

Chapter 2: Transforming Politics via Delegation to International Courts

Abstract: Even if international courts are widely seen as authoritative actors, ICs pretty much only have the power to say what the law means. Delegation to IC therefore inevitably begs question of *how* ICs can influence state behavior and political outcomes. This chapter first considers when we might expect ICs to be more or less concerned about eliciting state compliance with its rulings. I then provide three alternative understandings of how ICs influence state behavior. 1) ICs can be interstate arbiters, helping two states resolve a dispute by identifying from a set of possible outcomes the “legal” solution. 2) ICs can influence multilateral politics and promote international institutional change by redefining the meaning of the law. 3) litigants can also seize ICs to influence domestic and transnational politics, using ICs as tipping point actors that reconstituting state preferences by giving concrete, symbolic and legitimacy resources to domestic actors who prefer a more law-consistent policy. The real question is when do ICs end up influencing international politics in each of these ways.

International courts are permanent judicial institutions delegated the authority to say what the law means in cases that are adjudicated. In creating an international court (IC), states create a rival authority, one that breaks a government’s monopoly power to say what compliance with international law entails.¹ IC are both legally and politically authoritative, even if few believe that international courts are entirely neutral actors. The legal reasoning judges invoke combines with their formal mandate to give international judicial rulings a legal authority. Moreover, compared to the litigating parties, international judges are disinterested interpreters of the law since judges lack a direct stake in the outcome of the case. While legal scholars may disagree about the legal validity of one interpretation over another, ICs legal interpretations are generally presumed to be authoritative, especially compared to the arguments of governments, which tend to approach legal interpretation in light of their own particular interests.

But even if ICs are authoritative, international courts pretty much only have the power to say what the law means. ICs share the dilemma of national constitutional courts; they can issue authoritative rulings, but international judges cannot force governments to respect their rulings. Delegation to IC therefore inevitably begs question of *how* ICs can influence state behavior and political outcomes. Supporters of international courts will agree with critics that international judicial rulings do not have enough inherent authority to on their own influence political

¹ See Chapter 1 for more.

outcomes. Rather, legal rulings must combine with other factors to influence political outcomes.² This chapter identifies three distinct models of how IC rulings combine with other factors to influence international and domestic political outcomes. Each model rests on different assumptions about the factors that shape state behavior. While the models are distinct, they are not competing. Rather, the three models reveal how the assumptions embedded in different scholarly traditions lead to different expectations about the potential for ICs to influence state behavior.

The main point of contention revolves around the question of why, and thus when, states comply with international law. Realist scholars assume that states only follow their national interests, in which case compliance will only happen when international rules and IC rulings reflect national interests. Others see governments as persuadable, expecting that ICs may be able to help persuade governments that compliance with the law serves their broader interests. Adjudicating between these two perspectives may be impossible because ICs could be tailoring their rulings so as to elicit compliance. If ICs are anticipating state reactions, we may never know if states follow an IC ruling because they were persuaded to do so or because the IC correctly deduced the state's national interest.³ Scholars have sought to disentangle this conundrum by employing increasingly sophisticated qualitative and quantitative methods to investigate how political factors shape IC decision-making. If critics can demonstrate that ICs tailor their rulings to the interests of powerful governments, they can undermine any claim that ICs are independent or that they are capable influencing international relations. Tests of varying hypotheses have met with mixed and contested results. The evidence that international judges cater to the interests of certain states is weak at best, as is the evidence that judges worry about being legislatively reversed or passed over for reappointment. The only point of some agreement is that compliance concerns probably shape the decisions of international judges to some extent.⁴ Since the debate

² Even at the domestic level, few believe that judicial rulings are politically transformative because of their inherent authority. Law and society scholarship commonly presumes that societal factors are perhaps even more important than legal rulings in shaping political outcomes. For example, see: Epps, 1998, Rosenberg, 1993.

³ On how the endogeneity of international agreements makes it hard to know why states comply with international agreements, see: Downs, Rocke and Barsoom, 1996. An equally great challenge is how do we know a state's national interest? Can we presume that the arguments states put forth in court represent their national interests? How do we balance short-term interests in defending the policy under attack against long-term interests in maintaining the legal and political integrity of the overall agreement? On the fungibility of national interests and the difficulty of operationalizing principal-agent theory, see: Alter, 2008: 36-8 .

⁴ A partial list of studies include Carrubba, Gabel and Hankla, 2008, Garrett, Kelemen and Schulz, 1998, Ginsburg, 2005, Pollack, 2003, Posner and De Figueiredo, 2005, Posner and Yoo, 2005, Steinberg, 2004, Stone Sweet, 2004,

pivots around the issue of what shapes government compliance with international law, this chapter begins by considering when we should expect compliance concerns to be paramount in IC decision-making. In which situations are IC rulings and government interest likely to be aligned so that IC rulings reflect government interests, even if a particular government might have preferred a somewhat different interpretation for the case at hand? In which situations might IC rulings plausibly conflict with what states following their national interests would do anyway?

As a first cut to understanding how compliance concerns may shape IC decision-making, section I returns to the distinction introduced in chapter one between self binding and other binding delegations of authority. I argue that where states delegate authority to ICs to bind others, compliance concerns should recede in political significance because ICs behavior and government interests are likely to be in alignment.

Having circumscribed the context where ICs need to worry about compliance with their rulings, the rest of the chapter focuses on how ICs can influence sovereign states to comply with their rulings. Section II defines the three models of how ICs influence state behavior. The *interstate arbiter model*, embraced by people with realist conceptions of international relations and accepted by law and economics/rational choice scholarship on international law, sees a very limited role for ICs. ICs can construct focal point solutions that help coordinate state actions, but only where international legal rules reflect national interests and where states are largely indifferent to the range of interpretative solutions IC might adopt. The *multilateral politics model* builds on functional theories of international cooperation that argue that states consent to international agreements to capture collective gains. ICs help monitor and punish state defections from international agreements so that defection does not confer an unfair advantage or undermine collective benefits. Compliance with IC rulings gets ‘enforced’ by the states that stand to lose if the law is violated. The *transnational politics model* moves away from the multilateral politics conception of states as a unified rational actor, considering instead how actors within states shape decisions about international law compliance. The transnational politics model builds on the notion that adhering to the rule of law is a public good, especially

Stone Sweet, 2010, Voeten, 2008. The question in all of these studies is whether variation can be explained by fairly crude proxies scholars use to operationalize their hypotheses. Most studies fail to control for the alternative explanation that legal concerns or the merits of the case shape IC decision-making, so it is hard to know the extent to which law versus politics shape IC decision-making.

when international agreements codify what are essentially promises between a government and civil society. Where civil society believes adherence to the rule of law is a good in itself or that adherence to a particular international law promotes their interests, ICs can influence domestic interpreters of the law and/or mobilize domestic and transnational compliance constituencies to pressure governments to adhere to international law and IC rulings.

Most scholars champion one model over others, focusing on the model that reflects with their underlying assumptions about the factors shaping state behavior in international relations. But ICs can influence politics via the mechanisms discussed in each of the models, so it is really pointless to argue that one model better captures the role of ICs in international relations compared to others. A more useful approach is to try to ascertain which model holds in which contexts. Identifying the root assumptions underpinning each model helps us to see the contexts in which each model is more or less likely to apply.

Section III builds a unified theory from the three different models discussed in Section II. If we take as given that ICs can construct focal point understandings of the law, we can unify the insights of the transnational and multilateral politics models of IC influence. This section develops the argument of ICs as tipping point political actors, explaining how this argument competes with a number of alternative perspectives. For those less interested in international relations theory, the conclusion recaps the analysis without all of the theory.

1. When is Compliance a Concern for ICs?

The scholarship on compliance with international law raises the question of whether IC rulings reflect or challenge government definitions of national interests. One way to think about this question is to ask when we might expect IC rulings to align with state interests, versus when we might expect IC rulings to impinge on the ability of sovereign states to do as they please. We can capture the varied way in which delegation to ICs implicates state autonomy by thinking about whether delegation to ICs is self-binding on states or whether delegation primarily binds actors other than states that created the IC. This section develops the distinction between self-binding and other-binding authority introduced in chapter one by considering how the four roles international courts play in international politics—dispute resolution, enforcement, administrative review and constitutional review—reflect a logic of self-binding or other-binding delegation. The analysis shows that different logics shape the design of legal systems, how

judges conceive of their responsibility to respect legislative intent, and thus whether courts act as agents of states or public trustees of a legal agreement.

While some judicial roles primarily bind actors other than political sovereigns, and others primarily self-bind sovereigns, politics can become judicialized in both contexts, and thus in all four judicial roles. Wherever courts become key actors determining the meaning of the law, out-of-court political life will take place in the shadow of judicial rulings. But state-IC politics will vary across judicial roles because state sovereignty is implicated differently depending on whether or not delegation to ICs primarily binds sovereigns or other actors to follow the law as interpreted by ICs. I begin by considering the distinction between self-binding and other-binding delegation in the domestic context. This distinction helps one to see that often delegating authority to courts extends state power, and only sometimes does judicial authority end up constraining governmental and legislative authority. I then consider how the international context is different from the domestic context.

Delegation to Courts in the Domestic versus International Context

It is easiest to introduce the distinction between judges as self-binding and other binding tools of sovereign states by beginning with a stylized historical narrative. In earlier times and in smaller societies there was no delegation to judges; Chiefs and Kings both made law and served as the interpreters of the law. As territories grew, delegation of interpretive authority became unavoidable. Sovereign actors—those with the authority to make law—primarily delegated dispute settlement authority, the power to make a decision about a controversy or a dispute. While sovereign actors were ceding interpretation of the law, they were not themselves subject to the interpretations of their judges mainly because no judge would presume to know better than the Sovereign what the law meant. This delegation was other-binding—Sovereigns were subjecting others to judicial interpretations of the law. As the state apparatus grew, the role of judges grew. Cases still appeared as controversies judges were asked to resolve, but when the subject of cases became state actors, judges ended up in a monitoring and enforcing role with judges reviewing whether the Sovereign's other agents (e.g. tax collectors, local rulers, state administrators etc), were faithfully following the Sovereign's laws. Neither type of delegation—dispute settlement or monitoring and enforcing—bound the Sovereign so long as the Sovereign himself was never subjected to the authority of the court.

