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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.

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.[31]

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

[31] See Alter 1998a; and Alter 2000.

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.[32] 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."[33] Indeed, one of its judges has described the ECHR in a dissenting opinion as the "last resort protector of oppressed individuals."[34] Such rhetoric is backed up by a willingness to find for the individual against the state.[35]

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 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.[36]

[32] 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.
[33] Bernhardt 1994.
[34] *Cossey v. United Kingdom,* 184 E.C.H.R., ser. A (1990).
[35] Helfer and Slaughter 1997.
[36] See Burley and Mattli 1993; and Weiler 1991 and 1999.

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The motives of these national courts are multiple. They include a desire for "empowerment,"[37] competition with other courts for relative prestige and power,[38] a particular view of the law that could be achieved by following EC precedents over national precedents,[39] recognition of the greater expertise of the ECJ in European law,[40] and the desire to advantage or at least not to disadvantage a particular constituency of litigants.[41] Similar dynamics of intracourt competition may be observed in relations between national courts and the ECHR.[42] 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.[43]

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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

[37] See Weiler 1991; and Burley and Mattli 1993.
[38] Alter 1996b, and 1998a,b.
[39] Mattli and Slaughter 1998b.
[40] Craig 1998.
[41] Plötner 1998.
[42] Jarmul 1996.
[43] See Weiler 1994; and Finnemore and Sikkink 1998.

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 as moderate for both GATT and WTO. On the embeddedness criterion, GATT was low and WTO, with its mandatory procedures, is moderate (see Table 7.4). 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.[44] 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.

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

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.[45]

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.

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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

[45] 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 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.

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 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.

8

Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note

Judith Goldstein and Lisa L. Martin

*** In this article we consider how increases in the legalization of the international trade regime interact with the trade-related interests of domestic actors. Although legalization may reduce incentives for cheating by individual nations, we identify ways in which the unintended effects of legalization on the activities of domestic economic actors could interfere with the pursuit of progressive liberalization of international trade. Domestic politics cannot be treated as extraneous or as an irrational source of error that obstructs the purposes of legalization. Instead, politics operates in systematic ways and is the mechanism through which legalization exerts its effects. These effects range far beyond reducing opportunism by unitary states.

Through incremental change in the postwar years, the international trade regime has evolved away from its origins as a decentralized and relatively powerless institution and become a legal entity. The number of countries and the amount of trade covered by the rules agreed to in 1947 have expanded greatly. After 1995 and the creation of the World Trade Organization (WTO), the regime further increased its demands on members by elaborating and expanding commercial rules and procedures, including those that relate to the system of settling disputes. In practice the expansion of the regime in the post–World War II period has made trade rules more precise and binding. The result is that the implications or

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behavioral demands of rules have become increasingly transparent to all participants.[1]

We argue that this increased legalization does not necessarily augur higher levels of trade liberalization, as suggested by supporters. The weakly legalized General Agreement on Tariffs and Trade (GATT) regime was remarkably successful at liberalizing trade; it is not apparent that the benefits of further legalization will outweigh its costs. This finding derives from an analysis of domestic politics and, in particular, from the incentives facing leaders to join and then adhere to the dictates of a liberal international trade regime. We support our position through an analysis of two aspects of trade politics.

First, we examine the effect of legalization on the incentives of domestic groups to mobilize and pressure their governments to adopt policies that favor them.[2] *** We believe that better information will empower protectionists relative to free traders on issues relating to the conclusion of new agreements and free traders relative to protectionists on issues of compliance to existing agreements. Second, we examine the implications of a more "binding" GATT/WTO on member governments. Although GATT rules were always obligatory in a legal sense, the provisions for using escape clauses and other loopholes interacted with domestic political realities in a way that made their use increasingly rare. This fact, combined with a strengthened dispute-resolution mechanism under the WTO, has increased the extent to which governments are "obliged," in a political sense, to maintain their liberal commitments. Reducing the ability of governments to opt out of commitments has the positive effect of reducing the chances that governments will behave opportunistically by invoking phony criteria for protecting their industries. On the other hand, tightly binding, unforgiving rules can have negative effects in the uncertain environment of international trade. When considering the realities of incomplete information about future economic

[1] Legalization refers to three aspects of international law: obligation, precision, and level of delegation to a centralized authority. Abbott et al., this issue.

