The New Terrain of International Law: International Courts in International Politics

Book Precis
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Introduction: The New Terrain of International Law

What is the “new terrain” of international law? To answer this, we must first have a sense of what the “old terrain” is. The “old terrain” of international law is captured by international law’s historical name, “the law of nations,” where international rules are seen as mere contracts between states. One can still find examples of contemporary international law that fits this description. But the “old terrain” of international law conceives of international law only in terms of contracts among states. These international legal “contracts” have for a very long time included provisions governing how sovereigns treat their citizens as well as how they treat individuals and property captured during wars (Krasner 1999), thus commitments to individuals, and not just commitments to other sovereigns. Nonetheless, the notion that international law is a contract among sovereign states has endured, carried forward through our ideas of what international relations and international law entails.

In the new terrain of international law, international law is binding law, creating duties, expectations and rights that penetrate the surface of the state. The new terrain of international law is the result of a double shift that has emerged over the last sixty years. One force leading to this new terrain is the substantive expansion of international law to cover issues that were traditionally governed by states. To some extent, the substantive expansion of international rules has followed from the trend of governments asserting an extraterritorial reach to domestic rules so as to help regulate and shape the way global forces affect domestic politics. Whatever its origins, international law increasingly speaks to how government should treat their citizens, which goods are allowed into national markets and on what terms, how much environmentally destructive elements states should allow their firms and people to create etc. While we count on governments to implement these rules, increasingly sub-state actors are going to the source of the rules, invoking international laws and regulations directly in national contexts. The move of going to the international source, as opposed to relying on domestic implementing legislation, reflects a shift of expectations. If sub-state actors see governments as having duties and themselves as having rights based on international law, and if governments start to interact with sub-state actors as if they have rights under international law, then both domestic and international politics moves into the new terrain of international law (Risse, Ropp, and Sikkink 1999; Shaffer 2003).

The second shift is a result of the growth of multilateral institutions. In very real and concrete ways, multilateral institutions have gained governance roles. As executive bodies, multilateral institutions propose legislation and convene meetings where representatives of states agree to collective rules that, once ratified, become binding both on signatories and non-
signatories alike. Some multilateral institutions have legislative abilities wherein committees of state representatives can pass legislation that does not require the traditional step of national ratification for the legal rule to be binding. Multilateral institutions also have been granted administrative roles, with international secretariat issuing binding interpretations of rules and decisions related to implementing international rules (Bradley and Kelley 2008). Combined with the first trend—the substantive expansion of national and international law—the trend of delegating a variety of powers to multilateral institutions means that increasingly there is governance that does not depend on national legislative consent for its authority, and that exists largely outside of domestic judicial oversight.

These two shifts in international law have arguably driven the turn towards creating a fundamentally different type of international court, what I call “new style” international courts. “Old-style” international courts also exist; they are accessible by states only, and they lack compulsory jurisdiction. These design features ensure that international courts can only be used to resolve contractual disputes where both parties are states, and where both parties recognize the potential benefit of a legal ruling. In the terminology I develop in this book, old style international courts are inter-state dispute adjudication bodies. They still serve a function, but they are not all or even most of what international courts are now doing.

“New style” international courts have compulsory jurisdiction, access for non-state actors, and implicit if not explicit enforcement powers. These features allow non-state actors to invoke international legal mechanisms to shape state behaviour, expanding the pool of actors who can bring international courts into international and domestic politics. Since IC jurisdiction is compulsory, states are more likely to be unwilling defendants in legal suits. Thus new style ICs bring with them a higher likelihood that ICs will be used, that ICs will be less dependent on states wanting to use ICs, and a greater potential that international litigation will be sovereignty compromising.

I have defined old and new style courts based on the design features of international courts, in large part because most theories about international courts focus on these design features. But I believe that the design of the court follows the larger change in the roles delegated to international courts. Whereas in the past international courts were only delegated inter-state dispute adjudication roles, today states have delegated to international courts administrative review authority, constitutional review authority, and enforcement authority. The design of the IC, I believe, follows from the decision to delegate these new types of powers to ICs because the only way IC can plausibly play these other roles is if their jurisdiction is compulsory, and if non-state actors also have access to the legal body.

This book documents and explains the trend of delegating these four types of authority to international courts. In doing so, it aims to help us see and better understand the new architecture of the international legal system. I focus on the twenty existing international courts (see the definitional discussion that follows), examining the roles that have been delegated to them and the usage of these courts. Most of these international courts were created since 1990, which itself indicates that relative newness of the trend of delegating more and different types of authority to international courts. Usage of international courts, both old and new style, is increasing; roughly seventy percent of the total international judicial activity and rulings have come since 1990. Three of the existing ICs are mostly if not wholly “old style” international courts. Eighty-five percent (17/20) are “new style” courts, meaning they have compulsory jurisdiction and access for

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1 70% (19568 of 27904) of the admissible cases are since 1990, and 69% (15396 of 22206) completed rulings, opinions or orders are since 1990.
non-state actors to initiate disputes. While the most frequent role delegated to international courts is dispute adjudication (sixty-five percent), ninety-percent (18/20) of existing international courts have been also been delegated authority to play roles beyond inter-state dispute adjudication—namely administrative review, constitutional review and/or enforcement. The most active international courts tend to be “new style” ICs.

Not only are most scholars and practitioners unaware of these developments, they are ill equipped to understand them. Most existing international law scholarship either assumes that all international courts are inherently the same, or it focuses on a single role—dispute adjudication or enforcement—thinking that insights from a single international court, a single role, or a single legal ruling portend a general pattern that applies across all international courts and cases. But really, we should expect the political influence of international courts to vary by role, and the potential for delegation to impinge on national sovereignty or generate political controversy to vary as well.

The larger argument of the book is that each judicial role has its own set of politics because each judicial role inherently puts courts in a different relationship to states, and each judicial role has its own set of expectations regarding what the relationship between the court and the state should be. By understanding the politics surrounding the four different roles courts play in a political system we can better understand variations in state-court relations, and thus we can better understand the extent to which single examples may or may not apply across ICs. Also, we can better understand why features that some theories expect to be likely to lead to activist international courts—such as private access—end up not having the effect that as some fear. By figuring out why certain delegations are controversial, we can put concerns about delegation to ICs into their context.

An important policy implication follows. ICs have issued over 28,000 binding legal decisions. Most scholarship focuses on a very small sliver of these rulings, and most controversy surrounds an even smaller number of international legal rulings. Before we toss the baby out with the bathwater, raising often unsubstantiated concerns about delegation to international courts in general, we should better understand what ICs actually do, and why only a small fraction of what ICs do is even potentially politically controversial. We should also better understand where and how delegation of authority to ICs can be politically and substantively useful.

Empirically, the book provides what may be the first bird’s eye view of the larger landscape of international courts. Chapter two provides more detail about existing international courts and about adjudication patterns across international courts, focusing on the subject matter for different international courts as well as the geographical distribution of the trend of delegating authority to international courts. It then explains the four judicial roles of ICs in their international form, and shows the roles that have been delegated to specific ICs. Chapters three through six consider each judicial role independently, describing the reasons international courts are delegated the specific role, the relationship between ICs and states in the given role, and state-IC politics in the role. I provide examples of international courts and quasi-judicial legal bodies in each role, using a broad range of case studies to suggest both similarity and divergence in the how different ICs play a given role.

Chapter seven considers how my analysis changes conventional understandings of the politics of ICs. International relations and international law scholarship is extremely state-centric, focusing almost exclusively on the relationship between ICs and executive-branch decision-making. Insufficient attention is paid to the important role of intermediaries—lawyers,
national judges, and government bureaucracies—yet these are the actors who usually end up defining how international rules have a domestic effect. Because of its state-centric focus, most international law and international relations scholars expect the appointment rules for judges, the extent to which legal rules are binding, and voting rules required to change international legislation—to be the most significant features that define the politics between states and international legal bodies. Most ICs do not vary significantly along these dimensions. The analysis I offer suggests that the focus on IC design is misplaced—that other factors contribute to variation in the independence and influence of ICs. I argue that the main way that ICs influence state behaviour is by serving as tipping point actors elevating the power and influence of domestic and international actors who prefer outcomes that happen to be more congruent with what international law requires. Chapter seven draws out the implications of my analysis for contemporary debates about the influence, independence and effectiveness of ICs.

The functional explanation this book offers explains why the design of the delegation contract varies, and why both expectations and politics varies by judicial role. The analysis tells us that because of delegation to ICs, we now have a set of actors that can play significant roles in international politics. The question then becomes: when, where and why are the delegated roles activated? When do latent roles become active, and when does judicial activity have a substantive political influence on what states do? Chapter eight considers this question. My hope is that in using a functional analysis to explain many features of ICs, I can shift the focus of scholarly and political debate. We can stop seeing puzzles in questions that have straight up functional answers. We can stop talking in sweeping and overly general terms that are themselves politically harmful. Instead we can focus on the many issues that are outside of my general framework, yet which affect when, where and how international legal bodies exercise the authority that has been delegated to them.

The rest of this introduction situates the phenomenon of delegation to international courts in the larger terrain of international law. Part I explains how I define an international court, and how I ascertain what roles are delegated to an IC. The definitions serve as important background information about international courts. Part II situates my focus on international courts within the larger international legal system so that we can better understand what this analysis does and does not capture. Part III examines what exactly is being delegated to ICs, and thus why delegation to ICs is politically significant. Part IV identifies three fundamentally different visions of how delegation to ICs reshapes international politics—a minimalist vision where the international legal process reveals new information that states use to recalculate their policy choice, a more typical vision where ICs shift the meaning of the law and thereby shift the costs and benefits of violating the law, and a more radical view where ICs realign domestic coalitions and thereby reconstitute how national interest in a given case. All three visions are true—the real issue is which visions hold in which contexts. My empirical investigations in subsequent chapters augment these understandings, thus I return to the issue of the influence of ICs in international politics in the conclusion of the book.

I. International Courts: Some Important Definitional Issues

Before proceeding with the argument, I need to provide some basic background information about international courts. While definitions are often boring, I have found some basic definitional background helps to clarify critical misperceptions.
What counts as an IC?

This book adopts the Project on International Courts and Tribunals’ (PICT) definition of an international court as 1) permanent institutions, 2) composed of independent judges 3) that adjudicate disputes between two or more entities, one of which is a state or international organization. They 4) work on the basis of predetermined rules of procedure and 5) render decisions that are binding.  

I add to PICT’s definition one more criteria. PICT includes all ICs that have been created by a treaty—twenty-six in all. Often, however, IC’s do not come into existence until a certain number of states ratify the treaty agreeing to the IC’s jurisdiction. Because I care about IC usage too, I only consider ICs that exist as of 2005 (e.g. the required ratifications are in hand, and the court has opened its doors for business).

This definition brings with it both benefits and liabilities. PICT’s definition usefully limits the realm of analysis. It includes the cases that most interest international relations scholars—namely ICs that adjudicate cases involving states—while creating a tractable number of courts to investigate. Also helpful is that the PICT definition creates some uniformity across cases. We know that all ICs meeting PICT’s definition have independent judges. In other words ICs have design features that ensure that judges cannot be removed except for egregious abuses of authority, and that the working conditions for judges cannot be altered simply because states are unhappy with legal rulings. International judicial independence is not just a formal category. International judges are independent actors. Of course appointment politics may still shape judicial decision-making, and some ICs are more willing to fill in legal lacunae aggressively. But as an empirical aside, research on IC decision-making has failed to find any systematic evidence that ICs tailor their decisions to please powerful countries, or that international judicial decision-making is biased by characteristics of the parties to the dispute.

All ICs meeting PICT’s definition issue binding rulings, which usually also means that the rules themselves are legally binding. This means that governments are legally obligated to respect IC decisions. We know that compliance with IC rulings is imperfect, though compliance with IC decisions tends to be significantly higher than most people expect (Börzel 2001; Hudec 1993; Paulson 2004; Schulte 2004; Helfer, Alter, and Guerzovich 2009). Indeed it is far from clear that state respect for IC rulings is worse than state respect for domestic judicial rulings (Zürn and Joerges 2005).

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2 See PICT’s synoptic chart. Since it was last updated, the Caribbean Court has come into existence, and a criminal tribunal for Sierra Leone was created. http://www.pict-pcti.org/matrix/matrixhome.html.

3 While ICs do sometimes hear cases where both parties are private actors, the dispute almost always raises the issue of whether IO or state practices (e.g. law on the books, law in action, or national application of an international law) cohere with international law.

4 For an excellent analysis of European Court of Human Rights (ECHR) decisionmaking, see: (Voeten 2008). Voeten finds that judges from socialist countries are systematically more critical of socialist governments, though their predilections do not per se lead the ECHR to be a biased court since decisions are taken collectively. A number of studies that have tested whether the European Court of Justice is biased vis-à-vis certain states. For example, see: (Stone Sweet 2004; Cichowski 2007; Börzel 2001). Eric Posner has asserted that International Court of Justice (ICJ) judges are biased (Posner and De Figueiredo 2004). Posner’s finding rests on a correlation: in most cases ICJ judges agree with their state’s position. Eric Voeten also finds that ECHR judges side overwhelmingly with their state’s position, but this could be because their state is on the right side of the law. When Voeten controls for other factors that could shape judicial decision-making, he finds no national bias in judicial decision-making. One suspects that a more rigorous investigation of ICJ decision-making would yield similar results.

5 Some ICs can also issue advisory opinions. In my analysis, however, I focus on the binding decisions noting if the delegated authority is advisory only. I also exclude from my count of legal rulings advisory decisions.
My requirement that ICs exist as of 2005 means that I exclude a number of regional legal bodies in Africa that exist on paper only. Chapter two includes these courts in the larger overview of delegation to ICs, but because I can only consider activation issues regarding courts that actually exist, I exclude these courts from the rest of my analysis. Meanwhile, the definition includes null cases—ICs that meet PICT’s definition, that exist, but are inactive. Inactive ICs present places where we can investigate why ICs do not end up playing the roles that have been delegated to them.

The most arbitrary element of PICT’s definition is the requirement that the legal body be permanent. There are many quasi judicial bodies and legal bodies that are not permanent but they are functionally equivalent to permanent ICs. The US-Iran claims tribunal, for example, was a special interstate dispute adjucration body set up to deal with disputes arising from the seizing of the United States Embassy and the subsequent freezing of Iranian assets. This body was composed of independent judges. It issued binding rulings using legal decision-making. But it was not a permanent body. Also, the World Trade Organization’s (WTO) dispute resolution system fits the definition only because the Appellate Body is permanent. Meanwhile, the nearly identical system for the North American Free Trade Agreement (NAFTA), and the arbitration system used by MERUSOR do not have permanent legal bodies, thus they does not count. The arbitrary nature of this part of PICT’s definition does not present a fundamental problem for this study. It means that I understate the trend of delegating authority to international legal actors, which is better than overstating the trend. The arguments I develop should apply to quasi judicial bodies to the extent they are functional equivalents of ICs. Indeed in my case discussions I relax PICT’s rigid definition to include quasi judicial bodies that play the role I am investigating.

How can one tell what roles are delegated to an IC?

This book is focused on understanding state decisions to delegate different types of authority to ICs. I use ideal type characterizations of the four legal roles delegated to ICs. These ideal types are adapted from the domestic context. The domestic analogy is both useful and accurate. It makes IC behaviour more recognizable. Moreover, I believe that most delegations to ICs are inspired by the domestic analogy. Diplomats are basing their recommendations on their experiences with delegation to courts in the domestic context. Delegation to ICs becomes understandably useful to the national legislative bodies that have to ratify the delegation, with the argument being that domestic courts are unable to supply judicial remedies at the international level so the choice is either to have no judicial remedies, or to create international judicial bodies to supply the legal roles and remedies. The larger public that learns about international litigation has no real understanding of international courts, and instead applies their general understanding of courts to make sense of what they read. Thus our expectations of what international courts should be doing in each role comes from our understandings of courts in the the domestic

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6 PICT has set up a special web page focused on African courts. See: http://www.aict-ctia.org/
7 Quasi judicial bodies constantly appear and disappear, thus any snapshot can only capture a picture of what is a moving target. The PICT project has generated a synoptic chart where they include the universe of quasi judicial bodies- legal bodies that fall short of one or more of PICT’s definitional criteria. I include their 2004 synoptic chart in an appendix, and I provide a glimpse of the larger universe of quasi-judicial bodies in Chapter 2.
system. Each substantive chapter considers the limits of this analogy by identifying how delegation at the domestic level is different from delegation to courts at the international level.

