Legalized Dispute Resolution: Interstate and Transnational

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International courts and tribunals are flourishing. Depending on how these bodies are defined, they now number between seventeen and forty.[1] In recent years we have witnessed the proliferation of new bodies and a strengthening of those that already exist. "When future international legal scholars look back at . . . the end of the twentieth century," one analyst has written, "they probably will refer to the enormous expansion of the international judiciary as the single most important development of the post–Cold War age."[2]

These courts and tribunals represent a key dimension of legalization. Instead of resolving disputes through institutionalized bargaining, states choose to delegate the task to third-party tribunals charged with applying general legal principles. Not all of these tribunals are created alike, however. In particular, we distinguish between two ideal types of international dispute resolution: interstate and transnational. Our central argument is that the formal legal differences between interstate and transnational dispute resolution have significant implications for the politics of dispute settlement and therefore for the effects of legalization in world politics.

Interstate dispute resolution is consistent with the view that public international law comprises a set of rules and practices governing *interstate* relationships. Legal resolution of disputes, in this model, takes place between states conceived of as unitary actors. States are the subjects of international law, which means that they control access to dispute resolution tribunals or courts. They typically designate the adjudicators of such tribunals. States also implement, or fail to implement, the decisions of international tribunals or courts. Thus in interstate dispute resolution, states act as gatekeepers both to the international legal process and from that process back to the domestic level.

1. Romano 1999, 723–28. By the strictest definition, there are currently seventeen permanent, independent international courts. If we include some bodies that are not courts, but instead quasi-judicial tribunals, panels, and commissions charged with similar functions, the total rises to over forty. If we include historical examples and bodies negotiated but not yet in operation, the total rises again to nearly one hundred.
2. Ibid., 709.

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In transnational dispute resolution, by contrast, access to courts and tribunals and the subsequent enforcement of their decisions are legally insulated from the will of individual national governments. These tribunals are therefore more open to individuals and groups in civil society. In the pure ideal type, states lose their gatekeeping capacities; in practice, these capacities are attenuated. This loss of state control, whether voluntarily or unwittingly surrendered, creates a range of opportunities for courts and their constituencies to set the agenda.

Before proceeding to our argument, it is helpful to locate our analysis in the broader context of this special issue of *IO*. Legalization is a form of institutionalization distinguished by obligation, precision, and delegation. Our analysis applies primarily when obligation is high.[3] Precision, on the other hand, is not a defining characteristic of the situations we examine. We examine the decisions of bodies that interpret and apply rules, regardless of their precision. Indeed, such bodies may have greater latitude when precision is low than when it is high.[4] Our focus is a third dimension of legalization: delegation of authority to courts and tribunals designed to resolve international disputes through the application of general legal principles.[5]

Three dimensions of delegation are crucial to our argument: independence, access, and embeddedness. As we explain in the first section, independence specifies the extent to which formal legal arrangements ensure that adjudication can be rendered impartially with respect to concrete state interests. Access refers to the ease with which parties other than states can influence the tribunal's agenda. Embeddedness denotes the extent to which dispute resolution decisions can be implemented without governments having to take actions to do so. We define low independence, access, and embeddedness as the ideal type of interstate dispute resolution and high independence, access, and embeddedness as the ideal type of transnational dispute resolution. Although admittedly a simplification, this conceptualization helps us to understand why the behavior and impact of different tribunals, such as the International Court of Justice (ICJ) and the European Court of Justice (ECJ), have been so different.

In the second section we seek to connect international politics, international law, and domestic politics. Clearly the power and preferences of states influence the behavior both of governments and of dispute resolution tribunals: international law operates in the shadow of power. Yet within that political context, we contend that institutions for selecting judges, controlling access to dispute resolution, and legally enforcing the judgments of international courts and tribunals have a major impact on state behavior. The formal qualities of legal institutions empower or disempower domestic political actors other than national governments. Compared to interstate dispute resolution, transnational dispute resolution tends to generate more litigation, jurisprudence more autonomous of national interests, and an additional source of pressure for compliance. In the third section we argue that interstate and transna-

3. Abbott et al., this issue, tab. 1, types I–III and V.
4. Hence we do not exclude types II and V (Abbott et al., tab. 1, this issue) from our purview.
5. See Abbott et al., this issue.

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tional dispute resolution generate divergent longer-term dynamics. Transnational dispute resolution seems to have an inherently more expansionary character; it provides more opportunities to assert and establish new legal norms, often in unintended ways.

This article should be viewed as exploratory rather than an attempt to be definitive. Throughout, we use ideal types to illuminate a complex subject, review suggestive though not conclusive evidence, and highlight opportunities for future research. We offer our own conjectures at various points as to useful starting points for that research but do not purport to test definitive conclusions.

A Typology of Dispute Resolution

Much dispute resolution in world politics is highly institutionalized. Established, enduring rules apply to entire classes of circumstances and cannot easily be ignored or modified when they become inconvenient to one participant or another in a specific case. In this article we focus on institutions in which dispute resolution has been delegated to a third-party tribunal charged with applying designated legal rules and principles. This act of delegation means that disputes must be framed as "cases" between two or more parties, at least one of which, the defendant, will be a state or an individual acting on behalf of a state. (Usually, states are the defendants, so we refer to defendants as "states." However, individuals may also be prosecuted by international tribunals, as in the proposed International Criminal Court and various war crimes tribunals.[6]) The identity of the plaintiff depends on the design of the dispute resolution mechanism. Plaintiffs can be other states or private parties—individuals or nongovernmental organizations (NGOs)—specifically designated to monitor and enforce the obligatory rules of the regime.

We turn now to our three explanatory variables: independence, access, and embeddedness. We do not deny that the patterns of delegation we observe may ultimately have their origins in the power and interests of major states, as certain strands of liberal and realist theory claim. Nevertheless, our analysis here takes these sources of delegation as given and emphasizes how formal legal institutions empower groups and individuals other than national governments.[7]

Independence: Who Controls Adjudication?

The variable *independence* measures the extent to which adjudicators for an international authority charged with dispute resolution are able to deliberate and reach legal

6. We do not discuss the interesting case of international criminal law here. See Bass 1998.

7. This central focus on variation in the political representation of social groups, rather than interstate strategic interaction, is the central tenet of theories of international law that rest on liberal international relations theory. Slaughter 1995a. Our approach is thus closely linked in this way to republican liberal studies of the democratic peace, the role of independent executives and central banks in structuring international economic policy coordination, and the credibility of commitments by democratic states more generally. See Keohane and Nye 1977; Moravcsik 1997; Doyle 1983a,b; and Goldstein 1996.

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judgments independently of national governments. In other words, it assesses the extent to which adjudication is rendered impartially with respect to concrete state interests in a specific case. The traditional international model of dispute resolution in law and politics places pure control by states at one end of a continuum. Disputes are resolved by the agents of the interested parties themselves. Each side offers its own interpretation of the rules and their applicability to the case at issue; disagreements are resolved through institutionalized interstate bargaining. There are no permanent rules of procedure or legal precedent, although in legalized dispute resolution, decisions must be consistent with international law. Institutional rules may also influence the outcome by determining the conditions—interpretive standards, voting requirements, selection—under which authoritative decisions are made.[8] Even where legal procedures are established, individual governments may have the right to veto judgments, as in the UN Security Council and the old General Agreement on Tariffs and Trade (GATT).

Movement along the continuum away from this traditional interstate mode of dispute resolution measures the nature and tightness of the political constraints imposed on adjudicators. The extent to which members of an international tribunal are independent reflects the extent to which they can free themselves from at least three categories of institutional constraint: selection and tenure, legal discretion, and control over material and human resources.

The most important criterion is independent selection and tenure. The spectrum runs from direct representatives of unconstrained national governments to a more impartial and autonomous process of naming judges. Judges may be selected from the ranks of loyal politicians, leading members of the bar, and justice ministries; or they may be drawn from a cadre of specialized experts in a particular area of international law. Their tenure may be long or short. After serving as adjudicators, they may be dependent on national governments for their subsequent careers or may belong to an independent professional group, such as legal academics. The less partisan their background, the longer their tenure; and the more independent their future, the greater the independence of adjudicators.

Selection and tenure rules vary widely. Many international institutions maintain tight national control on dispute resolution through selection and tenure rules.[9] Some institutions—including the UN, International Monetary Fund, NATO, and the bilateral Soviet–U.S. arrangements established by the Strategic Arms Limitation Treaty (SALT)—establish no authoritative third-party adjudicators whatsoever. The regime creates instead a set of decision-making rules and procedures, a forum for interstate bargaining, within which subsequent disputes are resolved by national representatives serving at the will of their governments. In other institutions, however, such as the EU, governments can name representatives, but those representatives are assured

8. Helfer and Slaughter 1997.

9. Even less independent are ad hoc and arbitral tribunals designed by specific countries for specific purposes. The Organization for Security and Cooperation in Europe, for example, provides experts, arbiters, and conciliators for ad hoc dispute resolution. Here we consider only permanent judicial courts. See Romano 1999, 711–13.

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TABLE 1. *The independence continuum: Selection and tenure*

Level of independence	*Selection method and tenure*	*International court or tribunal*
Low	Direct representatives, perhaps with single-country veto	UN Security Council
Moderate	Disputants control ad hoc selection of third-party judges	PCA
	Groups of states control selection of third-party judges	ICJ, GATT, WTO
High	Individual governments appoint judges with long tenure	ECJ
	Groups of states select judges with long tenure	ECHR, IACHR

long tenure and may enjoy subsequent prestige in the legal world independent of their service to individual states. In first-round dispute resolution in GATT and the World Trade Organization (WTO), groups of states select a stable of experts who are then selected on a case-by-case basis by the parties and the secretariat, whereas in ad hoc international arbitration, the selection is generally controlled by the disputants and the tribunal is constituted for a single case.