This other binding delegation extends state authority in a few ways. Delegating the role of judging saves the Sovereign from having to hear endless disputes, and it harnesses private actors to monitor the Sovereign's agents. Through legal challenges, the Sovereign could learn if his representatives were abusing their power, and the fact that monitoring existed in itself made it riskier for the Sovereign's representatives to abuse their own delegated authority. Since judges applied the Sovereign's law, courts extended the Sovereign's authority throughout the countryside. This inherent attraction of delegation is why around the world, in highly diverse contexts, sovereign leaders have created courts or court-like bodies to resolve disputes, including disputes involving the Sovereign's agents.⁵

Thus far I have only considered delegation in an authoritarian context, where the supreme leader both makes and enforces the law. Constitutional democracy differs from authoritarian rule in that it is premised on the notion of a social contract between leaders and their people. Government acts legitimately only when citizens can select their rulers and when governments respect the rule of law.⁶ Developments in constitutional democracy led to self-binding delegation wherein branches of government agreed to limit their powers by binding themselves to the authority of others, including to the authority of courts.⁷ When Sovereigns use courts to monitor their agents, as occurs in the administrative review role, delegation to courts remains primarily other-binding. When Sovereigns use courts to check their exercise of power, delegation to courts is primarily self-binding.

One can map the self-binding and other binding logics onto judicial roles. At the domestic level, it is especially easy to see how delegating different judicial roles binds the sovereign in different ways. Courts playing a *dispute resolution* role, hearing private litigant cases, mostly bind others by bringing state law into the resolution of private disputes. In *administrative review*, a judge checks the legal validity of the decisions, actions, and non-actions of public administrative actors, who themselves rely on delegated authority. Administrative actors may find themselves constrained, but that is the point of subjecting administrative

⁵ Shapiro, 1981.

⁶ Scholars of the rule of law in authoritarian contexts distinguish between rule of law and rule by law. In a rule of law system, governments can be held accountable to the law. In a rule by law system, governments use the formal procedures and tools of law as a means to punish opponents and control the polity. For more, see: Ginsburg and Moustafa, 2008.

⁷ Of course this binding is somewhat fictitious, since the self-binding could be undone through a new constitutional act. On the spread of constitutional review, see: Stone Sweet, 2000.

authority to judicial oversight. Thus this role remains primarily other binding, a tool of the legislatures to police the behaviour of administrative actors. Self-binding occurs in the enforcement and constitutional review roles. In the *enforcement* role, a judge monitors police and prosecutors as they use the state's coercive power. Force can only be legitimately used against citizens when it is lawful. *Constitutional review* checks whether the law created by legislatures or interpreted and applied by governments, or both, cohere with the constitution. These last two roles are pretty much always self-binding and sovereignty compromising, but they also help to reinforce the legitimacy of the sovereign's actions.

The rule of law includes both self-binding and other-binding dimensions, and thus delegation to courts will inevitably bind the sovereign, its agents, and its subjects. The distinction between self-binding and other binding delegations of judicial authority is nonetheless helpful in understanding the relationship of courts to states. Governments and legislatures do not see judges as their adversaries. Delegation is attractive because it provides efficiency gains that extend state power. Through delegation to courts states harness litigants and judges to help monitor the behaviour of private citizens and actors that exercise delegated state authority. Judges very often act as the state's agent, applying the state's law to the resolution of specific disputes. Administrative review is, of course, more contested than dispute resolution authority since courts are reviewing decisions of state actors. But states can write the law to be highly deferential to administrative actors, and make the burden of proof for showing administrative malfeasance quite high. Especially in other binding roles judicial and state interests tend to align—both judges and governments want the law consistently applied and the decisions of courts to be respected. This shared state-court interest is understood. In most cases, judicial rulings will be obeyed as a matter of course. It may be difficult to know if litigants follow judicial rulings because they respect the inherent authority of courts as independent disinterested interpreters of the law, or because they presume that governments will lend their coercive power to support the enforcement of legal rulings.⁸ But since we expect states to back up judges, the distinction may not matter.

The understanding that courts are tools of governments shapes the design of legal institutions, and how judges conceive of their role. For other binding delegations, state control of the judiciary is less of a concern, which is to say that the public can still believe there is a rule of

⁸ For a discussion of why people obey the law, see: Tyler, 2006.

law even when judges are political appointees, chosen to serve as governmental agents. If the point of delegation is to have courts apply the Sovereign's law, judges are also more likely to conceive of their role as faithfully applying the legislative will. They are more likely to defer to legislative intent, and to arguments presented by the government. And for other binding delegations it may also be desirable that a legislative rule can be easily shifted should the government not like how the judge is interpreting it. Other binding delegation is thus more likely to set up a principal-agent type of relationship between states and courts; states are more likely to create legal systems with tools to politically control the judiciary and judges are more likely to see themselves as bound to the intent of the legislature.⁹

Self-binding delegation is different, however. Self-binding delegation is meant to ensure that governments respect the social contract. Self-binding delegation is more accurately characterized as delegation to Trustees. Governments and their people task a court with overseeing the sovereign's compliance with the social contract so as to enhance the credibility of the government's claim to be ruling legitimately. Both governments and trustee-courts are playing to the same audience—the larger public. The different nature of self-binding delegation changes the design of legal system, and the task of judging. Judicial review would not be a check on governments if the government could simply change the judges or the law whenever a court ruled in a way it did not like. Thus the threshold for escaping a judicial interpretation must be higher in contexts of self-binding. Political leaders need to consult with the population if they want to change the requirements of law; they need to amend the constitution to nullify a legal ruling. Also, where courts are Trustees, judges cannot be seen as the agent of the state because, as Giandomenico Majone argues, “an agent bound to follow the directions of the delegating politician could not possibly enhance the commitment.”¹⁰ Thus when self-binding, states are more likely to create rules of reappointment, pay etc. to underscore the independence of judges. Constitutional court judges, for example, are appointed with legislative input, generally have life tenure, or a single term, so as to reinforce their independence. Judicial salaries and terms of employment are fixed by statute so that they cannot be changed without legislative input. The task delegated to trustees also differs. In contrast to administrative review, where judges are supposed to defer to legislative intent, in situations of self-binding judges are expected to apply

⁹ While scholars like to see courts as agents, it is still more accurate to say that courts are tools of the principals to control others (e.g. administrators, the police etc.). See: McCubbins, Noll and Weingast, 1989.

¹⁰ Majone, 2001: 110.

the law in accordance with the social contract—the constitution-- without deferring to the desires of the government or the legislature.¹¹

Table 2.1 below summarizes the main differences between self-binding and other binding delegations of authority, as they affect state-court relations within constitutional political systems.¹² The logic of appropriateness refers to a distinction in political science between whether material (logic of consequences) or identity/ideational factors (logics of appropriateness) shape actor behavior.¹³ While some theories prioritize material over ideational logics, most people expect both logics to matter to individuals. The table below identifies how the logics of appropriateness for self-binding contexts differs from that of other binding contexts.

¹¹ For more on the difference between delegating to agents versus trustees, see: Alter, 2008.

¹² Authoritarian political systems are different; authoritarian leaders use law to bind others, changing the judges or the law to cow and control political opponents and exempting themselves from the control of the legal system. For more see note: 6.

¹³ March and Olsen, 1999.

Table 2.1: Delegation of Authority to Courts in Constitutional Orders

	Other-Binding Delegation Courts as State's Agents	Self-Binding Delegation Courts as Trustees of the Law
Reasons states delegate authority to courts	<i>Efficiency Logic:</i> States delegate to courts to harness litigants as monitors and judges as enforcers of state law.	<i>Credibility Logic:</i> States delegate to courts to convince the public that they are respecting the social contract by adhering to the rule of law.
Alignment of state-court interests	<i>Alignment:</i> Both governments and judges want to see legal decisions enforced. States will readily change the law if they want a different legal outcome.	<i>Potential misalignment:</i> Judges may be thwarting governments and legislatures in their rulings. Governments may be unable to reverse judicial interpretations because overturning judicial rulings requires a constitutional amendment.
Judicial logics of appropriateness	<i>Legislative Supremacy:</i> Judges see themselves as branches of government, applying the law as legislatures intended it.	<i>Constitutional Supremacy:</i> Judges conceive of themselves as protectors of the constitutional order, prioritizing the constitution and the rule of law over the will of governments and legislatures.
Legal system design implications	<i>Courts Extending Principal Influence:</i> Government priorities are expected to figure largely in appointment and promotion policies. Appointments may be rotated frequently. Judges may be rewarded for their fidelity to the priorities of governmental actors.	<i>Courts Checking the Principal:</i> The perception of judicial independence is important. Judges have lifetime tenure, or limited terms to decrease the influence of governments on judicial decision-making. Judicial appointments are awarded at the pinnacle of a career, with judges chosen because of their established reputation.
Judicial roles falling primarily within each logic (at the domestic level)	<p>Dispute Settlement (among private actors) Contracting parties can bring to the court disputes regarding the meaning of the contract. Judge applies the states' law in settling the dispute.</p> <p>Administrative Review- Judicial review to determine if administrative decisions apply the law correctly and respect the confines of authority delegated to administrative actors.</p>	<p>Enforcement Authority- Judicial oversight of state's legitimate use of coercive power and state respect for legal procedure.</p> <p>Constitutional Review- Judicial authority to invalidate acts of legislative and executive bodies on the basis of a conflict with a higher order legal requirement.</p>

The international level is different than the domestic level in that ICs are often ruling on the actions of sovereign states and their agents. This means that we must amend the above discussion of how judicial roles implicate state autonomy. It is still the case that dispute resolution and administrative review are primarily other binding while enforcement authority and constitutional review authority are primarily self binding. But circumstances can arise in each role that will lead ICs to be issuing interpretations that impinge on national autonomy.

When ICs are helping to resolve private actor disputes, the international *dispute-adjudication* role remains very analogous to the king's representative resolving disputes. For example, Iran and the United States created the Iran-United States Claims Tribunal to channel private actor disputes arising from the United States government's decision to freeze Iranian

assets because of the student takeover of the United States Embassy.¹⁴ Since decisions of the Claims Tribunal were binding on US banks, the US government, and Iranian actors as well, this delegation was in some ways a self-binding delegation of authority. Indeed the decision to create the Claims Tribunal was based on both an efficiency and a credibility logic. Delegation of authority to the Iran-US Claims Tribunal conserved the time of domestic judges, who could divert claims to this special legal body. It also saved the Sovereign's time by allowing the US and Iran to focus their back-channel diplomacy on issues of greater import. Meanwhile, the decisions of the Claims Tribunal were considered more legitimate than national judicial rulings because the Claims Tribunal had judges from both countries as well as judges from neutral third parties. And since Iran and the US still got to define the terms the Claims Tribunal would use to resolve disputes, states could decisively shaped how the law was applied to national actors. Other examples of this type of primarily other-binding delegation of dispute resolution authority include the Eritrea-Ethiopia Claims Commission created to deal with property claims stemming from the civil war that led to the division of the country, and the Economic Court of the Commonwealth of Independent States that has heard claims from former Soviet soldiers residing in Commonwealth states.

