

# Delegating to International Courts: Four Varieties of Delegation and their Implications for “Delegating Sovereignty”

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Most analyses of delegation to international courts consider courts as a single category. For example, rational choice approaches describe courts as institutions that fill in contracts and help monitor and enforce agreements. Martin Shapiro, in his seminal book on *Courts: A comparative Political Analysis*, sees courts as fitting into a general logic of “triadic dispute resolution” where two equal parties enter the courtroom and the judge must avoid a dichotomous outcome to convince each party that the process was fair and somehow “neutral.” Martin admits a sliding continuum of how well different types of courts fit the ideal type model of triadic dispute resolution, yet in his framework *all courts* are seeking to substitute office for consent, and all courts are serving as arms of political authority enforcing the will of the powerful (as embodied in “the law”) upon the litigants that appear in front of them (which is why they are in fact not truly neutral).

I have no quibble with these arguments per se. But they operate at a level of generality that can obscure rather than elucidate, especially when one tries to compare across courts, legal decisions, or political contexts. The claim of this memo is courts actually play a handful of distinct and different roles in the political process and that we can develop distinct analytical arguments about how judicial politics will vary by role. Indeed, I think there will be variations in the design, political impact and politics of a court depending on the role it is playing. I adapt models of domestic judicial organization in a continental context into 4 judicial ideal types—Administrative Review, Dispute Resolution, Criminal Enforcement and Constitutional Review. I do not require that a court remain hermetically sealed within an ideal type box—administrative courts can practice constitutional review, and once this jurisdictional extension is accepted actually morph into constitutional as well as administrative courts. Nor do I require a case to fit into just one box—cases can involve factual, constitutional, and basic textual interpretive questions and judges can divide the issues accordingly. Nor am I naïve that legal questions are of one or another type—judges often define the legal issues so as to open and close their interpretive blinders allowing them to avoid issues or reach outcomes that they desire for legal, political or (less frequently) personal reasons. For me these ideal types are “hats” that a judge may change within and across cases. I believe that judges and interpretive audiences (lawyers and the public translators of legal rulings) understand that interpretive “hats” differ, and thus they expect different levels of judicial deference to the text, to legislative or political will, or to constitutional principles, depending on the judge’s hat/role. I also believe that roles can morph and change over time.

While I do not have the time or space to develop the ideas fully here, I see a theoretical pay off to breaking down the role of courts into four as opposed to a single category. The four roles help us understand why the theoretical implications do not per se translate or travel well.

For example, a Weingast analysis for the role of the merchant courts in reviving international trade (Milgrom, North, and Weingast 1990), or the role of administrative review in legislative oversight (Weingast and Moran 1983) probably has little to say about the role of the German Constitutional Court in Germany—nor should we expect the insights to travel across contexts given that merchant courts were dispute resolution bodies hearing private party breach of contract cases, while federal administrative courts are by design tools the legislature uses to monitor regulatory agencies, and the German Constitutional Court is by intention charged with policing the boundaries of legislative authority. Analyzing international courts (ICs) by the roles they play may also allow us to develop a more realistic picture about what ICs actually do with the interpretive authority they have been granted, and thus how delegation to ICs impacts state sovereignty in practice. I also expect payoff when we start to analyze rhetorical politics. All courts make law, and one cannot explain variation in political or legal outrage at a ruling solely in terms of the legal quality of the ruling, how far the judge may have strayed from the text in exercising his or her interpretive discretion, or by the power of those who are disappointed. Because the logic of what is being delegated to courts varies by judicial role, and because the relationship of the judicial branch to the state varies by role, we can expect judges to act differently across the four roles, and thus expect rhetorical politics to vary by role as well.<sup>1</sup>

This memo lays out the four judicial roles, discussing how they relate to delegating sovereignty. The final section briefly considers theoretical pay offs. I wrote most of this memo before I got the Bradley/Kelley definition of international delegation. I highlighted the correspondence to their definitions, and observe that their categories can improve on the lumping of the role of courts that I am challenging, though Bradley and Kelly also put all judicial roles under their “adjudicative” category.

## **The Four Roles in Brief (remember these are ideal types, and I allow roles to spill and morph)**

I will very briefly, and in a sketchy inadequate way, try to highlight what I see as this variation in delegation across roles, and in particular the different sovereignty implications of the delegation. Because these categories are not regularly used, there is no way to assess the percent of IC rulings that fit in each category—though I suspect that the lions share of IC activity involves administrative review (see note 7).

