International Law and International Relations

Edited by Beth A. Simmons and Richard H. Steinberg

CAMBRIDGE www.cambridge.org/9780521861861

Dispute Settlement

One of the major innovations of the WTO was to strengthen the dispute-resolution mechanism. States have lost the ability to wield a veto, which they used under the GATT to protect themselves against GATT-approved retaliation. In effect, residual rights of control have been shifted from states to the WTO, convened as the Dispute Settlement Body. According to proponents of the new system, the existence of veto power encouraged opportunism, whereas not having veto power deters such behavior. If this is the case, we should see predictable effects in the pattern of disputes brought to the WTO.

We suggest that the GATT dispute-settlement structure, by being more attentive to the realities of power and an uncertain economic environment, but also by providing publicity and possible sanctions when states blatantly disregarded regime rules, may have optimized the trade-off between constraint and flexibility that liberalization requires. As a way to examine this hypothesis, we ask whether the pattern of disputes has changed under the WTO in the manner predicted by the logic of reducing opportunism. The strong theoretical argument in favor of legalization claims that legalization is necessary to prevent opportunistic behavior. If we find that the incidence of opportunism has not changed in the face of increasing legalization, the argument in favor of legalization loses much of its force.[35]

If the primary effect of further legalization in dispute settlement is reducing opportunism, it should appear in the data as reduced political manipulation of the regime. Eliminating the power to veto should have observable effects on the activities of states and the outcome of disputes. Political scientists are producing a burgeoning literature on GATT/WTO dispute settlement, using sophisticated statistical techniques. However, this literature, regardless of the techniques involved, cannot escape problems of selection bias, since states chose whether to bring disputes and at what stage to resolve them. Here we suggest a few simple hypotheses about how the pattern of disputes should change with legalization if its major effect is a reduction in opportunism. If the data do not support these simple hypotheses, the case for legalization is substantially weakened.

[35] We assume a goal of reducing opportunism on theoretical grounds, without claiming that all negotiators had precisely this goal in mind. Certainly the agendas of negotiators were diverse, and reducing opportunism was only one goal among many.

Adopting the unitary state/opportunism model, we derive propositions about how legalization should influence patterns of disputes. Assuming the problem of opportunism suggests that the loss of veto power should have two primary effects: a *deterrent* effect and a *distributive* effect. States will behave strategically both in deciding when to bring disputes and whether to comply preemptively so that others have no cause to bring a dispute. This two-sided strategic behavior could render many predictions indeterminate. To identify refutable hypotheses, we focus on expected changes in the relative behavior of developed and developing states. Since both are subject to the same incentives in deciding whether to comply with changes in GATT/WTO rules, changes in the proportions of disputes brought are likely caused by changed calculations about the chances of success in a dispute and not by changed patterns of compliance. Although developing countries have more trade restrictions than developed countries, the marginal impact of new dispute-resolution procedures on compliance decisions should be the same for both. In addition, we concentrate on just the first few years of experience under the WTO rules. Since states can change their behavior in bringing disputes more quickly than they can change their basic trade regulations, the patterns we observe should be due primarily to calculations about whether bringing disputes is worthwhile, not fundamental changes in compliance.

A deterrent effect refers to the likelihood that the existence of veto power would deter states from bringing disputes. Bringing a formal dispute is costly and time consuming, and states could calculate that doing so is not worth the trouble if the powerful will simply veto any decision that goes against them. Thus we generate a deterrence hypothesis: *the existence of veto power deters some states from bringing disputes, and with the loss of veto power these states are no longer deterred.*

In order to collect data relevant to this general hypothesis, we need to derive some observable implications from it. We do so on the assumption that the intent of legalizing dispute-resolution procedures is to reduce opportunistic behavior by powerful states such as the United States.[36] One implication is that, since powerful states can no longer veto decisions that go against them, *we should expect the proportion of complaints against developed countries to rise under the WTO* (hypothesis 1). If states were deterred from bringing complaints against the powerful because of the existence of the veto, then such complaints should have a higher probability of success as a result of the loss of the veto. Therefore, we

[36] Jackson 1998.

should see more disputes brought against the powerful. This should be true even if states are, for strategic reasons, complying more fully under the WTO. Better compliance should hold for both developed and developing states; there is no reason to expect the proportion of disputes against the powerful to change as a result of changes in compliance patterns.