In still other situations—particularly in authoritarian countries—judges may be vulnerable to retaliation when they return home after completing their tenure; even in liberal democracies, future professional advancement may be manipulated by the government.[10] The legal basis of some international dispute resolution mechanisms, such as the European Court of Human Rights (ECHR), requires oversight by semi-independent supranational bodies. The spectrum of legal independence as measured by selection and tenure rules is shown in Table 1.

Legal discretion, the second criterion for judicial independence, refers to the breadth of the mandate granted to the dispute resolution body. Some legalized dispute resolution bodies must adhere closely to treaty texts; but the ECJ, as Karen Alter describes in this issue, has asserted the supremacy of European Community (EC) law without explicit grounding in the treaty text or the intent of national governments. More generally, institutions for adjudication arise, as Abbott and Snidal argue in this issue, under conditions of complexity and uncertainty, which render interstate contracts necessarily incomplete. Adjudication is thus more than the act of applying precise standards and norms to a series of concrete cases within a precise mandate; it involves interpreting norms and resolving conflicts between competing norms in the context of particular cases. When seeking to overturn all but the most flagrantly illegal state actions, litigants and courts must inevitably appeal to particular interpretations of such ambiguities. Other things being equal, the wider the range of considerations the body can legitimately consider and the greater the uncertainty concerning the proper interpretation or norm in a given case, the more potential legal independence it possesses. Where regimes have clear norms, single goals, and narrow scope—as in, say, some purely technical tasks—we expect to see limited legal

10. For a domestic case of judicial manipulation, see Ramseyer and Rosenbluth 1997.

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discretion. Where legal norms are valid across a wide area—as in the jurisprudence of the ECJ, which is connected to the broad, open-ended EC—there is more scope to promulgate general principles within the context of specific cases.[11] Similarly, greater legal independence exists where cross-cutting interpretations are plausible, such as over the scope of legitimate exceptions to norms like free trade, nonintervention, and individual rights. For instance, GATT and WTO dispute resolution bodies, or human rights courts, are increasingly being called upon to designate the margin of appreciation granted to national governments in pursuing legitimate state purposes other than free trade or human rights protection.

The third criterion for judicial independence, *financial and human resources*, refers to the ability of judges to process their caseloads promptly and effectively.[12] Such resources are necessary for processing large numbers of complaints and rendering consistent, high-quality decisions. They can also permit a court or tribunal to develop a factual record independent of the state litigants before them and to publicize their decisions. This is of particular importance for human rights courts, which seek to disseminate information and mobilize political support on behalf of those who would otherwise lack direct domestic access to effective political representation.[13] Many human rights tribunals are attached to commissions capable of conducting independent inquiries. The commissions of the Inter-American and UN systems, for example, have been active in pursuing this strategy, often conducting independent, on-site investigations.[14] Indeed, inquiries by the Inter-American Commission need not be restricted to the details of a specific case, though a prior petition is required. In general, the greater the financial and human resources available to courts and the stronger the commissions attached to them, the greater their legal independence.

In sum, the greater the freedom of a dispute resolution body from the control of individual member states over selection and tenure, legal discretion, information, and financial and human resources, the greater its legal independence.

Access: Who Has Standing?

Access, like independence, is a variable. From a legal perspective, access measures the range of social and political actors who have legal standing to submit a dispute to be resolved; from a political perspective, access measures the range of those who can set the agenda. Access is particularly important with respect to courts and other dispute-resolution bodies because, in contrast to executives and legislatures, they are "passive" organs of government unable to initiate action by unilaterally seizing a dispute. Access is measured along a continuum between two extremes. At one extreme, if no social or political actors can submit disputes, dispute-resolution institutions are unable to act; at the other, anyone with a legitimate grievance directed at

11. Weiler 1994.
12. Helfer and Slaughter 1997.
13. Keck and Sikkink 1998.
14. Farer 1998.

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government policy can easily and inexpensively submit a complaint. In-between are situations in which individuals can bring their complaints only by acting through governments, convincing governments to "espouse" their claim as a state claim against another government, or by engaging in a costly procedure. This continuum of access can be viewed as measuring the "political transaction costs" to individuals and groups in society of submitting their complaint to an international dispute-resolution body. The more restrictive the conditions for bringing a claim to the attention of a dispute-resolution body, the more costly it is for actors to do so.

Near the higher-cost, restrictive end, summarized in Table 2, fall purely interstate tribunals, such as the GATT and WTO panels, the Permanent Court of Arbitration, and the ICJ, in which only member states may file suit against one another. Although this limitation constrains access to any dispute-resolution body by granting one or more governments a formal veto, it does not permit governments to act without constraint. Individuals and groups may still wield influence, but they must do so by domestic means. Procedures that are formally similar in this sense may nonetheless generate quite different implications for access, depending on principal-agent relationships in domestic politics. Whereas individuals and groups may have the domestic political power to ensure an ongoing if indirect role in both the decision to initiate proceedings and the resulting argumentation, state-controlled systems are likely to be more restrictive than direct litigation by individuals and groups.

In state-controlled systems, the individual or group must typically lobby a specialized government bureaucracy, secure a majority in some relevant domestic decision-making body, or catch the attention of the head of government. State officials are often cautious about instigating such proceedings against another state, since they must weigh a wide range of cross-cutting concerns, including the diplomatic costs of negotiating an arrangement with the foreign government in question. Such indirect arrangements for bringing a case are costly, prohibiting government action to serve extremely narrow or secondary interest groups.

In other cases, state action under such arrangements can be considered prohibitively expensive because of the government's role as a veto player. The most obvious circumstance is one in which individuals and groups seek to file suit challenging the actions of their home state. (This is generally the type of litigation before most human rights and many regional economic integration bodies—which do not restrict access to states.) Although, in theory, an individual or group could secure access to international adjudication by mustering a large enough domestic bloc to override the outright hostility of the state, this rarely occurs in practice.

Within these constraints, GATT/WTO panels and the ICJ differ in their roles toward domestic individuals and groups. In the GATT and now the WTO, governments nominally control access to the legal process, yet in practice injured industries are closely involved in both the initiation and the conduct of the litigation by their governments, at least in the United States. A firm or industry group, typically represented by an experienced Washington law firm, will lobby the U.S. Trade Representative to bring a claim against another country allegedly engaging in GATT violations. The industry lawyers may then participate quite closely in the preparation of the suit and

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TABLE 2. *The access continuum: Who has standing?*

Level of access	*Who has standing*	*International court or tribunal*
Low	Both states must agree	PCA
Moderate	Only a single state can file suit	ICJ
	Single state files suit, influenced by social actors	WTO, GATT
High	Access through national courts	ECJ
	Direct individual (and sometimes group) access if domestic remedies have been exhausted	ECHR, IACHR

wait in the halls for debriefing after the actual proceeding. In the ICJ, by contrast, individual access is more costly. The ICJ hears cases in which individuals may have a direct interest (such as the families of soldiers sent to fight in another country in what is allegedly an illegal act of interstate aggression). However, these individuals usually have little influence over a national government decision to initiate interstate litigation or over the resulting conduct of the proceedings. As in the WTO, finally, individuals are unable to file suit against their own government before the ICJ. Because the ICJ tends to handle cases concerning "public goods" provision across national jurisdictions, such as boundary disputes and issues concerning aggression, the groups influenced by ICJ decisions tend to be diffuse and unorganized, except through the intermediation of national governments.

Near the permissive end of the spectrum is the ECJ. Individuals may ultimately be directly represented before the international tribunal, though the decision to bring the case before it remains in the hands of a domestic judicial body. Under Article 177 of the Treaty of Rome, national courts may independently refer a case before them to the ECJ if the case raises questions of European law that the national court does not feel competent to resolve on its own. The ECJ answers the specific question(s) presented and sends the case back to the national court for disposition of the merits of the dispute. Litigants themselves can suggest such a referral to the national court, but the decision to refer lies ultimately within the national court's discretion. Whether the interests involved are narrow and specific—as in the landmark *Cassis de Dijon* case over the importation of French specialty liquors into Germany—or broad, the cost of securing such a referral is the same. As Karen Alter shows in her article in this issue, different national courts have sharply different records of referral, but over time national courts as a body have become increasingly willing to refer cases to the ECJ. These referrals may involve litigation among private parties rather than simply against a public authority.[15]

15. It therefore remains unclear, on balance, whether the EC or the ECHR provides more ready access. Whereas the EC system under Article 177 allows only domestic courts, not individuals, to refer cases, the EC does not require, as does the ECHR and all other human rights courts, that domestic remedies be exhausted.

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Also near the low-cost end of the access spectrum lie formal human rights enforcement systems, including the ECHR, the IACHR, the African Convention on Human and People's Rights, and the UN's International Covenant on Civil and Political Rights. Since the end of World War II we have witnessed a proliferation of international tribunals to which individuals have direct access, though subject to varying restrictions. Even in the ECHR, a relatively successful system, individual access broadened slowly over time. Under the "old ECHR"—the one that existed prior to very recent reforms—individuals could bring cases themselves only if the government being sued had previously accepted an optional clause in the convention recognizing individual petition; otherwise only states could file petitions. This clause was initially accepted by only a few countries and not by all until the 1980s. NGOs and other third parties were excluded; anonymous petitions were not permitted. Any complaint to the system had, moreover, to be reviewed by the European Human Rights Commission before being passed on to the court—assuming that the government had accepted compulsory jurisdiction. Only if the commission decided in favor of referring the case would it finally be heard before the ECHR.