How do I know if a given role is delegated to an IC? Each of the twenty courts I investigate was created by a document; either a separate treaty that defines the roles, appointment processes and jurisdiction of the IC, or a series of articles within a larger treaty that provides a skeletal structure for the court. I give the general name of “Court Treaty” to the formally adopted inter-state agreements that define the jurisdiction and basic design of international courts (See Appendix I for a list of the IC Court Treaties). By examining the language in Court Treaties, I can identify explicit grants of judicial authority. I examined Court Treaties, looking for wording that grants jurisdiction in the Court Treaty. This technique ensures that I capture the powers delegated to the IC, without imputing a role from the behaviour of the IC. Table 1.1 lists in general terms the four roles delegated to IC, and the types of language that signifies that a specific role has been delegated. More than one role can be delegated to a single court, and design features (e.g. whether the IC’s jurisdiction is compulsory, which actors can raise a suit) can vary by role. Each of these roles is defined in greater detail in the chapters that follow.

Table 1.1 The Four Roles Explicitly Delegated to ICs

<table>
<thead>
<tr>
<th>Judicial Role</th>
<th>Language found in Court Treaties</th>
<th>What Judging Entails</th>
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</thead>
<tbody>
<tr>
<td>Administrative Review</td>
<td>Jurisdiction in cases concerning the legality of any action, regulation, directive, or</td>
<td>Judges hear claims that administrative decisions were arbitrary or capricious, ultra</td>
</tr>
<tr>
<td></td>
<td>decision of a public actor, or the public actor's failure to act.</td>
<td>vires, or inconsistent with what the law requires.</td>
</tr>
<tr>
<td>Constitutional Review</td>
<td>Jurisdiction to review the legality of any legislative act, regulation, directive, of an IO.</td>
<td>Examining the law passed by an IO legislative body or a state to determine if it</td>
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<td></td>
<td></td>
<td>conflicts with a higher law or principle (e.g. federal law, international law, basic</td>
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<tr>
<td></td>
<td></td>
<td>rights protections).</td>
</tr>
<tr>
<td>Enforcement</td>
<td>Jurisdiction regarding an enumerated list of crimes or jurisdiction to hear infringement</td>
<td>Adjudicating whether the prosecutor has established beyond a reasonable doubt that</td>
</tr>
<tr>
<td></td>
<td>suits against states. Cases generally are raised by a public prosecutorial type actor.</td>
<td>the defendant committed criminal acts. Adjudicating whether a state has violated (e.g.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>failed to fulfill its obligations) defined by international law.</td>
</tr>
<tr>
<td>Dispute Adjudication</td>
<td>General jurisdiction to “interpret the meaning of the law” or to “ensure that the law is</td>
<td>Judge evaluates litigant arguments, determining the accurate meaning of the law in</td>
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<td></td>
<td>respected,” jurisdiction to resolve disputes. PICT’s definition concerns only dispute adjudication</td>
<td>question. Cases may also involve judicial fact finding, and may go beyond legal</td>
</tr>
<tr>
<td></td>
<td>involving a state or an IO, and only by permanent courts.</td>
<td>interpretation to draw out the implications of the law for the dispute at hand.</td>
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</tbody>
</table>

I listed dispute adjudication last. Sometimes the grant of dispute adjudication authority is quite clear; in other cases dispute adjudication is a residual category in that the IC clearly does not have administrative or constitutional review roles, and no prosecutor or a commission can

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8 Indeed studies find that public opinion about ICs tends to rest heavily on public opinion about domestic courts; the more favourable popular opinion is about domestic courts, the more open the public is to international judges ruling against their governments (Gibson and Caldeira 1995; Gibson, Caldeira, and Baird 1998).

9 Court Treaties are usually composed of a series of articles, with different jurisdictional powers delegated to ICs in different articles. This format allows states to pick specific design features for specific roles. Chapters two identifies which ICs have been delegated which roles, while Chapters three through six provide more fine grained details about each delegation, including the Court Treaty articles that define the act of delegation and the design choices made for each court.
raise non-compliance suits. Rather, the IC is simply empowered to “interpret the law in cases that appear before it.”

Of course courts can end up playing roles that were not explicitly delegated to them. I consider these ‘morphed’ roles. While my data on delegation to ICs only considers explicit delegations of authority, my chapter discussions consider morphed roles. Whether the IC has explicitly been delegated constitutional and/or administrative review authority is usually pretty clear because Court Treaties are explicit about which actor’s decisions the IC is empowered to review (decisions of a supranational secretariat or a decisions of states acting as a sort of collective international legislative body). But in practice, whether a court is reviewing a decision applying the law (administrative review) or the law itself (constitutional review) can be unclear. Also, when ICs find that international rules trump domestic rules, or that a state has violated a law that has a constitutional resonance (e.g. human rights law), the IC may implicitly be conducting a sort of constitutional review. The step of an IC morphing into a de facto constitutional review body is not automatic. Many courts successfully maintain the distinction between administrative review and constitutional review, or enforcement and constitutional review, by interpreting their legal mandate narrowly. It is both an empirical and a political question if, when and why some ICs assume constitutional roles that were not explicitly delegated to them.

My definition of explicitly delegated enforcement authority requires that a supranational actor be authorized to raise non-compliance or enforcement cases. Non-compulsory dispute adjudication is less likely to slip beyond the delegated role compared to compulsory dispute adjudication, if only because defendant states are unlikely to accept IC authority in cases that raise sensitive issues of national sovereignty. Compulsory dispute adjudication, however, can easily morph into a decentralized enforcement mechanism with states raising suits in an effort to enforce international rules. Most ICs that have been delegated dispute adjudication roles do have compulsory jurisdiction for this role (9 of the 13 ICs). Indeed if one considered delegating compulsory dispute adjudication to an IC to signify states’ intent that ICs play an enforcement role, then enforcement would be the most frequent role delegated to ICs. My discussion of ICs in enforcement roles considers the morphed role of decentralized enforcement via compulsory dispute adjudication.

In what important ways do IC designs vary?

My definition of old style versus new style ICs turns on features of the IC design—whether or not the IC’s jurisdiction is compulsory, which actors can raise suits, and whether delegation is explicitly or implicitly designed to make international law more enforceable. Design differences are important because they capture the reality that delegation to ICs has not only increased in number; the nature and quality of delegation to ICs has also fundamentally changed.

IC design features can be quite controversial. For example, the big political cleavage regarding creating the International Criminal Court (ICC) was about the design of the ICC. The United States wanted the United Nations Security Council to be the body that authorizes the ICC’s prosecutor to pursue cases, so that the US could veto any investigations it disliked. Other states rejected this proposal because it would limit the independence of the ICC. Also, the United States wanted the ICC to have jurisdiction only regarding cases involving signatory states, to make sure that the ICC could never sit in judgment over United States officials or
soldiers. Others felt that the ICC should have jurisdiction over any war crime committed in signatory states, regardless of who the perpetrator might be. These disagreements were significant enough for the Bush Administration to repeal the Clinton Administration’s signature of the ICC Rome Treaty—a sure sign that states care greatly about these design features.

The possible variations in each IC design are listed in Table 1.2 below, organized from the least sovereignty compromising designs to the most sovereignty compromising designs. IC designs are more sovereignty compromising when it is harder for defendant states to thwart a legal procedure from advancing. This table represents a sort of Chinese menu that states can choose from when they design an IC. The categories can be combined in different ways, and states can specify different design features for different IC roles. For example, the International Tribunal of the Law of the Seas (ITLOS) allows private actors to raise suits against the Seabed authority. It allows the owners of seized vessels to challenge the government holding their vessel, but only with the consent of the boat-owner’s state. For the rest of the ITLOS court’s jurisdiction, only states can raise suits.

Old style ICs have the design indicated by the shaded grey boxes. New style ICs have the designs indicated by the white boxes. IC design features can be controversial, but they are not always controversial. This is because there are ways other than access rules and compulsory jurisdiction to circumscribe the types of cases the IC will be hearing. Section III will help us capture the extent to which design features become controversial by introducing the idea that delegation to ICs can be “other binding” or “self-binding.” Other binding delegations can involve design features that could compromise national sovereignty, but because the IC exercises its jurisdiction principally vis-à-vis non-state actors, or states that were not part of the delegation contract, these design features are of less concern to the architects of the legal system. Thus we can see that certain new-style designs (namely ICs which have authority only vis-à-vis international actors) are not likely to be sovereignty compromising because they are other-binding, and not self-binding, delegations.
Table 1.2- Important Design Variations in Delegation to ICs

<table>
<thead>
<tr>
<th>Compulsory Jurisdiction</th>
<th>Lower Sovereignty Risks</th>
<th>Optional protocols- states can agree to accept compulsory jurisdiction. The acceptance applies only vis-à-vis other states that have signed on to the protocol.</th>
<th>Higher Sovereignty Risks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compulsory jurisdiction- states must assent to a case before it can proceed to court</td>
<td>Compulsory jurisdiction- Any state actor challenged must appear in court. Defendants can argue that they are wrongly charged, or that the court lacks jurisdiction, but the Court gets to resolve jurisdictional questions.</td>
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Access Rules- who can initiate a case

| Directly Affected State Parties- Only states directly affected by a legal disagreement can raise a suit | National Courts- National Courts can refer cases to the IC if the case raises a question of international law. Private actors can gain access through national court references | Directly Affected Private Actors- firms, collectivities and individuals that are directly affected by an IO or state action may raise a case in front of the IC |
| Supranational actors- supranational political bodies (e.g. European Parliament, Secretariats), Supranational enforcement actors (e.g. Secretariats, Prosecutors) can challenge an IO policy or bring a state to court either on behalf of a state or private actor. |

Legal Targets

| IO Decisions and Policies- authorized litigants can challenge the policies and actions of supranational actors (e.g. secretariats, legislative bodies). | National Court decisions - litigants can appeal a national court’s application of an international rule. | State Actions- decisions, policies, and laws of states and state actors can be challenged in front of ICs |
| National Court |

It is worth mentioning design features that can vary somewhat, but which I do not believe to highly politically salient. There is a fairly small amount of variation in the appointment process for international judges. ICs judges are nominated by their governments, with selection occurring by assent or by a formal vote of the collectivity of states. For ICs where each country subject to the ICs jurisdiction cannot be guaranteed a judge (because it is impractical for the ICJ, for example, to have 191 judges), governments tend to offer a single nomination and selection of judges turns on the acceptability of the nomination to other states and the desire to create geographical representation on the court. Regional ICs are likely to have a judge from every country. Sometimes national nominations are automatically adopted, and other times a country will put forth a few choices for other member states to select from. While the choice of international judges is political, it is hard for any single state or any group of states to stack an IC in any particular ideological direction because each country gets to make its own nomination choice, and because usually a government’s preference regarding international judicial nominees change as the party in power changes (for more see Alter 2006).

IC designs can also vary in terms of lengths of judicial terms (somewhere between four and eight years) and the extent to which terms are renewable. Some scholars have hypothesized that shorter term lengths extend state control over IC decision-making (Stephan 2002), but there is little systematic evidence to support this claim. Further research about judicial appointment

10 Eric Voeten found modest support for the claim that European Court of Human Rights judges who were not up for reappointment were slightly more activist in their rulings, but other factors (such as the social background of judges, and the state where the judge came from) were far more likely to predict judicial behaviour (Voeten 2008).
politics is surely warranted. There is a very limited amount of research on judges who are appointed to ICs (Voeten 2007; Terris, Romano, and Swiggart 2008), but no systematic research on the politics of the appointment process. For now we can say that it is far from clear that the judicial appointment apparatus varies in meaningful ways across ICs, or that the appointment process itself has a substantive impact over international judicial behaviour. This claim may be surprising in that most people expect or think that ICs are inherently more political than domestic courts. ICs certainly must navigate a more fraught political terrain than most national judges, but IC judges do appear to maintain their independence. Indeed delegation to international courts may be quite different than delegation to domestic courts in that at the domestic level appointment politics are more easily influenced and controlled by the government in power (Alter 2006).

ICs also have more detailed “rules of procedure” that are created by states or by the court itself. These rules set out the steps litigants must follow in raising a case—the format of their appeals, any statute of limitations for filing a case, how long each step in the procedure is supposed to take, etc. Technical and logistical concerns seem to shape these design choices, which is perhaps why states often leave it to the judges themselves to work out the details of the litigation procedure.

My claim is that the design variations discussed in table 1.2, combined with other factors related to the political context (e.g. whether states are likely to comply with a ruling, public opinion on a specific legal issues, government positions on an issue etc) are more important in shaping IC decision-making compared to other IC design variations that exist. In particular, I don’t think one will obtain much insight from comparing appointment politics across international courts, if only because too many more significant factors related to the operating context of the court are likely to vary as well.

II. Locating the New International Courts in the New Terrain of International Law

Legal threats and litigation are, of course, not the main way in which international law shapes the behaviour of states and other actors the international system. Rather international courts are simply a piece of the larger legal system that includes the law itself, and the institutions that make and adjudicate the law. The analogy of the rainforest helps to capture the position of international courts in the larger international legal landscape.

The international legal system—with its codified and uncodified rules—is in my metaphor the canopy of the rainforest. Tree trunks connect the canopy to the ground; indeed the canopy cannot exist independent of its trunks. The largest trees are the multilateral institutions where rules are made. There are also many smaller trees and plants, some that live in the air and thus do not connect to the ground. These other life structures represent the many bi-lateral agreements and soft law rules that fill out and compliment multilaterally defined sets of rules. A very small amount of trees have international courts attached to them. These courts have authority over the part of the canopy that springs from the tree. The rest of the trees in the forest are either soft law, or they rely on arbitration clauses or quasi-judicial institutions, or they designate the International Court of Justice as the competent body to resolve any disputes that arise.

There is much life within the canopy that is largely independent of the life on the ground. International organization activity, including international judicial activity takes place in the
canopy, beyond the vision of everyone except for the relatively few who climb up onto the platforms. Life in the canopy is of interest to international relations scholars, but not to domestic scholars. The real question of interest is how is the canopy related to life on the ground?

The people that live on the ground are, of course, affected by the canopy, but they probably have no sense that the canopy is shaping their lives. This is because most international law is directly incorporated into domestic systems, at which point its connection to the canopy becomes imperceptible. While the fruits that the population lives on may appear to be completely independent from the canopy above or nearby, those who understand ecosystems know that the rainforest plays an important role in maintaining the domestic trees.

How does the canopy in general, and international courts in specific, influence life on the ground? Like the rainforest, the international legal canopy aims to create a context in which actors who live on the ground unconsciously adjust their lives to the rhythms defined by the international legal canopy. Domestic bodies will always be the main implementers of international rules. They will mostly follow international rules as a matter of course because domestic law reflects international law (or visa versa), because international law represents what states want to do anyway, because following international law has become part of accepted practice and is thus taken for granted, or because violations would trigger an undesired adverse consequence (e.g. if Russia arrests a diplomat from the United States for political reasons, the United States is likely to find a reason to arrest a Russian diplomat) (Chayes and Chayes 1993).

For this part of the international legal canopy, delegation to international courts may play a fairly minimal role. ICs can help to coordinate understandings of what the rules mean, in the ways discussed in section IV, but international legal mechanisms will contribute little else.

International enforcement matters in the cases where states are likely to accidently or intentionally violate international rules. Even in these cases, however, most legal violations will be resolved outside of the international legal context. Where there is international judicial oversight, the possibility of international review should cast a shadow over domestic and international decision-making. In a utopian international judicial system, an effective IC would cast such a strong shadow that legal violations would be resolved along the way either by voluntary compliance, out of court bargaining, or by domestic judges, and thus the international court would have few cases. Such a utopia assumes a level of knowledge and legal clarity that is unrealistic, but the utopian view is instructive in that it suggests that international judicial activity is a poor indicator of whether or not international legal rules are generally respected. For the instances where rules are violated—by accident or intent—ICs demand that a number of steps first be taken before the IC is seized. Economic courts usually require that litigants first attempt to negotiate a settlement. Simply signalling an intent to file a case can be enough to encourage compliance if the defendant expects to lose in court (Tallberg and Jönsson 1998). Human rights and trade courts require that domestic remedies first be exhausted, and the International Criminal Court includes a “complementarity principle” that encourages governments to deal with war crimes in order to keep the ICC from prosecuting the case. These steps are they way ICs radiate their influence domestically. What this means is that delegation to ICs is by design a back up mechanism to self-regulation and domestic oversight, with the intention that the mere possibility of international judicial review will lead actors below to do their job better. ICs should play their largest role by simply existing, and it is quite likely that the cases that do actually reach the IC are the hardest cases (e.g. the ones where compliance is least likely (Busch and Reinhardt 2000)). Whether ICs actually do play this larger role is of course an empirical question.
This analogy also reveals the limitations of the investigation this book undertakes. With the birds eye view I provide, we can better see what the forest looks like. But in zeroing in on international courts, I am ignoring equally critical elements of the canopy—the branches and leaves, and the many animals that live in and affect the canopy. Also, I’m only discussing the trees that have courts. Meanwhile it isn’t at all certain that trees with courts are meaningfully different from trees with arbitration clauses or other quasi-judicial mechanisms, or that having a court makes a tree better able to support the rainforest. The individual chapters dip into the canopy to describe what goes on in specific trees so that we can better visualize what courts are doing in each delegated role. But descriptions of specific courts will never truly capture the larger international regime complex in which the court operates. We can perhaps understand a tree, but doing so may tell us little about the larger eco-system of international law (Alter and Meunier 2009).

