Legalized Dispute Resolution: Interstate and Transnational

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ABSTRACT:

We distinguish between interstate and transnational third-party conflict resolution as the two best forms. States tightly regulate the choice of, access to, and adherence to international courts and tribunals in interstate conflict resolution. In contrast, people and non-governmental organizations have a lot of control on the selection, access, and implementation of transnational dispute resolution. With the use of this difference, it is possible to better understand the politics of international legalization, including how cases are brought forward, how often national governments are contested in court, how strictly decisions are followed, and how norms over time develop within legalized international regimes. Transnational conflict resolution is more likely to produce a high number of cases than interstate dispute resolution because it lowers the transaction costs of starting the process and creates new constituencies. The sorts of claims presented under transnational dispute resolution more easily result in international courts contesting state acts. Particularly when independent domestic institutions, like the court, arbitrate between people and the international institutions, transnational dispute resolution has a tendency to be linked with increased compliance with international legal judgements. In general, international legalization has better chances of long-term strengthening and expansion thanks to transnational dispute resolution.

KEYWORDS:

Courts, Dispute Resolution, International, Interstate, Legal.

I. INTRODUCTION

International tribunals and courts are thriving. They currently number somewhere between seventeen and forty, depending on how these bodies are classified. Recent years have seen both the emergence of new bodies and the fortification of those that currently exist. "They probably will refer to the massive growth of the international court as the single most significant development of the post-Cold War period," one observer has said. "When future international legal experts look back at the end of the twentieth century." A crucial aspect of legalization is represented by these courts and tribunals. States choose to assign the duty to independent tribunals tasked with applying broad legal principles rather than settling conflicts via institutionalized negotiation. But not all of these tribunals are made equal. We specifically make a distinction between the two ideal forms of transnational and interstate international conflict resolution. Our main contention is that the formal legal distinctions between interstate and transnational dispute resolution have major ramifications for the politics of dispute resolution and, therefore, the impact of legalization on international politics [1], [2].

The idea that public international law is a body of norms and procedures controlling interstate interactions is congruent with the practice of interstate conflict resolution. According to this concept, legal settlement of conflicts occurs between states who are seen as unitary actors. States regulate access to conflict resolution tribunals or courts because they are the objects of international law. The tribunal's judges are normally designated by them. States also carry out or do not carry out the judgments of international tribunals or courts. States serve as gatekeepers to the international legal system and from that system back to the domestic level in interstate dispute resolution. In contrast, access to courts and tribunals and the following implementation of their rulings in global dispute resolution are legally shielded from the whims of various national governments. As a result, these tribunals are more accessible to members of civil society. States lose their ability to function as gatekeepers in the pure ideal type; in reality, these abilities are diminished. A variety of chances for courts and their constituency to set the agenda are created by this loss of governmental power, whether it was done voluntarily or unintentionally. To place our findings in a larger perspective is beneficial [3], [4].

A kind of institutionalization known as legalization is characterized by responsibility, accuracy, and delegation. Our analysis is most useful when the duty is great. On the other hand, the circumstances we look at don't always

need precision. Regardless of how precisely regulations are applied and interpreted, our study looks at these choices. Indeed, when accuracy is low compared to high, such bodies may have a wider range of motion. Our attention is on a third aspect of legalization: the transfer of power to courts and tribunals created to settle international conflicts by using basic legal rules. Our case depends on three aspects of delegation: embeddedness, access, and independence. Independence refers to the degree to which formal legal frameworks guarantee that decisions may be made impartially with regard to specific state interests, as we discuss in the first section. Access describes how simple it is for parties other than governments to shape the tribunal's agenda. The level of decision-making in conflict resolution that can be executed without government intervention is referred to as embeddedness. High independence, access, and embeddedness is what we describe as the optimal kind of transnational conflict settlement, whereas low independence, access, and embeddedness are what we define as the ideal form of interstate dispute resolution. This paradigm, although undoubtedly oversimplified, aids in our understanding of why various courts, such the International Court of Justice (ICJ) and the European Court of Justice (ECJ), have different behaviors and effects [5], [6].