Although this process only rarely constituted an outright barrier to a suit, it could be time consuming. Recent reforms have abolished this intermediate step. The new ECHR, by contrast, gives individuals direct access to the court without any domestic or international intermediary.[16] Even so, however, it continues to require that any individual or group exhaust all national remedies before appealing to the system, typically meaning that litigants must first sue in a lower national tribunal and appeal the resulting judgment up the chain of administrative tribunals and domestic courts. The path to international dispute resolution is thus long, costly, and uncertain, even in this permissive environment; the process can take six to eight years and requires substantial legal expertise.

The Inter-American, UN, and nascent African systems of formal human rights enforcement are in some ways more permissive. As in the new ECHR, individual petition is mandatory. Under the IACHR, other actors have standing to bring suit on behalf of individuals and groups whose rights may be being violated. Indeed, the individuals and groups need not even consent to the suit, and anonymous petitions are permitted. The IACHR Commission has also adopted a very broad and permissive interpretation of what it means to exhaust domestic remedies.[17] Under the African Charter on Human and People's Rights, individuals and states may submit complaints, which will be heard if a majority on a commission so decide. The commission will soon be able to send cases on to the future African Court of Human and People's Rights only if the state against which a claim is being brought has accepted an op-

16. In response to the widespread success of the individual petition mechanism in Europe, the growth of the number of states party to the convention, and an increasing backlog of cases, the Council of Europe had sought to improve upon the existing judicial review machinery. After months of arduous negotiation, a majority of states signed Protocol 11, which, once ratified, will abolish the European Commission on Human Rights and create a permanent European Court of Human Rights. For a discussion of both systems, see Moravcsik 2000.

17. Sands, Mackenzie, and Shany 1999, 233–45.

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tional clause. As under the ECHR, domestic remedies must be exhausted. The UN requires individual petitions to trigger a process, though NGOs may be involved in the process. Whereas in the ECHR context, the commission took a relatively permissive attitude toward references to the court, this was not so in the Americas. For many years, the IACHR Commission declined to refer cases to the court—to the point where the court admonished the commission for failing to fulfill its "social duty to consider the advisability of coming to the Court."[18]

Among world courts and tribunals, the Central American Court of Justice, established in 1991 as the principal judicial organ of the Central American Integration System, offers the easiest access. Any state, supranational body, or natural or legal person can bring suit against a state party to assure domestic enforcement of regime norms. In addition, domestic courts can request advisory opinions in a preliminary reference procedure similar to the EC's Article 177.

Legal Embeddedness: Who Controls Formal Implementation?

There is no monopoly on the legitimate use of force in world politics—no world state, police, or army. Therefore, even if authority to render judgments is delegated to an independent international tribunal, implementation of these judgments depends on international or domestic action by the executives, legislatures, and/or judiciaries of states. Implementation and compliance in international disputes are problematic to a far greater degree than they are in well-functioning, domestic rule-of-law systems. The political significance of delegating authority over dispute resolution therefore depends in part on the degree of control exercised by individual governments over the legal promulgation and implementation of judgments. State control is affected by formal legal arrangements along a continuum that we refer to as embeddedness.

The spectrum of domestic embeddedness, summarized in Table 3, runs from strong control over promulgation and implementation of judgments by individual national governments to very weak control. At one extreme, that of strong control, lie systems in which individual litigants can veto the promulgation of a judgment *ex post*. In the old GATT system, the decisions of dispute-resolution panels had to be affirmed by consensus, affording individual litigants an *ex post* veto. Under the less tightly controlled WTO, by contrast, disputes among member governments are resolved through quasi-judicial panels whose judgments are binding unless *reversed* by unanimous vote of the Dispute Settlement Body, which consists of one representative from each WTO member state.

Most international legal systems fall into the same category as the WTO system; namely, states are bound by international law to comply with judgments of international courts or tribunals, but no domestic legal mechanism assures legal implementation. If national executives and legislatures fail to take action because of domestic political opposition or simply inertia, states simply incur a further international legal

18. Advisory Opinion OC-5/85, 5 Inter-American Ct. of H.R. (ser. A) (1985), 145, cited in Henkin et al. 1999, 525.

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TABLE 3. *The embeddedness continuum: Who enforces the law?*

Level of embeddedness	*Who enforces*	*International court or tribunal*
Low	Individual governments can veto implementation of legal judgment	GATT
Moderate	No veto, but no domestic legal enforcement; most human rights systems	WTO, ICJ
High	International norms enforced by domestic courts	EC, incorporated human rights norms under ECHR, national systems in which treaties are self-executing or given direct effect

obligation to repair the damage. In other words, if an international tribunal rules that state *A* has illegally intervened in state *B*'s internal affairs and orders state *A* to pay damages, but the legislature of state *A* refuses to appropriate the funds, state *B* has no recourse at international law except to seek additional damages. Alternatively, if state *A* signs a treaty obligating it to change its domestic law to reduce the level of certain pollutants it is emitting, and the executive branch is unsuccessful in passing legislation to do so, state *A* is liable to its treaty partners at international law but cannot be compelled to take the action it agreed to take in the treaty.

This is not to say that individuals and groups have no impact on compliance. Interstate bargaining takes place in the shadow of normative sanctions stemming from the international legal obligation itself. Even if governments do not ultimately comply, a negative legal judgment may increase the salience of an issue and undermine the legitimacy of the national position in the eyes of domestic constituents. And it is difficult for recalcitrant governments to get the offending international law changed. Multilateral revision is rendered almost impossible by the requirement of unanimous consent in nearly all international organizations.[19]

At the other end of the spectrum, where the control of individual governments is most constrained by the embeddedness of international norms, lie systems in which autonomous national courts can enforce international judgments against their own governments. The most striking example of this mode of enforcement is the EC legal system. Domestic courts in every member state recognize that EC law is superior to national law (supremacy) and that it grants individuals rights on the basis of which they can litigate (direct effect). When the ECJ issues advisory opinions to national courts under the Article 177 procedure described in detail in Karen Alter's article in this issue, national courts tend to respect them, even when they clash with the precedent set by higher national courts. These provisions are nowhere stated explicitly in the Treaty of Rome but have been successfully "constitutionalized" by the ECJ over

19. The EC, with qualified majority voting, is an exception. But here the unique power of proposal in the legislative process that generates most EC economic regulations is held by the Commission, which is unlikely to propose such a rollback of EC powers. Tsebelis 1994.

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the past four decades.[20] The European Free Trade Association (EFTA) court system established in 1994 permits such referrals as well, though, unlike the Treaty of Rome, it neither legally obliges domestic courts to refer nor legally binds the domestic court to apply the result. Domestic courts do nonetheless appear to enforce EFTA court decisions.[21]

International legal norms may also be embedded in domestic legal systems through legal incorporation or constitutional recognition. Although the direct link between domestic and international courts found in the EC is unique among international organizations, in some situations the national government has incorporated or transposed the international document into domestic law subject to the oversight of an autonomous domestic legal system. Many governments have, for example, incorporated the European Convention into domestic law, permitting individuals to enforce its provisions before domestic courts. Despite the lack of a direct link, there is evidence that domestic courts tend to follow the jurisprudence of the ECHR in interpreting the Convention.[22] Even without explicit statutory recognition, some legal systems—such as that of the Netherlands—generally recognize international treaty obligations as equal to or supreme over constitutional provisions. In the United States, the president and federal courts have sometimes invoked international treaty obligations as "self-executing" or "directly applicable" and therefore both binding on the U.S. government and domestic actors and enforceable in domestic courts—though Congress has increasingly sought to employ its control over ratification to limit this practice explicitly.[23]

Two Ideal Types: Interstate and Transnational Dispute Resolution

The three characteristics of international dispute resolution—independence, access, and embeddedness—are closely linked. This is evident from an examination of the extent to which different international legal systems are independent, embedded, and provide access. The characteristics of the major courts in the world today are summarized in Table 4, which reveals a loose correlation across categories. Systems with higher values on one dimension have a greater probability of having higher values in the other dimensions. This finding suggests that very high values on one dimension cannot fully compensate for low values on another. Strong support for independence, access, or embeddedness without strong support for the others undermines the effectiveness of a system.

Combining these three dimensions creates two ideal-types. In one ideal-type—interstate dispute resolution—adjudicators, agenda, and enforcement are all subject

20. Weiler 1991.
21. Sands, Mackenzie, and Shany 1999, 148.
22. Drzemczewski 1983.
23. Although customary international law is generally viewed as self-executing in the United States, and therefore can be applied by courts as domestic law, most international treaties do not create private rights of action. U.S. courts, moreover, have been hesitant to enforce customary international law against a superseding act of the federal government. See Henkin 1996; and Jackson 1992.

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TABLE 4. *Legal characteristics of international courts and tribunals*

International court or tribunals	*Legal characteristics*		
	Independence	*Access*	*Embeddedness*
ECJ	High	High	High[f]
ECHR, since 1999	High	High	Low to high[c]
ECHR, before 1999	Moderate to high[a]	Low to high[b]	Low to high[c]
IACHR	Moderate to high[a]	High	Moderate
WTO panels	Moderate	Low to moderate[d]	Moderate
ICJ	Moderate	Low to moderate[d]	Moderate
GATT panels	Moderate	Low to moderate[d]	Low
PCA	Low to moderate	Low[e]	Moderate
UN Security Council	Low	Low to moderate[g]	Low

Source: Sands et al. 1999.