Despite the limited view, examining delegation to international courts allows us to explore how making international law enforceable can change international politics. I think it is important to recognize that the goal of ICs is to push energy downwards, and to be imperceptible. More accurately said, “old style” international courts exist to help actors on the ground resolve their disagreements in peaceful ways. “New style” international courts exist to enhance the shadow effects of international rules in domestic systems and in the political process more broadly.

One other element of this analogy is important. For international law, like the rainforest, it is both a benefit and a liability that the dynamics and benefits of the international legal system are not well understood. The canopy’s main contribution is to nourish life on the ground below, and actors on the ground need not acknowledge nor work to maintain the rain forest. The benefit of being invisible is that it helps governments appease nationalist sentiments by reinforcing the illusion of national autonomy in the choices the government is making. But because the rain forest’s role is not recognized, it is easily for granted and devalued.

International relations scholars tend to consider international factors as “mattering” only to the extent that states end up doing something they would not otherwise have done (Krasner 1983; Downs, Rocke, and Barsoom 1996). Such a view misses, however, the regulative role of international institutions. International law on the books may well simply reflect what states were already doing at the moment the rules were written. Over time, however, having written down laws creates standard operating procedures and expectations much in the same way that the rhythms of the weather have farmers plant their crops after the greatest rains hit. It is easy to imagine many changes in state behaviour that might occur if there were no international canopy. Nationalist or revolutionary regimes would likely change existing practices merely to symbolize their break from the past and their repudiation of the status quo maintained by the powerful. Political expedience would likely tempt most governments to adopt economic protections to reward valued constituents, or to change understandings of human rights to reflect the desires of the governing elite. Such behaviours may be perfectly legal from a domestic perspective. But the accepted web of international law imposes non-negligible cost. Governments that repudiate international law may be labelled pariah states; they may not be granted the legitimizing courtesies of being listened to and respected at the international level; they may find reciprocal benefits denied to them and their citizens; and if there is an international enforcement mechanisms, violating international law can lead to open condemnation.
There is a suggestive evidence that international courts can help enhance the durability of international rules, and that international judicial decisions can help induce compliance with international rules (Zürn and Joerges 2005; Alter 2000). International courts may also have a disruptive influence (Bork 2003). This book focuses primarily on the act of delegating authority to an IC, and only secondarily on when delegation has a political impact. Thus the analysis contains an implicit claim that delegating authority to ICs is a meaningful act. Although I believe that ICs provide many useful benefits to states and to international law, the analysis in this book does not depend on ICs being a force for good in international politics. All that matters for this analysis is that international litigation has some effect on the way international rules work, even if ICs only have this effect some of the time. The next section considers how delegation to ICs is politically meaningful.

III. What actually is being delegated to international courts? Other-binding and Self-binding delegation to international courts

The “why delegate” and the “what is delegated” questions are inseparable in that one cannot ascertain why authority is delegated until we know what exactly is being delegated. I have said that ICs exist as a back up to self-regulation and domestic oversight. But delegation to ICs is specific—it exists for certain treaties, and only certain types of legal oversight. Most court treaties include an extremely general clause wherein the court is tasked with “ensuring that the law is respected” or helping to create a “uniform interpretation of the law.” Yet, given that courts must wait for cases to be raised, it is well impossible for them to ensure that the law is respected or that there is a uniform interpretation of the law. So what actually is being delegated to ICs? The rest of the book answers this question in specific terms, focusing on specific domains covered by the delegation contract. Here, I focus on the larger political significance of delegating authority to international courts.

Delegation to ICs is politically significant mainly because through delegation states are creating a rival authoritative actor—namely the court—that becomes the trustee guarantor of the law. To understand this claim, we must think about what exists when there is no delegation to ICs. Where we do not have international courts, either litigants interpret the rules on their own, or state actors become the dominant authority defining what “the law” means. Delegation to ICs

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11 In some collaborative research on how intellectual property litigation shaped Andean countries behavior (discussed in Chapter xxx), we found that anchoring intellectual property laws into the Andean legal system contributed to a more uniform application of Andean rules across member states, and it led intellectual property agencies to improve their administrative decision-making because the Andean Tribunal required administrative actors to provide facts and reasons for their decisions. We also found that the ATJ helped domestic agencies resist political pressure. In a couple of highly political cases, executive branches sought to circumvent Andean intellectual property rules via government decrees or bi-lateral treaties. These efforts were rebuffed by domestic actors (intellectual property agencies and national courts) only after the Andean Tribunal of Justice declared the national counter-laws invalid. The result was that the Andean legal system actually made Andean intellectual property rules more robust than intellectual property rules in neighbouring states, where rules were rewritten under pressure from the United States. In this particular case, US pressure is such that it is hard to know what might have happened if there were no Andean rules. But our analysis suggests that connecting domestic enforcement structures to supranational oversight can help politically penetrated domestic agencies resist the sorts of political pressures that tend to undermine the rule of law (Helfer, Alter, and Guerzovich 2009).

12 These general clauses are then followed by specific articles where the court is granted jurisdiction over particular legal issues, and where access rules and criteria for decision-making is usually specified. The specific clauses will shape which cases actually get litigated. I develop my role based classifications based on the specific grants of jurisdiction.
inherently alters this equation, introducing an outside actor with the power, legitimacy, and authority to say what the law means. This actor is, by definition, independent. States surely expect the IC to faithfully interpret the law as they intended it to be, but the IC decides what the law actually requires. In this respect, ICs become independent trustees of the legal agreement.

Politically, delegation to ICs creates a rival because ICs may come to be seen as having a greater legitimate authority to say what the law means compared to the state authors of the law. ICs are of course influenced by a number of factors as they decide what the law means—concerns for their reputation, concerns that their legal rulings will be respected, and constraints created by the wording and substance of the legal rules they are applying. State actors can have a decisive influence over these factors. But single litigant states do not control these factors. This is why simply creating an IC involves a sovereignty risk. While states can always ignore an IC, there remains a concrete risk that judicial rulings can shift the meaning of law in ways that can be politically irreversible by states, thereby putting governments on the defensive. This risk is not just hypothetical. Constitutional review involves nullifying laws passed by legislative bodies, while administrative review involves rejecting decisions made by public actors. Thus, if judicial actors play their intended roles, judges will at times disagree with, rule against, or render interpretations that run counter to what the makers and the enforcers of the law might have wanted, and what the democratic majority might prefer. Why would state actors willingly incur this risk?

John Locke used the metaphor of the State of Nature to discuss the risks of life in a world where there are no judges or governmental bodies, and the benefits individuals get when they give up their exclusive power to do as they please. For Locke, the State of Nature is still governed by the Law of Nature, a set of norms that are self-enforcing if only because people live in close proximity to each other and thus they cannot tolerate a world of absolute licence. People nonetheless want to leave the State of Nature, because it cannot provide much security. Man leaves the state of nature in part to have outside judges:

To this strange Doctrine, viz. That in the State of Nature, everyone has the Executive Power of the Law of Nature, I doubt but it will be objected, That it is unreasonable for Men to be Judges in their own Cases, that Self-love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others. And hence nothing but Confusion and Disorder will follow, and that therefore God hath certainly appointed Government to restrain the partiality and violence of Men… (Locke 1957: Second Treatise §13)

In other words, we prefer to give up our sovereign authority to do what we want because we believe that subjecting both ourselves and others to the review of a third party will create better outcomes. In contemporary parlance, delegation increases the credibility of any promise to follow the rules because it introduces a disinterested actor who will make sure individuals, including sovereigns, do not become overly coloured by our own interests and biases. This age old logic is why around the world, in highly diverse contexts, states have created courts or court-like bodies to resolve disputes (Shapiro 1981).

13 As many have shown, the voting thresholds required to reverse legal interpretation are particularly challenging to surmount because reversing legal rulings means disempowering actors who prefer the legally created status quo, and if reversal is perceived as political interference in a legal domain, defenders of the rule of law will rally to the side of judges (Marks 1989; Alter 1998).
Locke perhaps explains why individual’s give up their freedoms, but why would states willingly share their authority with an international actor and thereby give up some of their freedom? One answer might be that states fear themselves and each other, thus they recognize the same benefits the individuals do. Related to this answer is the reality that in the absence of international legal bodies, domestic judges have increasingly stepped in. National actors have extended the extra-territorial reach of domestic rules with the result that actors abroad have come to find themselves subject to the legal authority of courts abroad (Sassen 2006-261). If the choice is to have some governments (or their courts) interpreting international rules on their own, or having international judicial oversight, international adjudication can be preferable.

Jon Elster gives a slightly different answer, using the metaphor of Ulysses and the sirens to explain self-binding. Ulysses binds himself to the mast of a ship because he does not trust his own ability to resist the Sirens. In Elster’s argument, states self-bind both to lock in agreements against future governments, and because at some level they fear they will give in to the temptation to act expediently (Elster 2000).

A second answer is that the public remains ambivalent about having given so much authority to their state. For certain issues, this ambivalence generates serious concerns, which lead individuals to self-censor in ways that become a problem for governments. Giandomencio Majone uses the metaphor of a trustee to explain self-binding, introducing the idea that states self-bind because they have to play to an audience (the public) that does not trust Ulysses enough to let their daughters leave the house (Majone 2001). Like Locke, both Elster and Majone recognize that sovereign actors are not entirely trustworthy, and that state actors are more likely trustworthy if they self-bind by creating systems of checks and balances.

I have elaborated elsewhere how delegation to trustees alters politics (Alter 2008). I argued that self-binding delegation to independent Trustee-type actors fundamentally destabilizes the political context because Trustees often care more about their reputation within the larger public than pleasing state actors, and because Trustees can be seen as better decision-makers compared to self serving and politically expedient governmental actors. My earlier analysis, however, suggested that all delegation to ICs was self-binding delegation to Trustee actors. I suggested this because I could not go into detail about how delegation to ICs varies, and because all ICs have the potential of being a rival authority interpreting legal rules. The four judicial roles, however, allow for greater nuance.

In some of judicial roles, legislative actors delegate decisionmaking authority to courts as an “other-binding” means of social control; through delegation, states primarily bind others actors (citizens, businesses, government employees, administrative agencies, police, et cetera) to follow the interpretation and application of legal rules by courts. In other roles, legislative bodies or states bind themselves (“self-binding”), subjecting their decisionmaking authority to judicial oversight so as to enhance their own credibility as a “rule of law” political system. Other binding delegations follow an efficiency logic—the sovereign delegates to courts to capture the

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14 International relations scholars frequently extend social contract theory to states, assuming that states are largely analogous to individuals (Beitz 1979).
15 United States courts increasingly apply US anti-trust rules to firms based abroad. European courts have claimed universal jurisdiction and US courts have used the alien tort statute to gain jurisdiction over human rights violations abroad. Also, state decisions regarding safeguards and anti-dumping duties have cross-border effects.
16 Majone’s examples of self-binding include creating independent central banks to assure economic actors that the government will not spur inflation, and creating constitutional courts to assure the public that governments will not violate the social contract.
efficiency benefits of having judges take over some of their tasks. Other-binding delegations to international courts are more frequent and less likely to be sovereignty-compromising. Self-binding delegations follow a credibility logic—sovereigns appear more credible (e.g. less likely to abuse their authority) if they agree to submit the exercise of their authority to judicial oversight. Self-binding delegations are by their very nature sovereignty-compromising. This difference between other-binding and self-binding delegation to ICs will help us understand why states have accepted IC design features which seem to create greater sovereignty risks, and why so few of the 28,000 international legal rulings become politically controversial.

A stylized narrative helps to capture the difference between self-binding and other-binding delegations to courts. 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 adjudicative 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- adjudicative or monitoring and enforcing- bound the sovereign so long as the King himself was never subjected to the authority of the court. This “other binding” delegation increased efficiency in a few ways. It save the King from having to hear endless disputes, and it harnessed private actors to monitor the King’s agents. Through legal challenges, the King could learn if his representatives were abusing their power, and the fact that monitoring existed in itself made it riskier for the King’s representatives to abuse their own delegated authority.

Thus far I have only considered delegation in an authoritarian context, where the supreme leader both makes and enforces the law. While Thomas Hobbes imagined that people would be willing to put their full faith in their King, most social contract theorists expect that the people will want assurances that the government will promote their interests. Limited government, kept under surveillance by a system of checks and balances, is the Lockean solution that has been widely accepted. In modern times, this solution is called constitutional democracy. Constitutional democracy includes self-binding delegation, where branches of government agree to limit their powers by binding themselves to the authority of others—including to the authority of courts. Delegation of constitutional review and enforcement authority is self-binding; sovereigns are creating legal oversights to the exercise of what are clear and exclusive sovereign powers (the power to make law, and their monopoly on the legitimate use of coercive power.)

Self-binding delegation follows the credibility-based logic discussed above (governments bind themselves because they themselves, and others, believe that checks and balances create better results). At the same time, it is important to note that not all delegation to courts follows a

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17 Of course this binding is somewhat fictitious, since the self-binding could be undone through a new constitutional act. But in requiring a new constitutional act, governments are binding themselves to a set of procedures and steps that must be surmounted in order for the government to change the contract. These procedures provide a potential break on governments, requiring them to work with others to accomplish their goals.
credibility based logic; some follows an efficiency logic in that states are using courts to bind others, so as to extend their social control beyond what governments can on their own achieve (Shapiro 1981). The problem is that it is hard to tell which logic shapes which act of delegation to a court, and hard to keep delegation to courts, and courts themselves within a single logic. The legal profession intentionally blurs any distinction in the nature of delegation by insisting that the act of judging is single and universal, with judges using objective legal methods, applying preexisting rules to the controversies that appear before them. Of course we know that the legal myth is a myth. We know that legal traditions shape judicial practices (Merryman and Pérez-Perdomo 2007). We expect that legal practice will vary across time and space (Tamanaha 2004). We expect and observe that judges in authoritarian regimes behave both similarily and differently from judges in democracies where judicial independence is meaningful and real (Ginsburg and Moustafa 2008). We know the myth is false, and we know that it is impossible to keep the act of judging as a purely other-binding endeavour.

Still, self-binding versus other-binding types of delegation to courts exist in meaningful ways. For other binding’ delegations, state control is expected and understood, which is to say that the public does not have a problem with the notion that judges are political appointees, chosen to serve as governmental agents. Also, for other binding delegations it may be quite desirable that legislative rules can be easily shifted should the government does not like how the judge is interpreting them. In other words, in other-binding delegation to judges, judges may be more like agents of governments, without any concern about the legitimacy of judging.

Self-binding delegation is different, however. For credibility-enhancing delegation the best strategy is to delegate to an actor whose values visibly and systematically differ from the state, to make this actor highly independent and to refrain from meddling because, as Majone argues, “an Agent bound to follow the directions of the delegating politician could not possibly enhance the commitment” (2001: 110). The difference between delegating to entities that are meant to be state’s agents, and self-binding delegation, goes beyond contract design. As I explain elsewhere, in delegation to Trustees it becomes extremely important to select a Trustee who brings with them a solid reputation for quality independent thinking. Moreover, Trustees actors are asked to make independent decisions based on their own best judgment. Also, in self-binding delegation, states are limiting their authority so as to convince a third set of actors that the state can be trusted. Thus the “audience” the Trustee plays to is different from the states who are delegating authority in the first place. I used the rather vague term “the beneficiary” to capture this difference. The beneficiary is a constructed entity, constituted by the Trustee and by States as the putative audience that judges whether or not each actor is behaving appropriately (Alter 2008).

All delegation to courts usually includes the formal trappings of delegation to Trustees. For Martin Shapiro, judges will always create these trappings, acting in ways that suggest they are authoritative and independent actors, in order to convince the parties to the dispute to accept their legal rulings (1981: 12-3). Thus in some respects delegation to courts is always delegation to trustees. But expectations do matter. Where delegation is understood as having been intended to bind others, judges may be more deferential to the actors who delegated to authority to them. Where delegation is understood to be self-binding, judges may go out of their way not to be colored by the wishes of state actors.

Much more could be said about how ICs build their authority as Trustee actors. ICs are not born strong and effective—they need to create their own legitimacy and reputation so that litigants see a benefit from invoking the IC in their political struggles. But for now I must leave
aside the question of whether an IC becomes strong and effective, or how an IC becomes involved in international politics.

What is important to recognize is that delegation to ICs inherently changes the political context even where international judicial authority is fragile. Where there is a reasonable chance that an actor is likely to be called to account in front of a judge, the actor is more likely to moderate their own ill nature and passion.