Dispute resolution authority is also *not* self-binding when ICs lack compulsory jurisdiction. Non-compulsory dispute adjudication limits the intervention of ICs to situations where both governments consent to IC adjudication. Governments will only consent to international judicial resolution of the dispute where they are largely indifferent regarding the interpretation of the law. They will comply with the ruling because governments are largely indifferent to the outcome, and because they prefer a stable legal interpretation to legal indeterminacy. The discussion of the interstate arbitration model uses the example of the International Court of Justice determining the sea border between Canada and the United States to illustrate this point.

But when international dispute settlement is coupled with compulsory jurisdiction, delegation to ICs can morph into a self-binding grant of enforcement authority to the IC. Chapter

¹⁴ The independent tribunal was constituted and tasked with deciding 'claims of United States nationals against Iran and of Iranian nationals against the United States, which arise out of debts, contracts, expropriations or other measures affecting property rights; certain "official claims" between the two Governments relating to the purchase and sale of goods and services; disputes between the two Governments concerning the interpretation or performance of the Algiers Declarations; and certain claims between United States and Iranian banking institutions.' See the background of the Tribunal described on its webpage: <http://www.iusct.org/background-english.html>

3 will shows that most ICs have compulsory jurisdiction for their dispute resolution roles. But since most of the ICs with compulsory dispute resolution authority also have enforcement authority, the decision to commit to compulsory dispute adjudication is not really a new compromise of national sovereignty. The most politically significant grant of compulsory dispute resolution authority where there is no corresponding enforcement authority is the World Trade Organization (WTO) dispute settlement system.¹⁵ One can question whether the WTO system is actually better characterized as an enforcement system. Despite the name of the legal mechanisms-- the “dispute settlement” system—WTO law allows states to seek pecuniary remedies when their rights under the agreement are ‘nullified or impaired.’ I consider this issue further in the chapter on international enforcement courts.

International administrative review remains fully an other-binding grant of authority so long as ICs are only reviewing the administrative decisions of international actors. International administrative review can, however, take on a self-binding dimension when ICs are reviewing the applications of international rules by domestic administrative actors. Despite its self-binding nature, granting ICs administrative review authority over national administrative decision-making may be a lesser evil to the indeterminacy of national administrations acting in an uncoordinated fashion. Governments might also prefer to channel private litigant pressure to the IC, so that they can focus on issues of greater foreign policy concern.

Enforcement authority remains a self-binding delegation of authority to an IC. A possible exception to the self-binding nature of international enforcement authority is the creation of ad hoc criminal tribunals. The establishment of ad hoc international criminal tribunals paved the way for the creation of the International Criminal Court, which does bind the leaders of sovereign states. But Ad Hoc tribunals themselves did not bind the political leaders that created them, which may have been why permanent members of the Security Council considered them to be politically acceptable.

¹⁵ The other two cases where ICs have compulsory dispute resolution authority but no corresponding enforcement authority are the BENELUX and ECCIS systems. Since the BENELUX system primarily coordinates regulation for issues that do not fall under the purview of European Union law, it is highly unlikely that states would bring enforcement actions to the BENELUX court. The purpose and future of the ECCIS is less clear. States can bring cases against each other to enforce common agreements, although it would take a great deal of political courage to challenge Russia in court. Meanwhile, ECCIS states also envision using the ECCIS as a supreme court for a common market, at which point the ECCIS court will probably be given an enforcement authority.

The delegation of constitutional review at the international level reflects both a self-binding and an other-binding logic. On the one hand, states are limiting their ability to use international legislation to achieve objectives other than what has been explicitly allowed in the original treaty (the constitution). This limitation helps to ensure that national parliaments are not giving the executive a blank check for actions undertaken at the international level. On the other hand, ICs with constitutional review authority can also help to state actors to reign in the actions and interpretations of international institutions should these institutions try to extend their authority beyond what states agreed to in the original treaty.

Table 2.2 summarizes how delegation of different roles to ICs is and is not self-binding. States self-bind to increase the credibility of their commitment to follow the law. States bind others for efficiency gains; to leverage the resources needed to monitor and enforce the law. Where delegation to IC primarily binds actors other than those who create and staff the court, compliance concerns should recede in importance because the state architects of the legal system will implicitly, if not explicitly, back up the authority of IC rulings. The chapters on each judicial role divide the discussions in terms of whether delegation is other-binding or self-binding.

Table 2.2 Delegation to ICs reflecting Other or Self Binding Logics

	Other binding Logics	Self-Binding Logics
Dispute Settlement Authority	Compulsory dispute settlement for transborder disputes between private litigants Non-compulsory interstate dispute settlement authority	Compulsory interstate dispute settlement authority (morphs into enforcement) Compulsory dispute settlement with private contractors
Enforcement Authority	Ad Hoc criminal courts set up by the Security Council to prosecute war crimes in specific conflicts	Most international enforcement authority (trade, human rights, war crimes)
Administrative Review Authority	Review of administrative decisions of IO actors	Review of the national application of international rules
Constitutional Review Authority	Review of the legality of IO actions	Review of the legality of state actions

Because all boxes on the table above are filled, it may look like ICs are binding states as much as they are binding others. But this would only be true if the number of cases in each box were equal and thus if ICs spent as much time reviewing state compliance with international rules as they did fulfilling the many other-binding tasks they have been delegated. Chapter 3 will consider the distribution of IC rulings across courts. We will see that Europe's supranational

courts regularly bind states (although European Court of Justice is also an important administrative review body with respect to decisions of the European Commission). Outside of Europe, however, the number of cases that fall into the self-binding category falls precipitously.

Even if ICs spent equal time across self-binding and other binding roles, this discussion still provides an important corrective for much of the debate about delegation of authority to ICs. ICs do far more than compromise state authority. Delegation to ICs provides efficiency gains for governments, it enhances the credibility of state claims to be adhering to the rule of law, it helps coordinate interpretations across borders and creates legal checks on international action so that international governance is subject to the same sorts of legal checks as domestic governance.

Theoretical Insights of the Distinction between Self and Other Binding Delegations of Authority

Separating self-binding and other-binding logics is admittedly somewhat artificial. Chapter one gave four different reasons why states might delegate authority to ICs. Sometimes states are delegating authority to ICs to bind others—primarily international institutions but sometimes other states—to the authority of an IC. Sometimes states are self-binding so as to decrease their own temptation to cheat. Sometimes states are self-binding to enhance their credibility in the eyes of a third party—their own people, or perhaps foreign investors. And sometimes states are creating ICs to deal with cases closer to home so as to stave off extra-territorial enforcement actions. Each specific answer may capture only part of state decision-making regarding delegating authority to ICs. But number of puzzles in delegation to courts become understandable when one considers that delegation to courts can reflect a self-binding and/or an other-binding logic. For example, chapter three will show how this distinction helps make sense of the trend of creating new-style ICs, ICs with design features that seemingly increase the risk that ICs will be ruling on cases where defendants are reluctant participants. The category of international constitutional court also becomes more comprehensible when one considers that IC constitutional and administrative review authority can be used to create political checks on multilateral institutions.

Individual chapters will explicate further how ICs in each role are influencing international relations. For this chapter, however, what matters is the implications of this distinction in terms of when compliance concerns are more and less important in shaping IC rulings. By circumscribing the realm in which state and court interests are more likely to be in

alignment, we can see why much of what ICs do will not be politically controversial. We can also see that there are many contexts where state compliance will not be a primary factor shaping IC decision-making. ICs will surely consider the arguments made by representatives of governments, just as they would consider any well reasoned argument put forward by a litigating party or amicus participant. But the IC will not have to worry about tailoring its ruling to elicit compliance. International institutions and private actors will comply because the legitimacy of their claims depends on their reputation for respecting the rule of law. Powerful states will also generally back up IC rulings because the IC is doing exactly what the state architects of the legal system wanted it to do—resolve disputes, review private complaints against the actions of administrative actors, coordinate how common rules are interpreted, and fill in details of the law that they left unspecified.

In self-binding situations- IC enforcement actions, constitutional review of legality of state actions, and perhaps in some cases international review of state administrative decisions—ICs may need to worry about state compliance. Compliance concerns will not, however be the only factor shaping IC decision-making. The situation of ICs will be similar to that of domestic constitutional courts. Even though legislatures have tasked their constitutional courts with reviewing state actions, the court lacks any means to compel a governmental or legislative body to comply with its ruling. Compliance concerns are real, but any constitutional court that was so worried about compliance that it pandered to the whims of political actors would quickly lose its reputation as an independent judicial actor and thus its legal authority.

The rest of this chapter focuses on the situations in which IC rulings compel changes in state behaviour, and thus situations in which delegation to ICs ends up binding states and undermining national autonomy. Before moving on, it is worth highlighting that to say that sometimes ICs do not need to worry about compliance is not to say that IC decision-making is apolitical. There will be winners and losers in the case, and important legal precedents are likely to matter beyond the case at hand. Indeed wherever domestic actors care greatly about the legal outcome there will be legal politics. Moreover, to say that in certain roles ICs will primarily be constraining others, and thereby not compromising the sovereignty of the Court's creators, is not to say that delegation to ICs is risk-free. An IC will be always a rival authority to a national government because its legal interpretation is presumed to be inspired by legal concerns rather than self-serving political calculations. ICs can establish authoritative precedents that make it

harder for government to assert the legitimacy and legality of contrary behaviour. The larger point is that delegation to ICs does not always involve great sovereignty risks.

II. Three Conceptual Models of How ICs Influence State Behaviour

Chapter 1 explained how at its core, international law plays a regulative role of clarifying rules and procedures for public life in the international arena. International law is designed to constitute understandings of legal behaviour, and thereby help generate a world in which individuals and states modulate their behaviours to fit the expectations of other actors in the international arena. The regulative role of international law is often hard to see because states are altering their behaviour automatically, or behind closed doors. A focus on litigation is helpful primarily because it allows us to document state behaviour before a case is raised, providing window into how international law helps to alter state behaviour.

The discussion in the previous section makes it clear that not all litigation is aimed at transforming state behaviour. But some of the most interesting international litigation *is* aimed at influencing government behavior and international politics more broadly. The three models discussed in this chapter differ in their expectations of how litigant incentives interact with IC interests to shape legal and political outcomes. In the *interstate arbiter* model ICs influence international politics by constructing a focal point which itself represents an equilibrium position acceptable to state litigants. This minimalist model, favoured by rational choice and law and economic scholars, assumes that state interests are fixed and that international litigation mainly influences international politics by providing new information that affects state decision-making. The *multilateral politics* model recognizes that state interests are themselves more flexible and fluid, and that ICs can be part of politics within the international regime. In this model state or IO litigants invoke ICs to shift understandings of what compliance with international law entails. ICs build interstate political coalitions of support for their rulings, making it costly to ignore IC rulings. The *transnational politics* model involves perhaps the most radical transformation of international politics with ICs connecting with actors within states to help redefine government policy and national interests. ICs that are able to penetrate the domestic level can mobilize and motivate domestic actors, altering domestic balances of power and thereby reconstituting how countries define their international political interests. All three models are right, which is to say that sometimes ICs play the role described in each model.