[a]Depends on whether government recognizes optional clauses for compulsory jurisdiction of the court.

[b]Depends on whether government accepts optional clause for individual petition.

[c]Depends on whether domestic law incorporates or otherwise recognized the treaty.

[d]Depends on mobilization and domestic access rules for interest groups concerned.

[e]Both parties must consent. Recent rule changes have begun to recognize nonstate actors.

[f]Embeddedness is not a formal attribute of the regime but the result of the successful assertion of legal sovereignty.

[g]Permanent members of the Security Council can veto; nonmembers cannot.

to veto by individual national governments. Individual states decide who judges, what they judge, and how the judgment is enforced. At the other end of the spectrum, adjudicators, agenda, and enforcement are all substantially independent of individual and collective pressure from national governments. We refer to this ideal type as transnational dispute resolution.[24] In this institutional arrangement, of which the EU and ECHR are the most striking examples, judges are insulated from national governments, societal individuals and groups control the agenda, and the results are implemented by an independent national judiciary. In the remainder of this article we discuss the implications of variation along the continuum from interstate to transnational dispute resolution for the nature of, compliance with, and evolution of international jurisprudence.

In discussing this continuum, however, let us not lose sight of the fact that *values on the three dimensions move from high to low at different rates*. Table 4 reveals that high levels of independence and access appear to be more common than high levels

24. We use the term "transnational" to capture the individual to individual or individual to state nature of many of the cases in this type of dispute resolution. However, many of the tribunals in this category, such as the ECJ and the ECHR, can equally be described as "supranational" in the sense that they sit "above" the nation-state and have direct power over individuals and groups within the state. One of the authors has previously used the label "supranational" to describe these tribunals (Helfer and Slaughter 1997); no significance should be attached to the shift in terminology here.

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of embeddedness, and, though the relationship is weaker, a high level of independence appears to be slightly more common than a high level of access. In other words, between those tribunals that score high or low on all three dimensions, there is a significant intermediate range comprising tribunals with high scores on independence and/or access but not on the others.[25] Among those international legal institutions that score high on independence and access but are not deeply embedded in domestic legal systems are some international human rights institutions. Among those institutions that score high on independence but not on access or embeddedness are GATT/WTO multilateral trade institutions and the ICJ.

The Politics of Litigation and Compliance: From Interstate to Judicial Politics

Declaring a process "legalized" does not abolish politics. Decisions about the degree of authority of a particular tribunal, and access to it, are themselves sites of political struggle. The sharpest struggles are likely to arise *ex ante* in the bargaining over a tribunal's establishment; but other opportunities for political intervention may emerge during the life of a tribunal, perhaps as a result of its own constitutional provisions. Form matters, however. The characteristic politics of litigation and compliance are very different under transnational dispute resolution than under interstate dispute resolution. In this section we explicate these differences and propose some tentative conjectures linking our three explanatory variables to the politics of dispute resolution.

The Interstate and Transnational Politics of Judicial Independence

What are the politics of judicial independence? As legal systems move from interstate dispute resolution toward the more independent judicial selection processes of transnational dispute resolution, we expect to observe greater judicial autonomy—defined as the willingness and ability to decide disputes against national governments. Other things being equal, the fewer opportunities national governments have to influence the selection of judges, the available information, the support or financing of the court, and the precise legal terms on which the court can decide, the weaker is their likely influence over the decisions of an international tribunal.

Political interference is common in some domestic political systems. The secretary general of the Arab Lawyers Union has described routine "intervention with the judiciary through higher decisions" and by appointment of military and special courts in much of the Arab world.[26] Judges in Central and South America have been subjected to threats and assassinations. Even in domestic systems with strong courts, political selection of judges can affect decisions. And in the United States, where federal judges serve for life, the openly politicized nature of Supreme Court appoint-

25. Not surprisingly, domestic legal embeddedness is less common than widespread domestic access, since the former is a prerequisite for the latter.

26. Eissa 1998.

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ments is said to induce many aspiring lower federal judges to alter their decisions in anticipation of possible confirmation hearings before the Senate. The Italian and German Constitutional Courts are even more overtly politically balanced.[27] Perhaps the most infamous example of interference with the composition of a sitting court is President Franklin D. Roosevelt's effort in 1937 to "pack" the Supreme Court with additional justices of his choice. Instead, "a switch in time saved nine," as key justices suddenly changed their tune and found delegation to the plethora of new administrative agencies constitutional. In the context of de facto single-party rule in Japan, Mark Ramseyer and Frances Rosenbluth have documented the significant impact of decisions on the career trajectory of domestic judges, permitting the inference that selection processes affected judicial decisions.[28]

Evidence of government efforts to influence an international tribunal's direction through judicial selection is anecdotal. Rarely is the attempt at influence as crude as the case in September 1984, when a Swedish member of the Iran–U.S. Tribunal was assaulted by two younger and stronger Iranian judges.[29] Influence is typically more subtle. It was widely rumored, for instance, that the German government sought to rein in the ECJ by appointing a much less activist judge in the 1980s than previous German candidates, but hard evidence is virtually impossible to find. One leading ECJ judge, a long-time skeptic of the notion that the ECJ could be politicized in this way, nevertheless noted in the mid-1990s that "Things have changed. It is now 8–7 for us [that is, the supranationalists]."[30]

Restrictions on the financial resources available to tribunals may limit their independence. Such limitations have hampered efforts to transform the African Convention on Human and People's Rights into a system as effective as those found in Europe and, recently, the Americas.[31] Similarly, it has been argued that the members of the UN Security Council authorized the creation of the International Criminal Tribunal for the Former Yugoslavia to satisfy public opinion but tried to deny it sufficient resources to do its work.[32] If this strategy failed, it may have been in part because resources were ultimately provided from private sources such as foundations and wealthy individuals.[33] On the other hand, a striking difference between the ECJ and ECHR, as well as bodies such as the UN Human Rights Committee, is the relative distribution of resources, without which even an active court cannot process its caseload and make itself heard to a wider audience. Other drags include excessively cumbersome procedural rules, often designed to frustrate all but the most

27. Weiler 1998. Selection of a judge of an identifiable political stripe does not always guarantee corresponding decisions, however. Once on the bench, judges are subject to a specific set of professional norms and duties and develop their personal conception of the role they have been asked to fill in ways that can yield surprises. A paradigmatic case is President Eisenhower's appointment of Justice William Brennan, who gave little sign of the strong liberal standard-bearer he would become.

28. Ramseyer and Rosenbluth 1997.

29. Feldman 1986, 1004.

30. Lecture by Federico Mancini, Public Representation: A Democratic Deficit? Conference at Harvard University, Center for European Studies, 29–31 January 1993.

31. Welch 1992.

32. Forsythe 1994.

33. See Bass 1998; and Bassiouni 1998.

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persistent individual litigants, and limits on judicial capacities, such as a court's autonomous ability to find the facts in a particular case rather than having to depend solely on the representations of litigants. Where one of the litigants is a government, the court is likely to find itself unable to challenge the government's version of events without the independent ability to call witnesses or even conduct inspections.[34]

Such potential restrictions on autonomy—along with the threat of noncompliance or treaty revision—may increase judicial solicitude for state interests. We shall return to this question in our later discussion of long-term dynamism. Broadly, however, this discussion suggests the following conjecture: The more formally independent a court, the more likely are judicial decisions to challenge national policies.

The Interstate and Transnational Politics of Access

What are the political implications of movement from low access (interstate dispute resolution) to high access (transnational dispute resolution)? Our central contention is that we are likely to observe, broadly speaking, a different politics of access as we move toward transnational dispute resolution—where individuals, groups, and courts can appeal or refer cases to international tribunals. As the actors involved become more diverse, the likelihood that cases will be referred increases, as does the likelihood that such cases will challenge national governments—in particular, the national government of the plaintiff. The link between formal access and real political power is not obvious. States might still manipulate access to judicial process regarding both interstate and transnational litigation by establishing stringent procedural rules, bringing political pressure to bear on potential or actual litigants, or simply carving out self-serving exceptions to the agreed jurisdictional scheme. Consider the evidence.

Access to classic arbitral tribunals, such as those constituted under the Permanent Court of Arbitration, requires the consent of both states. With regard to access, the Permanent Court of Arbitration is as close as we come to a pure system of interstate dispute resolution. Slightly more constraining arrangements are found in classic interstate litigation before the Permanent Court of International Justice in the 1920s and 1930s, the ICJ since 1945, and the short-lived Central American Court of Justice. In these systems, a single state decides when and how to sue, even if it is suing on behalf of an injured citizen or group of citizens. The state formally "espouses" the claim of its national(s), at which point the individual's rights terminate (unless entitled to compensation as a domestic legal or constitutional matter), as does any control over or even say in the litigation strategy. The government is thus free to prosecute the claim vigorously or not at all, or to engage in settlement negotiations for a sum far less than the individual litigant(s) might have found acceptable. Such negotiations can resemble institutionalized interstate bargaining more than a classic legal process in which the plaintiff decides whether to continue the legal struggle or to settle the case.