Also important is the expectations about the act of judging matter. Judges have been delegated an authority. Expectations about this authority shape the political response to judging. When the United States Supreme Court determines that a state, or Congress, for example, lacks the inherent authority to pass a legislation in question, political actors generally accept that such a decision is part of the Court’s prerogative. Meanwhile, where judges have not been delegated such authority, political actors are likely to be quite surprised with a judicial ruling that declares invalid state law that has been correctly passed using accepted political procedures. These expectations are based on the role of the judge, which I think is a better predictor of the response than is the audacity of the legal interpretation. Indeed we can think of quite a number of audacious legal interpretations by constitutional courts that have been uncontroversial, while fairly pedestrian interpretations by judges in systems without judicial review (e.g. where no judge has been delegated constitutional review authority) have generated controversy.

The next section considers the theoretical notion of the different ways in which an IC can influence international politics, developing three different visions for how creating an IC can transform international politics.

IV. International Courts and International Politics- Three Visions [I'm looking for a better word than “visions” and wondering about the utility of the graphs]

The previous section argued that delegation to ICs is inherently transformative of international politics, but that delegation to ICs can vary in the extent to which sovereigns are likely to become subject to international judicial oversight. Below I discuss three ways that ICs can influence international politics. These ways raise the question of how delegation to ICs transforms international politics.

The first mode of influence, a minimalist role of ICs, is the role of ICs most often discussed in law and economic scholarship—namely the idea that ICs can help construct a focal point by selecting from a range of equilibrium positions acceptable to state actors. The minimalist vision assumes that state preferences are fixed, and that ICs are merely selecting from within a win-set of acceptable outcomes. This minimalist view applies best to old style ICs, which by definition lack compulsory jurisdiction. For old-style ICs, the fact that states have turned the issue over to a court to decide in itself suggests that states are happy to let the IC select a focal point outcome.

The second mode of political transformation recognizes that state preferences are themselves more flexible and fluid, identifying what most would agree is the typical role of ICs in international politics. ICs are invoked by state or IO litigants to shift understandings of what international laws entail, thereby reconfiguring international political coalitions and thus what is politically possible (e.g. what a state, or a majority of states, is willing to agree to). This argument can be seen as a friendly amendment to the law and economics approaches, akin to Robert Putnam’s argument that certain political actors are able to redefine the win-sets of
participants in the political process (Putnam 1988). In this typical role, ICs are used to reshape the win-set of political outcomes acceptable to states, and thereby to help shift state behavior.

The third vision involves a more radical transformation of international politics that comes from ICs connecting with actors within states to help redefine state interests. This third vision is one of constitutional politics. ICs are able to penetrate the domestic level to help alter domestic balances of power, and thereby reshape how governments define their policy preferences.

The task then is to explain the factors that shape which type of political transformation happens as a result of delegation to ICs—a challenge I take up in the rest of this book. The three types of political transformation via delegation to ICs should be seen as cumulative: “old style” ICs likely only influence international politics in the first way. Delegation of enforcement, administrative and explicit constitutional review powers can transform politics in the first and second ways. ICs in a morphed constitutional role are inherently more likely to shape international politics in all of three ways discussed—if they are used by litigants to shape politics. Moreover, where ICs do interact directly with domestic actors (judges and administrative actors), we are more likely to see all three types of transformed politics.

**Vision 1 - ICs as inter-state mediators:** Law and economics scholars envision that judging entails ascertaining equilibrium preferences of the state parties. Geoffrey Garrett and Barry Weingast suggest that European Court of Justice (ECJ) rulings select from a range of potential political equilibriums, and in doing so the ECJ constructs focal points—common understanding of rules—that all actors can use going forward (Garrett and Weingast 1993). Their theory has been developed by others who have shown 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 (Goldsmith and Posner 2005; Guzman 2008). Also, judicially constructed focal points may serve an “expressive function,” elevating the legal authority of one interpretation over another (McAdams 2004), but mainly the IC is helping states find a common understanding of the law by augmenting the information available to state actors, thereby allowing states to make a more fully informed rational choice.

The graph below captures the task of the international judging in this view, and thus how ICs potentially shift political outcomes. In this limited view, ICs are operating in the space defined by the preferences 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 preference 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. This change is only possible because states have precommitted to accepting any point on their curve, and thus the change in behaviour is not really a change in a state’s preference, since any point on the line is in principle acceptable to both parties.
These are important but fairly are limited contributions of international adjudication. Goldstein and Posner do not expect ICs to be able to change state preferences—indeed all ICs do is facilitate information exchange. Geoff Garrett and Barry Weingast assume that strong states end up defining what is politically and legally possible, while Posner and Yoo suggest that ICs can only be effective if they are willing to choose from the win-set defined by litigant governments (Posner and Yoo 2005).

The graph above includes a number of assumptions. It assumes that the equilibrium point on the line may move, but the line itself is unlikely to move. This vision suggests that the law reflects preferences of both states, rather than being a set of rules largely forced on one state by power bargaining dynamics (Gruber 2000; Steinberg 2002), and thus that the only effect of power is to shape where on the indifference curve the judicial outcome lies. Also state preferences are assumed to be stable over time. This last assumption is realistic only to the extent that ICs lack compulsory jurisdiction, in which case countries may well refuse to submit international adjudication unless they are fairly indifferent to where on the curve the outcome ends up being.

If the IC has compulsory jurisdiction, if the rules are subject to wider interpretative swings, if state preferences have changed over time, and if the legal rules do not entirely reflect what litigant states want at the moment the case is being litigated, it is quite likely that the preference of one of the state actors will lie outside of the curve above, which may be why we have the conflict in the first place. The next mode of influence relaxes these assumptions, moving from a world of inter-state contracts to a world of law where there are many states are bound to the same set of rules, and where these rules are sticky while state preferences themselves are more fluid.
Vision 2 - ICs as players in Inter-Governmental Politics

Section III argued that the most significant part of delegation to ICs is that states are creating trustee actors with the political authority to say what the law means. In defining what the law means, courts make some legal interpretations more authoritative than others. How does a court shift the law, and political outcomes, in this context?

In a world of law, most legal rules are adopted through multi-party negotiations. Legal rules reflect political compromises, and thus the pre-agreed rules have quite a bit of both ambiguity and flexibility built in. But some legal interpretations are not possible. Moreover, some negotiating losers will find that the legal rules do not reflect their preferences, and at any point in time a new government may no longer prefer the rule as it is written.

Courts often enter a fraught political terrain where the parties both disagree and refuse to settle, and where there likely are litigant power disparities that are known to all. Judges enter this terrain with their own concerns. Their mandate requires that they stay within a bounded area of accepted legal interpretation. Also, judges have a self-interest in maintaining their reputation for being independent decision makers, influenced by the persuasiveness of legal arguments rather than the power of the litigants. These judicial interests shape the act of judging in a way that is quite different than the view above. Judges are political actors, crafting compromises in order to convince each party that the judges are not taking a sides in the disputes. But the, judicial compromises are far less binary than the view above. Each legal case involves multiple arguments. Judges try to split the difference by conceding different points to each litigant so that both parties can walk away liking something about the legal outcome (Shapiro 1981: 17). While the judicial decision is a compromise that reflects political concerns, judges are nonetheless reshaping what the law means, and in some cases requiring a change in behavior.

For this expanded judicial role, we must move from a world defined by the preferences of the parties to a policy space where there are many different state preferences. The square below reflects the full realm of possible legal interpretations for a given policy issue, including both plausible interpretations (those within the discursive circle) and legal interpretations that probably go beyond what was can reasonably be read into law on the books once we take into account the intent of the parties when the law was written (interpretations outside of the discursive circle). Depending on how precise the legal rule is, the size of the circle—and thus the extent of discretion within this discursive space—will vary. The preferences of the many actors affected by the law are scattered all over the box. Some actors want outcomes that are hard to locate within the discursive space of legal interpretation, but the majority of the most powerful actors will find themselves within the legal discursive space.

The IC influences the political outcome by reshaping the meaning of the law, and thereby redrawing the coalition of political support for the law. Imagine a situation in which the plaintiff (litigant L) can gain a competitive advantage if the interpretation shifts. Seeking to create this political change litigant L asks the IC for a legal interpretation. In Graph 1.5 below, the IC shifts the meaning of the law in a way that compels actor A to move from policy point A1 to policy point A2. There are clear winners and losers in this redrawing of the law. Actors 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. If state A wants to maintain its reputation for respecting the rule of law, it will need to move from A1 to A2.

18 The terrain is not always fraught, as states may welcome the external catalyst to make a change they want, so as to deflect the blame for change.
Graph 1.5 Shifting the legal win-set via delegation of enforcement and dispute adjudication authority to ICs

There are many ways to build insight about the role of ICs from within this view by hypothesizing how ICs attempt to reshape international political coalitions. For example, one extension would be to introduce power dynamics. This new international legal space may be used to amplify voices of actors who were outmanoeuvred or simply not present when the legal rules were originally drafted. In diagram 1.5, actors B, D, C, F, L and J will actually prefer the legal interpretation to what existed before, whereas actors E, I and O will be indifferent. If we imagine that actor A is a great power, and actors B, D and E are middle powers, while L, F and J are developing countries, we can see that the IC has significantly altered the international political coalition supporting the rule. Another possibility is that actor L could be an international prosecutor, arguing for classifying rape as a war crime—a position actor A opposed during negotiations over the Rome Statute. The fact that the new legal interpretation represents the will of a coalition of states makes it hard for A to shift the interpretation back to the status quo ante. We can then hypothesize about the conditions under which weak or powerful states will use this new legal tool (Guzman and Simmons 2005).

Delegation of administrative and constitutional review roles present another dynamic through which the IC can influence politics within international institutions. In time T1 states had significant interpretive latitude (represented by the largest circle). Where ICs have administrative and constitutional review authority, supranational actors—the legal secretariat, or the supra-national legislative body—have an inherent ability to shift the law through administrative decisions or by redrafting the law. In time T2, these supranational actors interpreted existing rules more narrowly, and thereby removing interpretive flexibility of
individual states (represented by the smaller dashed circle in graph 1.6).\(^1\) In the graph below, the IO administrator reduced the level of state A’s discretion, legally compelling a shift in state A’s policy to point A2. Delegation to ICs introduces the possibility of using litigation to challenge such actions. State A (or firm A) can challenge the IO administrator’s interpretation in front of the IC. The IC in this example issued an interpretation that reduced the interpretive space (providing a partial victory for the supranational administrator), but moved the discursive space back to a position that allows state A to legally maintain their policy A1. In the process, the preference of state H—which had been legal before the IO administrator had reinterpreted the rule, is now no longer legal.

**Graph 1.6 Transformation of international politics via international administrative and constitutional review**

![Graph 1.6](image)

In this vision, delegation to ICs is transformative because IC can help to recraft the meaning of the law and the coalition of support underpinning the law. Furthermore, we can see that delegating more roles—in particular administrative and constitutional review roles—introduces different political possibilities at the international level.

I still haven’t explained why state A would ever shift their position if it involved actually changing their preference. In the minimalist vision, states moved from point ‘a’ to the point defined by IC because during litigation new views emerged so that now the government realizes that the change in position brings benefits too. In this vision, the government may have been persuaded to change its policy, or the government realizes 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 fighting the case will undermine its leverage in other policy debates it cares more about.

\(^1\) They could also expand the circle of law, but then again so can states.
While this vision is better able to capture how time and larger international politics can change state preferences, this vision has international law being a contract among states. It thus fails to 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 A1 to A2—perhaps the international level politics scrambles domestic politics, advantaging and empowering domestic actors who prefer that domestic policy coheres with international law.

**Vision 3- Constitutional Politics: ICs help shift the chessboard of both domestic and transnational politics**

In this vision, ICs are used as part of a domestic struggle to shift practice in ways that become closer to the requirements of international law. This vision recognizes that there are many actors within a state that have a hand in policy implementation, and that a government’s behavior may be changed without shifting law on the books. This view also recognizes that the government may choose to shift its country’s behaviour, employing a variety of techniques towards this end (e.g. proposing new legislation, issuing an executive order, instructing executive agencies to reinterpret exiting domestic law on the books etc). Or, one of the many actors within the state may decide to shift practice—and they may do this independent of the direction or desire of the government.

How does delegation to ICs contribute to sub-state transformations of policy and behavior? In the previous visions, the box of contestation represented an international policy space where states were black box entities with a single political preference, and other states were the only actors with a stake in the debate. In this third vision, 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, outsider actors gain a role in the international legal debate, and thereby in the domestic debate. In this vision, 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. The ICs interpretation shifts the box to the dotted line, which better represents the preferences of a number of actors within state A. The graph 1.7 below attempts to capture this idea.
Graph 1.7 Transformations of Domestic Preferences as a result of delegation to ICs

The IC ruling thereby becomes a vehicle to pressure the government, providing a reason for an actor within the state (a judge, an administrator etc) to change their behavior so as to defacto reshape domestic law. If the government wants to oppose the IC, it will have to either rewrite the international legislation in question (convincing countries B and C to vote against their preference), or it might have to mount a legal challenge against its own judges or try to fire the civil servant who dared to follow the IC.

In vision two, the IC mainly shifted the international context. This graph captures how the IC essentially plays a constitutional role in the domestic system, redrawing the boundaries of state and IO authority and shifting the context within a state. In both vision two and vision three the IC becomes a tipping point actor, empowering those actors within the state as well as other states that prefer the IC’s interpretation. The possibility of a favourable IC ruling can in itself mobilize social actors to bring a case, and later to rally behind a specific legal outcome.

This scenario identified in vision 3 is actually quite common, even in legal systems that only allow states to raise cases. For example, in the Avena case, Mexico sued the United States in front of the ICJ for putting on death row defendants who had been denied their consular affairs rights. Germany had brought as similar suit. Moreover, the many countries that abhor the death penalty tacitly backed Mexico’s position. In addition, the lawyers arguing the case were Americans who honed their skills in US based death penalty cases. In other words, this dispute represented an alliance of American death penalty foes and other states. In the Avena, President Bush tried to comply with the ICJ ruling, but the United States Supreme Court ruled that the federal government lacked the power to order state courts to respect an ICJ ruling. We are midpoint in the multi-level politics generated by this dispute. The State Department is worried that US citizens might be denied access to their consuls, and Congress is considering passing the

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20 Add citation
21 Add citation
22 Add citation
necessary legislation to allow for a legal review of rulings in cases where litigants had not had the chance to consult with their consul.

The *Avena* decision exists because the ICJ had compulsory jurisdiction for cases involving the Vienna Convention on Consular Affairs. The United States responded to the ruling by withdrawing from the compulsory jurisdiction of the ICJ.\(^{23}\) But even though the US has now rescinded its delegation of authority to the ICJ’s jurisdiction for future cases, the politics of this particular case continue.\(^{24}\) This examples thus suggest how IC roles can morph, and how all case of delegating compulsory authority to ICs generate sovereignty risks.

A theoretical extension might consider how different states have different internal coalitions. Democracies may 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 will complicate domestic politics within the state.

The three visions together

All three visions exist, which is to say that sometimes ICs only help construct focal points, whereas other times ICs help reconstitute state preferences. The fact that there are three separate visions tells us that any theory that applies to only one vision will at best capture only a slice of the role of ICs in international politics. This discussion thus identifies the limits of a law and economics approach to international courts—such approaches cannot capture the more complex politics that ensues because IO actors and sub-state actors can be mobilized around international legal issues.

The intellectual agenda set up by these three visions is clear. We need to better understand the circumstances under which each set of politics is possible, as well as the political circumstances that help shape the way the IC intervenes politically—whether it shrinks or expands the interpretive space of law.

V. Conclusion: ICs and the New Terrain of International Law

In the new terrain of international law, international rules creates rights and duties that bind actors within states, thereby affecting the larger ecosystem that is domestic and international politics. In most cases, domestic actors will not realize that international law is creating a constraint. In fact the most prevalent role of international law may be to sap the strength of those actors who seek to shift domestic policy in a way that might violate international law. Such a role is hard to capture using social science tools, because it requires one to investigate changes that might have but did not actually occur.

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\(^{23}\) In the Nicaragua case, the US withdrew from the ICJ’s general jurisdiction. In the Mexican death penalty case the US withdrew from the compulsory aspect of the Vienna Convention on Consular Affairs.\(^{24}\) A similar story can be told about Nicaragua’s ICJ case against the United States where opponents of contra aid joined with supporters of the rule of law in challenging Reagan’s Nicaragua policy through both domestic and international legal means (Reichler 2001).
Delegation to ICs introduces a dynamic element into this new terrain of international law, one that may be easier to see. Delegation to ICs shifts international politics because it introduces the possibility that legal appeals to IC can be used as a tool to influence both international and domestic politics. This new dynamic should exist even in cases that are not litigated, suggesting that IOs where delegation to an IC exists should in themselves have more legalized politics (Abbott et al. 2000). But this shift will only exist where potential litigants invoke legal arguments and threaten to bring legal suits. Also, the larger political context is likely to shape whether an how ICs play a transformative political role. The wider variety of roles delegated to ICs expands the types of influence ICs can have because it expands the situations and contexts in which legal appeals to the IC can occur. Also, the roles delegated to some extent shape the design of the IC, thereby creating a greater opportunity for ICs to be involved in international politics.