Second, since less powerful countries may now have a greater chance of having decisions in their favor implemented, *we should see developing countries increasingly bringing complaints* (hypothesis 2). Simply put, the deterrence hypothesis suggests that under the WTO, weak states should no longer be deterred. Like hypothesis 1, hypothesis 2 should hold even if patterns of compliance have improved, since improved compliance should hold for both developed and developing states. There is no reason to expect strategic compliance behavior to lead to a change in the proportion of disputes brought by developing countries.

Finally, a process marred by opportunism should be most evident in relations between powerful and weak states. Thus a third implication of the deterrence hypothesis is that *we should see an increase in the proportion of cases brought by developing countries against developed countries* (hypothesis 3). As the WTO depoliticizes trade and so encourages the less powerful to demand their legal rights, we should see more of these "asymmetric" disputes.

The evidence on these three hypotheses about deterrent effects is mixed.[37] Regarding hypothesis 1, of the complaints raised under the GATT through 1989, 87 percent were brought against developed states.[38] Under the WTO, this percentage has dropped, contrary to the expectation from the opportunism perspective, to 64 percent. This is likely a result of the expansion of regime rules to cover more developing-country trade. The high percentage of complaints brought under the GATT against developed states is not surprising, considering the value of their market for other states. Yet it indicates that the power to veto did not allow powerful states to deter others from bringing complaints against them. This finding suggests that the GATT, in spite of the decentralized nature of its dispute-resolution process, was able to constrain the behavior of developed countries, as Hudec also concludes.[39] Preventing opportunism does not require high levels of legalization.

[37] For a more thorough examination of patterns of disputes in the GATT and the WTO, see. Hudec 1999; and Sevilla 1998.

[38] Hudec 1993, 297.

[39] Hudec 1999.

Hypothesis 2 posits that developing countries will be more likely to use the WTO procedures than they were to use the GATT mechanism. If this is true, we should see the percentage of complaints brought by developing countries rising under the WTO. This prediction holds up better than the first. Under the GATT (through 1989), only 19 percent of complaints were brought by developing countries.[40] This number has risen to 33 percent in the first few years that the WTO mechanisms have been in effect. However, considering the evidence just discussed on the identity of defendants, it seems likely that this increased reliance on the dispute-resolution mechanism reflects some dynamic other than a decreased ability of the powerful to deter complaints against themselves. In particular, it seems likely that increased legalization has reduced the costs of bringing suits, thus making it more frequently worth the cost of bringing a complaint for poor states, regardless of the identity of the defendant.[41] In other words, legalization has encouraged weaker states to bring more complaints, generally because doing so is easier, not because the powerful will no longer veto them.

Hypothesis 3 predicts an increase in the number of complaints brought by developing countries against developed countries under the WTO. This hypothesis fares badly, because the data show that under the GATT developing countries targeted almost solely the rich world in their disputes. Hudec's data show almost no cases of developing countries bringing complaints against one another. The exceptions are disputes between India and Pakistan. In contrast, the twenty complaints brought by developing countries so far under the WTO have been just about evenly divided between targeting the developed and developing world. Two factors might explain this finding. First, the costs of bringing disputes are now lower, so it is more often worthwhile to bring them against developing countries. Second, the Uruguay Round extended many trade rules to developing countries, so the dispute-resolution procedures can be used against them for the first time. Regardless of the particular mechanism at work, the pattern of complaints shows that the major change under the WTO procedures has been an increased willingness of developing countries to bring complaints against one another. This effect is not consistent with reduced opportunism.

