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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. ***

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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

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 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.

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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,[18] 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 the past four decades.[19] 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

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

[19] Weiler 1991.

TABLE 7.4. *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

[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.
Source: Sands et al. 1999.

legally binds the domestic court to apply the result. Domestic courts do nonetheless appear to enforce EFTA court decisions.[20]

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Two Ideal Types: Interstate and Transnational Dispute Resolution

The three characteristics of international dispute resolution – independence, access, and embeddedness – are closely linked.*** The characteristics of the major courts in the world today are summarized in Table 7.4, 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.

[20] Sands, Mackenzie, and Shany 1999, 148.

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 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.[21] 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 7.4 reveals that high levels of independence and access appear to be more common than high levels 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.[22] 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.

[21] 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.

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

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

*** 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.

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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. ***

Access to classic arbitral tribunals, such as those constituted under the Permanent Court of Arbitration, requires the consent of both states. *** 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.

* * *

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. ***

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The de facto system is one in which most states, like the United States, reserve the right to bring specific cases to 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.[23] ***

[23] Rosenne 1995.

TABLE 7.5. *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.

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, [for example,] the United States exercised its extra-institutional power to induce Mexico to drop the case before the judgment could be enforced. * * *

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.

* * *

The comparative data summarized in Table 7.5 further support [the first] 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 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.[24]

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.

* * *

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

[24] Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltungfur Branntwein* (Cassis de Dijon), 1978.

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.

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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.[25] ***

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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

[25] Helfer and Slaughter 1997.

embed international law in domestic legal systems should be most effective among such 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. ***

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.[26]

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.[27]

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

[26] See Keohane and Hoffmann 1991; Alter 1998a; and Pollack 1997.
[27] See White 1990; Glendon 1991; and Sunstein 1996.

develop legal precedent over time without triggering 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.[28] Hence the ICJ has been constrained in developing a large and binding jurisprudence. *** 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.[29] 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, 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.[30]

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[28] Chayes 1965.
[29] Ibid.
[30] See, for example, Charney 1994.