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considerable difficulty in identifying the causal effects of legalization. Compliance with rules occurs for many reasons other than their legal status. Concern about reciprocity, reputation, and damage to valuable state institutions, as well as other normative and material considerations, all play a role. Yet it is reasonable to assume that most of the time, legal and political considerations combine to influence behavior.

At one extreme, even "pure" political bargaining is shaped by rules of sovereignty and other background legal norms. At the other extreme, even international adjudication takes place in the "shadow of politics": interested parties help shape the agenda and initiate the proceedings; judges are typically alert to the political implications of possible decisions, seeking to anticipate the reactions of political authorities. Between these extremes, where most international legalization lies, actors combine and invoke varying degrees of obligation, precision, and delegation to create subtle blends of politics and law. In all these settings, to paraphrase Clausewitz, "law is a continuation of political intercourse, with the addition of other means."

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Legalized Dispute Resolution: Interstate and Transnational

Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter

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

[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.

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.

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.

*** It is helpful to locate our analysis in a broader context. *** 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

[3] Abbott et al., 119 (this book) tab 1, types I–III and V.
[4] Hence we do not exclude types II and V (Abbott et al., tab. 1, 119) from our purview.
[5] See Abbott et al., 119 (this book).

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 transnational 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 non-governmental 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 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

[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.

[8] Helfer and Slaughter 1997.

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.

* * *

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 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

[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.

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

TABLE 7.1. *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

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 7.1.

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,[11] 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,[12] 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. ***

[11] Karen J. Alter, "The European Union's Legal System and Domestic Policy Spillover or Backlash?" *International Organization* 54, 3 (Summer 2000) p. 489.

[12] Kenneth W. Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", International Organization 54, 3 (Summer 2000), p. 421.

The third criterion for judicial independence, *financial and human resources*, refers to the ability of judges to process their caseloads promptly and effectively.[13] 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.[14] 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.[15] 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 government policy can easily and

[13] Helfer and Slaughter 1997.
[14] Keck and Sikkink 1998.
[15] Farer 1998.

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 7.2, 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.

* * *

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. *** 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 individuals are unable to file suit against their own government before the ICJ. ***

Near the permissive end of the spectrum is the ECJ. Individuals may ultimately be directly represented before the international tribunal, though

TABLE 7.2. *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

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,[16] 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.[17]

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

[16] Karen J. Alter, "The European Union's Legal System and Domestic Policy: Spillover or Backlash?", *International Organization* 54, 3 (Summer 2000), p. 489.

[17] 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.

TABLE 7.3. *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

to which individuals have direct access, though subject to varying restrictions. ***

* * *

Legal Embeddedness: Who Controls Formal Implementation?

*** 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 7.3, 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