The larger question this book investigates is how delegating different types of authority to ICs creates different potentials for ICs to play a role in international politics. We can already see in the discussion of the three visions of politics delegation of authority to ICs has the potential of morphing into a defacto constitutional role for the IC, where domestic actors or external actors invoke the IC in an attempt to shift the politics within the state. The rest of this book seems to develop these visions further, to better understand how the different visions operate in practice.

Chapter 2- The New International courts- A Birds Eye View

This empirical chapter describes the international judicial landscape presenting the data I’ve collected on international courts (ICs). The goal is to get beyond lists of courts, to help the reader see the contours of the trend of delegating authority to ICs. These contours define the geography of the political changes I am investigating.

This book examines the different judicial roles that have been delegated to ICs, thus most of the book categorizes ICs by judicial roles. This chapter, however, also categorizes ICs by old and new-style courts, by subject matter, and by geographical distribution so that the reader may identify a number of patterns in delegating authority to ICs. It is helpful to see that ICs primarily deal with one of three issues—trade, human rights and war crimes—and that there is significant geographical clumping in delegation to ICs with regional ICs found primarily in Latin America, Europe and Africa.

The chapter also presents data on IC usage. This data reveals that delegation to ICs has grown over time. We find both an increase in the number of ICs and IC usage starting in 1990.

By the end of this chapter the reader should be convinced that the trend of delegating authority is vast; that delegation to ICs exists in a wide variety of political contexts; and they should have a sense of which issues and actors are affected by delegation to ICs.

I. A shift towards creating and using new style ICs

This section explains the categories of old v. new style ICs, and documents the trend towards creating new style ICs.
Old style ICs were accessible to state actors only, and they lacked compulsory jurisdiction. These design limitations ensured that ICs could only play an inter-state dispute adjudication role. Europe was the first continent to break from this ‘old style’ design, and for a while its supranational courts were seen as outliers. Writing in 1976 Werner Levi wrote:

The reluctance of states to have their disputes adjudicated finds expression, first, in limiting their obligation of submitting to judicial procedures, and second, in limiting the jurisdiction of the Court when they do submit to judicial procedures. States have consistently rejected the notion of a general and universal obligation of submitting all their disputes to an international court. They have almost as adamantly opposed agreements to submit their disputes to judicial decisions by international courts (the so-called “compulsory jurisdiction”). This was true, for example, in the case of arbitration in general of the international courts, of the Law of the Sea Conference (1958), the Conference on Diplomatic Intercourse and Immunities (1961), the Conference on Consular Relations (1963), the Conference on the Law of the Treaties (1968-1969), the Third Law of the Sea Conference (1975). Whenever “compulsory” jurisdiction was proposed it was rejected in favor of “optional procedures” by which states had the option of choosing which method for peaceful settlement or disputes they wanted to apply. The nearest to an obligation for judicial settlement is the “optional clause” in Article 36 of the Statute of the International Court of Justice and certain commitments of Western European States to the use of the European Court of Justice. (Levi 1976: 70-1)

Increasingly, however, European style courts are the norm which is to say that most ICs are “new style” ICs with compulsory jurisdiction, access for non-state actors, and an implicit if not an explicit intention that the IC help enforce international agreements.

Providing a list of ICs makes it hard to visualize the contours of delegation to ICs. The rest of this chapter categorizes delegation of ICs so that we can get a better sense of what the trends are behind this long list.
Table 1: Twenty Old and New Style ICs, by date established

<table>
<thead>
<tr>
<th>International Courts</th>
<th>Geographic Region</th>
<th>Subject Matter Jurisdiction</th>
<th>Date Established</th>
<th>Compulsory Jurisdiction</th>
<th>Jurisdiction for noncompliance suits</th>
<th>Private Actor access</th>
<th>Number of cases 1990-2006</th>
<th>Total Cases (Founding-2006)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent Court of Justice</td>
<td>All regions</td>
<td>Any inter-state issue</td>
<td>1919-1945</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. International Court of Justice (ICJ)</td>
<td>All regions</td>
<td>Any inter-state issue + authority regarding the UN Charter + other international treaties where ICJ is designated as the final interpreter</td>
<td>1945</td>
<td>Optional Protocol for UN</td>
<td>Can vary for other treaties</td>
<td></td>
<td>34</td>
<td>111 filed, 80 decisions</td>
</tr>
<tr>
<td>2. International Tribunal for the Law of the Seas (ITLOS)</td>
<td>All regions</td>
<td>Law of the Sea convention (ITLOS III), plus oversight of the Seabed Authority created by ITLOS III.</td>
<td>1982</td>
<td>Optional Protocol + explicit authorization to bring disputes to 3 possible fora (exception, seabed authority &amp; seizing of vessels)</td>
<td>Only for seabed authority &amp; seizing of vessels is private access allowed</td>
<td></td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>3. Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries (OAPEC)</td>
<td>Arab Middle East</td>
<td>Disputes relating to the Oil Cartel, but only for middle east members</td>
<td>1980</td>
<td>X</td>
<td></td>
<td>Only where states agree</td>
<td>2¹</td>
<td></td>
</tr>
</tbody>
</table>

New Style Courts

| 4. European Court of Justice (ECJ) and its Court of First Instance | Europe | Trade and other issues governed by European Union Law | 1952 | X | X | X | 16119 | 23593 |
| 5. European Court of Human Rights (ECHR) | Europe | Human Rights | 1950 | X | X | X (as of 1998) | 7528 filed, 7323 decided | 12,310 filed, 7828 decided |
| 6. Benelux Court (BCJ) | Europe | Inter-state disputes among members | 1965 | X | X | Indirect* | 84 | 137 filed, 127 decided |
| 7. Inter-American | Latin | Human Rights | 1969 | Optional Protocol | X | Commission is a | 153 | 162 |

¹ Only where states agree
<table>
<thead>
<tr>
<th>Case Description</th>
<th>Region</th>
<th>Year</th>
<th>X</th>
<th>Y</th>
<th>Z</th>
<th>Gate Keeper</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Andean Tribunal Of Justice (ATJ)</td>
<td>Latin America</td>
<td>1979</td>
<td>X</td>
<td></td>
<td></td>
<td>1252</td>
</tr>
<tr>
<td>10. European Free Trade Area Court (EFTAC)</td>
<td>Europe</td>
<td>1992</td>
<td>X</td>
<td></td>
<td></td>
<td>90</td>
</tr>
<tr>
<td>General Agreement on Tariffs and Trade (GATT)</td>
<td>All Regions</td>
<td>1953-1993</td>
<td></td>
<td></td>
<td></td>
<td>229 cases, 98 rulings</td>
</tr>
<tr>
<td>15. World Trade Organization Permanent Appellate Body (WTO)</td>
<td></td>
<td>1994</td>
<td>X</td>
<td></td>
<td></td>
<td>357 filed, 270 decisions</td>
</tr>
<tr>
<td>17. International Criminal Court (ICC)</td>
<td>All Regions</td>
<td>War Crimes</td>
<td>1998</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>----------------------------------------</td>
<td>-------------</td>
<td>------------</td>
<td>------</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>18. Caribbean Court of Justice (CCJ)</td>
<td>Latin America/Caribbean</td>
<td>All issues, plus appeals of domestic civil &amp; criminal law cases</td>
<td>2001</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>20. Economic Community of West African States (ECOWAS/CEDEAO) Court of Justice</td>
<td>Africa</td>
<td>Originally was a trade court with very limited access. In 2005, human rights were added to the jurisdiction, and private actors were given access.</td>
<td>2002</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

| Total Judicial Decisions | (1990-2006) 24,950 | (All years) 33,057 |
| Total Judicial Activity | (1990-2006) 30,353 | (All years) 38,995 |

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I have excluded from consideration private access when it only includes suits brought by employees if the IO. * Indirect means that cases with private litigants would come through national courts references to the IC. ** = no data. 1 Data from 1999. ECCIS data from (Dragneva 2004). 2 There is an implicit compulsory jurisdiction, but only so long as the disputes do not infringe on the sovereignty of any of the countries concerned. Also, for cases involving firms, jurisdiction must be consented to by the state. 3 As a general rule, consent to the CACJ contentious jurisdiction is implicit in the ratification of the Protocol of Tegucigalpa. However, consent must be explicitly given in the case of: a) territorial disputes (in which case consent to jurisdiction has to be given by both States party to the dispute); b) disputes between States member of the Central American Integration System and States which are not members; c) cases in which the Court sits as arbitral tribunal. 4 GATT does not meet PICT’s definition because there was no permanent court. This is the reason that NAFTA is not included on the table as well.
II. Subject Matter and Geographic Distribution of delegation to ICs
Delegation to ICs generally covers three issues—economic issues (e.g. trade and foreign investment regulation), human rights, and war crimes. There are in addition a few general ICs that can hear a wide variety of disputes.

I have tables that break down ICs by subject matter, and by region. These tables include quasi judicial bodies. The data shows that part of the increase in delegation to ICs is a result of the proliferation of regional agreements. Delegation to ICs is geographically concentrated in Latin America, Europe and Africa. An interesting finding is that there is no delegation to ICs in Asian multilateral regimes, although Asian countries are members of pan-regional institutions where delegation to ICs exist—such as the UN and the WTO—and Asian countries do participate in international litigation in these institutions.

I have data on usage of different ICs that allows one to see judicial activity (e.g. litigation) by subject matter, by court, and by region. Numerically speaking, Europe’s courts are the most active, and thus they skew the litigation data. But there are ICs in other contexts that are also active.

III. Delegation of four roles across ICs
The second half of the chapter focuses on trends in delegating the four roles that are used in the rest of the book. The 4 roles I describe are: dispute resolution, administrative review, enforcement, and constitutional review. This chapter first describes the 4 roles courts play as ideal types, then it charts the trends in delegation of these roles. The first table shows which ICs have which roles have been delegated to which courts—allowing us to see an overall delegation trend. We can see that common market courts tend to have all 4 roles, and that these tend to be regional courts as opposed to universal courts.
TABLE X: DELEGATION OF DIFFERENT ROLES TO ICs

<table>
<thead>
<tr>
<th>Judicial Role</th>
<th>ICs with this Role (see Table 2 for full court names)</th>
<th>Percent of Total ICs explicitly delegated this role (n=20)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dispute Adjudication</td>
<td>ATJ, BCJ, CACJ, CCJ, COMESA, ECCIS, ECJ, ECOVAS, EFTAC, ICJ, ITLOS, OAPEC, OHADA, WTO</td>
<td>14/20 (70%)</td>
</tr>
<tr>
<td>Enforcement</td>
<td>ATJ, CACJ, COMESA, ECHR, ECJ, ECOVAS, EFTAC, IACHR, ICC, ICTY, ICTR, ICTSL</td>
<td>12/20 (60%)</td>
</tr>
<tr>
<td>Administrative Review</td>
<td>ATJ, BCJ, CACJ, COMESA, ECJ, ECOVAS, EFTAC, ITLOS</td>
<td>8/20 (40%)</td>
</tr>
</tbody>
</table>

Note that courts can be delegated more than one role, and that the design of a court can vary by role. Thus it is not the case that the ICJ is one type of court and the ECJ another type of court. Note as well that roles do not adhere to issue areas—so that human rights courts are not one type of court while trade courts are another type of court (the exception to this rule are international criminal courts, which play one role only).

IV Linking IC design to IC roles - A Functional Argument about the Design of ICs

In this section I will develop the functional argument about IC design. Each role has a minimum design criteria. We can see that for enforcement and administrative roles, IC design reflects this minimum design requirement. For constitutional and dispute adjudication roles, frequently the minimum design is exceeded. This is probably because dispute adjudication is often intended to be a sort of decentralized enforcement system, and because constitutional review is designed to limit IO authority—access to the IC for this role is wide so as to create the maximum potential for limiting ultra vires IO behavior.

Grey boxes highlight the minimum design criteria to make it easier to see if IC roles meet minimum design criteria. We should not find it surprising if the grey boxes are marked. Meanwhile designs that exceed or fall short the minimum criteria call for additional explanation. That dispute adjudication roles generally do exceed the minimum design criteria suggest that states intend dispute adjudication to be a form of decentralized enforcement for a treaty. Sometimes the text of the delegation contract makes this intention quite explicit. Chapter discussions will provide more detail about the roles delegated to specific courts.
IC Design and Judicial Roles (Access refers to which actors can initiate a dispute)

<table>
<thead>
<tr>
<th>Judicial Role &amp; Minimum Design Criteria</th>
<th>ICs with this Role</th>
<th>Compulsory Jurisdiction</th>
<th>State Access</th>
<th>Private access</th>
<th>Supra-National Actor Access</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dispute Adjudication</strong></td>
<td>ATJ</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BCJ</td>
<td>X</td>
<td>X</td>
<td>Via national courts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CACJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Community officials</td>
</tr>
<tr>
<td></td>
<td>CCJ</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td></td>
</tr>
<tr>
<td></td>
<td>COMESA</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECCIS</td>
<td>Unclear</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECJ</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td>Community officials</td>
</tr>
<tr>
<td></td>
<td>ECOVAS</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td>Supranational Authority</td>
</tr>
<tr>
<td></td>
<td>EFTAC</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td>Surveillance Authority</td>
</tr>
<tr>
<td></td>
<td>ICJ</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ITLOS</td>
<td></td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>OHADA</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WTO</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Enforcement</strong></td>
<td>ATJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Secretariat</td>
</tr>
<tr>
<td></td>
<td>CACJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Community Institutions</td>
</tr>
<tr>
<td></td>
<td>COMESA</td>
<td>X</td>
<td>X</td>
<td>Via national courts</td>
<td>Secretary General</td>
</tr>
<tr>
<td></td>
<td>ECHR</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>(Commission eliminated 1998)</td>
</tr>
<tr>
<td></td>
<td>ECJ</td>
<td>X</td>
<td>X</td>
<td>Via national courts</td>
<td>Commission</td>
</tr>
<tr>
<td></td>
<td>ECOVAS</td>
<td>X</td>
<td>X</td>
<td></td>
<td>Executive Secretary</td>
</tr>
<tr>
<td></td>
<td>EFTAC</td>
<td>X</td>
<td></td>
<td></td>
<td>Surveillance Authority</td>
</tr>
<tr>
<td></td>
<td>IACHR</td>
<td>Optional protocol</td>
<td>X</td>
<td></td>
<td>Commission</td>
</tr>
<tr>
<td></td>
<td>ICC</td>
<td>X</td>
<td></td>
<td></td>
<td>Prosecutor</td>
</tr>
<tr>
<td></td>
<td>ICTY</td>
<td>X</td>
<td></td>
<td></td>
<td>Prosecutor</td>
</tr>
<tr>
<td></td>
<td>ICTR</td>
<td>X</td>
<td></td>
<td></td>
<td>Prosecutor</td>
</tr>
<tr>
<td></td>
<td>ICTSL</td>
<td>X</td>
<td></td>
<td></td>
<td>Prosecutor</td>
</tr>
<tr>
<td><strong>Administrative Review</strong></td>
<td>ATJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>BCJ</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>CACJ</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>COMESA</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECOVAS</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>EFTAC</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ITLOS</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td><strong>Constitutional Review</strong></td>
<td>ATJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CACJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>COMESA</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECOVAS</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>
Chapters 3-6- Empirical and descriptive chapters on ICs

These chapters develop the argument that the state IC politics will vary by role. Each of these chapters will:

1) describe the reasons international courts may be delegated a given role (the motivations for delegation)

2) Develop an argument about the general politics of the IC in the role (the inherent relationship the role puts the judge in vis-à-vis the state) and arguments about the factors giving rise to variation in how judges play the given judicial role.

3) Go beyond the list in the previous chapter by describing in brief detail the international courts that are authorized to play the particular role, so as to provide a snapshot empirical view of the current international legal system with respect to the legal role. I’ll also add some quasi-judicial bodies in the role so that we can see how relaxing the PICT definition expands the realm of delegation.

4) Provide case studies that go into greater depth on 2-3 ICs as they play their role, so that we can better understand some of the political dynamics of international courts in a role. Usually I try to include one quasi-judicial body so that we can see that the roles pertain to any international legalized body. The cases will represent the different visions of the role of ICs in international politics.