We attempt to link internal politics, international politics, and international law in the second half. International law clearly functions in the shadow of power; governments and conflict settlement courts both respond to the authority and preferences of their respective nations. We argue, however, that within that political setting, institutions for appointing judges, limiting access to conflict resolution, and enforcing the rulings of international courts and tribunals have a significant influence on state conduct. Legal institutions' formal characteristics may either strengthen or weaken domestic political players, excluding national governments. Transnational conflict resolution often results in more litigation than interstate dispute settlement, jurisprudence that is more independent of national interests, and an extra source of compliance pressure. In the third part, we make the case that the long-term dynamics of interstate and transnational conflict resolution are different. The expansionary nature of transnational dispute resolution seems to be innate; it offers additional chances to express and create new legal standards, sometimes in unanticipated ways [7], [8]. This page shouldn't be seen as an effort to be definitive but rather as exploratory. We employ ideal types throughout to clarify a complicated topic, analyze suggestive but contested data, and flag promising areas for further investigation. At several times, we provide our own hypotheses as potential areas of inquiry but do not intend to test any firm findings [9], [10].

A typology of dispute resolution

In international politics, resolving conflicts is heavily institutionalized. Established, permanent norms are applicable to broad categories of situations and cannot simply be disregarded or altered when they become problematic for one party or another in a particular situation. This article focuses on organizations where the application of specified legal norms and principles is entrusted to a third-party tribunal for the purpose of conflict settlement. Due to this act of delegation, disagreements must be presented as "cases" between two or more parties, with at least one of those parties the defendant being a state or a person acting on its behalf. Since states are often the defendants, we will refer to them as defendants. The planned International Criminal Court and other war crimes tribunals are examples of international tribunals that may bring charges against people. Depending on how the dispute resolution process is built, the plaintiff's identity may change [11], [12].

Plaintiffs may be other nations or private parties, such as people or non-governmental organizations (NGOs), who have been assigned to oversee and uphold the regime's mandatory norms. Now let's look at our three explanatory variables: embeddedness, access, and independence. We do not dispute that, contrary to certain strands of liberal and realist theory, the patterns of delegation that we witness may ultimately have their roots in the strength and interests of important nations. However, our research here assumes that these sources of delegation exist and focuses on how formal legal structures provide people and organizations authority other than national governments.

II. DISCUSSION

Independence: Who Is in Charge of Judgment?

The variable independence gauges how independent of national governments adjudicators for an international body tasked with resolving disputes are able to discuss and make decisions. In other words, it evaluates how impartially a judgment is made with regard to particular state interests in a certain instance. Pure state control is at one end of a continuum in the classic international paradigm of conflict settlement in politics and law. Conflicts are settled by the representatives of the parties involved. The rules and their relevance to the particular case are each interpreted by each party, and conflicts are settled via institutionalized interstate bargaining. Although there are no enduring legal precedents or standards of procedure, judgments in formalized conflict settlement must be compliant with international law. Institutional norms may also affect the result by establishing

the criteria such as voting requirements, voting standards, and selection that are used to make authoritative choices. Individual states may have the authority to veto rulings even in cases where formal processes have been created, as in the UN Security Council and the former General Agreement on Tariffs and Trade (GATT). The type and degree of the political restraints placed on adjudicators are measured by how far they go down the continuum away from this conventional interstate system of conflict settlement. An international tribunal's members' level of independence is a reflection of their capacity to free themselves from at least three types of institutional restraint: legal discretion, selection and tenure, and control over financial and human resources.

Different regulations apply to tenure and selection. Through selection and tenure policies, several international organizations retain strict national control over dispute settlement.9 Some organizations, such as the United Nations, International Monetary Fund, NATO, and the bilateral agreements between the United States and the Soviet Union created under the Strategic Arms Limitation Treaty (SALT), do not appoint any kind of reputable third-party arbitrators. Instead, the regime establishes a set of norms and processes for making decisions, a venue for interstate negotiation, and any ensuing disagreements are settled by national delegates acting at the whim of their respective governments. Governments may appoint representatives in other organizations, such as the EU, but such representatives are guaranteed a lengthy term of office and may go on to enjoy legal status independent of their service to particular nations. Unlike ad hoc international arbitration, where the selection is typically controlled by the disputants and the tribunal is established for a single case, first-round dispute resolution in GATT and the World Trade Organization (WTO) involves groups of states choosing a stable of experts who are then chosen on a case-by-case basis by the parties and the secretariat.