### **Dispute Resolution (similar to Bradley/Kelly’s “adjudicative authority”)**

The dispute resolution role is the archetype “triadic dispute resolution model” wherein two litigants bring a dispute to a judge, asking for a binding interpretation of the law that they can use to resolve the dispute. In the domestic context, civil courts are the primary “dispute resolution” bodies, and both litigants are usually private parties. The *Project on International Courts and Tribunals (PICT)* defines an “international court” as a body in which one or more of

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<sup>1</sup> While conceptions of what is an “appropriate level” of judicial deference to political bodies are very likely culturally specific, I do think that this role-based variation holds across legal systems, in no small part because most non-Islamic legal systems in the world are based on a mixture of three European models which use these distinctions—the Commonwealth system of common law, and the French and German civil law systems. I won’t die on the sword for this claim, but since ICs are largely Western creations, and international legalization is a Western solution for international problem, the categories should hold for my case.

the parties will be a state or an IO<sup>2</sup> — thus by definition ICs with a dispute resolution authority will differ from the traditional domestic model in that one party is likely to be a public actor.

The archetype model of ICs is having “adjudicative authority”- indeed that is all that Bradley and Kelly recognize. This perception is based on “old style” ICs, like the ICJ. Most, but not all, international courts have dispute resolution authority to “interpret the meaning of the law” in concrete cases brought before them (13 out of 20 ICs I have analyzed), but many were delegated other roles as well. “Old style” ICs were pretty much only dispute resolution courts, and they lacked general compulsory jurisdiction. Instead there were optional protocols allowing compulsory jurisdiction with certain countries and in certain issues. With countries allowed to pick and choose the contexts for IC dispute resolution, “old style” dispute resolution ICs did not necessarily create sovereignty costs for states.<sup>3</sup>

A fundamental change occurred in the 1990s, however, and increasingly ICs are “new style” courts ICs with general compulsory jurisdiction, an intentionally expanded authority which sometimes includes authority to hear non-compliance suits, and often even with private access.

**TABLE 1: OLD AND NEW STYLE ICs, BY DATE ESTABLISHED**

International Courts	Date Established/ Created	Compulsory Jurisdiction	Jurisdiction for noncompliance suits	Private Actor access	Total Cases (last year included in figures) <sup>1</sup>
Old Style Courts					
International Court of Justice (ICJ)	1945/1946	Optional Protocol			104 contentions cases filed, 80 judgments, 23 Advisory opinions (2003)
Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries (OAPEC)	1980/1980	So qualified as to be meaningless <sup>1</sup>		X By optional state consent	2 cases (1999)
International Tribunal for the Law of the Seas (ITLOS)	1982/1996	Optional Protocol + (exception, seabed authority & seizing of vessels)		Seabed authority & seizing of vessels only	13 judgments (2004)
New Style Courts					
European Court of Justice (ECJ)	1952/1952	X	X	X	2497 infringement cases by Commission, 5293 cases referred by national courts, 7528 direct actions (2004)
European Court of Human Rights (ECHR)	1950/1959	X	X	X (as of 1998)	8810 cases deemed admissible, 4145 judgments (2003)
Benelux Court (BCJ)	1965/1974	X	X	Indirect*	**
Inter-American Court of Human Rights (IACHR)	1969/1979	Optional Protocol	X	Commission is a gate keeper	104 judgments, 18 advisory opinions, 148 orders for provisional measures (2003)
Court of Justice of the Cartagena Agreement (Andean Pact) (ACJ)	1979/1984	X	X	X	31 nullifications, 108 infringement cases, 711 preliminary rulings (2004)
European Court of First Instance (CFI)	1988/1988	X	ECJ hears these cases	X	2083 decisions from 3003 cases filed (figures exclude staff cases) (2004)
Central American Court of Justice (CACJ)	1991/1992	X	X	X	65 cases, 21 Advisory opinions, 30 rulings, 7 cases dismissed for lack of competence,

<sup>2</sup> See their matrix definition page. <http://www.pict-pecti.org/matrix/matrixhome.html>

<sup>3</sup> According to Werner Levi, ICs were intentionally and repeatedly denied compulsory jurisdiction so as to protect national sovereignty Levi, Werner. 1976. *Law and Politics in the International Society*. Beverly Hills: Sage Publications..