All of these descriptions are tentative—I need to enmesh myself in the literature on each role [though what I’ve read and exploration by research assistants suggests the literature will not provide much help]. The cases will also be important in shaping the discussion. I intend to have a roughly common format across the 4 chapters, though this current outline is not fully consistent.

Chapter 3: International Dispute Adjudication Bodies

Giving ICs a dispute resolution role is the oldest form of delegation to ICs—meaning this was the first and most traditional roles international legal bodies have played. For this reason, dispute resolution is the paradigmatic role in which most people think about ICs.

I. Why delegate to ICs?

Reason to delegate: in creating a legalized dispute adjudication body, politicians mainly create a mechanism that can be used to resolve disagreements about what the law means, should turning the issue over to a legal body be useful. Creating a dispute adjudication body provides a means to fill in legal agreements, since a judge may be better able to apply complex rules to the ever
changing facts that give rise to disputes. Turning to an IC can be helpful when governments want to distance themselves from the political outcome (e.g. buy time, shift blame). Also, where actors mainly want stable rules so that they adjust and invest in policies based on these expectations, states often find it useful to turn a dispute over to an IC which can create a general interpretation that can apply across cases, time, and countries.

Examples of ICs playing a classic international dispute adjudication role:

- ICJ helping to define the meaning of the ‘continental shelf’ to help resolve a boundary dispute
- WTO AB resolves whether WTO law regarding “natural resources” applies to sea turtles too.
- ITLOS reviews whether a boat was seized illegally by country X

Usually the decision to create such a body does not tie potential litigants into choosing to resolve their disagreements through legalized mechanisms. Indeed many international agreements create a variety of acceptable means of dispute resolution, including as an option, but not requiring, legalized disputes resolution.

**What do international dispute adjudication bodies look like?** Dispute adjudication delegation has no functionally required minimum design criteria- as long as the parties are satisfied that the process is fair and neutral, any third party can serve as a triadic dispute resolution mechanism following Shapiro’s logic (regardless of if the third party is legal or non-legal). Because there is no minimum functional design requirements for dispute resolution, we find great variety in the design of ICs on dispute resolution roles.

<table>
<thead>
<tr>
<th>Role</th>
<th>How do we know the role when we see it:</th>
</tr>
</thead>
</table>
| **Dispute Resolution (Private Law)** | **Jurisdiction- compulsory or non-compulsory jurisdiction**
Core Role: Declare the meaning of the law as it pertains to the case in front of the judge. It is unclear if, from a legal realism perspective, judges should aim to resolve the dispute or enforce the law.
What judging entails: Judge evaluates litigant arguments, determining the accurate meaning of the law in question. Cases may also involve judicial fact finding, and may go beyond legal interpretation to draw out the implications of the law for the dispute at hand. |
| | Jurisdiction to resolve questions about the law in concrete disputes between litigants. According to PICT’s definition of an IC, one litigant must be a state or government entity. |
| | **Access rules-Can be limited to states, or allow private litigant access**
When treaty is a contract between states, states only have access. When treaty creates rights and/or obligations for non-state actors, non-state actors may also be granted access. |
| | **Remedies- Binding legal interpretation**
Declaratory rulings ordering the losing party to respect the law. Sometimes the victor can be awarded compensation, or allowed to legally deviate from the law as long as the “loser” continues to violate the law. |

Where ICs have compulsory jurisdiction in this role, however, reluctant states may find themselves dragged to court. In reality, most delegations of dispute adjudication authority exceed the bear minimum design criteria, suggesting that states want ICs to be able to help enforce international legal agreements. This chapter will focus on dispute adjudication that is not meant as enforcement. I will considered compulsory dispute adjudication that serves as enforcement as a “morphed role”, discussed more in Chapter 5.
II. How domestic delegation to courts differs from international delegation to courts

This section focuses on the relationship of the court to the state in dispute adjudication delegation. In the domestic context, the litigants are likely to be private actors and the judge is extending state social control over the resolution of the dispute. International litigation is fundamentally different in that the state can itself be a defendant in the suit. Whereas at the domestic level delegation of dispute adjudication authority tends to be other-binding, at the international law such delegations tend to be self-binding. By making the ICs jurisdiction non-compulsory, or limiting the subject matter of the delegation, states can limit the role ICs can play. But the potential for compulsory international dispute adjudication to morph into enforcement or constitutional roles is high—thus there is a real difference in delegation at the domestic compared to the international level.

III. The empirical world of Delegation of international dispute Adjudication authority

<table>
<thead>
<tr>
<th>Judicial Role &amp; Minimum Design Criteria</th>
<th>ICs with this Role</th>
<th>Compulsory Jurisdiction</th>
<th>State Actors</th>
<th>Private access</th>
<th>Supra-National Actor Access</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dispute Adjudication</td>
<td>ATJ</td>
<td>X</td>
<td></td>
<td>limited</td>
<td></td>
</tr>
<tr>
<td>PICT definition requires that states or IOs can be party to the dispute</td>
<td>BCJ</td>
<td>X</td>
<td>X</td>
<td>Via national courts</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CACJ</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>Community officials</td>
</tr>
<tr>
<td></td>
<td>CCJ</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td></td>
</tr>
<tr>
<td></td>
<td>COMESA</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECCIS</td>
<td>unclear</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ECJ</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td>Community officials</td>
</tr>
<tr>
<td></td>
<td>ECOWAS</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td>Supranational Authority</td>
</tr>
<tr>
<td></td>
<td>EFTAC</td>
<td>X</td>
<td>X</td>
<td>limited</td>
<td>Surveillance Authority</td>
</tr>
<tr>
<td></td>
<td>ICJ</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>ITLOS</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>OHADA</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td></td>
<td>WTO</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Additional delegations that do not meet PICTs definition

| IRAN-US Tribunal                         | X | X | X |
| NAFTA                                   | X | X | Chapter 11 & 19 |
| Permanent Court of Arbitration           | X | X |
Looking to fill out this list—suggestions are welcome!

**Case studies (3-5 pages each)**
Empirically, the chapter will draw most on the ICJ, the Iran-US Claims Tribunal (which does not meet PICTs definition, thus we can see how the category is broader than the table above), and GATT. These examples bring in the difference between interstate dispute resolution v. private actor/state dispute resolution. They also allow us to see how the design of a court matters. This will be the one case where the ICJ is discussed.

**IV. Politics of International Dispute Adjudication**
International dispute adjudication can fit in all 3 visions discussed in intro

<table>
<thead>
<tr>
<th>The role based politics (tentative-case studies will help): It is perhaps mainly in a dispute resolution role that legal design matters—because there is no “functionally required” minimum design for this role and thus greater design variation in design, and because the difference between an IC with and w/out compulsory jurisdiction can be very large indeed.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dispute resolution bodies without compulsory jurisdiction mainly offer the option of legalized dispute resolution should both parties prefer it. Parties will bring cases because they do want to follow the rules. They bring a legal case so that the IC can clarify the meaning of the law, so that they can follow it correctly. It may also be convenient to let the IC to be the actor that delivers the bad news to others so that the government can deflect blame from itself. Compliance with rulings from such bodies is likely to be relatively high, because only the cases where both parties want a legal resolution will be litigated.</td>
</tr>
<tr>
<td>Dispute resolution bodies with compulsory jurisdiction may be called upon to enter a more fraught terrain, one where the defendant fundamentally does not want the court to be involved. Compulsory dispute resolution bodies can come to function as decentralized enforcement bodies, where the plaintiff raises a legal suit in an attempt to compel the defendant to respect the law. [If I include the GATT case, I can introduce how shift to WTO alters politics]</td>
</tr>
</tbody>
</table>

This discussion will also engage the scholarly debate about IC dispute adjudication.

**V. A policy-makers guide to international dispute adjudication**
Legalized dispute adjudication in not clearly better than non-legalized dispute adjudication. If we really want mechanisms to resolve disputes, we should be quite open to using less formal means of dispute adjudication. If we really want decentralized enforcement, however, then we should be more open about what we are seeking.

**Chapter 4: Administrative International Courts**
In terms of quantity of judicial outputs, probably most international adjudication is administrative review. This is true mainly because Europe’s supranational courts are primarily involved in administrative review, and their caseload is vastly larger than the case loads of other ICs. The ATJ is also the 3rd most active IC, and it is mostly involved in administrative review of state IP agencies.
I. Why delegate administrative review authority to courts?

Administrative review is a frequent tool of political accountability, designed to give the subjects of the public bodies a means to challenge governmental decisions that are arbitrary, capricious, or illegal. Political bodies have an interest creating such mechanism, in part because sometimes public actors do make bad decisions that the government itself would not want, and in part because having such checks and balancing mechanisms can enhance the legitimacy of political rulers.

Courts in this role tend to be deferential to legislative intent—after all the main role is to ensure that administrative agencies faithfully apply the law as written.

IC in this delegated role courts become monitoring bodies, working on behalf of states to ensure that actors relying on delegated authority (generally administrative actors) do not abuse their authority. It is primarily an “other binding” role, with little compromise of sovereignty.

What do international courts with Administrative Review Authority look like?

Coding the role: Courts with administrative review role have jurisdiction in cases concerning the “legality of any action, regulation, directive, or decision” of a public actor, or the public actor’s “failure to act.”

<table>
<thead>
<tr>
<th>Role</th>
<th>Design</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Administrative Review</strong></td>
<td><strong>Jurisdiction—Must be Compulsory</strong></td>
<td>TJAC assesses whether the Andean Commission’s decision to grant a patent for a pipeline procedure is valid. CFI reviews whether the Commission’s decision to refuse an import license, or block a merger, was legal. ITLOS reviews a decision of the seabed authority to deny a mining permit for a firm to mine the ocean floor, or a decision of the Guinea government to seize a vessel in its territorial waters. CCJ hears an appeal of a national court ruling, on the bases that the ruling violates a CARICOM rule. COMESA IC hears a reference from a national court asking a question about the COMESA treaty. OHADA reviews an arbitration ruling upon the request of one of the parties, to ensure it complies with OHADA law.</td>
</tr>
<tr>
<td>Core Role: To review decisions of public administrators to ensure the decisions were made following proper procedure, respect the law, and are not arbitrary or capricious.</td>
<td>Jurisdiction in cases concerning the legality of any action, regulation, directive, or decision of a public actor, or the public actor’s “failure to act.” For ICs administrative review authority can include the right to hear preliminary references from national courts in cases involving a national government’s or supra-national governments application of an international administrative rule. Can also include cases where domestic remedies are exhausted, meaning implicitly appeals of national court rulings.</td>
<td></td>
</tr>
<tr>
<td>What judging entails: Judges hear claims that administrative decisions were arbitrary or capricious, ultra vires, or inconsistent with what the law requires.</td>
<td>Access rules—Usually includes access for non-state actors</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Actors subject to administrative decisions must have access for administrative review to be meaningful. For ICs, if only governments are subject to international administrative decisions, then access can be restricted to states. But where firms and private actors are subject to international or national administrative decisions, private litigants will need access.</td>
<td>TJAC assesses whether the Andean Commission’s decision to grant a patent for a pipeline procedure is valid. CFI reviews whether the Commission’s decision to refuse an import license, or block a merger, was legal. ITLOS reviews a decision of the seabed authority to deny a mining permit for a firm to mine the ocean floor, or a decision of the Guinea government to seize a vessel in its territorial waters. CCJ hears an appeal of a national court ruling, on the bases that the ruling violates a CARICOM rule. COMESA IC hears a reference from a national court asking a question about the COMESA treaty. OHADA reviews an arbitration ruling upon the request of one of the parties, to ensure it complies with OHADA law.</td>
</tr>
<tr>
<td></td>
<td>For private litigants, usually judges require private litigants to first show that the public action personally and directly affects them before the case is accepted.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Remedies—Put “illegal” action in abeyance</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Power to nullify government policies or decisions or order an administrator to act. Sometimes</td>
<td></td>
</tr>
</tbody>
</table>
compensation is allowed for egregiously negligent administrative actions or non-actions.

All ICs in this role met the minimum design criteria. The design criteria do not per se generate sovereignty compromising politics.

Morphed role- will be when dispute adjudication or enforcement turns on administrative decision-making.

II. How domestic delegation of administrative review authority differs from international delegation to courts

There are 2 sorts of administrative review undertaken by international courts. The first type of administrative review is exactly analogous to the domestic model where the subjects of administrative decisions help states monitor actors who themselves rely on delegated authority. As such, it is fairly uncontroversial. The second type of administrative review authority can generate more controversy because it makes state actors the subjects of international litigation, but the larger dynamics of administrative review at the international level are similar to administrative review at the domestic level.

1. ICs may be given authority to review the decisions and actions of international institutions. The reason to delegate supranational administrative review authority is to ensure that international institutions do not operate outside of the law. In other words, because we hold domestic public administrators in legal check, many people believe that we should hold international public administrators in legal check as well. This judicial role is perhaps the least controversial of all IC judicial roles because it is about empowering private actors and states to challenge actions of supra-national bodies—something which promotes the rule of law, and involves no sovereignty costs for states.

2. ICs may be given the authority to review the decisions and actions of domestic public institutions. Domestic administrators are the de facto implementers of international agreements: they decide how international policies will be realized in the domestic realm. For this reason, sometimes ICs have been authorized to review how domestic administrators apply legal rules (e.g. NAFTA chapter 19, EC legal system preliminary ruling mechanism. Andean legal system). Even when ICs are not explicitly given administrative review authority, domestic administration actions may becomes the subject of an IC case. The WTO may also de facto be reviewing the actions of a domestic agency as it implements policies that potentially run afoul of WTO rules. The idea that an international body sits in review of a domestic public actor that is, in principle, domestically accountable is uncomfortable for some. Thus international administrative review of domestic public actors can become politically controversial.
III. The empirical world of Delegation of international administrative review authority

The real political question is not the design of the IC in this role, but rather whether the IC is empowered to review national administration of supranational rules and the terms under which review can be undertaken. Some ICs have administrative review roles designed for oversight of national administrative bodies. Usually the litigant must first work through domestic judges. Either the domestic judge will themselves refer the case to the IC, or ICs are authorized to hear appeals of domestic rulings once domestic remedies have been exhausted.

The table below identifies which ICs with administrative review roles also have mechanisms other than enforcement to review national implementation of supranational rules.

<table>
<thead>
<tr>
<th>IC</th>
<th>Review of decisions of supranational administrators</th>
<th>Review of implementation by national administrators</th>
</tr>
</thead>
<tbody>
<tr>
<td>ATJ</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>BCJ</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>CACJ</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>COMESA</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>ECJ</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>ECTAC</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>ITLOS</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>OHADA</td>
<td>X</td>
<td></td>
</tr>
</tbody>
</table>

*OHADA* is not on my list of explicit delegations of administrative roles, probably because it can only play its role vis-à-vis national implementation of common business rules (which may in fact be more of an enforcement role).

IV. Politics of International Dispute Adjudication

Administrative review politics fit in vision 2 & 3…

For administrative review in particular politics will vary based on 1) the standard of review—the criteria by which an IC is able to find an administrative decision to violate the law; 2) the level of activity undertaken by the administrator (since legal challenges pertain to actions taken or actions that could have been taken) 3) whether the IC is overseeing an international administrative actor or a domestic administrative actor.

1) *Standard of review can vary—generally more detail (longer text) means a more limited standard of review. The less said, the more discretion the court has.*

*Very limited standard of review—ITLOS seabed authority- Article 189. “The Seabed Disputes Chamber shall have no jurisdiction with regard to the exercise by the Authority of its discretionary powers in accordance with this Part; in no case shall it substitute its discretion for that of the Authority. Without prejudice to article 191, in exercising its jurisdiction pursuant to article 187, the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations and procedures of the Authority are in conformity with this Convention, nor declare invalid any such rules, regulations and procedures. Its jurisdiction in this regard shall be*
confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention."

More expansive administrative review authority- European Union Consolidated Treaty Article 230
The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.
It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. [Article 232 authorizes “failure to act” suits against the same set of actors]

This example mixes the grant of constitutional review authority with the grant of administrative review authority

2) extent of administrative activity
We can see in ITLOS example above, that the main factor limiting the administrative review role of the ITLOS court is the inactivity of the Seabed Authority. Administrative review at EU level is politically important because the Commission has so much administrative authority and it is so active.

Example of EU Commission Administrative review politics—probably competition policy

3) Reviewing domestic v. int’l administrative actors.