[2] The number and variety of groups participating in the politics of trade has grown in the last decades. Where the classic models assumed three groups with trade-related interests – consumers, import-competing groups, and exporters – other groups, whose interests span from human rights to a clean environment, have come to believe that their interests are influenced by trade negotiations. The logic of this article, explaining the interaction among international regimes, social mobilization, and domestic politics, applies to any interest that groups perceive to be influenced by international trade agreements.

shocks, we suggest that legalization may not result in the "correct" balance between these two effects of binding.

In this article we develop both the theoretical reasoning and the empirical support for our cautionary note on the domestic effects of legalization. We begin by examining information and group mobilization and suggest that the predictability that comes with legalization has both positive and negative effects on the trade liberalization goal of the regime. We then investigate the "bindingness" of trade rules. Through examination of the use of safeguards and the new dispute-resolution procedure, we argue that trade rules have become more binding, even if *pacta sunt servanda* has always applied to such rules, and that enforcement of rules is now more certain.

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LEGALIZATION, INFORMATION, AND THE MOBILIZATION OF DOMESTIC GROUPS

The logic of precision, delegation, obligation, and increased transparency played a large role in negotiations over transforming the GATT into the WTO. The intended effect of these modifications in the WTO was to expand the breadth of the trade regime and enhance compliance so as to increase the benefits of membership. The problem with this logic is that it neglected domestic politics. Maintenance of free trade is politically difficult and is a function of the differential mobilization of those who favor liberalization and those who oppose a further opening of the economy to foreign products. Mobilization itself is a function of a number of factors, including the cost of mobilizing and the potential gains from collective action. One consequence of legalizing the trade regime has been greater transparency and predictability about the effects of trade agreements. Increased information of this sort has mixed effects on the mobilization of domestic interests and therefore on the ability of governments to maintain support for liberal trade policies.

The Logic of Mobilization

Consider first the impact of increased precision of trade rules during the process of trade negotiations. The ability of leaders to sign an accord will depend on the groups mobilized for or against the accord. The pattern of mobilization is not always predictable; mobilizing interest groups requires

overcoming collective-action problems that can be quite intense. Actors within these groups must realize first that they have a common interest in government policies. They must then come to believe that it is worthwhile to bear the costs of collective action. A number of factors can undermine mobilization. The factors most relevant to international trade include the large and diffuse nature of some economic interests, lack of information that the interests of actors are at stake in particular international negotiations, and possible calculations that the costs of influencing government policy outweigh anticipated benefits.[3]

From the perspective of encouraging the liberalization of international trade, the fact that groups who prefer economic closure might suffer from collective-action problems is a blessing. If all antitrade forces were well organized and able to exert substantial pressure on their political representatives, the prospects for liberalization would be dim. The interaction with legalization enters the analysis at this point. In that legalization entails a process of increased precision of rules and transparency of agreements, it affects the behavior of domestic groups by increasing the information available to actors about the distributional implications of trade agreements. To the extent that such knowledge enhances the mobilization of antitrade forces relative to already well-organized protrade groups, legalization could undermine liberalization. Information matters for both protectionist and proliberalization interests. However, if these groups are differentially mobilized prior to the process of legalization, information will have the larger marginal effect on the groups that are not as well organized. The structure of the multilateral trade regime, based on the principle of reciprocity, has provided strong incentives for exporters to organize throughout the post-1950 period.[4] Growing dependence on exports and the multinational character of economic interests has also led to strong and effective lobbying efforts by free-trade advocates.[5] We therefore concentrate on the likely impact of greater information on the incentives facing protectionist groups.

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[3] Collective-action problems have been central to the literature on endogenous tariff formation. See, for example, Magee, Brock, and Young 1989; and Mayer 1984.

[4] Gilligan 1997.

[5] Milner 1988.