34. Helfer and Slaughter 1997.

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Under interstate dispute resolution, political calculations inevitably enter into the decision to sue. For instance, in 1996 the United States adopted the Helms-Burton legislation, which punishes firms for doing business with Cuba. Although the EU claimed that this legislation violated WTO rules and threatened to take the case to the WTO, in the end it failed to do so: an agreement was reached essentially on U.S. terms. The forms of legalization do not, therefore, guarantee that authoritative decisions will be honored by third parties. Hence even among formally highly legalized processes, the degree of operational authority of the third-party decision makers may vary considerably. More systematic evidence comes from the EU, where governments tend to be reluctant to sue one another, preferring instead to bring their complaints to the EU Commission. The Commission, in turn, was initially—and to an extent, remains—reluctant to sue member states, due to its fear of retaliation and need to establish its own political legitimacy.[35]

Although in interstate dispute resolution states decide when and whether to sue other states, they cannot necessarily control whether they are sued. If they are sued, whether any resulting judgments can be enforced depends both on their acceptance of compulsory jurisdiction and, where the costs of complying with a judgment are high, on their willingness to obey an adverse ruling. U.S. relations with the ICJ provide an example. After pushing for the creation of the ICJ as part of the UN Charter, the United States promptly accepted the compulsory jurisdiction of the ICJ by Senate resolution.[36] The same resolution, however, included the Connally reservation, providing that U.S. acceptance "shall not apply to . . . disputes with regard to matters which are essentially within the domestic jurisdiction of the United States as determined by the United States."[37] In other words, the Senate insisted that the United States remain judge in its own case as to whether disputes were sufficiently "international" to go to the court.

To be sure, the Connally reservation has always been controversial in the United States, and the State Department has resisted invoking it when the United States has been called before the ICJ. Yet control of access does not stop there. In 1984, when the ICJ appeared to take Nicaragua's complaints against the United States seriously, the United States revoked its agreement to the ICJ's compulsory jurisdiction. The United States deposited with the secretariat of the UN a notification purporting to exclude, with immediate effect, from its acceptance of the court's compulsory jurisdiction "disputes with any Central American state" for two years.[38] It litigated the first round of the case, arguing that its revocation of jurisdiction was effective, but then simply failed to appear in the second round after the court ruled that it did indeed have jurisdiction.[39]

This sort of flagrant defiance is rarely necessary. The de facto system is one in which most states, like the United States, reserve the right to bring specific cases to

35. See Alter 1998b; Stein 1981; and Dashwood and White 1989.
36. S. Res. 196, 79th Cong., 2d sess., 92 *Cong. Rec.* 10706 (1946).
37. Ibid.
38. Briggs 1985, 377.
39. Schwebel 1996.

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the ICJ or to be sued in specific cases as the result of an ad hoc agreement with other parties to a dispute of specific provisions in a bilateral or multilateral treaty. This system ensures direct control over access to the ICJ by either requiring all the parties to a dispute to agree both to third-party intervention and to choose the ICJ as the third party, or by allowing two or more states to craft a specific submission to the court's jurisdiction in a limited category of disputes arising from the specific subject matter of a treaty.[40] In the ICJ, procedural provisions govern time limits requiring a state to accept a tribunal's jurisdiction before a particular suit arises, time limits for filing the suit itself, the reciprocal nature of the opposing parties' acceptance of jurisdiction, and rules governing intervention by a third state whose interests may be directly affected by disposition of an ongoing suit.[41] Such procedural provisions are key weapons in the litigator's arsenal, with the result that many interstate cases, like suits between individuals, stalemate for years in procedural maneuvering. Some such provisions are promulgated by tribunals themselves, but the majority are bargained out *ex ante* among states contemplating submission to third-party dispute resolution.

More informally, potential defendants may exert political pressure on plaintiff states not to sue or to drop a suit once it has begun. When confronted by an unfavorable GATT panel judgment (in favor of Mexico) concerning U.S. legislation to protect dolphins from tuna fishing, the United States exercised its extra-institutional power to induce Mexico to drop the case before the judgment could be enforced. Another more subtle example concerns the U.S.–Nicaraguan dispute referred to earlier. Although the United States refused to participate in proceedings on the merits of the case, the ICJ ruled on 27 June 1986 that the United States' mining of Nicaraguan harbors violated provisions of customary international law, which were similar to, and should be interpreted in light of, the UN Charter.[42] The United States refused to comply with the decision, and on 27 October 1986 it vetoed a Security Council resolution, which received eleven affirmative votes, calling for it to comply with the ICJ ruling.[43] Nicaragua asked for more than $2 billion in damages, but with the electoral defeat of the Sandinistas, it requested postponement of further proceedings. In 1990 the United States asked the Nicaraguan government of President Violeta Barrios de Chamorro to abandon its claim; it was reported that the Bush administration told Nicaragua that future U.S. aid would depend on such abandonment.[44]

The preceding discussion of access suggests two conjectures:

1. The broader and less costly the access to an international court or tribunal, the greater the number of cases it will receive.

2. The broader and less expensive the access to an international court or tribunal, the more likely that complaints challenge the domestic practices of national governments—particularly the home government of the complainant.

40. Rosenne 1995.
41. Ibid.
42. ICJ, *Military and Paramilitary Activities in and Against Nicaragua.* (Nicaragua v. United States of America.) Merits, Judgment. ICJ Reports 1986, 97–99.
43. See *New York Times*, 29 October 1986, A3.
44. *See New York Times*, 30 September 1990.

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TABLE 5. *Access rules and dockets of international courts and tribunals*

Level of access	*International court or tribunal*	*Average annual number of cases since founding*
Low	PCA	0.3
Medium	ICJ	1.7
	GATT	4.4
	WTO	30.5
High	Old ECHR	23.9
	EC	100.1

Source: Sands et al. 1999, 4, 24, 72, 125, 200.

We cannot thoroughly evaluate these conjectures here, but a preliminary analysis suggests their plausibility. Consider, for example, the size of an international tribunal's docket. Broadly speaking, the greater the formal access, the greater the caseload we should expect to observe. Courts cannot work without cases. They are quite literally out of business and without even a toehold to begin building their reputations and developing constituencies that will give them voice and at least a measure of independent power. Thus, for instance, if the access rules of the ECJ only gave states and the Commission the right to sue, the ECJ would—like the ICJ—probably have adjudicated relatively few cases and would play a role on the margins of European politics. The vast majority of significant cases in the history of the EU have been brought under Article 177 by individuals who request (or hope) that national courts will send them to the ECJ for adjudication. Another highly developed example is found in international human rights courts. The optional clause of the ECHR, Article 10, permitting individuals to bring complaints, has been the source of nearly all complaints before the Commission and the ECJ. Interstate complaints have been few in number, less than fifteen (all but a few involving state interest in co-nationals in other countries), compared with thousands of individual complaints.[45] The IACHR functions in a similar manner.

The comparative data summarized in Table 5 further support this conjecture. The average caseload of six prominent international courts varies as predicted, with legal systems granting low access generating the fewest number of average cases, those granting high access generating the highest number of cases, and those granting moderate access in between. The difference between categories is roughly an order of magnitude or more. While we should be cautious about imputing causality before more extensive controlled studies are performed, the data suggest the existence of a strong relationship.

Case study evidence supports the conjecture that transnational dispute-resolution systems with high levels of access tend to result in cases being brought in national

45. Moravcsik 1995.

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courts against the *home* government. This is the standard method by which cases reach the ECJ. For example, the *Cassis de Dijon* case—a classic ECJ decision in 1979 establishing the principle of mutual recognition of national regulations—concerned the right to export a French liquor to Germany, yet a German importer, not the French producer, sued the German government, charging that domestic regulations on liquor purity were creating unjustified barriers to interstate trade.[46]

The Interstate and Transnational Politics of Embeddedness

Even if cases are brought before tribunals and these tribunals render judgments against states, the extent to which judgments are legally enforceable may differ. We have seen that most international legal systems create a legal obligation for governments to comply but leave enforcement to interstate bargaining. Only a few legal systems empower individuals and groups to seek enforcement of their provisions in domestic courts. However, in our ideal type of transnational dispute resolution, international commitments are embedded in domestic legal systems, meaning that governments, particularly national executives, no longer need to take positive action to ensure enforcement of international judgments. Instead, enforcement occurs directly through domestic courts and executive agents who are responsive to judicial decisions. The politics of embedded systems of dispute resolution are very different from the politics of systems that are not embedded in domestic politics.

Under interstate dispute resolution, external pressure for compliance stems ultimately from the power and interests of national governments of participating states, which back demands with threats of reciprocal denial or punishment. Reciprocity and retaliation are often effective means of enforcement, at least for powerful states whose interests are engaged. As Judith Goldstein and Lisa Martin point out in their article in this issue, governments have made little use of the escape clause in GATT, arguably because doing so would have required providing compensation at the expense of other industrial sectors. That is, reciprocity on the international level implies that gains from reneging on a given arrangement will have to be balanced by losses to some other sector; and the political protests from that sector are likely to be shrill. Using the concept of "compliance constituencies" articulated by Miles Kahler in his conclusion to this issue, it is important to recognize that even if international law is not embedded in domestic legal processes, past agreements, linked to reciprocity, may create strong political pressures for compliance. If domestic "compliance constituencies" are the key to enforcement, we should expect to see more domestic pressure for compliance in trade regimes, where concentrated, mobilized constituencies like exporters and importers tend to press for compliance with tariff liberalization. Goldstein and Martin find evidence for such pressures for compliance.

Yet despite the real successes, in some circumstances, of interstate dispute resolution, it clearly has political limitations, especially where compliance constituencies

46. Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung fur Branntwein* (Cassis de Dijon), 1978.