		(some exceptions) <sup>2</sup>			7 cases in progress (2004)
European Free Trade Area Court (EFTAC)	1992/1995	X	X	(Via national courts, advisory opinions only)	59 opinions (2003)
Economic Court of the Commonwealth of Independent States (ECCIS)	1992/1993	X	X	X	47 cases, not clear if they are ruled on yet (2000)
Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)	1993/1998	X	X	X	3 judgments, 1 order (2003)
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)	1993/1997	X	X	X	4 opinions, 27 rulings (2002)
International Criminal Tribunal for the Former Yugoslavia (ICTY)	1993/1993	X	X	X (Defendant Only)	75 public indictments, 18 completed cases, 11 judgments (2003)
<i>General Agreement on Tariffs and Trade (GATT)</i> <sup>3</sup>	1953- 1993	-			229 cases, 98 rulings
World Trade Organization Appellate Body (WTO) <sup>4</sup>	1994	X	X		304 disputes formally initiated, 59 appellate rulings, 115 panel reports (2003)
International Criminal Tribunal for Rwanda (ICTR)	1994/1995	X	X	X (Defendant Only)	58 cases in progress, 17 completed cases (2003)
International Criminal Court (ICC)	1998/2002	X	X	X (Defendant Only)	3 situations under investigation, but no indictments or rulings to date
Caribbean Court of Justice (CCJ)	2001/2005	X	X	X	Began operation April 2005
International Criminal Tribunal for Sierra Leone (ICTSL)	2002/2002	X	X	X (Defendant Only)	11 indictments proceeding, 2 withdrawn due to death (2003)
Total International Judicial Activity					29261 admissible cases filed or under investigation

Data compiled by author, based on the best information available on the PICT website, updated by visiting the websites of the international courts and consulting scholarship where available. I have excluded a number of African Courts for lack of information about them. ECCIS data from (Dragneva 2004). 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. <sup>1</sup>OAPEC court has 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. <sup>2</sup> 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. <sup>3</sup>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.

Where there are dispute resolution ICs with compulsory jurisdiction, states are ceding their monopoly right to interpret the meaning of the international agreements they have signed. The extent to which state sovereignty is, in fact, compromised will depend on which cases are litigated. Whether or not cases are litigated can depend on access rules, the legal threshold required for a plaintiff to have standing and to win their case, and a host of factors that shape whether or not a plaintiff decides to pursue their cause through international legal channels (Alter 2000).

As in the domestic context, parties retain the right to settle the case out of court, before or after a ruling, including adopting settlements that differ from what the law requires. Also, while formally international legal rulings are “binding,” states retain the right to creatively interpret what compliance means or to ignore the ruling (Joseph Weiler called this “exit through non-compliance” (Weiler 1991)). The exit option in the international context is different from the domestic context where there is a state authority to back up the judicial rulings, making exit harder to pull off.

Thus international dispute resolution differs from its domestic counter-part in two fundamental ways—at least one party is likely to be a sovereign state, and the interest of the law maker (states as a collective) and the law enforcer (the court) are not per se aligned so usually there is no governing authority that will back up the legal ruling. Where ICs lack compulsory jurisdiction, consent must be elicited before the case ever reaches the court creating a selection bias that favors voluntary compliance with the ruling. Most people believe that compulsory jurisdiction makes a legal system more effective than non-compulsory jurisdiction. As John Yoo and Eric Posner emphasize, where ICs have compulsory jurisdiction, international legal rulings are less likely to uniformly elicit compliance (Posner and Yoo 2005). This doesn't mean the IC is less effective; the measurement of effectiveness is not whether there is compliance with IC rulings (Helfer and Slaughter 2005).<sup>4</sup> ICs with compulsory jurisdiction are likely to be used more because cases are harder to block. As long as IC rulings give a rhetorical legitimacy boost to whoever “wins” the case, ICs can contribute to pushing non-complying states in the direction of greater compliance with the law.

### **Criminal Enforcement (Criminal Courts and Infringement Proceedings-similar to Bradley/Kelly's enforcement authority, though they do not consider courts as enforcement entities)**

While it is commonly said that courts “enforce the law,” it is always governments, with a monopoly on the legitimate use of force, which enforce the law. The functional judicial role of “criminal enforcement” is to ensure that governments use their exceptional coercive powers legitimately, meaning lawfully. In the criminal enforcement system courts adjudicate suits raised by a public prosecutor against an actor accused of violating the law. The role of the judge is to determine whether the prosecutor has proven its case, and thus whether an otherwise illegal use of state force vis-à-vis the defendant is justified.