If legalization reduces opportunism as intended, a second effect that should result from eliminating the veto power is enhanced equity in the

[40] Hudec 1993, 296.
[41] Sevilla 1998.

outcomes of disputes. We can formalize this as a fourth hypothesis: *legalization of dispute resolution has reduced the bias toward the powerful in the settlement of disputes* (hypothesis 4). A distributive effect could be estimated by comparing the outcomes of disputes brought under the GATT versus under the WTO. Unfortunately, since few cases have yet been resolved under the WTO, we can say nothing definitive on this issue. However, we can look at dispute outcomes under the GATT to see if they tended to favor developed countries as expected. If the weakly legalized GATT mechanisms encouraged opportunism, this trend should appear as a bias toward the powerful in the outcomes of disputes under the GATT. Eric Reinhardt has provided a careful statistical study of the factors determining the distributive outcomes of GATT disputes.[42] He tests the hypothesis that powerful states tend to get a larger share of the benefits of resolved disputes. Employing a number of alternative operationalizations, Reinhardt found no evidence that asymmetries of power work in favor of the powerful. Instead, he found a bias in favor of defendants, regardless of power asymmetries.

As with the data on the choice to bring complaints, in looking at the outcomes of disputes we find little evidence that the GATT operated in an overtly politicized manner, with powerful states using the GATT dispute-resolution procedures to deter weaker states from bringing complaints or to force outcomes of disputes to favor the powerful. The GATT, in spite of its weak level of legalization, provided many of the benefits we expect to see from international institutions. It discouraged opportunism without a resort to highly legalized mechanisms. This finding raises further questions about the benefits that states will be able to derive from further legalization.

Improving the compliance of powerful states with their explicit obligations under the rules of international trade was one of the primary motivations behind the enhanced dispute-resolution mechanisms of the WTO. Thus moving from a politicized process to a more legalized one should have an observable impact on the behavior of powerful states. However, the evidence is weak that the WTO has made the difference intended by proponents of more legalized dispute-resolution procedures. While developing countries appear more willing to lodge formal complaints than they were previously, the complaints do not target the behavior of powerful states any more than they did before. One plausible interpretation of the evidence on the number of complaints being brought

[42] Reinhardt 1995.

is that the GATT was in fact quite influential in constraining powerful states, leading us to ask how much value will be added by increased legalization. Considering the drawbacks of increased legalization discussed earlier, the benefits must be clear in order to justify further moves in this direction. Dispute outcomes do not show evidence of coercion by powerful states, consistent with the idea that the political sensitivity of the GATT was not as much of an impediment to liberalization as legalization proponents presumed.

CONCLUSION

This article was motivated by questions about the relationship between international legalization and trade. The benefits of legalization lie in the fact that the more efficiently a regime provides information, reduces transaction costs, and monitors member behavior, the harder it is for a unitary state to behave opportunistically and renege on trade agreements. However, an analysis of the domestic requisites of free trade suggests potential negative effects of legalization that must be weighed against its benefits. When we consider cooperation with the trade regime to be a function of the interests of domestic political actors, the assumption that increased legalization leads to more trade openness becomes questionable. Although we cannot demonstrate that legalization has gone so far that it threatens liberalization, we do wish to sound a cautionary note based in the impact of legalization on the mobilization of protectionist groups.

We examined three theoretical issues implicated by the legalization of the trade regime. First, we asked how greater precision at the time of negotiating treaties changes the incentives of antitrade groups to mobilize. In that legalization leads to more and better information about the distributional effects of proposed agreements, we suggested that it could actually deter the conclusion of cooperative deals. Faced with certainty of loss, the expected utility of a group's organizing increases, suggesting that negotiators could find themselves confronted by powerful veto groups, undermining their ability to construct a majority in favor of a treaty. This dynamic of information provided by a legalized regime leading to massive mobilization may help explain the level of social activism at the 1999 WTO meetings in Seattle.

Second, we applied the same logic of information and mobilization to expectations about the maintenance of agreements already in force. The logic of information here predicted a different outcome from that during

negotiations. By focusing on the incentives of exporters, we argued that when exporters know that they are likely targets of retaliation, they are more motivated to organize in support of the trade regime than those subject to an imprecise threat of retaliation. Thus the prediction about the effect of changes in the information environment varies, depending upon whether we are considering the expansion of trade liberalization or compliance with enacted treaties.