The Interstate Arbitration Model: ICs Construct Focal Points

Scholars who apply economic concepts and models to explain politics envision that judging entails ascertaining equilibrium interests of the state parties. For example, Geoffrey Garrett and Barry Weingast suggest that European Court of Justice (ECJ) constructs focal points, shared understanding of rules that all actors can use going forward.¹⁶ Others have built on this insight showing that the equilibrium point constructed by judges may well be different than what states would have a priori chosen. The process of litigating a dispute may lead parties to divulge information, helping the parties find greater common ground thereby building state support for international rules.¹⁷ Because judicially constructed focal points serve an expressive function, elevating the legal authority of one interpretation over another, the focal point constructed by ICs is both meaningful and valuable.¹⁸ But mainly the IC is helping states find a shared understanding of the law by augmenting the information available to state actors.

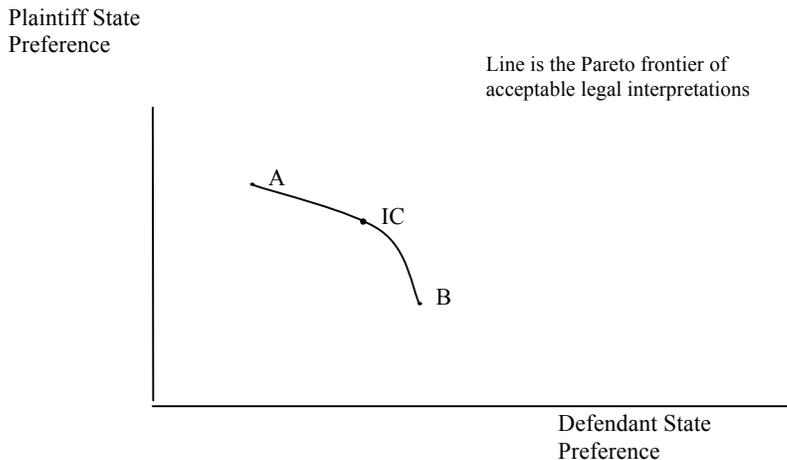
The graph below captures the task of the international judging in this model. In this limited view, ICs are operating in the space defined by the interests of the litigant states (represented by the x and y axis), bounded by what legal rules allow (represented by the curved line). ICs essentially pick the spot that is both on the line defined by the law and on the indifference curve *of the litigants*. This graph suggests that ICs may help move a state's behaviour from perhaps A or B, to the point defined by the IC. In economic terms, so long as the IC ruling is somewhere on each state's indifference curve, the IC ruling will represent a Pareto improvement. The ruling will create a shared understanding and provide a legal certainty that did not exist before. This change in state behavior from point A to the point defined by the IC is only possible because states have pre-committed to accepting any point on the curve, and thus the change in behaviour is not really a change in a state's underlying interest.

¹⁶ Garrett and Weingast, 1993.

¹⁷ Goldsmith and Posner, 2005, Guzman, 2008.

¹⁸ McAdams, 2004.

Graph 2.1 IC Interstate Arbiters Constructing Focal Points



These are important but fairly are limited contributions of international adjudication. Rational choice scholars admit the possibility that international law can change state interests. Nonetheless they explicitly assume that disputes over law provide information rather than redefine national interests.¹⁹ Geoff Garrett assumes that ICs pick the point on the curve based on the interests of the strongest states in the system, while Posner and Yoo suggest that ICs can only be effective if they are willing to choose from the set of interpretations acceptable to litigant governments.²⁰

One can add more nuances to this model.²¹ Still, the core model includes a number of limiting assumptions. First, the only relevant actors in this model are states, which are assumed to have fixed national interests. While not inherent to the model, law and economic approaches generally assume that compliance is voluntary so that law must reflect the interests of both states. Courts can move the equilibrium point on the line, but the explicit or tacit support of states is

¹⁹ Posner and Yoo conceptualize ICs as simple problem solving devices that do not transform interests (2005: 6). Goldstein and Posner note that they cannot rebut the constructivist challenge that international law can reconstitute state preferences, but they “doubt it is true in any important degree” and note that constructivists have not show that international law transforms individual and state interests” (2005, at p. 9). Guzman assumes away the constructivist notion that interests can be transformed, defending the choice by noting that “developing a theory of international law requires us to make certain initial assumptions and to stick with them as much as possible.” (2008: 215)

²⁰ Garrett, 1995: 17-8, Posner and Yoo, 2005. Posner and Yoo’s claims about effectiveness is controversial because they conflate compliance with IC rulings with effectiveness, presuming that ICs are *only* effective if states will immediately comply with their ruling. For a critique of their analysis, see: Guzman, 2008: 53, Helfer and Slaughter, 2005

²¹ Andrew Guzman (2008), Tom Ginsburg (2005) and Richard McAdams (2004 & 2005) have added quite a number of nuances to law and economics approaches, providing a bridge to the next model.

needed for the line to move itself. Without this support, the IC risks non-compliance and the real possibility that states will overrule the IC by passing new domestic or international legislation.

The model of ICs as interstate arbiters is most applicable to the context of non-compulsory interstate dispute settlement. Where a court lacks compulsory jurisdiction, countries are likely to refuse to submit international adjudication *unless* they are fairly indifferent to where on the curve the outcome ends up being. A good example of this type of dispute settlement is the ICJ's decision in the Gulf of Maine dispute between the United States and Canada. Fishermen in both the United States and Canada had big stakes in this dispute, as the ICJ's decision determined which fishermen could access scallop beds and fishing in the border area dividing the United States and Canada. But this local fight did not loom large for either the United States or Canada, which have extensive relations and interests that span a variety of economic and political issues. By letting the ICJ decide the dispute, both the Canadian and United States governments could absolve themselves of the responsibility of deciding, directing fishermen's ire to the ICJ. For the United States there was an added appeal to turning the dispute over to the ICJ. The Reagan administration had recently refused to participate in the ICJ's adjudication of United States involvement in the military conflict in Nicaragua. By submitting the Gulf of Maine dispute to the ICJ, the Reagan administration could demonstrate that it remained committed to international law and international dispute settlement.²²

The attributes of the Gulf of Maine case itself suggest the limited political applicability of this model. The world of ICs as interstate arbiters applies where state actors are the litigants, and when governments are not greatly concerned with which point the IC chooses on the indifference curve. These will mostly be coordination contexts, where states mainly care that the policy is coordinated transnationally,²³ and low stakes contexts where states might also be happy letting ICs to fill in the details of their contracts.

For scholars who believe that ICs can *only* play a role constructing focal points, the limited applicability of this model creates an inherent limit to the political influence of international law and international courts. ICs could, of course, create focal points that non-state actors coalesce around. But international law scholars employing law and economic theories tend

²² Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984. ICJ REP. 246 (Judgment of Oct. 12), reprinted in 23 ILM 1197. The ICJ has helped resolve a number of disputes involving sea borders, but it has not been allowed to decide what may be the most financially important dispute—whether Australia or East Timor owns the oil that is found on a shared continental sea shelf.

²³ On the difference between coordination and cooperation contexts, see: Raustiala, 2000, Stein, 1983.

to also posit that compliance with IC rulings is voluntary.²⁴ The argument conveniently concentrates political power in the executive branch; governments decide what the national interest is and governments choose whether or not to comply with IC rulings.

Once we have ICs with compulsory jurisdiction, however, ICs will also rule on cases where the defendant is an unwilling participant and where there is no clear indifference curve connecting the two litigant's positions. The more legal rules are subject to wide interpretative latitude, the more state interests are mutable, the more authority international law has, and the more compliance constituencies are mobilized to press states to respect international law, the less likely that the IC will be looking primarily to litigant interests to decide cases.

Multilateral Adjudication Model: ICs Reshape the Strategic Space of International Politics

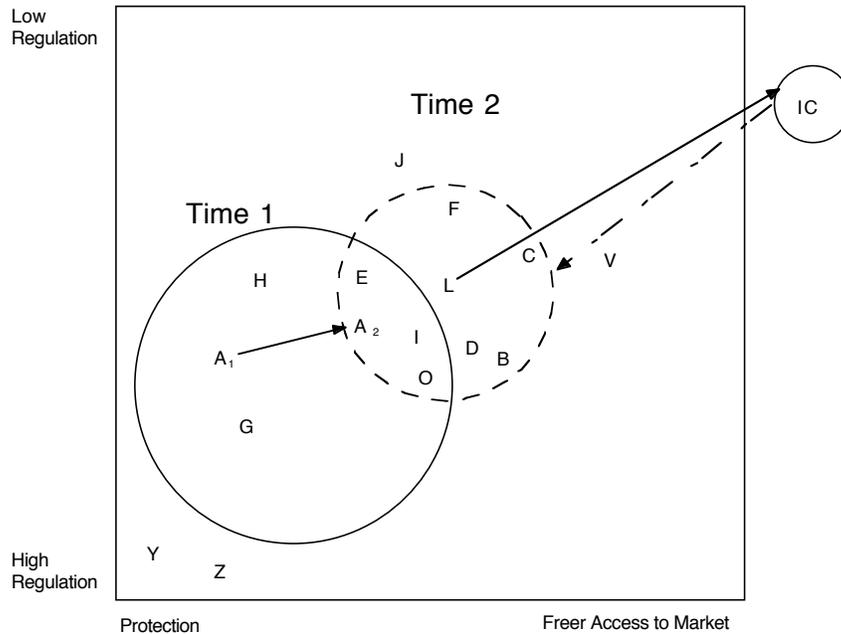
In the multilateral politics model we move from a world defined by the interests of the state parties to world of law where law renders certain policies more legitimate, and where legal legitimacy is politically important. This world of law encapsulates a multi-dimensional policy space where there are many different state interests, some of which are compatible with the law and some of which are not. Multilateral politics leads to the creation of legal rules within this policy space, rules intended to balance off the differing interests of states. The square below reflects a simplified two dimensional policy space that defines the realm of potential outcomes for a policy issue. The policy space in this example reflects different opinions on the desirability of government regulation of economic activities (y axis), as they intersect with opinions regarding the appropriate level of protection against global market pressures (x axis). German citizens might prefer lots of government regulation of economic production, but as an exporting state Germany might also prefer free market access and thus low levels of protection. The United Kingdom might prefer low levels of state regulation and low levels of protection. Meanwhile Japan might prefer high levels of regulation and high levels of protection. The circles within the policy space represent discursive spaces created by international law. These spaces bound what can be seen as a plausible legal interpretation of the law as it stands. Beyond these circles are legal interpretations that probably go beyond what can reasonably be read into law on the books. The discursive space is a circle, rather than a point, because international legal rules often have

²⁴ See: Goldsmith and Posner, 2005.

ambiguity and flexibility built in. Depending on how precise the legal rule is, the size of the circle—and thus the extent of state discretion within this legal discursive space—will vary. The interests of the many state actors affected by the law are scattered all over the policy space. Some states will prefer outcomes that are hard to locate within the discursive space of legal interpretation. For these actors, law will constrain the choices they make to the extent that violating the law creates costs. The most powerful actors will find themselves within the legal discursive space because they will have written the law to suit their interests. Time and elections, however, can lead to changing interests so that powerful and weak states can all find themselves wanting to adopt or maintain a policy that arguably lies outside of the discursive space defined by extant international law.

