Views State of Judicial Reform*, FBIS, Dec. 25, 1996, in FBIS, Doc. No. FBIS-SOV-97-058-S.

changes must be implemented with the cooperation of both the judiciary and the Ministry of Justice. This may cause delays or friction in the reform process.

V. ANALYSIS

A. Trends

¶106 These eleven countries have provided examples of different legal cultures and their effects on efficiency. Many countries appear to be able to meet judicial demand when comparing data at a given point in time. The clearance rates, for example, of many of the courts sampled appear to be respectable. A closer evaluation of judicial performance in each country over time, however, reveals a different picture; this picture indicates that further reforms are needed. That is, looking at clearance rates is not enough—there is a need to look at a combination of indicators as well as congestion rates to understand the situation facing these courts.

¶107 Different cultures have produced different results. Some countries have adopted working environments based on strict management of case processing.[218] As seen in Singapore and Peru, increased productivity through clearance rates can be a positive result of judicial reforms. There are, however, additional elements of judicial reform that must be addressed. Such changes take time. Many of the countries are experiencing a rise in cases filed as well as the number of cases pending. Although there has been an overall increase in the number of cases filed, the trend is for courts to adjust their performance to meet growing demand by resolving more cases. This is not, however, always enough to improve clearance rates. Even in courts where the number of cases filed has decreased, this has not translated into dramatic reductions in pending cases.

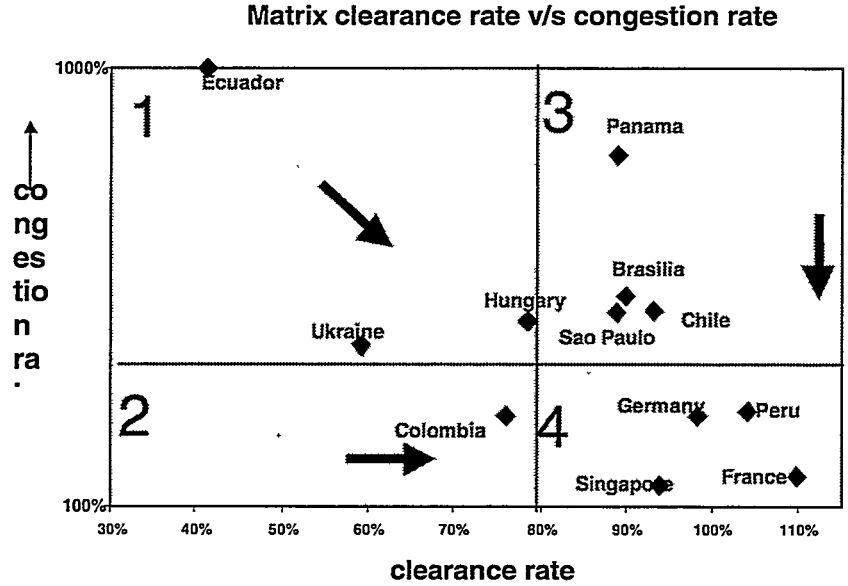
B. Some Possible Reforms

¶108 Although different reforms for improving access, quality and timeliness can be considered, this section concentrates on three possible reforms. These include improving productivity, increasing the number of judges through the establishment of temporary courts, and increasing judicial capacity by means of permanent courts.

¶109 Improving court productivity can include information technology, training, new case processing designs and cultural changes. Cultural changes, in particular, can be difficult because they require changes in how people work. The extent to which this change will be

218. Such factors can have a positive effect on the pace of litigation. *See* REEXAMINING THE PACE, *supra* note 44, at 49.

necessary depends on what kind of condition the judiciary is in. Improved productivity is often considered part of, and complimentary to, the second and third reforms proposed. While such reforms may require fewer resources than the latter, they necessitate more commitment by the



judiciary. Out of the three reforms, improving productivity may be more easily implemented as a pilot.

¶110 Where increased productivity is not enough to improve judicial capacity, the establishment of *temporary* courts may provide additional judges. Such courts can be used where there is a large number of pending cases. Temporary courts are particularly useful in circumstances where the clearance rate is acceptable, but the backlog continues to grow. In such cases, retired judges might be brought on temporarily to alleviate the backlog, without requiring a fixed continued future cost. In addition, such temporary courts may provide a mechanism for the judiciary to demonstrate success during a modernization process.

¶111 When increased demand on courts is expected to continue over time, the establishment of additional *permanent* courts could be considered. An analysis of past trends and future expectations is needed to inform this decisionmaking process. Consideration also should be given to the budget, since permanent courts require additional judicial resources to be sustained. New courts would permit the judiciary to provide permanent increased capacity for users of the courts.