Case studies: 1) ATJ and national IP agencies; 2) NAFTA chapter 19 panels (quasi judicial body)
Ex.- Review of grant of 2nd use patent in Andean context

Politics of Administrative Review- First factor that matters is whether or not administrations are taking decisions that could be challenged—if rules are not generally followed, and all actors are happy ignoring the rules, there will be no case law. If there are cases, the influence of courts on administrative actors will turn on the standard of review, and rules on legal standing—which are defined in part by legislative bodies and in part by judges themselves. While legislative bodies can tell administrative review courts only to focus on process, and only to review cases where the plaintiff is directly effected, judges can choose to expand or limit the focus of their review, focusing only on administrative process (which gives administrators great discretion so long as they follow procedure), or they can become more involved in reviewing whether administrative decisions promote the objectives of the legislation itself- in which case administrative review may easily morph into constitutional review or enforcement politics.
V. A policy-makers guide to international administrative review

International administrative review exists for 3 reasons:

1) to create legal checks on international administrative agencies (since domestic courts are unable to create such checks)

2) to create a mechanism to facilitate a uniform application of international rules across countries—to create a level playing field, and to facilitate agency coordination (Belmont case?)

3) to provide a means to diffuse individual charges that countries are implementing common rules incorrectly (keeping private actor disputes from becoming inter-state disputes) (NAFTA)

This analysis suggests that states should be quite willing to extend administrative review internationally for these 3 objectives. Delegation creates checks on administrative authority, and it provides a democratic means for sub-state actors to “have their day in court” and thereby be heard. And it does this with generally very little compromise of national sovereignty.

Chapter 5: International Enforcement Courts—Criminal Courts, Infringement Proceedings and Decentralized Enforcement mechanisms

Courts with an enforcement role have jurisdiction to hear infringement suits against states, and individuals acting under the color of state authority.

I. Why delegate to ICs

Reason to Delegate: Of course all court rulings, to some extent, can be seen as part of an enforcement apparatus. When a court declares a law means X, de facto it is labeling any behavior Y as a violation of the law. Even if the Court does not go on to create a remedy for the violation, the ruling alone has created a stigmatizing label that behavior Y is “illegal.” Indeed by branding certain behaviors as violations of the law, dispute resolution and administrative review can de facto “morph” into enforcement. So why create a category of “enforcement courts” if all courts in some way participate in enforcing the laws?

While we often hear that courts “enforce the law,” strictly speaking this is untrue. Courts make rulings that other actors enforce through sanctions. Courts can, however, be part of the state’s enforcement apparatus, determining whether a rule has been violated and what, if any, remedy should be a result of the violation. In this respect, delegation of an enforcement role can increase the credibility of any punitive action undertaken by the state.

There are two types of explicit enforcement courts.
1) In the **criminal enforcement system**, it is governments with a monopoly on the legitimate use of force that enforce the law. The functional judicial role of “criminal enforcement” is to ensure that governments use their exceptional coercive powers legitimately, meaning lawfully. Thus the courts do not technically enforce the rules, rather they confer on governments the legitimacy to use coercive power without violating trust between governments and their citizens.

Criminal Courts have jurisdiction regarding an enumerated list of crimes. In the criminal enforcement system courts adjudicate suits raised by a public prosecutor against an actor accused of violating the law. This model is replicated for the international criminal system. *For this section briefly describe ad hoc criminal courts v. permanent ICC + complentarity principle.*

<table>
<thead>
<tr>
<th><strong>Criminal Enforcement</strong></th>
<th><strong>Jurisdiction-must be compulsory</strong></th>
<th><strong>Milosevic War Crimes trial</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>Core role: Part of state law enforcement apparatus. Role of court is to ensure that public authorities have reasonable evidence and grounds for punishing those who violate the law.</td>
<td>Jurisdiction in cases brought by public prosecutors regarding an enumerated list of crimes or jurisdiction to hear infringement suits against states.</td>
<td>European Commission infringement suit against Ireland for waging a “Buy Irish” campaign in violation of the EC’s non-discrimination clause. Should Ireland fail to respect the ruling, the Commission can raise a second suit to determine the level of penalties for non-compliance.</td>
</tr>
<tr>
<td>What judging entails: Adjudicating whether prosecutors have established beyond a reasonable doubt that the defendant committed criminal acts.</td>
<td>Access rules-Public plaintiffs and public or private defendants</td>
<td>IAHCR Commission charges that Peru has violated the rights of one of its citizens. The Court agrees and orders compensation for the victim.</td>
</tr>
<tr>
<td></td>
<td>Remedies-punish law violators</td>
<td></td>
</tr>
<tr>
<td></td>
<td>For violent crimes, court can order incarceration for the perpetrator of a crime. For infringement cases, declaratory rulings. Sometimes compensation can be ordered.</td>
<td></td>
</tr>
</tbody>
</table>

2) Non-criminal enforcement courts hear infringement suits, where the criminal label is removed entirely so as to avoid the stigma associated with being labeled criminal. Like the criminal system, however, there is a prosecutorial “Commission” that investigates and presents evidence of legal violations.

**Example:** Andean General Secretariat + EC Commission

**II. How domestic delegation of enforcement authority differs from international delegation to courts (this is a mess—I'll fix it)**

Criminal model not all that different internationally compared to domestically, except that international prosecution will primarily include hard cases—thus the court will not have the same chance to learn and develop its reputation in low level cases.

The job of selecting which cases to prosecute is always political, especially when the defendant will be a powerful person. Both domestically and internationally enforcing the law against politically powerful actors is hard to do. The defendants may have resources to hire the best lawyers, and the case will be highly scrutinized. In such a context, the defendant is poised and waiting for any mistake on the part of the prosecution or the judge. We should expect
international criminal prosecution to resemble more the prosecution of the rich and powerful domestically.

Enforcement of non-criminal laws domestically tends to be much more benign than international enforcement via infringement suits, because states will be the subject of enforcement. Also, domestically judges can count on the support of the state in using its coercive power to back up a legal ruling. Internationally, states are unlikely to lend their power to enforce international legal rulings. Legal rulings thus either mainly paint scarlet letters, or they authorized retaliation creating what Hans Kelson referred to as a more primitive model of enforcement.

A third difference is that internationally, we also rely on decentralized enforcement. In the domestic system governments have the monopoly on the legitimate use of force, thus only the state can authorize punitive actions. Private actors, however, can bring cases to prosecutors or file their own civil claim. Private actor legal suits do not lead to jail time, but they can create fines.

Most of the ICs with enforcement roles also allowed states to raise non-compliance suits, though usually it is easier to let the supranational body pursue the case. The international system allows aggrieved parties to invoke legal mechanisms to win a legal judgment or in some case a fine.

International legal system also used decentralized enforcement—allowing certain aggrieved parties to raise suits themselves. Sometimes the IC is quite explicit that states or private actors are authorized to raise infringement suits in front of the court. The ECHR now relies exclusively on this model, having eliminated the Commission as a gate keeper in 1998. The CACJ also relies primarily on this model, as there is no supranational actor explicitly charged with monitoring compliance with the agreement.

III. The empirical world of Delegation of international enforcement review authority

The table below identifies the universe of delegating enforcement roles to ICs, considering this third possibility of decentralized enforcement. The first category is the criminal model of enforcement where a prosecutor charges an individual with a crime. The second category is the non-compliance model where a supranational authority can raise a violation in front of the IC. The third category includes ICs where aggrieved parties (states or private actors) are explicitly authorized to raise noncompliance suits against states. We can see that if we included this decentralized enforcement category in chapter two, then enforcement would have been the most frequently delegated role with 15 of the 20 ICs (75%) considered in this volume having been designed for some sort of enforcement role.

<table>
<thead>
<tr>
<th>Criminal Enforcement Model</th>
<th>Non-Criminal Infringement Model (supranational actor raise noncompliance suits against states)</th>
<th>Decentralized Enforcement Role (Private actors or states can raise suits)</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC</td>
<td>ATJ</td>
<td>ECCIS (states only)</td>
</tr>
<tr>
<td>ICTY</td>
<td>CACJ</td>
<td>ECHR (private actors &amp; states)</td>
</tr>
<tr>
<td>ICTR</td>
<td>COMESA</td>
<td>ITLOS (re: seizing of vessels only)</td>
</tr>
<tr>
<td>ICTSL</td>
<td>ECJ</td>
<td>WTO (states only)</td>
</tr>
</tbody>
</table>
IV. International Enforcement Politics

Enforcement politics fit in visions 2 & 3 defined in the intro. The politics of delegation will vary greatly depending on which of the three enforcement models is used.

Criminal enforcement politics revolves around influencing the Prosecutor to raise suits. In the criminal model, the prosecutor can only proceed to court if they have significant evidence of a criminal violation. States can influence whether or not there is a prosecution by putting political pressure on the international prosecutor, and by creating financial and information barriers to prosecuting a case.

Case study: ICC or ICTY prosecution

Infringement enforcement politics use Supranational actors as fire alarm monitors of compliance- Common markets have generally empowered secretariat to oversee state compliance with the agreement. The secretariat is a political body, subject to the influence of states. It can be discouraged from pursuing cases where states are not strongly committed to implementing the common rules.

Case studies: ATJ & ECJ.

Decentralized enforcement politics- WTO

Human Rights Courts as Enforcement Bodies— IACHR and early ECHR: International human rights courts fit most appropriately in this category. Reviewing state compliance with human rights rules inevitably involve constitutional issues. But states apparently lack the stomach to create an international constitutional court to rule on the appropriateness of their policies. Thus they create far weaker review mechanisms that are awkward for their task.

The only remedy for a constitutional violation is to stop the violation. If human rights courts were to be constitutional courts, they would need the power to negate the law—to rule it illegal and thereby create an injunction against applying the rule. International human rights mechanisms do not have this power. They can declare a policy is inconsistent with international human rights treaties, but not order a government to change its policy.

International human rights courts were initially set up as enforcement bodies—with a commission that would investigate cases, deciding if the violation was such that a legal case was merited. The legal ruling would declare the practice to violate the international convention. At most the court could order compensation for the victim. “Compliance” with the ruling, formally speaking, required only the compensation be granted. Of course the state might expect more rulings and more compensation awards if it persists in its illegal practice. But formally speaking, each case is unique and international legal rulings do not create precedents. Politically speaking,
most people do not pursue violations against them. Thus it would not be illegal, and may even be practical, for the government to pay compensation, be seen as “complying” with the ruling, yet change nothing in their practice.

The awkwardness of international human rights mechanisms, as they were designed, has contributed to their inability to actually play their role as human rights advocates would expect. IACHR lacks compulsory jurisdiction, yet it is clear that a enforcement court must have compulsory jurisdiction if it is going to be able to enforce the rules. Also, a human rights court should allow anyone whose right has been violated to raise a suit. The ECHR first required plaintiffs to go to the Commission, which for years refused to bring most cases to court. Over time, the ECHR commission passed through more cases, and in 1998 the level of the Commission was eliminated. Formally speaking, the only remedy for ECHR rulings is compensation. In practice, however, domestic courts will apply ECHR precedent, so the ECHR more than any other international human rights body has come closer to resembling the more expected constitutional role a human rights court should play.

*I will return to these court under the discussion of morphed constitutional roles*

**V. A policy-makers guide to international enforcement**

Because one cannot really force states to do anything, international enforcement works primarily by mobilizing public opinion within states to create an internal pressure on governments—thus the most successful enforcement politics operate within the 3rd vision of the role of ICs, where state interests can be reconstituted by shuffling domestic politics. Once we recognize this reality, then we become more tolerant of the legal limitations of the models that exist.

**Chapter 6: International Constitutional Courts**

States often chafe at the notion that international courts are constitutional courts because constitutional review creates inherent limits on state sovereignty in ways that having courts monitor administrative actors, or help enforce the law, does not directly do. There are clear instances where states have delegated explicit constitutional review authority, as a means to help states themselves check supranational legislative action. More controversially, there are instances where ICs have assumed the constitutional authority to determine the limits of state sovereignty. The former category of explicit delegation of constitutional authority is potentially significant, but only rarely does it become politically important. It is the latter category of morphed constitutional review authority which is the most significant.

**I. Why delegate constitutional review authority?**

Explicit delegations exist in order to create checks on actors which have supranational legislative authority. If a state is unhappy with the policies adopted by the collective, they can challenge the policy. The morphed role is more controversial

*Explicit delegations*
**Constitutional Review**  
(judicial review)

**Core role:** To make sure that legislative actors do not exceed their authority, or violate constitutional provisions, when they exercise sovereign authority.

**What judging entails:**
Examining the law or action to determine if it conflicts with a higher law or principle (e.g. federal law, international law, basic rights protections).

**Jurisdiction- must be compulsory**
Jurisdiction to review the legality of any act, regulation, directive, or decision of an IO or of a national government.

**Access rules- state actors and often non state actors too**
If only members of legislative bodies can bring cases, constitutional review is mainly a means for the minority to challenge the majority. For constitutional limitations on government to be meaningful, non-state actors need to be allowed to challenge “illegal” laws and policies.

**Enforcement mechanisms- de facto nullification of rule**
Primarily declaratory rulings that the government has infringed the law. Usually this is enough to undermine the legitimacy and commitment to the law. Compensation can be awarded for violations that harm individuals.

| Explicit examples of international constitutional review authority: |
| ECJ, CACJ, or TJAC assess whether a regulation passed by a supranational entity exceed the entity’s authority. |
| Cases that morph into constitutional review: |
| ECHR assesses whether the European Convention on Human Rights requires Britain’s state owned train system to grant employment benefits to partners in same-sexed couples. |
| WTO’s AB defines the precautionary principle in a way that makes it illegal for Europe to prohibit the sale of beef treated with hormones even though the ban applies to both imports and domestic beef. |
| ECJ takes on a role assessing the compatibility of national law with European law, assessing whether Germany’s restriction of women from combat roles violates EU’s equality provisions. |

Most interesting story is morphed story where ICs come to practice judicial review of state law & policy. Basically any effort to “enforce” international law over domestic law opens the door to constitutional review. Lawyers are of mixed mind if international constitutional review (meaning review of domestic law & policy) is to be welcomed or abhorred.

Lawyers who welcome international review of state policy have no trouble discussing the “constitutionalization” of international conventions, meaning the elevation of a treaty into a constitutional level document. Lawyers who are concerned with state sovereignty seek to keep international law in the realm of contract enforcement, not constitutional review, where a court at most declares a breech of contract that can let the contract right holders off of maintaining their end of the bargain, without any direct implications for the national law in question (which remains perfectly “legal”)

Ex. of ECHR and WTO in morphed roles

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**Chapter 7: State-International Court Politics Across the Four Roles**

International relations and international law scholarship is extremely state-centric, focusing almost exclusively on the relationship between ICs and executive-branch decision-making. To some extent this focus makes sense. Governments have a large say in making
international law. Foreign affairs ministries are the most concerned with diplomatic relations, thus they are the most likely to understand how being perceived as a law-breaker hampers negotiations in different international terrains. Executive branches are also legally responsible in overseeing how international legal commitments are implemented, and where states are involved in litigation, it is usually the executive branch that represents the government.

While there are some good reasons to focus on state-IC relations, the state-centric focus leads us astray when we start to consider the ways in which IC decisions reverberate across this broader set of actors. As introduction suggested, ICs are able to influence state decision-making by altering the international playing field, or the domestic playing field, or both. In order to understand how state decision-making gets altered, we need to bring into focus a broader range of actors—including IO actors, lawyers, national judges, government bureaucracies, firms, political parties etc.—because these end up influencing how international rules have a domestic effect.

International law and international relations theories often get trapped in the state-centric focus. Most IR scholars have expected the appointment rules for judges, the extent to which legal rules are binding, and voting rules required to change international legislation---in other words the political mechanisms that executive branches can most easily control---to be the most significant features that define the politics between states and international legal bodies. Most ICs do not vary significantly along these dimensions, which should make us immediately suspect regarding the importance of these features in shaping state-IC politics.

But it could be that these features do not matter because ICs themselves anticipate state concerns. All three of the visions of the role of ICs discussed in the introduction expect ICs to be attuned to their political environment. The second and third vision, however, expect ICs to influence political outcomes by reconstituting political coalitions in support of international rules. In this view, ICs become tipping point actor that can be used by litigants who oppose a government’s policy to elicit an interpretation that is different than the status quo, but which also enjoy considerable domestic and international support.

Because courts control neither they sword nor the purse, they seek to inspire others to push for law compliance. This dependence on others—on societal and state actors—shapes the strategy of judging. ICs endeavour (work towards) greater respect for international law. International adjudication is set up primarily to be prospective, sanctioning continued non-compliance more than past non-compliance. ICs must also avoid creating a legal bar for compliance that is politically unreachable. Thus ICs seek to create costs for non-compliance while working with the actors that are in the best position to facilitate compliance with international rules—the national governments, other states, and actors within society that also seek respect for international rules. The rest of this section elaborates this view of how ICs contribute to tipping the political balance in the direction of greater law compliance. The focus is on how ICs can alter the strategic environment of governments, by identifying law violations and creating material and legitimacy based costs for continued non-compliance.