There are two types of international criminal enforcement mechanisms. War crimes tribunals deal with violent abuses of the law, and the criminal label is used precisely because of its stigma. War crimes tribunals mirror their domestic criminal counterpart— they have jurisdiction to adjudicate cases pertaining to an enumerated list of crimes, cases are raised by public prosecutors, and guilty parties end up in jail. “Infringement mechanisms” are international enforcement systems with the stigma associated with the “criminal” label removed. Non-criminal ICs with enforcement authority have an explicit jurisdiction to hear “infringement suits” (with no hint that such suits involve anything criminal). Infringement cases are usually raised by “commissions” (a less harsh term than a “prosecutor” though their role is largely the same) with “governments” or public actors as defendants in the cases. At the international level, the criminal enforcement model is often adapted, allowing states to raise infringement suits against other states.<sup>5</sup> Also, international enforcement ICs mainly paint scarlet letters upon law violators (though the ECHR can award a nominal compensation for victims of Convention transgressions).

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<sup>4</sup> Eric Reinhardt and Marc Busch show that WTO cases settled before a ruling actually have a higher level of plaintiff satisfaction than cases that reach the litigation stage. This doesn't mean the legal system did not matter, rather it means that ICs tend to end up with the “hardest” cases, which is why compliance is not a measurement of the effectiveness of a legal system Busch, Marc L, and Eric Reinhardt. 2000. Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes. *Fordham International Law Journal* 24 (November-December):148-72..

<sup>5</sup> Where there is also an international prosecutor/commission, this option is seldom exercised. Instead states will bring a complaint to the Commission to investigate and pursue.

I need to make a methodological point at this junction. My classifications of courts are based on founding court treaties—thus they establish base lines about what was delegated to an IC in the first instance. I identify judicial roles by the jurisdictional language used in the delegation contract (the Court Treaty) and thus I only count as “enforcement courts” ICs with jurisdiction over a list of crimes or explicit jurisdiction to hear “infringement” cases. But where international dispute resolution mechanisms have compulsory jurisdiction, they can come to play an enforcement role.<sup>6</sup> I consider this a “morphed role” that has emerged through time.

### **Administrative Review (similar to Bradley/Kelly’s regulatory authority, though they do not consider courts in this role)**

The functional role of administrative review is to hold *public officials* accountable by providing a means for the subjects of administrative actions to challenge a public decision (Edley 1990: 13-48). Administrative review authority can be recognized from an IC’s jurisdiction to hear cases regarding the “legality” of a public “action, policy or regulation,” or to hear “actions to annul” or “failure to act” charges regarding decisions or non-decisions of public actors.

It is often overlooked the extent to which delegation to ICs involves delegating administrative review authority. Administrative review may be the most prevalent form of IC review. As Table 2 will show, there are at least seven ICs with formal administrative review authority. Numerically speaking, administrative review may actually comprise the largest share of IC’s dockets.<sup>7</sup> If a chief reason behind delegation to ICs were to extend administrative review to the international level, at least part of the trend of allowing private access to ICs would make more sense. Delegation to ICs would be a natural response to the rise in complaints about international agencies running amok, and private actors would have to be empowered to raise suits (Alter 2006).

When ICs have authority to review the decisions of international administrators, delegation to ICs involves little sovereignty costs. Instead, the IC may be acting as a monitor of state delegation to international actors, ensuring that the IO stays faithful to its delegated mandate. Where ICs are reviewing national regulatory decisions, delegation will likely involve sovereignty costs.

International scrutiny of domestic regulators may actually be a welcomed intent in delegation. For example, NAFTA Article 19 panels allow states to diffuse domestic pressure on governments by allowing bi-national panels to handle the political question of whether national

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<sup>6</sup> For example, the GATT era “dispute resolution mechanism” was not compulsory or binding because panel formation and findings could be blocked. When the WTO was created, and the dispute resolutions system became compulsory and formally binding. While GATT era panels could also authorize retaliation and legal derogations from WTO agreements, only the advent of compulsory jurisdiction morphed WTO panels into enforcement entities.