Finally, we looked at the effects of a system of highly deterministic penalties on domestic actors. Here we suggested that trade regimes need to incorporate some flexibility in their enforcement procedures; too little enforcement may encourage opportunism, but too much may backfire, undermining the ability of domestic actors to find support for an open trade policy. By decreasing the ability to breach agreements, WTO negotiators may have underestimated the inherently uncertain character of the international economy and so the need to allow practical flexibility in enforcement of regime rules.

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Given the short history of the WTO, the empirical support for our theoretical arguments is inconclusive. Still, evidence suggests that the effects of legalization may not be as glowing as proponents argue. First, legalization may be one reason for the increased attention and activity of antitrade groups. We cannot say whether this will deter nations from further liberalization, since policy will ultimately depend on the balance of national forces between pro- and antitrade groups. Still, it is clear that those groups who are targeted for liberalization in the new round of discussions have become active proponents of particularistic policies. Second, some evidence suggests that changes in WTO rules undermine the incentive for export groups to mobilize in defense of free trade. In that the WTO makes retaliation more difficult, both because of changes in the rules on safeguard provisions and because of the process of dispute resolution, we expect exporters to mobilize less often to balance the action of rent-seeking import-competing groups.

Consideration of the effect of the more precise and binding safeguard and dispute-settlement provisions also raises questions about the turn toward legalization. Given the difficulty of their use, few countries turned to GATT safeguards, choosing instead alternative methods to deal with difficulties in compliance. Making these safeguards more difficult to use may have been both unnecessary and counterproductive – if countries found it necessary to turn to alternative mechanisms to deal with the

political effects of market dislocation before, the change in rules on safeguards does little to solve the underlying problem. Similarly, our investigation of the WTO dispute-settlement mechanism gives us little reason to think that legalization in the realm of settling disputes will have significant effects on trade compliance. The GATT system was relatively effective at deterring opportunism, in spite of its political nature.

The source of stability of trade agreements is found in domestic political mechanisms. The rules of the regime influence countries by making it easier or harder to find majority support for trade openness; if the regime supports rules that are unhelpful to politicians at home, it may well undercut its own purpose. Thus the legalization of international trade could turn on itself if analysis of the benefits of legalization neglects associated political costs. Thomas Franck has argued that the greater the "determinacy" of a rule, the more legitimate it becomes.[43] Determinacy, however, may be of greater value to lawyers than to politicians, whose interests in trade liberalization will be constrained by elections. Elected officials face a dilemma. If there is too little formalism in international trade rules, politicians will be unable to commit for fear of opportunism by others; too much formalism and they lose their ability to opt out of the regime temporarily during especially intense political opposition or tough economic times. Analyses of legalization that focus on maximizing state compliance neglect complex domestic political dynamics. It is well possible that attempts to maximize compliance through legalization will have the unintended effect of mobilizing domestic groups opposed to free trade, thus undermining hard-won patterns of cooperation and the expansion of trade.

[43] Franck 1995.

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Alternatives to "Legalization": Richer Views of Law and Politics

Martha Finnemore and Stephen J. Toope

The authors of "Legalization and World Politics" (special issue of *IO*, summer 2000) have done an excellent job connecting one branch of thinking about international law (rooted in the legal theory of H. L. A. Hart) to one branch of thinking about international politics (neoliberal institutionalism).[1] However, the connections between the two disciplines are broader and deeper than the volume indicates. International legal scholars have long understood that international law is more than the formal, treaty-based law on which the volume's authors focus their work. Law is a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies.[2] Customary international law displays this richer understanding of law's operation as does the increasingly large body of what has been termed "interstitial law," that is, the implicit rules operating in and around explicit normative frameworks.[3] Similarly, legal pluralist analysis of domestic and international legal systems focuses on the interaction of overlapping state and nonstate normative systems.[4]

We show how a fuller appreciation of what international law is and how it influences behavior allows room for a wealth of intellectual connections between international legal scholarship and research in international

[1] *International Organization* 54, 3, Summer 2000.
[2] Glenn 2000.
[3] Lowe 2000.
[4] See Walzer 1983; and Macdonald 1998.