¶112 Since improving productivity may not always be possible, an analysis of data based on historical performance of the courts and the current level of productivity would determine what types of reform could be considered.[219] In Ecuador, for example, if reforms can expect to improve clearance rates by fifty percent at the maximum, this would not be enough to deal with current or future caseloads since the congestion rate is over 1000 percent. In a country where productivity can be increased enough to address the filed cases, however, reforms could include temporary judges or courts to address backlog reduction. [220] If the productivity cannot be increased and pending caseloads are numerous, permanent new courts should be considered.[221]

¶113 According to such an analysis, France, Germany, Peru, and Singapore are currently capable of addressing the number of filed cases in the courts without significant delay and congestion. Peru achieved this capability through the employment of temporary judges—some of whom became permanent—as well as through training, case management, and automation. In France, Germany and Singapore, where judicial and administrative responsibilities are separate, judges spend one hundred percent of their time on judicial tasks. In Peru, by contrast, judges dedicate only about forty-five percent of their time to judicial work. On the other hand, Chile, Brazil, Hungary, and Panama, with acceptable clearance rates, may not be able to address the high number of pending cases through improved productivity alone. Together with reforms related to improving productivity in the current courts, they may wish to also consider temporary courts to deal with backlog reduction. Colombia is different, as it has less congestion. It needs, however, to improve productivity in order to meet the demand of filed cases. To do this, it may wish to consider implementing a program with a limited number of temporary courts.

¶114 Finally, Ecuador and the Ukraine are examples of countries that may consider a combination of all three reforms. With Ecuador's low clearance rate of about forty percent and extremely high congestion, it is improbable that the courts can raise their clearance rates in the short or

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219. This type of analysis is related to the "production capacity" of judicial systems—that is, improving the availability of justice or the ability of the judicial system to satisfy the increasing demands of the community. The objective is to define different strategies that can be implemented in order to efficiently adjust the capacity of courts to meet judicial demand. There exists an equilibrium point at which the number of resolved cases, at a particular point in time, will be similar to the number of cases filed.

220. This strategy is used when the congestion rate is too high and the clearance rate is "acceptable." For example, when the clearance rate is 70 percent, and its possible to improve this rate by 40-50 percent in the medium range. The clearance rate would need to reach 100 percent such that the pending cases would not increase.

221. For example, if the clearance rate is lower than 66 percent, it may improve by an additional 50 percent (thereby creating 100 percent clearance). However, the number of filed cases may never decrease and then every year the backlog increases. Additionally, if the system already has a high congestion rate (for example 200 percent), the backlog will not decrease. The experiences in Chile, Colombia (Itagui) and Argentina show that in the short and medium range, the clearance rate improved on average, 40-50 percent: in Chile, by 30 percent; in Argentina, by 60 percent; and in Colombia by 40 percent.

medium term to one hundred percent.[222] As a result, temporary courts, combined with new permanent courts and productivity reforms, may allow the courts to address the high demands placed on them. Such reforms could initially be implemented in pilot areas to observe whether they have the expected results, before being expanded nationally.[223]

VI. CONCLUSION

A. Importance of Baseline Data for Planning

¶115 Identifying trends in court performance requires the recordation of empirical information as baseline data over time. Assessment of such judicial indicators is essential for evaluating progress in court performance, planning for future needs, and strategizing for new reform efforts. Indeed, reform strategies based on a single year's review, may be misguided. Baseline data further allow planners to assess relative success rates of different reforms on an objective, rather than purely subjective, basis. Judicial data is also essential for budgetary planning purposes, such as for future increases in the number of courts, judges, staff, and services. If budgetary planning is done without the benefit of statistical information, future needs cannot be adequately estimated.[224]

¶116 Baseline data is also important for evaluating performance standards, such as those developed in the United States by the Commission on Trial Court Performance Standards.[225] Such data may be measured by structured observation by ordinary citizens, questionnaires, surveys, interviews, and review of documents, as well as by more familiar measures such as clearance rates, pending cases, and incoming cases. While some have found the realization of these standards costly, and thus prohibitive for most courts, the collection of baseline data can facilitate the transfer of know-how and successful technique from country to country, thus reducing the costs of reform.

B. Making Data Known and Publicly Accessible

¶117 *Public Awareness:* In addition to assisting in the planning of reforms, the collection of baseline data may help increase confidence in the judicial reform process itself—on the part of judges, court personnel,

222. Ecuador is the only country that does not have information technology in the courts.

223. Ecuador is in the process of implementing pilot courts.

224. For a look at the criteria used by U.S. state courts to determine budget allocations, see NATIONAL CENTER FOR STATE COURTS, ASSESSING THE NEED FOR JUDICIAL RESOURCES: GUIDELINES FOR A NEW PROCESS (1983) (including a list of factors indicating and influencing the need for resources, a list of methods for determining such need by case type, and information on what data is necessary and how to collect it).