**ICs introduce a political sphere outside of regular political channels where political agreements can be reopened and where different rules shape decision-making.** Courts offer a distinct venue, one where legal rules of the game shape contestation and independent judges get to pronounce the meaning of the law. Sometimes litigants care not for the legal rules of the WTO system, for example, does not allow compensation for past violations of WTO rules. Where ICs can levy compensation to the victims of legal violations, these fines tend to either be fairly small or primarily symbolic. (Stone 1992)
game; they mainly seek an outcome that is different that what regular political channels produced. Alec Stone Sweet shows how the French Conseil Constitutionnel (Constitutional Council) was first used by the French Government to reopen and chip away at laws passed by the Parliament that it did not like. For Stone’s account, it did not matter that the Constitutional Council was a legal body—indeed some question whether the Constitutional Council even was a legal body. All that mattered was that the Constitutional Council was a channel to challenge a legislative act that the national assembly had passed.26

For others, the attraction is that a court is a legal body that operates according to different rules than political bodies. In a courtroom, power is not equalized but nor is it a determining of the legal outcome. Powerful actors understand that legal arguments and not entitlements will shape judicial decision-making, and thus they do not argue that the judge should side with them because they are powerful. Instead, power is in the room in the form of legal argumentation. Powerful actors try to out-lawyer their opponents, overwhelming them with multiple and complicated legal arguments designed in part to increase the time and cost of litigation. The powerful can also often claim a greater understanding of the law given that they helped write it, and they can threaten to use their “go it alone” power27 which in a legal context means the can threaten to ignore a legal ruling.28 These tactics can lead to in-court advantages. But the powerful also find their arguments constrained by legal rules, which lead them to adopt tactical shifts that sometimes concede a lot of ground.29

Most importantly, in the end the powerful do not get to decide the outcome. The different principles guiding judicial decision-making, and the fact that judges are the decision-makers makes the legal venue attractive to plaintiffs. While judges do endeavour compliance, and perhaps at times chafe political bodies reverse their rulings, these concerns do not inevitably lead them to pander vis-à-vis defendants. We know that judges have made rulings where it is clear the decision will be ignored, and where judges know the decision will lead to a change in legislation.30 And we know that the powerful fear that they cannot influence judges, which is why they try to settle cases out of court. Plaintiffs know this too—if the law is on David’ side, there is a reasonable chance that David can beat Golaith in court.

The possibility that a dispute might end up in court extends the influence of judges (and the law) into the out-of-court political process, and thus the existence of this alternative venue alters politics even where a case never makes it to court.

The possibility of a legal ruling mobilizes potential litigants and reframes their political strategies. When a court is created, potential litigants are alerted to look for legal suits that can promote a political change. Lawyers advise clients on ways to avoid potential suits,31 and plaintiffs collect evidence that they can use in a legal case. These actions send powerful signals to potential defendants, encouraging out-of-court negotiations. The possibility of litigation is important in increasing the influence of law in political settlement; scholars have found that

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26 (Gruber 2000)
27 (Galanter 1974)
28 On the advantages of the powerful see: (Alter 2001)
29 (Alter 2008: 189-192)
30 See the discussion of this in: (Edelman, Uggen, and Howard 2000)
31 (Mnookin and Kornhauser 1979)
settlements in out of court negotiations are closer to what the law requires when there is a viable litigation threat.\textsuperscript{32}

In this way, the creation of the ICC has arguably reshaped international politics, focusing non-governmental organizations and victims on the goal of creating evidence that can be used by a prosecutor in the case, and framing events in terms that can give rise to a criminal complaint. The ICC also creates new targets for political lobbying—introducing the prosecutors office and the Security Council as actors that can influence whether a case gets litigated. And it shapes the demands of tyrants, who seek legal protections as part of any agreement to leave office.

\textbf{Legal rulings can create a binding definition of a rule that shifts the political context.}

Legal rulings shift the political context in four ways.

- Legal rulings create binding specificity for imprecise rules. Even quite clear rules will have lacunae and ambiguities, which allows them to be subject to creative interpretation. Regardless of if the ambiguity was accidental or strategic, and notwithstanding the motive of the plaintiff in asking for a judicial interpretation, the change in rule interpretation can change the policy and political context.

- In some cases, a rule is truly ambiguous and parties are willing to follow the rule, but just disagree on its meaning. In such scenarios, court rulings serve an “expressive function,” providing information that helps two parties coordinate interpretation of the rule.\textsuperscript{33} An example of such a case is the ICJ’s North Continental Sea Shelf case where Germany, Denmark and the Netherlands disagreed on whether the “equidistant principle” was the only valid way to determine which parts of the continental shelf belonged to which countries.\textsuperscript{34} With this ruling, Germany succeeded in resisting Dutch and Danish pressure in resolving its border dispute. Australia was later able to use this ruling in support of its claim over oil reserves located within both its own and East Timor’s Exclusive Economic Zone, yet geographically much more proximate to East Timor.

- In other situations, the rule ambiguity is intentional and the legal fight is aimed at winning in court what one could not win in negotiations. David Victor and Kal Raustalia label as “strategic ambiguity” the negotiating strategy where provisions are written to be vague so that they can be interpreted in many ways.\textsuperscript{35} When courts interpret intentionally ambiguous rules, they can award the winner in the case a victory that they could not or did not win in the negotiating process. We have seen this occur with respect to the “precautionary principle.” The GATT Agreement’s Article XX allowed countries to limit imports where there were concerns about health or safety issues. This provision was considered unclear, thus in the Uruguay Round member states negotiated a separate agreement on Sanitary and Phytosanitary Measures (the SPS agreement), which included a “precautionary principle” that would apply when science was unclear about the health effects of a product. The United States and Europe fundamentally disagreed on the issue, thus even the SPS agreement was unclear. In the WTO’s Beef Hormone’s case, the US challenged Europe’s claim that science could not prove that beef from cattle treated with hormones was safe for human consumption. The European Union wanted the “precautionary principle” to be interpreted to mean that a product must be proven safe to be allowed, where the United States wanted the “precautionary principle” to be interpreted to mean that a product must be proven unsafe to be disallowed. The US prevailed, winning an

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{32} (Tallberg and Jönsson 1998; McAdams 2004)
  \item \textsuperscript{33} (Raustiala and Victor 2004)
  \item \textsuperscript{34} Cite ICJ North Continental Sea Shelf
  \item \textsuperscript{35} (Whiteside 2006)
\end{itemize}
\end{footnotesize}
interpretation of the “precautionary principle” that it could not achieve through the negotiating process.36

Legal rulings can change the meaning of laws on the books, facilitating policy change in the absence of a new initiative: Rule redefinition is one of the instruments of political change identified by Kathleen Thelen and Wolfgang Streeck.37 Courts can be harnessed by litigants to reinterpret rules so as to facilitate policy change. For example, Article 2(2) of the European Community’s Equal Treatment directive allowed for derogations to the requirement of equal treatment for occupations and activities where the training was such that the sex of the worker a determining factor.38 For many years, this exception was seen as applying military policies that limited women from serving alongside men. Tanja Kriel wanted to be hired for a combat support position to maintain electronic weapons. She challenged a German Constitutional provision that limited women to serving in the military only as nurses or members of the band. Reversing the presumption that the military was exempted under European law, the European Court of Justice ruled that the German provision was too encompassing.39 The ruling itself did not change the German policy, but the Socialist Party had long wanted to include women in more military roles, to expand the forces it could commit to NATO operations. For this same reason, the German Green Party opposed changing the constitution. The ECJ ruling provided a cover the Socialist government could use to disappoint its coalition partner, leading to a change that many in Germany saw as reasonable but one that would not have otherwise been made.40

Legal rulings confer legitimacy on legal behaviours, and paint scarlet letters on illegal behaviour. Many IC rulings are “declaratory rulings” which are not per se enforceable. One might then ask what the point is of bringing a suit. To win a legal case a litigant must convince a group of judges, who have no direct stake in the suit, that the litigant’s position is valid. Regardless of whether one believes that IC judges are neutral,41 ICs get to determine which behaviours do and do not cohere with the law, and thus which behaviours are legitimate in the context of a rule-of-law society. With a positive ruling, a litigant has won legitimacy for her position. This was the goal of Nicaragua’s legal team in its suit against the United States. Formally speaking, ICJ decisions are enforceable by the Security Council, but the Security Council has never helped to implement an ICJ decision, and given that the US has a veto, it was clear that Security Council never would move to censure the United States. Since its complaint to the Security Council was blocked, Nicaragua appealed to the ICJ to enforce international laws related to the use of force. According to an American lawyer involved in the dispute,

36 For more on this issue see: (Streeck and Thelen 2005; Shaffer and Pollack 2008)
37 (Finnemore and Sikkink 1998: 19-22) This fits with Sikkink and Finnemore discussion of how norm entrepreneurs find platforms for them to launch initiatives. (Posner and De Figueiredo 2004: 899)
40 Add citation to expanded Trustee article in my forthcoming OUP book.
41 Eric Posner argues that ICJ judges are biased because statistically speaking, they side disproportionately with their own government, and with like-minded countries (Voeten 2007). Erik Voeten also finds that statistically speaking, international judges vote more often with their country. But most cases do not involve a judge’s own country. Voeten finds other factors shape ECHR judge’s behavior, factors that may be stronger predictors of voting than whether or not a case includes a government’s own country (Reichler 2001).
Nicaragua’s legal team was trying to undermine the legitimacy of Reagan’s policy. The efforts worked, which is what incensed Robert Bork who noted that “Even before the Court’s decision” Bork argued, “Carlos Arguello, Nicaragua’s ambassador to the Netherlands…announced that a decision against the United States would be a serious political and moral blow to them.” And so it was.”

Legal rulings can be ignored; in fact the Reagan administration ignored the ICJ’s Nicaragua ruling. But the only way to actually unseat the legitimacy conferred by a legal ruling is to change the law so that what was illegal becomes now legal. The US refusal to follow the ICJ, and even its withdrawal from the ICJ’s compulsory jurisdiction did not change what the ICJ confirmed—the US mining of Nicaragua’s harbors did violate international law.

Changing international law requires a positive act. Legislating in order to reverse a court decision can be easy. When legal rulings mainly reveal problems in the way the law is written, it is easy to change international law. For example, when the European Court of Justice found that the European Community’s equal treatment directive did not allow countries to adopt policies to promote minority hiring, member states quickly changed the directive to allow affirmative action. But changing a law can also be prohibitively difficult. A legal ruling creates a new status quo that actors may cling to—creating what Fritz Scharpf has labelled a Joint Decision Trap. As long as a contingent of states remain committed to the court’s interpretation, the legal interpretation will stick even if a majority of actors prefers a different legal interpretation, and even if all can agree that the status quo is sub-optimal. The US’s mining of the Nicaraguan harbor and aiding of the Contras was declared illegal—the precedent underpinning the ruling stands. One way to understand the legal and political policies of President George W. Bush’s administration is a reaction to the fact that the US lost the Nicaragua case in front of the ICJ, and it lost in its attempts to stop the creation of the International Criminal Court. Because the United States can change neither the law on the books nor the existence of ICs who can review decisions regarding the use of force, the Bush administration has adopted a political strategy of seeking to change customary law on the use of force as well as understandings of well established laws regarding the Geneva convention and terrorism. In short, they seek to change interpretation of existing rules through political strategies with foundations designed to stand up in court.

Legal victories raise the cost of maintaining “illegal” policies: Fear of an adverse legal ruling can in itself create a bad to be avoided. Thus, an international court may open the door for the type of “boomerang” politics that Kathrynn Sikkink, Thomas Risse and Stephen Robb describe, when domestic actors reach outside of the domestic realm for external support to pressure their government to change state policy. The willingness of European national courts to stand in judgment over the behaviours of General Augusto Pinochet dictators has reshaped politics within Latin American countries. Rather than allowing other countries to sit in judgment over them, Argentina and Chile removed amnesties that had been granted and began investigating and prosecuting crimes committed under previous regimes.

The above example did not involve an international court, but interstate litigation can “pierce the domestic level,” giving resources and energy to internal actors that support the

42 (Bork 1989/90: 23-4)
43 (Scharpf 1988: 7)
44 (Risse, Ropp, and Sikkink 1999)
45 (Sikkink and Lutz 2001)
46 (Hathaway 2005; Sikkink and Walling 2006)
external litigant’s position. Energizing American opposition was an identified legal objective in the Nicaragua case. The legal team hoped a legal victory might shift the few votes in the US Congress needed to defeat Contra-Aid. Fifteen days after the ICJ’s first ruling against US efforts to summarily dismiss the suit, Congress for the first time voted against Contra-aid.

Or, a legal victory can be linked to sanctions that simply make a policy more costly to maintain, perhaps shifting the incentives and political support of the actors who pay the greater costs. When Europe along with a few other countries won its WTO ruling against US Steel Safeguard provisions, the EU threatened to retaliate against Florida’s citrus industry in the run-up to George Bush’s presidential election. Days before the sanctions were going to come into effect, the Bush administration lifted the safeguard tariffs, declaring that the industry had recovered enough to withstand import pressure.

[This discussion does not consider the 4 roles—I need to return to how the politics varies by roles—and thus how the general story discussed above varies by roles, and by the political context]

Chapter 8: Conclusion- What Shapes the role of International Courts in International Politics (very preliminary)

Categories tell us to think about international law beyond dispute resolution terms—recognize that ICs are playing a broader variety of roles

Categories help us understand some variation we observe in design, and variation in how the design will matter—to get beyond simple and unvariegated tables that would suggest that the ECJ is like the ICC because both have prosecutors, both have private access, and both have compulsory jurisdiction.

Categories tell us to focus on roles not designs, and the suggest that theories for one type of review will not “travel” well—
- Ex. Because ICC politics emanate firstly from decisions of the prosecutor, the politics of the ICC will inherently be different than the politics of the ICJ. ICC prosecutor will largely determine which cases make it to court—not state litigants. ICC prosecutor will be influencable through resource and information constraints in ways that will not be useful vis-à-vis the ICJ where parties must construct their own cases.
- Theories designed to understand administrative review are likely to be ill suited in the context of constitutional review—as administrative review has the court enforcing the will of legislative bodies vis-à-vis public administrators (and thus is other binding) where constitutional review has the legislative body being held to a “higher” standard embodied in a constitution (and thus is self binding).

Categories help us think about different relationships between states and courts, and thus different understandings of what and when slippage occurs.

47 (Ellickson 1991)
48 (Reichler, 2001: 34)
49 Add citation
Contrast self binding v. other binding politics.

Self binding is potentially most controversial, but not always so. Return to the reasons to delegate—these can apply in self-binding (where Ulysses himself recognizes the dangers temptation poses to himself and others)

But categories are acontextual. The next step is to bring in context- how do we understand relationship between design & context? Context comes in as an activation story (which cases are brought) and as an judicial behavior story.

We are starting for certain courts to have a better sense of how they are being used, but there is so much we don’t know about international courts. To say ICs are created to play certain roles only begs the question of when do ICs play the role they were intended to play, and when do they morph beyond a limited role? The real questions to ask are:

1) Why are some issues international issues litigated, and others not? This is a question about what sorts of cases actors choose to bring, rather than what opportunities to bring cases have been created.

2) What are the distributional consequences of juridifying international relations? Which actors are inherently privileged when we delegate to ICs for the resolution of certain political issues?

3) In formal legal theory, there is just the law and the neutral interpreters—context doesn’t matter. But we are all legal realists now—we know that context does matter. How does the context of an international court shape how the international legal system works? Which elements of political context matter, and how do they matter?

4) The proliferation of international legal bodies is itself a manifestation of a greater desire to make international rules enforceable. Thus we must ask a question which we often taken for granted in the domestic context where law is almost by definition enforceable: how does the influence of international law itself change in the shadow of enforcement mechanisms?

The answers to these questions will lie mostly in the politics of activating courts, the boldness of the court when it is invoked, and the politics that emerges in the wake of international legal rulings. Because these factors can vary, we will find identically designed courts coming to play very different roles across time and space.

The books conclusion will start to probe some of the empirical and normative questions raised by the trend of delegating authority to international courts, with the goal of pushing beyond conventional categories and approaches to answering the important questions we must ask.

1) Activation story—we can say with greater precision than we have how different ICs could be used (access rules), but this is not the same as saying how they are used. Can describe types of cases- subject areas, who the litigant is—but data remains very highly aggregated. Don’t actually know very much about the substance of the cases being raised (can bring in vicious v. virtuous circle)
2) **How ICs decide - can debunk** - power politics & most simplistic of sanctioning concerns. Bring in comparison between ACJ & ECJ

3) **Political consequences of IC rulings** - reasons to create courts is different than reasons to use courts. Thus we cannot tell from their origin what role they actually will play. We can expect feedback effects—precedent mattering, lessons learned by courts and litigants. Most ICs are on a new trajectory- are not yet to “regular politics”—still working up the learning curve. This is the big open question, and the harder to research one.

Bibliography of cited works.