Litigants bring a case to an IC in the hope that the IC will validate their interpretation of the law. Imagine a situation in which a developing country wants to challenge an environmental standard used to limit access to a developed country's market. The developing country (litigant L) lacks the power to change the law, but it will gain market access if the interpretation shifts. Seeking to create this political change litigant L asks the IC for a legal interpretation. The IC influences the political outcome by reshaping the meaning of the law, redrawing the discursive space and thereby redrawing the coalition of political support for the law. In Graph 2.2, the IC shifts the meaning of the law in a way that compels actor A to move from policy point A_1 to policy point A_2 .

Graph 2.2 Multilateral Adjudication Politics: Shifting the Meaning of the Law



Why would state A ever shift their position if it involved moving away from their preferred policy? In the minimalist interstate adjudication model, states moved from point ‘A’ to the point defined by IC because they started out largely indifferent and litigation revealed new information--the focal point solution. States used this new information to clarify rather than to change their interest. By contrast the multilateral politics model assumes that how state actors define the national interest can change. It also assumes that even powerful actors are constrained by public perceptions regarding the rule of law. Governments in this model are persuaded to change their policy because of tactical considerations. Perhaps the government realized that fighting this issue is not worth it—that the particular fight is far less important than the larger set of benefits the international institution confers or that litigation costs exceed the costs of complying. Or perhaps the government has reputational concerns. Perhaps failing to concede the case will mobilize opposition with respect to other issues the government cares about. If governments care at all about being seen as law-abiding, then law becomes a tool to influence even economically and militarily powerful states. Indeed there are clear winners and losers in this redrawing of the law. H, G and A₁ are no longer within the circle of the law, but now a larger set of actors finds the law pleasing to them and thus Actor A is unlikely to be able to sanction the IC or shift the meaning of the law back to where it arguably was in Time 1.

The multilateral politics model works where ICs have compulsory jurisdiction, and thus where Actor A cannot block the case from proceeding. This model suggests that even in a world of law, judges are strategic actors. Judges must exhibit fidelity to the law so as to maintain their reputation as legal actors. An administrative review role may suggest that judges should look to legislative intent, whereas a constitutional review role may suggest that judges prioritize constitutional issues over the desire of state-actors. But in the hypothetical schematic above, IC judges pick from among the legally valid interpretations an outcome that garners support among a broad range of state actors, including states that did not participate in the legal proceedings. The fact that judges must consider a larger variety of state interests, and the reality that legal concerns matter for the IC's authority, make the act of judging in multilateral politics model is quite different than the act of judging in the interstate dispute resolution model where compliance concerns forced ICs to pick an equilibrium point between the interests of litigating states.

A WTO Appellate Body's doctrine on unforeseen market developments provides an example of how ICs can redefining the meaning of international rules to alter multilateral politics. WTO law creates limits on state usage of market safeguards, temporary provisions enacted to protect the viability of domestic producers when imports surge. Different WTO provisions, however, suggested different limitations on the use of safeguards creating uncertainty about when safeguards were legally permissible. In a 1997 case, the EU challenged the legality of an Argentinean safeguard on footwear arguing that the market disruption was neither unusual nor surprising and thus the safeguard was illegal. Argentina defended its safeguard by arguing that WTO law did not require that the damage be unforeseen, and at any rate the injury in itself was 'unforeseen.' The panel agreed with Argentina, but the Appellate Body (AB) reversed the panel ruling, finding that safeguards are only allowed when a market disruption is unforeseen.²⁵ This interpretation arguably created a higher legal threshold for the imposition of safeguards, one that countries would not have agreed to ahead of time. The US had participated as a third party in the footwear dispute, arguing that politicians should use diplomatic negotiation to balance conflicting language.²⁶ If the US arguments had prevailed, states would be able to offer their own interpretations of WTO safeguard rules until powerful countries could shape an agreement

²⁵ Argentina – Safeguard Measures On Imports Of Footwear WT/DS121/AB/R Report of the Appellate Body 14 December 1999. The dispute concerned Article XIX of GATT 1994.

²⁶ Ibid p. 19.

clarifying existing rules. As it was, the AB rejected the US argument. Shortly after the footwear case, the United States lost a similar suit concerning safeguards imposed on Australian and New Zealand lamb imports. In this case, the AB sided with Australia's assertion that the United States International Trade Commission had failed to prove that damages were a result of unforeseen developments. Australia and New Zealand won the right to retaliate and US lifted its lamb meat safeguards.²⁷

There are many ways to build insight about the role of ICs in judicializing multilateral politics. The ability of judges to craft a compromise, and thus the supply of IC judicial law-making, will depend to some extent on the flexibility of the law in question but also on the distribution of interests in the policy space. One can hypothesize about the factors that make international laws more or less flexible, about the factors that shape the distribution of state interests, and about the contextual conditions that lead some ICs to be more or less willing to decrease states' interpretive latitude.²⁸ One might hypothesize about the conditions that lead state interests to congregate around certain outcomes, and the conditions under which ICs are more likely to find a multilateral constituency that supports far reaching legal interpretations. One could also build on this model by introducing power dynamics. One can hypothesize about the conditions under which weak or powerful states will use an international legal tool,²⁹ and the conditions under which this international legal space will be used to amplify voices of actors who were outmanoeuvred or simply not present when the legal rules were originally drafted.³⁰

Delegation of administrative review authority, and the existence of international prosecutorial type actors present another basis for variation around this general model. International administrators may shift the law through administrative decisions and states can turn to international courts to rein the administrator in. International prosecutors can try to shift the law through legal suits, for example arguing that military leaders have an obligation to stop rampant rape by subordinates or that even single rapes can constitute war crimes.³¹ ICs with constitutional review authority to nullify international rules present other options as well. State

²⁷ For more on this case see: Alter, 2008: 48-50.

²⁸ For scholarship in this vein see: Abbott, Keohane, Moravcsik, Slaughter and Snidal, 2000, Ginsburg, 2005, Steinberg, 2004.

²⁹ For scholarship in this vein see: Davis, 2006, Davis and Blodgett Bermeo, Forthcoming, Guzman and Simmons, 2005.

³⁰ Gruber, 2000.

³¹ See the discussion of the Akayesu case in Chapter 5 for more.

parties, for example, can appeal to the IC to nullify laws on the books, and to perhaps require the any new law passed be configured differently than the law under dispute.

This multilateral politics model is better able to capture how time and larger international politics can change definitions of the national interest, but this model still has international law being a contract among states. In representing state interests as a single point, and thus as monolithic, the multilateral politics model still does not capture the essence of the new terrain of international law—the reality that international law can penetrate states, and international courts can be part of domestic political strategies. The final transformation of international politics, discussed below, provides another explanation for why state A could move from A_1 to A_2 —perhaps the international level politics scrambles domestic politics, advantaging and empowering domestic actors who prefer that domestic policy coheres with international law.

Transnational Politics Model: ICs Reshape Domestic and Transnational Politics

The multilateral politics model aimed at encouraging governments to change their country's behaviour (e.g. adopt new legislation, issue an executive order, reinterpret law on the books) because of interstate pressure or concerns about the country's international reputation. By contrast the transnational politics model recognizes that actors within states can contribute to national policy change without explicit government support, and even despite the interests of government in power.

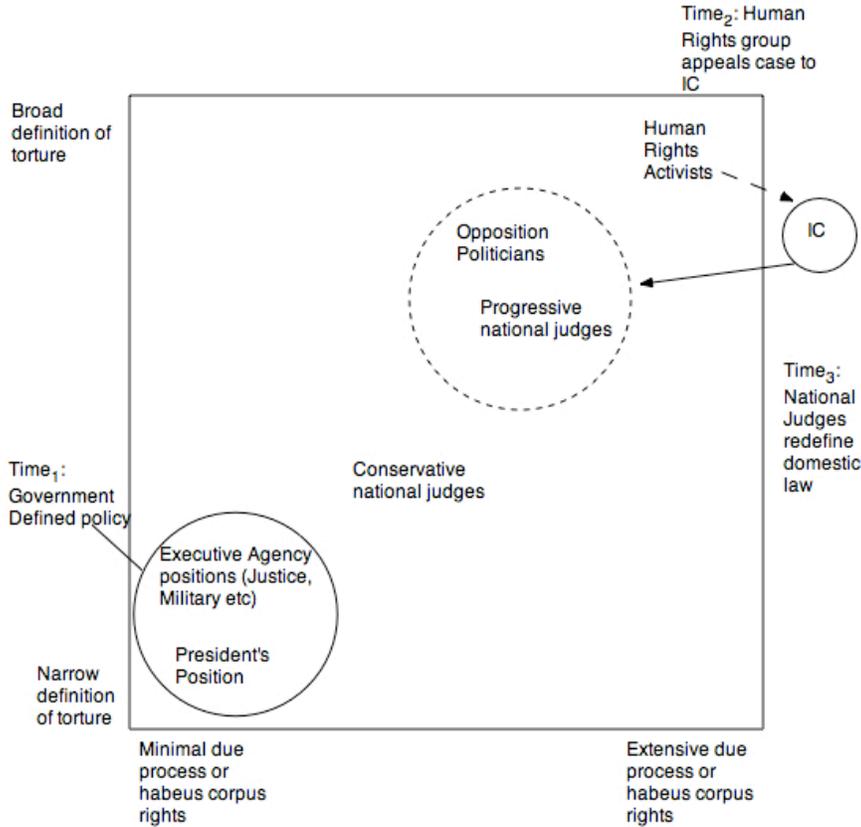
How does delegation to ICs contribute to sub-state transformations of policy and behaviour? In this third model, we need to consider each state as a series of actors—judges, administrators, criminal prosecutors, political parties and interest groups etc. Because the contestation involves international rules, actors outside of the domestic political system gain a stake in the domestic legal debate, and thereby in the domestic political debate. In this model, either actors within the state reach outside, or transnational actors (NGOs, other states, international prosecutors etc) bring the case with the tacit support of domestic actors. As in the multilateral politics model, ICs interpretation shifts understandings of what the law means. The graph 2.3 below captures this idea. The diagram imagines a policy dimension in which domestic actors disagree about whether certain coercive interrogation techniques constitute torture (y

axis), and about the habeus corpus right of plaintiffs to have their claim heard in either domestic or foreign courts (x axis).³²

Imagine that a human rights NGO pursues a case on behalf of a specific litigant who claims she was tortured. The government might charge that the plaintiff has no rights under international law to raise the case, or otherwise try to defend their policy. The IC could find in favour of the plaintiff, in which case she would most likely win compensation. Even if the IC did not find that the plaintiff had been a victim of torture, the IC's legal precedent can be used by domestic judges to scrutinize the policies and actions of the government. In the notional case below, the box drawn by the IC is fairly large, suggesting that national judges will be left to decide the contours of what constitutes torture as well as the legal rights of private actors. But the political debate will be shifted because national judges will now have a clear legal reason to more vigorously review governmental assertions regarding coercive measures.