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are weak. Under interstate dispute resolution, pressures for compliance have to operate through governments. The limitations of such practices are clear under arbitration, and notably with respect to the ICJ. In the case involving mining of Nicaragua's harbors, the United States did not obey the ICJ's judgment. Admittedly, the Reagan administration did not simply ignore the ICJ judgment with respect to the mining of Nicaragua's harbors, but felt obliged to withdraw its recognition of the ICJ's jurisdiction—a controversial act with significant domestic political costs for a Republican president facing a Democratic Congress. Nevertheless, in the end the United States pursued a policy contrary to the ICJ's decision. Even in trade regimes, political pressure sometimes leads to politically bargained settlements, as in the case of the U.S. Helms-Burton legislation. And a number of countries have imposed unilateral limits on the ICJ's jurisdiction.

More broadly, reciprocity does not work well when interdependence and power are highly asymmetric. Under these circumstances, reciprocal denials of policy concessions may have much more severe consequences for the more dependent party. Furthermore, powerful governments may threaten weaker targets not only with reciprocal denial of policy concessions but also with further retaliation in linked areas. The United States has, for example, used unilateral threats of sanctions under Section 301 and with respect to antidumping and countervailing duty statutes. It has also threatened numerous governments with economic and military sanctions in an effort to compel compliance with international human rights norms. Overall, interstate dispute resolution presents many opportunities for powerful states to set the agenda for a legal process, to introduce political bargaining into decision making, and to thwart implementation of adverse legal decisions.

The politics of transnational dispute resolution are quite different. By linking direct access for domestic actors to domestic legal enforcement, transnational dispute resolution opens up an additional source of political pressure for compliance, namely favorable judgments in domestic courts. This creates a new set of political imperatives. It gives international tribunals additional means to pressure or influence domestic government institutions in ways that enhance the likelihood of compliance with their judgments. It pits a recalcitrant government not simply against other governments but also against legally legitimate domestic opposition; an executive determined to violate international law must override his or her own legal system. Moreover, it thereby permits international tribunals to develop a constituency of litigants who can later pressure government institutions to comply with the international tribunal's decision.[47] Consider the language of the ECJ in its landmark 1963 decision announcing that selected provisions of the Treaty of Rome would be directly effective as rules governing individuals in national law: "The Community constitutes a new legal order . . . for the benefit of which the states have limited their sovereign rights . . . and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore imposes obligations on individuals but is also intended to confer on them

47. Helfer and Slaughter 1997.

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rights which become part of their legal heritage."[48] The primary individuals and groups the ECJ had in mind were importers and exporters, many of whom came to understand that they had a direct interest in helping the court hold governments to their word on scheduled tariff reductions. Individuals and groups also have incentives to bring cases in other substantive contexts, including human rights and environmental law.[49]

The politics of compliance under transnational dispute resolution tends to give courts more leverage than they enjoy under interstate dispute resolution. The result is an environment in which judicial politics (the interplay of interests, ideas, and values among judges) and intrajudicial politics (the politics of competition or cooperation among courts) are increasingly important. Judicial politics are subject to a wide range of constraints that may or may not intersect with state interests—for example, the exigencies of legal reasoning, which Thomas Franck has distilled as the legitimacy-based demands of consistency, coherence, and adherence,[50] not to mention simple logic; the texts and case law available to shape a particular decision; and the political preferences and judicial ideology of individual judges.[51] More broadly, however, the relationships between international and national courts are central to the politics of transnational dispute resolution. In the words of Joseph Weiler, "The relationship between the European Court and national courts is the most crucial element for a successful functioning of the European legal order."[52]

Transnational dispute resolution does not sweep aside traditional interstate politics, but the power of national governments has to be filtered through norms of judicial professionalism, public opinion supporting particular conceptions of the rule of law, and an enduring tension between calculations of short- and long-term interests. Individuals and groups can zero in on international court decisions as focal points around which to mobilize, creating a further intersection between transnational litigation and democratic politics.

This discussion of the politics of interstate and transnational dispute resolution suggests that the following two conjectures deserve more intensive study.

1. Other things being equal, the more firmly embedded an international commitment is in domestic law, the more likely is compliance with judgments to enforce it.

2. Liberal democracies are particularly respectful of the rule of law and most open to individual access to judicial systems; hence attempts to embed international law in domestic legal systems should be most effective among such

48. Case 26/62, *N. V. Algemene Transp. and Expeditie Onderneming Van Gend and Loos v. Nederslandse administratie der belastingen*, 1963 E.C.R. 1, 12.

49. This dynamic is not limited to Europe. David Wirth explains it succinctly in his analysis of compulsory third-party dispute resolution as a mechanism for enforcing international environmental law. Wirth 1994.

50. Franck 1990.

51. Mattli and Slaughter 1995.

52. Weiler 1998, 22. The ECHR has experienced considerable variation in its effectiveness, which does not seem on its face to be well explained by embeddedness. With respect to the ECHR, we believe that more research is needed to evaluate explanations that rely on embeddedness.

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regimes. In relations involving nondemocracies, we should observe near total reliance on interstate dispute resolution. Even among liberal democracies, the trust placed in transnational dispute resolution may vary with the political independence of the domestic judiciary.

Although embedding international commitments does not guarantee increased compliance, we find good reason to conclude that embeddedness probably tends to make compliance more likely in the absence of a strong political counteraction. However, as Goldstein and Martin argue in this issue, by removing loopholes, legalization also takes away "safety valves" that can reduce political pressure for drastic changes in rules. As they argue with respect to the WTO, "moving too far in the direction of legalization could backfire, undermining the momentum toward liberalization that the weakly legalized procedures of GATT so effectively established." To be genuinely successful, international law needs to rest on a strong basis of collective political purpose and shared standards of legitimacy: where these conditions exist (as in the EU), embedding international law in domestic legal processes is more promising than when they are absent.

The Interstate and Transnational Dynamics of Legalization

We have considered the static politics of legalization. Yet institutions also change over time and develop distinctive dynamics. Rules are elaborated. The costs of veto, withdrawal, or exclusion from the "inner club" of an institution may increase if the benefits provided by institutionalized cooperation increase. Sunk costs create incentives to maintain existing practices rather than to begin new ones. Politicians' short time horizons can induce them to agree to institutional practices that they might not prefer in the long term, in order to gain advantages at the moment.[53]

What distinguishes legalized regimes is their potential for setting in motion a distinctive dynamic built on precedent, in which decisions on a small number of specific disputes create law that may govern by analogy a vast array of future practices. This may be true even when the first litigants in a given area do not gain satisfaction. Judges may adopt modes of reasoning that assure individual litigants that their arguments have been heard and responded to, even if they have not won the day in a particular case. Some legal scholars argue that this "casuistic" style helps urge litigants, whether states or individuals, to fight another day.[54]

Although both interstate and transnational dispute resolution have the potential to generate such a legal evolution, we maintain that transnational dispute resolution increases the potential for such dynamics of precedent. The greater independence of judges, wider access of litigants, and greater potential for legal compliance insulates judges, thereby allowing them to develop legal precedent over time without trigger-

53. See Keohane and Hoffmann 1991; Alter 1998a; and Pollack 1997.
54. See White 1990; Glendon 1991; and Sunstein 1996.

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ing noncompliance, withdrawal, or reform by national governments. We next consider in more detail the specific reasons why.

The Dynamics of Interstate Third-party Dispute Resolution

In interstate legal systems, the potential for self-generating spillover depends on how states perform their gatekeeping roles. As we will show, where states open the gates, the results of interstate dispute resolution may to some degree resemble the results of transnational dispute resolution. However, in the two major international judicial or quasi-judicial tribunals—the Permanent Court of Arbitration and the ICJ—states have been relatively reluctant to bring cases. The great majority of arbitration cases brought before the Permanent Court of Arbitration were heard in the court's early years, shortly after the first case in 1902. The court has seen little use recently—the Iran Claims Tribunal being an isolated if notable exception.

States have been reluctant to submit to the ICJ's jurisdiction when the stakes are large.[55] Hence the ICJ has been constrained in developing a large and binding jurisprudence. Even so, it has triggered overt and effective national opposition. Before the United States revoked compulsory jurisdiction in advance of the Nicaragua case, France had previously revoked its acceptance of the ICJ's compulsory jurisdiction in response to suits brought against it by Australia and New Zealand concerning its nuclear testing in the South Pacific in the 1960s.[56] Since the USSR and China had never accepted compulsory jurisdiction, Great Britain stood alone by late 1985 as the only permanent member of the UN Security Council willing to expose itself to the risk of being brought before the ICJ on an open-ended basis. What has emerged in the ICJ is essentially a system of discretionary submission to its jurisdiction, allowing states to control access case by case. In 1945 75 percent of all states that had ratified the Statute of the Permanent Court of International Justice also accepted the ICJ's compulsory jurisdiction; as of 1995 only 31 percent of states party to statute accept compulsory jurisdiction.[57] As measured by the level of legal obligation, legalization in the ICJ has moved *backwards* over the last half-century.

Still, it is fair to note that use of the ICJ did increase substantially between the 1960s and 1990s, reaching an all-time high of nineteen cases on the docket in 1999.[58] Although this increase does not equal the exponential growth of economic and human rights jurisprudence in this period, it marks a significant shift. In part this reflects pockets of success that have resulted in expansion of both the law in a particular area and the resort to it. The ICJ has consistently had a fairly steady stream of cases concerning international boundary disputes. In these cases the litigants have typically already resorted to military conflict that has resulted in stalemate or determined that such conflict would be too costly. They thus agree to go to court. The ICJ,

55. Chayes 1965.

56. Rosenne 1995, 270 n. 17. See also *Nuclear Tests (Australia v. France)*, 1974 I.C.J. 253 (20 December); and *Nuclear Tests (New Zealand v. France)*, 1974 I.C.J. 457 (20 December).