In still other circumstances, notably in authoritarian nations, judges may be subject to reprisals when they return home after serving their terms; even in liberal democracies, the government may affect judges' future career progress. Some international dispute resolution systems, like the European Court of Human Rights (ECHR), are subject to semi-independent supranational scrutiny due to their legal foundations. The second criteria for judicial independence, legal discretion, deals with the scope of the authority vested in the conflict resolution body. While certain established dispute resolution entities are required to strictly follow treaty terms, the ECJ has upheld the supremacy of European Community (EC) law without explicitly referencing the treaty language or the intentions of state governments, as Karen Alter explains. Generally speaking, institutions for adjudication emerge, according to Abbott and Snidal, in circumstances that necessitate the incompleteness of interstate contracts due to complexity and ambiguity. Adjudication thus entails interpreting norms and resolving conflicts between competing norms in the context of specific situations, rather than simply applying exact criteria and norms to a number of real cases under a certain mandate. All but the most blatantly unconstitutional governmental acts must ultimately be overturned, therefore litigants and courts must rely on specific interpretations of these ambiguities. A body's capacity for legal independence increases, other things being equal, with the variety of lawful factors it may take into account and the degree of ambiguity around the appropriate standard or interpretation in a particular situation.

Financial and human resources, the third requirement for judicial independence, relates to the capacity of judges to handle their caseloads in a timely and efficient manner. Such resources are required for handling a significant volume of complaints and producing reliable, high-caliber conclusions. They may also allow a court or tribunal to create a factual record that is separate from the state litigants who appear before them and to make its rulings public. Human rights courts, which work to disseminate knowledge and generate political support on behalf of persons who would otherwise lack direct domestic access to effective political representation, should pay special attention to this. Many commissions with the ability to undertake independent investigations are affiliated to human rights courts. For instance, the commissions of the Inter-American and UN systems have actively pursued this tactic, often conducting impartial, on-site examinations. In fact, while a previous petition is necessary, the Inter-American Commission's inquiry need not be limited to the specifics of a particular case. The larger the financial and personnel resources that courts have at their disposal and the more powerful the commissions that are affiliated with them, the greater their legal independence. In conclusion, the degree of a conflict resolution body's legal independence depends on how free it is from the influence of individual member states in terms of decision-making, tenure, information, and the use of financial and human resources.

Access: Who Has Standing?

Access is a variable, just like independence. From a legal standpoint, access measures the variety of social and political actors who have the authority to bring a dispute before a court; from a political one, access measures the variety of individuals who have the power to define the agenda. Access is crucial for courts and other dispute resolution agencies since, unlike the executive and legislative branches of government, they are "passive" and unable to take unilateral action by seizing a dispute. Access is evaluated between two extremes along a

continuum. At one extreme, conflict resolution organizations are unable to intervene if no social or political players may file complaints; at the other, anybody with a valid grievance against a particular government policy can do so quickly and affordably. In the middle, there are circumstances when people can only file complaints by working through governments, persuading governments to "espouse" their claim as a state claim against another government, or by paying for an expensive process. The "political transaction costs" to people and organizations in society of bringing a claim before an international dispute resolution body may be measured by this continuum of access. The more onerous the requirements are for bringing a claim before a dispute resolution body, the more expensive it is for parties to do so.

Purely interstate courts, such as the GATT and WTO panels, the Permanent Court of Arbitration, and the ICJ, which only allow member states to sue one another, tend toward the more expensive, limited end. By giving one or more countries a legal veto, this restriction restricts access to any conflict resolution organization; but, it does not give governments free reign to act. Influence may still be used by individuals and organizations, but only at home. Depending on principal-agent relationships in domestic politics, procedures that are nominally comparable in this sense may still create completely diverse consequences for access. State-controlled processes are likely to be more restricted than direct litigation by individuals and organizations, even if people and organisations may have the domestic political clout to assure a continuing, if indirect, participation in both the choice to commence proceedings and the ensuing debate.

Within these limitations, the GATT/WTO panels' and the ICJ's approaches to domestic people and organizations diverge. Governments ostensibly restrict access to the judicial system under the GATT and now the WTO, but in reality, at least in the United States, harmed industries are directly engaged in both the start and conduct of the action by their governments. Individual access at the ICJ, however, is more expensive. Cases that include people who may have a direct stake in the outcome are heard by the ICJ, such as those involving the families of soldiers who have been deployed to fight in another nation in the course of what is seen to be an unlawful act of interstate aggression. However, in most cases, these people have little control over a national government decision to begin an interstate lawsuit or over the subsequent handling of the proceedings. The ICJ does not allow people to sue their own governments, as it does with the WTO.