We thank Jutta Brunnée, H. P. Glenn, Rod Macdonald, René Provost, Bob Wolfe, participants in the University of Chicago Law School International Law Workshop, two anonymous reviewers, and the editors of *IO* for helpful comments on an earlier draft.

relations – connections that are not evident from the framing of the "legalization" phenomenon in the *IO* volume. *** Narrow and stylized frameworks like this one may be useful if they provide conceptual clarity and facilitate operationalization of concepts. However, the empirical applications of legalization in the volume suggest the opposite: the articles reveal that the concept of legalization as defined in the volume is peripheral, in need of revision, or generates hypotheses that are wrong. ***

A RICHER VIEW OF INTERNATIONAL LAW

The framers of the volume are careful in defining their terms. *Legalization* refers to a specific set of characteristics that institutions may (or may not) possess: obligation, precision, and delegation.[5] Each of these characterizations may be present in varying degrees along a continuum, and each can vary independently of the others. This attention to definitions is helpful and lends coherence to the volume, but appropriating the general term *legalization* for only a few features of the law is misleading. It suggests that law *is* and can only be this limited collection of formalized and institutionalized features. The phenomenon the authors investigate might more accurately be termed *legal bureaucratization*, since it seems to involve the structural manifestations of law in public bureaucracies. *** Without a broader view of law that causes us to pay attention to legal procedures, methodologies, institutions, and processes generating legitimacy, the authors' three components of legalization lack theoretical coherence and raise more questions than they answer, as we show.

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The view of law presented in the volume, though important, is limited. In it, law is constructed primarily through cases and courts, or through formal treaty negotiation. The processes of law are viewed overwhelmingly as processes of dispute resolution, mostly within formal institutionalized contexts. The "international legal actions" chosen in the volume's introduction to epitomize the phenomenon of legalization are mainly examples of tribunal decisions. The secondary evidence of legalization is drawn exclusively from explicit obligations imposed by treaties.[6] Law

[5] Abbott et al. 2000, 401.
[6] Goldstein et al. 2000, 385–86.

in this view is constraint only; it has no creative or generative powers in social life. Yet law working in the world constitutes relationships as much as it delimits acceptable behavior. The very idea of state sovereignty, both a legal and a political construction, creates the context that allows for the formal articulation of treaty rules.[7] Similarly, property rights, over which political actors battle in many of the volume's articles, are themselves dynamic constructions generated by law. Oddly, given this group of authors, even the role of formal law in creating and shaping the life of institutions like the IMF, GATT, and WTO, explicitly addressed in the volume, is neglected. Theirs is an overwhelmingly liberal and positivist view of law. It is also limited to the bureaucratic formalism described by Weber and so is very "Western" in a narrow sense.[8] We are not implying that Western law, positivism, and liberalism are uninteresting theoretical frameworks, but an analysis of the role of law in world politics that is entirely constrained by these three optics, attending primarily to formal institutions, is at best partial.[9]

Despite the efforts of the framers of the volume to define terms and to expressly bracket issues, at the end of the day it is difficult to decide exactly what the authors have set out to demonstrate and what analytic work their concept of legalization is supposed to accomplish. Is legalization a dependent variable or an independent one? *** If legalization is a phenomenon to be explained, what other factors might explain it, and how important are they? If legalization explains aspects of state behavior, what other independent variables should be considered in assessing legalization's role, and how might these interact with legalization?[10] Equally important for the authors, do the three defining features of legalization all have the same causes, or cause the same effects, and how would we know if they did (or did not)? ***

[7] Biersteker and Weber 1996.

[8] Glenn 2000.

[9] For a helpful categorization of various legal theories as they relate to the question of compliance, see Kingsbury 1998. Among the competing theories of international law (and particularly of international obligation) that are not included within the volume's concept of legalization are the "world constitutive process" model of the Yale School (Lasswell and McDougal 1971; Reisman 1992), natural law approaches (Verdross and Koeck 1983), the "transnational legal process" model of Harold Koh (Koh 1997), the "interactional" framework of Brunnée and Toope (Brunnée and Toope 2000), and the rigorously rationalistic law and economics approach of Goldsmith and Posner (Goldsmith and Posner 1999).

[10] See Abbott and Snidal 2000; see also Abbott et al. 2000.