57. Schwebel 1996.

58. Ibid.

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in turn, has profited from this willingness by developing an extensive body of case law that countries and their lawyers can use to assess the strength of the case on both sides and be assured of a resolution based on generally accepted legal principles.[59]

Another factor in the expansion of the ICJ's caseload over the past two decades may have been the court's willingness to find against the United States in the Nicaragua case, thereby enhancing its legitimacy with developing countries.[60] At the same time, it has received a number of very high profile cases that seem likely to have been filed in the hope of publicizing a particular political dispute as much as securing an actual resolution. Examples include the suit brought by the United States against Iran over the 1979 taking of diplomatic hostages, Iran's suit against the United States for the destruction of oil platforms in the Persian Gulf, two suits brought by Libya against the United States and Great Britain arising out of the Lockerbie air disaster, and Bosnia's suit against Yugoslavia for the promotion of genocide. Although such cases are vigorously litigated by teams of distinguished international lawyers on both sides, the likelihood of compliance by the losing state seems dubious.

The ambiguous, even paradoxical consequences of the Nicaragua case suggest that the interaction between dispute resolution mechanisms and substantive agreement over time is complex. Not only does the nature of substantive agreement influence the probable development of legal systems over time, as we have seen, but the nature of legalization may influence the nature of substantive cooperation. In some cases legalization may even lead to more contention and conflict over the nature of the rules. This is an area where more research would be welcome.

The Dynamics of Transnational Dispute Resolution

The key to the dynamics of transnational dispute resolution is access. Transnational dispute resolution removes the ability of states to perform gatekeeping functions, both in limiting access to tribunals and in blocking implementation of their decisions. Its incentives for domestic actors to mobilize, and to increase the legitimacy of their claims, gives it a capacity for endogenous expansion. As we will see with respect to GATT and the WTO, even a formally interstate process may display similar expansionary tendencies, but continued expansion under interstate dispute resolution depends on continuing decisions by states to keep access to the dispute settlement process open. Switching to a set of formal rules nearer the ideal type of transnational dispute resolution makes it much harder for states to constrain tribunals and can give such tribunals both incentives and instruments to expand their authority by expanding their caseload. Indeed, tribunals can sometimes continue to strengthen their authority even when opposed by powerful states—particularly when the institutional status quo is favorable to tribunals and no coalition of dissatisfied states is capable of overturning the status quo.[61]

59. See, for example, Charney 1994.
60. Schwebel 1996.
61. See Alter 1998a; and Alter, this issue.

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The pool of potential individual litigants is several orders of magnitude larger than that of state litigants. Independent courts have every incentive to recruit from that pool. Cases breed cases. A steady flow of cases, in turn, allows a court to become an actor on the legal and political stage, raising its profile in the elementary sense that other potential litigants become aware of its existence and in the deeper sense that its interpretation and application of a particular legal rule must be reckoned with as a part of what the law means in practice. Litigants who are likely to benefit from that interpretation will have an incentive to bring additional cases to clarify and enforce it. Further, the interpretation or application is itself likely to raise additional questions that can only be answered through subsequent cases. Finally, a court gains political capital from a growing caseload by demonstrably performing a needed function.

Transnational tribunals have the means at their disposal to target individual litigants in various ways. The most important advantage they have is the nature of the body of law they administer. Transnational litigation, whether deliberately established by states (as in the case of the ECHR) or adapted and expanded by a supranational tribunal itself (as in the case of the ECJ), only makes sense when interstate rules have dimensions that make them directly applicable to individual activity. Thus, in announcing the direct effect doctrine in *Van Gend and Loos*, the ECJ was careful to specify that only those portions of the Treaty of Rome that were formulated as clear and specific prohibitions on or mandates of member states' conduct could be regarded as directly applicable.[62] Human rights law is by definition applicable to individuals in relations with state authorities, although actual applicability will also depend on the clarity and specificity of individual human rights prohibitions and guarantees.

In this way, a transnational tribunal can present itself in its decisions as a protector of individual rights and benefits against the state, where the state itself has consented to these rights and benefits and the tribunal is simply holding it to its word. This is the clear thrust of the passage from *Van Gend and Loos* quoted earlier, in which the ECJ announced that "Community law . . . imposes obligations on individuals but is also intended to confer on them rights that become part of their legal heritage." The ECHR, for its part, has developed the "doctrine of effectiveness," which requires that the provisions of the European Human Rights Convention be interpreted and applied so as to make its safeguards "practical and effective" rather than "theoretical or illusory"[63] Indeed, one of its judges has described the ECHR in a dissenting opinion as the "last resort protector of oppressed individuals."[64] Such rhetoric is backed up by a willingness to find for the individual against the state.[65]

Ready access to a tribunal can create a virtuous circle: a steady stream of cases results in a stream of decisions that serve to raise the profile of the court and hence to

62. Case 26/62, *N. V. Algemene Transp. and Expeditie Onderneming Van Gend and Loos v. Nederslandse administratie der belastingen.* 1963 E.C.R. 1, 12.
63. Bernhardt 1994.
64. *Cossey v. United Kingdom,* 184 E.C.H.R., ser. A (1990).
65. Helfer and Slaughter 1997.

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attract more cases. When the ECJ rules, the decision is implemented not by national governments—the recalcitrant defendants—but by national courts. Any subsequent domestic opposition is rendered far more difficult. In sum, transnational third-party dispute resolution has led to a de facto alliance between certain national courts, certain types of individual litigants, and the ECJ. This alliance has been the mechanism by which the supremacy and direct effect of EC law, as well as thousands of specific substantive questions, have been established as cornerstones of the European legal order.[66]

The significance of the alliance between domestic and supranational courts lies in part in the fact that it was an unintended consequence of European integration. There is no doubt it was unforeseen by the member states; Article 177 was an incidental provision suggested by a low-level German customs official in the Treaty of Rome negotiations. However welcome the functional benefits of ECJ jurisprudence may subsequently have been—and the fact that in recent years member states have deliberately strengthened the enforcement power of the ECJ while limiting its jurisdiction suggests that they were—the founding members of the EC intended to create something much closer to a classical interstate dispute-resolution system. Individual member states often opposed the efforts of the ECJ to transform the institutions set forth in the treaty into a functioning transnational dispute-resolution system. Nothing similar exists in the annals of interstate dispute-resolution bodies.

The assertion of the importance of the ECJ in this process—in particular, the assertion of the supremacy of European law and its direct effect in domestic legal systems—was not automatic. International tribunals with transnational jurisdiction deliberately exploit this link to deepen domestic enforcement. The role of the ECJ in encouraging the cooperation of national courts has been amply documented.[67] A new generation of scholarship has focused much more on the motives driving the national courts to ally themselves with the ECJ, noting substantial variation in the willingness both of different courts within the same country and of courts in different countries to send references to the ECJ and to abide by the resulting judgments. What is most striking about these findings is the extent to which specific national courts acted independently not only of other national courts but also of the executive and legislative branches of their respective governments.[68] A German lower financial court, for example, insisted on following an ECJ judgment in the face of strong opposition from a higher financial court as well as from the German government.[69] The French

66. See Burley and Mattli 1993; and Weiler 1991 and 1999.

67. See Stein 1981; Weiler 1991; and Burley and Mattli 1993.

68. This conclusion is not uncontroversial. Some political scientists argue that these national courts were in fact following the wishes of their respective governments, notwithstanding their governments' expressed opposition before the ECJ. The claim is that all EC member states agreed to economic integration as being in their best interests in 1959. They understood, however, that they needed a mechanism to bind one another to the obligations undertaken in the original treaty. They thus established a court to hold each state to its respective word. See Garrett 1992; Garrett and Weingast 1993; and Garrett, Kelemen, and Schulz 1998. On this view, intrajudicial politics within the EU were either anticipated by the founding states or were epiphenomenal. For a debate on precisely this point, see Garrett 1995; and Mattli and Slaughter 1995.

69. Alter 1996b.

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Court of Cassation accepted the supremacy of EC law, following the dictate of the ECJ, even in the face of threats from the French legislature to strip its jurisdiction amid age-old charges of *"gouvernment par juges."*[70] British courts overturned the sacrosanct doctrine of parliamentary sovereignty and issued an injunction blocking the effect of a British law pending judicial review at the European level.[71]

The motives of these national courts are multiple. They include a desire for "empowerment,"[72] competition with other courts for relative prestige and power,[73] a particular view of the law that could be achieved by following EC precedents over national precedents,[74] recognition of the greater expertise of the ECJ in European law,[75] and the desire to advantage or at least not to disadvantage a particular constituency of litigants.[76] Similar dynamics of intracourt competition may be observed in relations between national courts and the ECHR.[77] National courts appear to have been more willing to challenge the perceived interests of other domestic authorities once the first steps had been taken by other national courts. Weiler has documented the cross-citation of foreign supreme court decisions by national supreme courts accepting the supremacy of EC law for the first time. He notes that though they may have been reluctant to restrict national autonomy in a way that would disadvantage their states relative to other states, they are more willing to impose such restrictions when they are "satisfied that they are part of a trend." An alternative explanation of this trend might be ideational; courts feel such a step is more legitimate.[78]

The incentives for expansion of a transnational docket also assume a certain familiarity and comfort with litigation as a means of dispute resolution among the potential pool of litigants. Litigants in countries with a tradition of "public interest litigation," for instance, whereby NGOs use the courts to vindicate the rights of particular minorities or otherwise disadvantaged social groups, may readily see a transnational tribunal as another weapon in their arsenal.[79] More fundamentally, litigants in any country must perceive some use in resorting to the courts at all, suggesting a correlation between the most successful transnational tribunals and those presiding over countries with at least a minimum tradition of the rule of law. Alternatively, litigants in countries with a once-functioning legal system that has been corrupted or otherwise damaged may be quicker to resort to an international tribunal as a substitute or corrective for ineffective or blatantly politicized domestic adjudication.[80]

Yet even within the EU legal system, the most studied of all transnational litigation processes, we still know "surprisingly little about the behavior and organization of

70. See Alter 1996b; and Plötner 1998.
71. Craig 1998.
72. See Weiler 1991; and Burley and Mattli 1993.
73. Alter 1996b, and 1998a,b.
74. Mattli and Slaughter 1998b.
75. Craig 1998.
76. Plötner 1998.
77. Jarmul 1996.
78. See Weiler 1994; and Finnemore and Sikkink 1998.
79. See Harlow and Rawlings 1992; and Alter and Vargas 2000.
80. See Helfer and Slaughter 1997; and Stone Sweet 1999.