³² While this case is fictional, the first interstate case heard by the European Court of Human Rights concerned the issue of whether certain police tactics constitute cruel and unusual punishment. (See *Ireland v. United Kingdom*, 1976 Y.B. Eur. Conv. on Hum. Rts. 512, 748, 788-94 (Eur. Comm'n of Hum. Rts.)) The ECtHR has gone on to rule on many cases regarding government interrogation tactics, indeed there is an entire guidebook of European Human Rights law concerning what does and does not constitute torture. The handbook is replete with references to European Court of Human Rights rulings. See Reidy, 2002.

Graph 1.3 Transnational Judicial Politics Model



In both the multi-lateral and transnational politics model, the IC shifted the meaning of the law so that what was once a legal policy became illegal, and thereby more costly to maintain. In the transnational politics model the IC ruling provides a legal basis for an actor within the state (a judge, an administrator, or even the government) to apply laws on the books differently, and thereby to reshape state policy. For human rights cases, the IC ruling may mainly appeal to national judges who will be front line enforcers of international and national human rights laws. In administrative review cases, the ruling may appeal mainly to national administrators who are front line implementers of international administrative rules.³³ Also possible is that the IC crafts the ruling to give the government leverage to use vis-à-vis opposition forces, allowing it to push through a policy change that it desires.

The key to ICs having influence is that there needs to be a sub-state compliance constituency that favours the outcome that happens to be closer to what international law requires. An example of this model is the Andean Tribunal's (ATJ) case regarding second use

³³ Helfer, Alter and Guertzovich, 2009: 28-9.

patents, discussed in Chapter five. The ATJ had established a close working relationship with national intellectual property agencies, but still domestic agencies hesitated to apply Andean law over conflicting national law. National agencies applied the new laws written by Peruvian, Ecuadorian and Venezuela governments for the American pharmaceutical firm marketing Viagra. These laws allowed for patents to be issued when a new purpose for an existing drug emerged. The Andean Secretariat then brought a non-compliance suit against Peru, and later a second suit against Ecuador and Venezuela, leading to non-compliance judgements. The ATJ's rulings appealed to national administrators who had only reluctantly issued the second use patents (indeed before the national decrees, the Peruvian agency charged with issuing patents had refused to issue the requested patents). While these governments did not remove the offending laws from the books, national administrators simply stopped applying them. They revoked all the second use patents that had been issued, and the producer of Viagra stopped bothering to pursue patent infringement cases against generic companies.³⁴ Meanwhile, in light of the ATJ rulings the United States stopped pressing to include second use patents as part of bi-lateral intellectual property law agreements.³⁵

Another example of the IC providing a transnational impetus for domestic change is the ECJ ruling condemning Germany's limitations on the jobs women can fill in the military, discussed further in chapter 7. A provision of the German constitution limited the participation of women in the military to membership in the band or the medical staff. Peace activists supported this provision because a small volunteer army would mean that the German government would be limited in its ability to station German forces abroad, since only volunteer forces could serve outside of Germany. The ECJ ruling helped the coalition German government push through a desired constitutional change. While the government welcomed the impetus, the ECJ ruling was key in that it allowed the Green party, traditional supporters of the German peace movement, a face saving way to remain part of the coalition government.³⁶

Chapter eight will consider the conditions that increase the likelihood that sub-state actors work with international courts. Another theoretical extension of the transnational judicial politics model might consider how differences in state structure (democratic, authoritarian, presidential or parliamentary), and the extent to which governmental bureaucracies can act independently

³⁴ Ibid.: 28-30.

³⁵ See chapter five for more on this case.

³⁶ See chapter seven for more on this case.

(e.g. an independent judiciary, powerful national administrative agencies) shape the ability of ICs to influence domestic politics. Such an exploration would likely find that democracies create a larger potential for an IC to shift the internal coalition than, for example, an authoritarian system where neither judges nor administrators are free to ignore the government, and where opposition politicians may also refuse to challenge their government. Meanwhile, in federal systems there will be more actors filling the policy space, and the IC may need to consider how the rules of federalism complicate domestic politics within a state.

The point of keeping the interstate, multilateral and transnational models distinct is to identify the different causal forces at play in each model. But the distinctions, and the models, are artificial in many ways. To see states as unified actors is a simplifying assumption; few people believe that states are actually unified actors or that government preferences are immutable. The models, as models, are also truncated in time. They present compliance with international law and IC rulings as a delinked decision, as if compliance with an individual IC ruling did not have an affect beyond the case at hand. The models also suggest that compliance is a choice made based on the constellation of current interests, as if there were no larger normative forces at play, and as if there is no long term consequence for undermining the authority of international law and of ICs.

Still, the models are useful in helping us identify how certain factors enhance and limit the prospects of international law and the ability of ICs to influence government behaviour. Law and economics approaches often impose a single preference on states, generalizing a 'national interest' from a preference articulated (e.g. revealed) by a government's lawyer. Often such an assumption is false, but sometimes it applies. Where IC authority is not compulsory, governments are likely to consent to litigation only where they anticipate that having a focal point solution will be helpful. Where the preferences of litigating states cannot be located on a single indifference curve, and where there are deeply felt preferences that are shared by governments and substate actors, ICs may also find themselves hard pressed to find a legal solution that will elicit compliance. In such contexts, compliance with international law may depend whether or not there are significant multilateral costs associated with rejecting international law.

But quite often state preferences are not firmly held. State lawyers usually see their job as requiring them to defend the status quo; it is not for them to consider if the status quo actually serves the country's interest. Governments could make such a calculation, but they tend to be overwhelmed with other policy concerns, so governments also often fail to seriously ponder what policy best serves state interests. Where domestic support for existing policy is weak, and where domestic actors are divided on a political issue, international litigation may serve as a means to construct a coalition of support for international law. Litigation mobilizes the support of domestic actors who favor policies that cohere with international laws, aligning policy activists with those actors for whom being seen as 'law compliant' is a good in itself. Fearing such mobilization, governments may become more likely to grant concessions so as to avoid an more unwanted legal rulings.

The next section considers how one might bring the models together.

III. Towards a Unified Model of IC Influence: ICs as Tipping Point Political Actors Influencing States

This section brings insights from all three theories together, adding a dynamic dimension to the time-constrained models discussed above. If we take as given that ICs can construct meaningful focal points—authoritative understandings of the law that a broad range of actors will rely on in decision-making-- then we can unify all three models by conceiving of ICs as political tipping point actors. Of course legal interpretations can be constructed and shifted without appealing to judges, but litigation provides a tool that individual litigants can use to quickly shift existing legal interpretations. The option to litigate can mobilize potential litigants to demand changes in existing practices. Simply by existing, ICs can increase out of court bargaining in the shadow of the law. The prospect of litigation creates an incentive for government actors to take such demands seriously. The many steps in the litigation process serve as signalling devices, used to advance discussions.

Graph 2.4 diagrams the steps through which delegation to ICs tips national attitudes with respect to international law and IC rulings. In Time 0 the state violates an international rule either by intention or accident. Time 1 has bargaining in the shadow of the IC. Plaintiffs will suggest the possibility of litigation, states may file formal complaints, commissions may issue advisory reasoned opinions, prosecutors may begin formal investigations, all of which begin a process of dialogue and persuasion that can lead to out-of-court settlements in the shadow of the

law. Litigants can gradually ratchet up pressure by taking concrete steps towards initiating litigation (indictments, references to the court etc). Cases may settle in the shadow of an IC, with states changing practices to avoid litigation.

If the case does not settle out of court, the dispute will eventually be litigated at the international level. Time 2 involves legal bargaining: each side musters an interpretation of the law that favors their side. Litigants can get a sense for the outcome, choosing to settle so as to avoid a binding international legal ruling. If the case does not settle, the IC will decide how to interpret the law. Savvy international judges will write their ruling to appeal to those actors who are likely to lend political support to facilitate compliance. If domestic judges and national administrators will be applying the ruling, savvy international judges will use language and legal metaphors that will make the ruling familiar and helpful to the judge.³⁷ If governments will be applying the ruling, savvy ICs may craft compromises that allow each side to claim a partial victory. But if the government is obstinate, ICs may well bypass the government giving to substate advocates rhetorical and symbolic ammunition and something concrete to demand (e.g. restitution, compliance with the ruling etc).³⁸ Together, Time 1 and Time 2 represent judicialized international politics. International disputes and politics are resolved through bargaining in the shadow of the IC, with politics changing because an IC has the authority to issue a binding legal interpretation.