The ECJ is located close to the permissive end of the spectrum. Although the choice to refer the case to the international tribunal is still up to a local court authority, individuals may eventually appear before it unrepresented. If a case presents issues of European law that the national court does not feel qualified to address on its own, it may unilaterally send the matter to the ECJ under Article 177 of the Treaty of Rome. The matter is then returned to the national court for consideration of the dispute's merits after the ECJ responds to the particular question(s) raised. Although litigants themselves may propose such a referral to the national court, the national court ultimately has the power to do so. The expense of obtaining such a referral is the same, regardless of whether the interests implicated are wide or restricted, as in the historic Cassis de Dijon case concerning the importation of French specialty liquors into Germany. 16 various national courts, as Karen Alter demonstrates in her essay, have noticeably diverse referral histories, but over time, national courts as a group have been more inclined to send cases to the ECJ. These recommendations can entail legal action not only against a governmental institution but also between private parties. Formal human rights enforcement mechanisms, such as the ECHR, the IACHR, the African Convention on Human and People's Rights, and the UN's International Covenant on Civil and Political Rights, are also close to the low-cost end of the access spectrum. Since the conclusion of World War II, there have been an increasing number of international courts to which people have direct access, although with varied limitations.

Legal Embeddedness: Who Controls Formal Implementation?

Implementation and compliance are far more difficult in international conflicts than they are in well-established, domestic rule-of-law systems. Therefore, the political importance of giving up power over conflict resolution relies in part on how much influence each government has over the legal system and how decisions are carried out. Formal legal agreements have an impact on state authority along an embeddedness continuum. The range of domestic embeddedness includes extremely strong control by particular national governments over the proclamation and execution of rulings to very little influence. Systems where a single litigant may veto the issuance of a decision ex post are at one extreme, that of strong control. Individual plaintiffs had the right to an ex post veto under the previous GATT system, which required consensus approval of dispute resolution panels' rulings. Contrarily, under the less closely regulated WTO, disagreements between member governments are settled by quasi-judicial panels whose decisions are final until overturned by a unanimous vote of the Dispute Settlement Body, which is made up of one representative from each WTO member state.

The majority of international legal systems fall under the same classification as the WTO system; is, governments are required by international law to abide by rulings of international courts or tribunals, but no domestic legal framework ensures that the rulings are put into effect. States simply acquire a new international legal responsibility to fix the harm if national administrations and legislatures choose not to act due to domestic political opposition or simple inaction. In other words, state B has no other legal option under international law if a court determines that state A illegally interfered with state B's internal affairs and orders state A to pay damages, but state A's legislature refuses to appropriate the money. In the alternative, state A is liable to its treaty partners under international law but cannot be forced to take the action it agreed to take in the treaty if it signs a treaty requiring it to change its domestic law in order to reduce the level of certain pollutants it is emitting and the executive branch is unsuccessful in passing legislation to do so.

On the opposite end of the scale, independent national courts that may impose international judgements against their own governments exist in situations when the power of individual governments is severely restrained by the pervasiveness of international standards. The EC judicial system is the most conspicuous illustration of this kind of enforcement. Every member state's domestic courts acknowledge that EC law is supreme over domestic law (direct impact) and that it gives people rights that they may assert in court (supremacy). National courts often recognize advisory opinions issued by the ECJ under the Article 177 process, as Karen Alter's article18 describes in full, even when they conflict with precedent decided by higher national courts. Although these clauses are not expressly specified in the Treaty of Rome, the ECJ has effectively "constitutionalized" them over the previous 40 years.19 Such referrals are also permitted under the European Free Trade Association (EFTA) court system, which was founded in 1994. Unlike the Treaty of Rome, however, it does not legally obligate domestic courts to refer cases or obligate domestic courts to implement the decision. However, it seems that domestic courts uphold EFTA court rulings.

Two Ideal Types: Interstate and Transnational Dispute Resolution

Independence, access, and embeddedness are three features of international conflict resolution that are intertwined. The characteristics of the most important courts in the world today, which show a shaky association across categories. Systems that score better on one dimension are more likely to score higher on the other dimensions. According to this conclusion, very high values on one dimension cannot entirely make up for poor values on another. Without significant support for the others, a system's efficacy is compromised by strong support for independence, access, or embeddedness. Two ideal kinds are produced by combining these three dimensions. One ideal option, interstate dispute resolution, allows for national government vetoes over the adjudicators, agenda, and enforcement. Who judges, what they judge, and how the judgment is implemented are all decisions made at the state level. On the other end of the scale, adjudicators, agenda, and enforcement are all largely insulated from the pressures of both individual and group national government pressure. This ideal form is referred to as international conflict resolution. The EU and ECHR are the most obvious instances of this institutional framework, in which judges are shielded from national governments, society persons and groups set the agenda, and an independent national court implements the decisions. The other sections of this article cover the nature, application, and development of international law as well as the effects of variations along the continuum from interstate to transnational conflict resolution.