225. See *supra* note 32 for a description of these performance standards.

government, and, most of all, citizens at large. Today, data on court performance remains difficult to find, and may be unreliable in many countries. By evaluating judicial reform programs using a set of specific indicators, the availability and accessibility of court performance data should increase. This information should be widely disseminated to increase confidence and public participation in the reform process. Such dissemination allows greater understanding of the problems, consensus building and, therefore, a greater possibility that reforms will be effective in reaching their targets.

¶118 Indeed, the public availability of court performance data is essential for good democratic governance—it facilitates improved public awareness of the problems surrounding the judiciary, encourages public debate on the topic, and promotes the participation of civil society in the judicial reform process. Development depends on informed citizens capable of demanding improved policies. Using publicly available data, individuals and nongovernmental organizations can work together to instigate and promote new legal norms by pressuring political actors to adopt new policies and practices.[226] They can use public data to hold government accountable for any back-sliding or failure to improve; they can promote change by reporting facts and information.[227] This strategy has been successful in the areas of human rights, women's issues and the environment. It has recently also been used in the area of judicial reform. In 1996, for example, the Lawyers Committee for Human Rights gathered interested parties in Venezuela to discuss the judicial reforms being implemented there and to apply pressure for change.[228] In addition, the media can play an important role in information dissemination to encourage judicial accountability and transparency.

¶119 *Comparison among judiciaries*: The availability of data also facilitates comparisons between judiciaries—nationally and internationally. Such comparison can be useful as a learning tool. In the United States, for example, a group of courts undertook to exchange information to see what factors were successful in creating more efficient courts.[229] Comparisons may also stimulate healthy competition between courts by providing less successful jurisdictions with the very specific, and achievable, goal of matching their competitors' performance. Further, comparisons may demonstrate to different jurisdictions what is possible to achieve under circumstances similar to their own; thus, they can strive, not for an ideal,

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226. *See* Kathryn Sikkink, Transnational Advocacy Networks and the Social Construction of Legal Rules, Paper Presented for the Conference on New Challenges for the Rule of Law: Lawyers, Internationalization, and the Social Construction of Legal Rules (Nov. 7-9, 1997) (unpublished paper, on file with author).

227. *See id.* at 5.

228. *See generally* LAWYERS COMMITTEE FOR HUMAN RIGHTS, HALFWAY TO REFORM: THE WORLD BANK AND THE VENEZUELAN JUDICIAL SYSTEM (1996).

229. *See* Dorothy Toth Beasly et al., *Time on Appeal in State Intermediate Appellate Court*, JUDGES' J., Summer 1998, at 12, 12. Local legal culture may have been the cause of speedy case resolution in certain courts. *See* Lawrence A. Salibra II, *Debunking the Civil Justice Reform Myth: If No Litigation Crisis Exists, How Can We Fix It?*, JUDGES' J., Summer 1998, at 19, 20.

but for a specific measure. This may assist courts in acknowledging the problem of delay, which may, in turn, contribute to the establishment of new methods for dispute resolution. ADR mechanisms are already forming in countries that are perceived to have inefficient and ineffective judicial systems.

¶120 *International Organizations:* International and bilateral organizations backing judicial reforms also have an interest in performance data to use in project evaluation. For example, as the World Bank has become more involved in judicial reform projects, one of the important roles it has assumed is the collection of empirical data.[230] Without such information, reformers end up working in isolation, without benefiting from the experience of other reformers, and not knowing how other systems resolve similar problems. With the availability of information, judicial reform projects financed by such organizations will benefit in both design and evaluation.

¶121 Finally, information on court performance can assist in promoting greater confidence in the rule of law as well as the economy. Although there are many social and economic indicators that are gathered and disseminated annually, there has not been the same effort to gather judicial indicators and information on the rule of law.[231] There is increasing interest in, and need for, doing so. Such indicators are not only important for commercial litigants, but also for criminal defendants and civil society at large; they are essential for assessing the overall status of development in a country.

¶122 This study has aimed to develop a transnational description of judicial administration using some basic elements of performance. It is, however, also an invitation to others to continue developing comparative assessments of court performance around the world in all of its various aspects. Although complex, an overall assessment of court performance may contribute to development by providing both the government and citizens a greater understanding of the courts and their function. With this understanding, there is a greater possibility to demand change and promote good governance through transparency and accountability. The process of good governance should ensure greater respect for the rule of law, confidence in the judiciary, and legal protection of human rights.

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230. *See, e.g.*, DAKOLIAS, JUDICIAL SECTOR, *supra* note 5, at 69 (noting the important role of the Bank in providing empirical information to evaluate judicial systems); BUSCAGLIA & DAKOLIAS, JUDICIAL REFORM, *supra* note 5; Edgardo Buscaglia & Maria Dakolias, Comparative International Study of Court Performance Indicators (Jan. 1999) (unpublished manuscript, on file with author).

231. For example, World Bank Development Reports provide an annual assessment of countries in terms of a set of selected world development indicators. These include poverty, land, health, government size, budgets etc.; no judicial indicators, however, are assessed.