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litigators of EC law, and nothing from a comparative perspective [across EU countries]."[81] Even within apparently dynamic and expansive jurisdictions, the process is not unidirectional, varying considerably across different national courts, different issue-areas in the same court, and across countries.[82] Direct institutional links between individual litigants and an international tribunal create an internal logic of legalization that can become a powerful catalyst for growth, yet more research is required to explain precisely how this decisively important evolution unfolds.

The evolution of the ECHR has been less purely legal. In the ECHR system, as we have seen, litigants have been encouraged over time by the publicity accorded ECHR judgments and the growing willingness of national legislatures and administrative entities, as well as courts, to comply, rather than by a direct legal link on the model of Article 177 of the Treaty of Rome. The clauses in the European Human Rights Convention allowing individuals to bring cases before the Commission (Article 10) and recognizing the compulsory jurisdiction of the ECHR (Article 25) were initially optional among the members of the Council of Europe. It was three decades until individual access and recognition of the court's jurisdiction became universal. These practices were then codified in Protocol 11 to the convention, signed in 1994, whereby all parties recognized the compulsory jurisdiction of the permanent ECHR and permit individuals direct access to it in all cases. Signature of the new protocol was made a condition of admission for any new members, a simultaneous recognition of the greatly enhanced effectiveness of transnational over interstate litigation. In many cases new democracies strongly committed to a successful political transition enthusiastically embraced the clauses.[83] In other cases such willingness may have reflected the relative weakness of the candidate states relative to the members of the largely West European club they were seeking to join.

Beyond Formalism: The Dynamics of GATT and the WTO

The contrast between the two ideal types of dispute resolution we have constructed—interstate and transnational—illuminates the impact of judicial independence, differential rules of access, and variations in the domestic embeddedness of an international dispute-resolution process. The ICJ fits the interstate dispute-resolution pattern quite well; the ECJ approximates the ideal type of transnational dispute resolution. The form that legalization takes seems to matter.

Form, however, is not everything. Politics is affected by form but not determined by it. This is most evident when we seek to explain more fine-grained variations in the middle of the spectrum between the two ideal types. The evolution of the GATT, and recently the WTO, illustrates how politics can alter the effects of form. Formally, as we pointed out earlier, GATT is closer to the ideal type of interstate dispute resolution than to transnational dispute resolution. The independence of tribunals is coded

81. Stone Sweet 1998, 330. See also Harlow 1992.
82. Golub 1996.
83. Moravcsik 2000.

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as moderate for both GATT and WTO. On the embeddedness criterion, GATT was low and WTO, with its mandatory procedures, is moderate (see Table 4). Most important, however, are access rules: in both the old GATT and the ITO (since 1 January 1995), states have the exclusive right to bring cases before tribunals. In formal terms, therefore, states are the gatekeepers to the GATT/WTO process.

We noted in the first section, however, that the relationships between actors in civil society and representatives of the state are very different in GATT/WTO than in the ICJ. In the GATT/WTO proceedings the principal actors from civil society are firms or industry groups, which are typically wealthy enough to afford extensive litigation and often have substantial political constituencies. Industry groups and firms have been quick to complain about allegedly unfair and discriminatory actions by their competitors abroad, and governments have often been willing to take up their complaints. Indeed, it has often been convenient for governments to do so, since the best defense against others' complaints in a system governed by reciprocity is often the threat or reality of bringing one's own case against their discriminatory measures. In a "tit-for-tat" game, it is useful to have an army of well-documented complaints "up one's sleeve" to deter others from filing complaints or as retaliatory responses to such complaints. Consequently, although states retain formal gatekeeping authority in the GATT/WTO system, they often have incentives to open the gates, letting actors in civil society set much of the agenda.

The result of this political situation is that the evolution of the GATT dispute-settlement procedure looks quite different from that of the ICJ: indeed, it seems intermediate between the ideal types of interstate and transnational dispute resolution. Dispute-resolution activity levels have increased substantially over time, as the process has become more legalized. Adjudication in the GATT of the 1950s produced vague decisions, which were nevertheless relatively effective, arguably because GATT was a "club" of like-minded trade officials.[84] Membership changes and the emergence of the EC in the 1960s led to decay in the dispute resolution mechanism, which only began to reverse in the 1970s. Diplomatic, nonlegalized attempts to resolve disputes, however, were severely criticized, leading to the appointment of a professional legal staff and the gradual legalization of the process. With legalization came better-argued decisions and the creation of a body of precedent.

Throughout this period, the formal procedures remained entirely voluntary: defendants could veto any step in the process. This "procedural flimsiness," as Robert E. Hudec refers to it, is often taken as a major weakness of GATT; but Hudec has shown that it did not prevent GATT from being quite effective. By the late 1980s, 80 percent of GATT cases were disposed of effectively—not as a result of legal embeddedness but of political decisions by states. This is a reasonably high level of compliance, though not as high as attained by the EC and ECHR. The WTO was built on the success of GATT, particularly in recent years, rather than being a response to failure.[85]

84. This paragraph and the subsequent one rely on Hudec 1999, especially 6–17.

85. The annual number of cases before the WTO has risen to almost twice the number during the last years of GATT; but Hudec argues that this change is accounted for by the new or intensified obligations of

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We infer from the GATT/WTO experience that although the formal arrangements we have emphasized are important, their dynamic effects depend on the broader political context. Our ideal-type argument should not be reified into a legalistic, single-factor explanation of the dynamics of dispute resolution. Even if states control gates, they can under some conditions be induced to open them, or even to encourage actors from civil society to enter the dispute resolution arena. The real dynamics of dispute resolution typically lie in some interaction between law and politics, rather than in the operation of either law or politics alone.

The foregoing discussion of dynamics suggests that the following three conjectures deserve detailed empirical evaluation:

1. Compared with interstate dispute resolution, transnational dispute resolution offers greater potential for the widening and deepening of dispute resolution over time, for unintended consequences, and for progressive restrictions on the behavior of national governments.
2. Judges in transnational dispute-resolution systems are more likely than those in interstate dispute-resolution systems to exploit the potential for independence, access, and embeddedness to centralize political authority in international institutions, particularly dispute-resolution bodies themselves.
3. Whereas very large political differences between ideal-typical systems are well explained by formal institutional characteristics of international legal regimes, more fine-grained differences reflect differences in the ability of domestic political groups to exploit those institutional characteristics.

Conclusion

We have constructed two ideal types of legalized dispute resolution, interstate and transnational, which vary along the dimensions of independence, access, and embeddedness. When we examine international courts, we find that the distinction between the two ideal types appears to be associated with variation in the size of dockets and levels of compliance with decisions. The differences between the ICJ and the ECJ are dramatic along both dimensions. The causal connections between outcomes and correspondence with one ideal type or the other will require more research and analysis to sort out; but the differences between the ICJ and ECJ patterns cannot be denied. Their dynamics also vary greatly: the ECJ has expanded its caseload and its authority in a way that is unparalleled in the ICJ.

The GATT/WTO mechanisms do not reflect our ideal types so faithfully. States remain formal legal gatekeepers in these systems but have often refrained from tightly limiting access to dispute resolution procedures. As a result, the caseload of the GATT processes, and the effectiveness of their decisions, increased even without high formal levels of access or embeddedness. Hence, GATT and the WTO remind

the Uruguay Round, rather than being attributable to changes in the embeddedness of the dispute resolution mechanism. Hudec 1999, 21. Hudec acknowledges, however, that he is arguing against the conventional wisdom.

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us that legal form does not necessarily determine political process. It is the interaction of law and politics, not the action of either alone, that generates decisions and determines their effectiveness.

What transnational dispute resolution does is to insulate dispute resolution to some extent from the day-to-day political demands of states. The more we move toward transnational dispute resolution, the harder it is to trace individual judicial decisions and states' responses to them back to any simple, short-term matrix of state or social preferences, power capabilities, and cross-issues. Political constraints, of course, continue to exist, but they are less closely binding than under interstate dispute resolution. Legalization imposes real constraints on state behavior; the closer we are to transnational third-party dispute resolution, the greater those constraints are likely to be. Transnational dispute-resolution systems help to mobilize and represent particular groups that benefit from regime norms. This increases the costs of reversal to national governments and domestic constituents, which can in turn make an important contribution to the enforcement and extension of international norms. For this reason, transnational dispute resolution systems have become an important source of increased legalization and a factor in both interstate and intrastate politics.

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