However, let's not lose sight of the reality that values on the three dimensions go from high to low at various speeds while we talk about this continuum. High levels of access and independence seem to occur more often than high levels of embeddedness, and while the association is weaker, a high degree of independence seems to occur somewhat more frequently than a high level of access. In other words, there is a considerable intermediate range between those tribunals that score high or poor on all three dimensions, consisting of tribunals with high ratings on independence and/or access but not on the others. Some international human rights organizations are among the international legal entities that rank well for independence and accessibility but are not firmly ingrained in national legal systems. The GATT/WTO global trade institutions and the ICJ are two examples of institutions that get good marks for independence but not for access or embeddedness.

1. The politics of litigation and compliance: from interstate to judicial politics

Making a procedure "legal" does not make politics disappear. The scope of a given tribunal's power and who has access to it are political issues in and of themselves. However, further possibilities for political involvement may occur throughout a tribunal's tenure, sometimes as a consequence of its own constitutional requirements. The most intense conflicts are likely to emerge ex ante in the negotiations over a tribunal's founding. Form does important, however. Transnational conflict resolution differs significantly from interstate dispute resolution in

terms of the typical politics of litigation and compliance. We explain these variations in this section and provide a few speculative hypotheses connecting our three explanatory factors to the politics of conflict resolution.

2. The Interstate and Transnational Politics of Judicial Independence

We anticipate seeing more judicial autonomy, which is defined as the desire and capacity to determine conflicts against national governments, as legal systems transition from interstate dispute resolution toward the more autonomous judicial selection procedures of transnational dispute resolution. Other things being equal, the less influence national governments have over the judges who are chosen, the information that is made available, the court's support or funding, and the specific legal issues that the court can decide, the less likely it is that they will have an impact on those decisions.

3. The Interstate and Transnational Politics of Access

What are the political ramifications of switching from interstate conflict settlement, which has little access, to transnational dispute resolution, which has wide access? Our main argument is that as we move toward transnational conflict resolution—where people, organizations, and courts may appeal cases or refer them to international tribunals—we are likely to notice, generally speaking, a new politics of access. The possibility that cases will be referred rises with the diversity of the parties involved, as does the likelihood that such lawsuits may challenge national governments, particularly the national government of the plaintiff. It is not immediately clear how formal access relates to actual political influence. States may still exert control over access to the judicial system in both intrastate and extraterritorial disputes by imposing onerous procedural requirements, applying political pressure to would-be or actual litigants, or simply establishing self-serving exceptions to the established jurisdictional framework. Both governments must agree in order to use traditional arbitral courts, such as those established by the Permanent Court of Arbitration.

Classic interstate litigation before the Permanent Court of International Justice in the 1920s and 1930s, the ICJ after 1945, and the short-lived Central American Court of Justice all include somewhat more restrictive agreements. In these systems, even when suing on behalf of an aggrieved citizen or group of people, a single state determines when and how to file a lawsuit. Any control over or even input into the litigation strategy ends once the state formally "espouses" the claim of its national(s), unless they are entitled to compensation under domestic law or the constitution. Thus, the government is free to pursue the claim aggressively, not at all, or to negotiate a settlement for an amount far lower than what the individual litigant(s) may have considered tolerable. Such discussions may more closely resemble institutionalized interstate bargaining than a traditional legal procedure where the plaintiff chooses whether to pursue the matter to trial or settle it.

III. CONCLUSION

The interstate and transnational ideal forms of legalized conflict resolution that we have created differ along the axes of independence, access, and embeddedness. When we look at international courts, we see that the two ideal forms appear to differ in terms of the number of dockets and degrees of decision-making compliance. The ICJ and ECJ significantly diverge from one another in both directions. The discrepancies between the ICJ and ECJ patterns cannot be disputed, but more investigation and analysis will be needed to determine the causal links between results and correspondence with one ideal type or the other. Additionally, their dynamics are quite different: the ECJ has significantly increased both its workload and its power compared to the ICJ. The GATT/WTO processes do not accurately represent our ideal kinds. States continue to serve as the systems' official legal gatekeepers, but they have often refrained from severely restricting who has access to the dispute resolution processes. As a consequence, even without high formal degrees of access or embeddedness, the caseload of the GATT procedures and the efficacy of their rulings grew. Thus, the GATT and the WTO serve as a reminder that political process is not always determined by legal form. Politics and law work together to create judgments and decide how successful they are, not each one acting alone. Systems of international dispute resolution aid in organizing and defending certain groups that profit from regime norms. As a result, national governments and domestic constituencies face higher costs of reversal, which may significantly aid in the upholding and spreading of international standards.

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