Sometimes the ruling will be enough to change state behavior. Domestic actors might see an IC ruling as a helpful way to clarify a valid legal disagreement, and some domestic actors will desire the external push as it provides them with political cover and/or political ammunition they can use to defend a choice that might otherwise be criticized. If the legal ruling and the remedies awarded are insufficient to induce compliance, international actors, other states and political activists turn to multilateral leverage strategies to ratchet up the costs of noncompliance. External leverage strategies in time 3 mobilize both international and domestic political pressure to influence political decision-makers, using publicity, boycotts, protests, restrictions on actors within the targeted state, sanctions etc.³⁹ Leverage strategies can be used by foreign actors and multilateral institutions, or by domestic and transnational actors, thus leverage strategies can

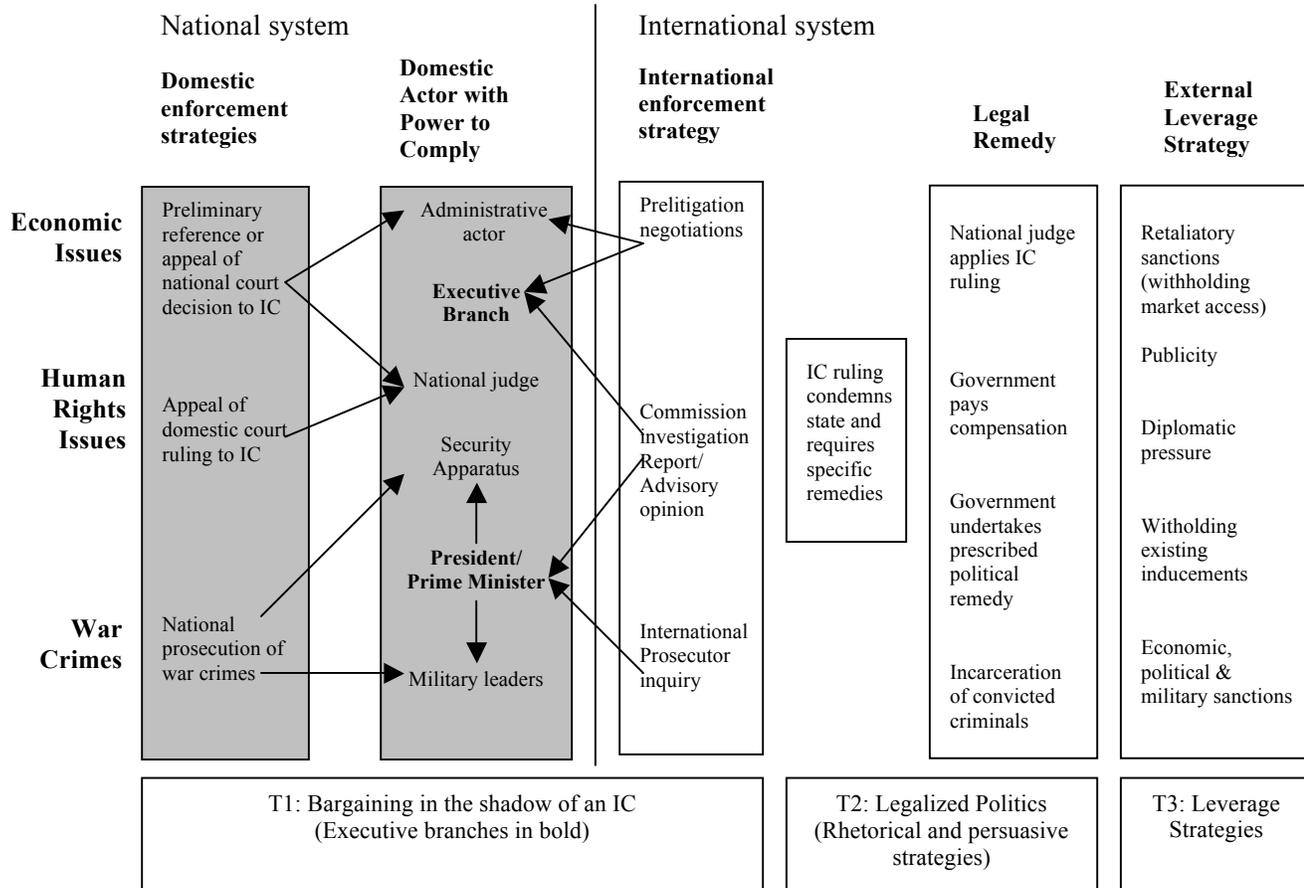
³⁷ For more on how IC judges can appeal to litigants, see: Helfer and Slaughter, 1997.

³⁸ Cavallaro and Brewster explicitly recommend that the IACHR appeal to actors who can help leverage their rulings into state compliance. See: Cavallaro and Brewer, 2008.

³⁹ Risse, Ropp and Sikkink, 1999.

have both multilateral and transnational dimensions. Time 3 represents politics in the wake of an IC ruling, where political compromise and partial compliance are the most likely outcome. Even where compliance is partial, and even if states decide to amend the law in part, politics in time 3 represents judicialized international relations as long as the outcome is different than what would have been absent an IC ruling.

Graph 2.4 Political Dynamics of International Law Enforcement (by issue area)



Judicialized politics in times one, two and three generally include both domestic and international dimensions. Domestic advocates can use international legal rulings to try to influence national officials, stressing the reputation of the country at home and abroad. ICs can also try to inspire a grass roots strategy, following the spiral model discussed by Thomas Risse, Stephen Ropp and Kathryn Sikkink.⁴⁰ International legal agreements can mobilize the creation of local and international watchdog actors.⁴¹ National and transnational activists can then use international legal mechanisms and international legal rulings to demonstrate that political leaders are deviating from the goals and standards inscribed into international and domestic law

⁴⁰ Ibid..

⁴¹ Simmons, 2009: 24-42.

and their promise to respect the rule of law. In this transnational politics strategy, ICs become informally allied with grassroots organizations because they both want to induce government respect for international law.

External leverage strategies can also have domestic dimensions. For example, the World Trade Organization (WTO) allows other states to retaliate for violations of WTO rules by targeting politically sensitive industries and regions. The WTO can authorize Europe to raise tariffs against Florida orange products, which may lead orange producers in Florida to protest the steel protections offered to Pennsylvania. International criminal courts may issue indictments and arrest warrants for officials, deterring them from traveling abroad.⁴² An indictment by the International Criminal Court may undermine the reputation of person at home, and it might lead countries to cease cooperating with a political leader thereby raising the domestic costs of letting an indicted war criminal operate in their country. Indictments can also lead to the freezing of assets and make international travel politically risky, creating external pressure on the indicted individual. These direct and indirect sanctions occur as a consequence of IC intervention, which may itself have been instigated at the behest of non-state actors. Thus IC activation becomes a means for non-state actors to leverage multilateral and interstate political pressure.

The tipping point argument outlined above suggests that transnational litigation strategies are focused on sub-state actors and are prior to multilateral strategies focused on government officials. Domestic actors usually prefer to be seen as responding to important domestic concerns, rather than responding to external pressure. Moreover, advocates are likely to first try domestic political channels before turning to international strategies. While targeting sub-state judges and administrators may be sufficient to induce a change a state policy, advocates may prefer to work through governments. The support of the political branches sends a positive signal to the domestic implementers of international rules. Especially where numerous actors will be involved in implementing international rules, explicit governmental support helps. Where governments and legislatures are disposed to follow international law or IC rulings, advocates may rely on political strategies that target governments rather than domestic enforcement strategies.

This tipping point model has within it a number of assumptions. First, like all of the models discussed in this chapter, the tipping point argument assumes that ICs are strategic actors.

⁴² Sikkink and Lutz, 2001.

But whereas the interstate arbiter model suggests that ICs are focused on the interests of the litigating states, this model suggests that ICs are focused on building political support for the law and their legal rulings among both domestic and international actors. Second, the tipping point argument assumes that international courts have some autonomy. International judges can make rulings that displease litigants and powerful states, and ICs are not beholden to institutional politics within the international organization which they may be part of. This independent and legal nature of the IC is part of the IC's appeal. Litigants raise cases because international legal outcomes are different than what can be obtained through regular political channels. Also important is that the IC resides outside of the state, so that litigants can hope for an interpretation that differs from what domestic legal actors might offer.

A number of factors may limit the ability of ICs to tip domestic or international politics. ICs must be invoked—seized by litigants or brought into political debates—if they are going to be able to influence politics. If there are no litigants with a desire or ability to threaten litigation or invoke the IC, ICs may never become part of debates about state policy and international law compliance. Also, there must be some perceived costs to losing a legal case. Either governments must care about being seen as law-abiding, or the sanctions associated with a legal loss must be significant. Finally, international law and IC rulings must find political support among lawyers, governments, political actors or civil society. These limiting conditions are for the most part exogenous to the IC. Judicial rulings may mobilize litigants and activist, and help to build social support for the law. But there must be some underlying support for or interest in seeing that law on the books is either respected or changed. Whether such an underlying interests exists is not something judges can control. Chapter 8 will focus on these exogenous factors, examining when ICs are more likely to be invoked and when ICs are more likely to find allies who want to use litigation, international law or IC rulings to influence state policy.

For now we can say that delegation to ICs will only become politically important where ICs can find both domestic and international political allies who share an interest in seeing law on the books respected. We can thereby understand why some constituted ICs end up being politically irrelevant. Where states are simply mimicking the forms of expected international law—adopting common market legal structures where there is no deeper desire to eliminate barriers to trade—ICs will sit on the sidelines of both domestic and international politics. Where potential litigants are legally or politically blocked from raising cases, ICs will also be inactive

and perhaps of little political importance. And where ICs lack allies, international judges may lack the courage to require that states actually do anything to comply with international rules.

In putting an emphasis on the importance of ICs having compliance constituencies for the law, the tipping point argument implicitly suggests that other factors matter less in shaping IC behavior. The tipping point argument presumes that the government of the day articulates their conception of the national interests, but that rival perspectives also exist. For this reason, scholars who put great weight on the preferences of states articulated in court are likely to be led astray.

In emphasizing the goal of working with domestic and international allies to build political support for international law, the tipping point argument also suggests that eliciting immediate compliance with a legal ruling may not be the short-term goal of international judges. Especially if the current government is out of sync with the preferences of actors within and across states, international judges might gladly sacrifice short-term compliance for the prospect of deeper political change over time.⁴³

In emphasizing the importance of garnering support from societal actors, the tipping point argument also suggests that judges are not focused primarily on how they might secure a reappointment to the court or a promotion. There certainly are contexts where judges will worry most about being reappointed or promoted, but the international legal arena is not such a context. This is especially so because any particular government has very little long-term say over the career prospects of former international judges. Ex international judges have career opportunities in academia, in the lucrative field of mediation and arbitration, and in other international courts to which the country belongs. Indeed it may well be the case that a judge that is unpopular with one faction becomes especially attractive because he represents everything a previous government or a particular faction does not like.⁴⁴

The tipping point argument puts a premium of international rules that can mobilize transnational politics. The transnational litigation component of the tipping point argument also suggests that embedded international law contributes to IC effectiveness. This statement brings with it many implications.

⁴³ For more on the difference between compliance and effectiveness see: Raustiala, 2000.

⁴⁴ For more on appointment politics in the international realm see: Alter, 2006, Voeten, 2007. On the varied careers of international judges, see: Terris, Romano and Swigart, 2008.

By *embedded international law* I mean international law that is either directly applicable in the national legal order or textually similar to domestic law. International law becomes embedded into national political orders in one of three ways: 1) where international treaties and secondary legislation are self-executing, international law becomes directly binding on domestic actors without requiring further implementing legislation; 2) where states formally incorporate international law into national law by creating domestic implementing legislation, there will be domestic rules that replicate international law in whole or in part; 3) domestic legal orders can also already contain texts, constitutional provisions and legal precedents that are similar in nature to international law.⁴⁵ The key point is not *how* but *whether* the international law is embedded into the national legal order. As long as there are domestic legal texts that strongly resemble international texts, reinterpretation can be a mode for political change.⁴⁶ This emphasis on embedded law as it influences transnational litigation strategies suggests that it may not matter whether a national legal system is monist or dualist, civil law or common law in nature.

In stressing the importance of embedded international law, I am also implicitly suggesting that the design of the international legal system does not *ipso facto* determine whether or not transnational litigation strategies can work. Scholars have observed that ICs that allow private litigants to initiate litigation tend to be busier, and that some of the most active and effective ICs also allow private actors to initiate litigation.⁴⁷ In some cases private access signals that

⁴⁵ This definition of legal embeddedness captures factors that others have also stressed. Keohane, Slaughter and Moravcsik also stress the political importance of legal embeddedness, and Hathaway argues that domestic enforcement of international law can contribute to making international law effective. But Keohane et al focus more on whether or not governments can blunt the legal effect of an international legal ruling through legal and political strategies and Hathaway stresses domestic enforcement of international law rather than whether international legal norms are themselves embedded within national legal orders. See Hathaway, 2005: 520-25, Keohane, Moravcsik and Slaughter, 2000: 466-68.

⁴⁶ In monist legal systems, national constitutions declare international law supreme so that conflicts between domestic and international law should be resolved in favor of international law. By contrast, in dualist legal systems international law become domestically binding only via its incorporation into national law. This incorporation makes international law part of ordinary domestic law, but international can be subordinated to national constitutional law and to subsequent ordinary laws. Legal scholars often expect that the monist nature of a national legal system will mean that domestic courts are more likely to adhere to international law. This is not, however, necessarily the case. Even if the national constitution grants international law supremacy over national law, international law may still be subordinated to other constitutional provisions. Moreover, only if the government stipulates that a treaty is self-executing will the law and/or IC interpretations be binding on domestic implementers of national law.

⁴⁷ See: Alter, 2006, Keohane, Moravcsik and Slaughter, 2000. But it is also true that some ICs with private access have fairly empty dockets. Many African legal systems, for example, allow private access yet international litigation remains rare despite apparent noncompliance with existing laws. Effectiveness is admittedly a contested concept, but there is nonetheless widespread agreement that certain international legal systems—namely the ECJ, ECtHR and the WTO systems—quite often succeed in encouraging greater compliance with international rules. For definitions of effective legal systems, see: Helfer, Alter and Guertzovich, 2009: 3, Helfer and Slaughter, 1997: 282-7.

international law is embedded into the national legal order. For example, where domestic judges are authorized to send references to the IC, or to have their rulings appealed to the IC, domestic judges are themselves going to be directly applying international rules. But private access is neither necessary nor sufficient for international law to be embedded into national legal systems. Ratification of the International Criminal Court's Rome Statute, for example, requires signatory states to adopt laws prohibiting war crimes. The international criminal system also encourages national courts to enforce war crimes law so as to avoid the ICC asserting authority.

International criminal law is thus embedded into national legal orders, even though the ICC system does not allow private litigants to initiate international litigation. Private access can also exist without international law being embedded into a national legal order. For example, some ICs allow private actors to initiate litigation challenging the validity of IO acts and the decisions of international actors. The law the IC applies may not be embedded within national legal orders and the IC's rulings may not be relevant for domestic actors interpreting similar domestic law.

The larger implication of the tipping point argument is that to understand the behavior of international judges and the influence of ICs in international politics, one must consider factors that operate both inside and outside of the courtroom.

IV: Conclusion: The Transformative Power of Delegating to Courts

The judicialization of politics occurs when politicians conceive of their policy and legislative options as bounded by what is legally allowed and when courts gain authority to define what the law means. At the domestic level, we might expect politics to be judicialized wherever independent judges and courts exist. But applying this same expectation to the international level presents problems. Even if international judges are independent actors, ICs must worry about whether or not states will comply with their rulings.

Many practitioners and scholars expect international judges to be focused primarily on eliciting compliance with their rulings, so much so that the preference of litigating states will dominate IC decision-making. This chapter offered a number of reasons to question this presumption. First, I explained that in many instances state and IC interests will be aligned. ICs will be doing exactly what states want them to do: binding others to adhere to the rule of law. Where ICs serve as dispute resolution bodies for private actors cases and where ICs are administrative review bodies for international administrators, ICs will be acting as agents of states helping to monitor the extent to which other actors are following the law. In coordination

contexts—situations where states want common rules given a common interpretation—states will also happily let ICs facilitate the uniform interpretation of international rules. Also, where ICs are applying legal rules at the behest of powerful states—as occurs in ad hoc international criminal courts—IC rulings are likely to enjoy the tacit if not overt support of these states. These situations are not apolitical. Real interests are at stake, and the subjects of the law care greatly about legal interpretation and judicial decisionmaking. But states delegated authority to ICs so that judges can fill in the law and resolve these disputes. This delegation is not sovereignty compromising so long as the governments delegating authority are unlikely to be subjected to judicial scrutiny.

The chapter then focused on situations where states have bound themselves to international judicial oversight. Self-binding limits state autonomy, but it also brings benefits. States self-bind to increase the credibility of their commitment in the eyes of other actors. Where governments want to encourage foreign investment and where governments want to bolster a promise to their own population, they may happily submit to international judicial oversight and readily respect IC rulings to provide proof of the government's commitment to the rules in question. Also, governments might see a grant of constitutional review authority to an IC as a self-binding means to ensure that international legislative bodies do not chip away at the power of domestic parliaments.

But there are also situations where ICs redefine the meaning of international law, constrain state autonomy and induce governments to walk away from policies that might enjoy considerable domestic support. I identified three different conceptual models of how ICs can influence state behaviour in situations where state desires may not be in alignment with IC interpretations. The models were abstract and artificially differentiated, since there is usually more than one reason why governments respect an IC ruling. The point of differentiating models, however, was to think about the assumptions animating each model. In the interstate arbiter model, ICs are wholly dependent on governments choosing to comply with their ruling. The interstate arbiter model is based on a realist view of international relations. If you believe that national interests are given—defined by geopolitical realities, inherent needs, or essentialist criteria—then the international law can only meaningfully exist in the few places that diverse international interests converge. These situations exist, but the world of international law and IC influence would be quite small if ICs could only be interstate arbiters.

The possibilities for international law and for IC influence open up when one conceives of national interests as mutable. If state interests are mutable, time and context become important factors. ICs can make rulings that a current government might dislike in the expectation that a future government or perhaps some sympathetic actors within the state might be more amenable. In the multilateral politics model, ICs can harness the support of a coalition of states to pressure a noncompliant government. In transnational politics model, ICs can harness domestic actors to use their resources to push for compliance with an IC ruling.

The chapter brought the three different perspectives together. All three perspectives allow that ICs can construct focal points, creating shared understandings of legal rules. The focal point solution is embraced because the IC ruling has authority and legal certainty is desirable. The unified model posits that ICs can also help reconstruct national interests. I argued that ICs build support for their interpretations by allying with actors inside and outside of states, including but not limited to governmental actors that may welcome an external push to pursue a contested policy. ICs contribute to judicialized politics by offering interpretations that tip the political balance in favor of domestic and transnational actors who want policies that happen to cohere more closely with the objectives and goals of international law.

This book focuses on cases that are litigated. But the tipping point argument suggests ICs will be able to tip the political balance where litigants are able to seize the court *and* where international rules enjoy the political support of key constituencies. Litigants do not have to actually seize the court; the prospect of litigation may be enough to spur change. These limiting conditions mean delegating authority to an IC does not ensure that ICs will have influence and international legal rules will be respected. Rules may be ignored because no actors are able or brave enough to seize the court. And ICs may bend to politics where the rules they are asked to enforce do not enjoy political support within states or society. But as Chapter 1 argued, ICs should play their largest role by simply existing. If shared understandings emerge regarding what international law requires, out of court conversations and bargaining can be shaped by the law even in cases where litigation is unlikely. The extent to which international law shapes politics may, however, be constrained by the extent to which there is an active field of lawyers and experts invoking the law to shape politics.

The tipping point argument implicitly suggests that a number of factors scholars stress are not so important in determining ICs influence domestic and international relations. It suggests

that international judges are not so worried about eliciting compliance or being reappointed that they cater to the interests of litigating or politically powerful states. It suggests that factors exogenous to ICs—the distribution of preferences among states and within national politics—are more important in shaping IC influence than is having ICs with private access provisions or strong sanctioning tools. And it suggests that societal preferences matter more than domestic legal attributes such as whether a national legal system is monist or dualist, civil law or common law.

These alternative explanations excluded by the tipping point argument are important to recognize. If national legal structures generated fundamental barriers to international law's influence, then we would need to change formal elements of national legal systems before international law could be a tool of international and domestic political change. But if formal structures are not a significant barrier, then shifting the attitudes of lawyers, judges, governments and potential litigants can be enough to encourage state respect of international law. If ICs were mostly dependent on pleasing governments and powerful states, then there really would be no point to focusing efforts on shifting the attitudes of lawyers, judges and potential litigants. And if strong sanctioning tools were the key to IC effectiveness, then we would either need to increase the sanctioning power of ICs or concede that international law and international courts will never have much influence in international relations. In rejecting these alternatives, the tipping point argument suggests that the real focus should be on shifting attitudes of national judges and citizens so that they demand that governments keep their legal commitments, both domestic and international. The tipping point argument also suggests that ICs already do respond to the interests of coalitions of actors, including both state and societal actors, and thus that ICs are not unaccountable political actors.

The point of delegating authority to ICs is to create a legal actor, outside of individual states, with the power and authority to say what international law means. The promise of ICs is that they will create a legal finality where there are disagreements about the meaning of international law. In creating a medium term legal finality, delegation to ICs also presents an inherent risk to domestic sovereignty. ICs provide a way around domestic obstructions, a way to challenge domestic practices and precedents made without consideration of international law and a way to circumvent individuals who use their position to block efforts to change existing national policy. Circumventing domestic channels naturally upsets those actors who prefer

existing national policy. At the domestic level, if legislative actors dislike judicial interpretations they can change the law, change the constitution, or change the composition of the court. But ICs are applying international law, not domestic law. Changing either the law or the composition of an IC requires multilateral coordination and assent. This loss of domestic control, and the possibility that international law can reopen domestic policy debates, is an anathema to those people who prefer national solutions. Defenders of the status quo argue that governments sole obligation should be to its own people and its own political system. They suggest that outside interference is inherently illegitimate, and that domestic judges should only consider what domestic law and domestic constitutions require. These may be the arguments of sore losers, but there is a valid point to consider.

In today's globalized world, one cannot ignore the importance of actors and interests that reside outside of national borders. The real question is whether global law should become another avenue through which international forces penetrate the domestic sphere. The tipping point argument brings global law into domestic politics. It brings international courts into debates about the meaning of law, judicializing both domestic and international politics. I return to the normative desirability of further opening domestic spheres to international forces in chapter 8, where I consider the implications of delegating authority for ICs for domestic democracy.

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