<sup>7</sup> It is largely forgotten that the European Court of Justice was first and foremost an administrative review body. Administrative review was so central to the European legal system, that a Court of First Instance was created to increase the legal system’s administrative review capacity. Probably most ECJ and CFI rulings involve administrative review. Nearly all of the Andean Court’s rulings involve administrative oversight Alter, Karen. in progress. Exporting the European Court of Justice Model: The Experience of the Andean Common Market Court of Justice. *Manuscript in Progress*... Seventy-two of ECHR rulings are about “access to justice” and thus review of domestic legal procedures Cichowski, Rachel. 2006. Courts, Rights and Democratic Participation. *Comparative Political Studies* 39 (1):50-75.. These three courts issue the vast majority of all international legal rulings, so in numeric terms alone, most IC decision-making likely involves administrative review.

administrators were biased in their implementation of dumping and countervailing duty rules.<sup>8</sup> The EU's preliminary ruling mechanism was also designed to allow the ECJ to oversee domestic implementation of EEC policies.

Sometimes, the advent of administrative review may be less welcomed. The WTO's appellate body transformed a dispute into a sort of administrative review when it ruled that the US could pass legislation to protect sea turtles, but the US agency charged with implementing the law had failed to create a policy that was compatible with WTO rules.<sup>9</sup> Few accused the WTO AB of overstepping its authority in the case, especially because the GATT treaty includes a concept of "nullification" of GATT concessions. While perhaps not criticized as a breach of authority, the AB's ruling was sovereignty compromising in its assertion of authority to oversee implementation of an otherwise WTO legal US policy.

### **Constitutional Review (Bradley & Kelley do not have this category)**

ICs with explicit constitutional review authority have jurisdiction to assess the validity of "laws and acts" of legislative bodies, ensuring procedural rules for law-making were followed, that the policy/law coheres with the constitution or Treaty, and that the legislative action is not ultra-vires (exceeding the legislator's authority). Four ICs have been delegated explicit constitutional review authority (ECJ, Andean Court of Justice, Central American Court of Justice and the Court of Justice for the Common Market of Eastern and Southern Africa). In each case, the IOs had the legislative authority to pass binding laws that in some cases could be directly applicable in the domestic context.

In addition to the 4 intentional delegations of constitutional authority, a number of ICs have morphed constitutional roles. When the WTO appellate body asserts that WTO law has some grundnorms, it makes a constitutional level ruling that establishes limits on state authority. When the ECJ asserted the direct effect and supremacy of European law, it transformed its preliminary ruling mechanism, which was designed for administrative review authority, into a constitutional mechanism that allows private actors to challenge the validity of national laws. And when the ECHR rules that a state policy has violated the European Convention on Human Rights, the ruling has a constitutional effect since the European Convention is widely seen as more than a treaty. These "constitutionalizing" practices, once accepted as valid, transform ICs into constitutional bodies, making the issue of initial delegation moot.

### **Where I want to go with this framework**

There are a few parts of the claim that the politics of courts vary systematically by judicial role.

First, I believe that variation in role maps quite well onto variation in observed design. To give you a sense of the breakdown, I'm pasting a table from my article on IC design which was focused primarily on explaining variation in private-access to ICs (Alter 2006). To be rigorous in my definitions, I only included ICs that meet PICT's definition of an IC and I assessed a court's role from the "jurisdictional authority" stated in the IC's founding treaties (identified in column 1). This self-imposed rigidity means that what some might consider legal

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<sup>8</sup> NAFTA bodies do not meet PICTs definition of an IC because they are not permanent bodies. Thus do not appear on the table, though they are functionally similar to courts that do appear on the table.

<sup>9</sup> United States--Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R DSR (Dispute Settlement Reports) 1998:VII 2755 ((Oct. 12, 1998 adopted, Dispute Settlement Body, Nov. 6, 1998)

bodies (e.g. NAFTA bodies) are excluded and that courts appear under their intentionally designed as opposed to morphed role (thus human rights courts appear as enforcement courts, and the WTO as a dispute resolution body). The second column has in bold my theoretical hypotheses about IC design—developed in the article. The final columns identify in grey which courts exceed the expected “minimum design” criteria, and in black which courts fall below the expected minimum criteria. The argument I made was that functional imperatives alone explain much of the design variation in terms of private access rules (functional design imperatives explain for 19 out of 20 ICs whether or not private access was granted, though not whether or not private actors can initiate cases in the constitutional or enforcement roles). Grey boxes do not falsify the functional explanation, rather they mean we need more than a functional explanation to account for the observed design. Note that courts can be given more than one sort of role/jurisdictional authority, and the design of a court can actually vary depending on the role (the Treaties separate role and design into different Treaty articles). Note as well that the trend of giving dispute resolution bodies compulsory jurisdiction is poorly explained, and it is not captured in any way by Bradley/Kelley’s “degree of delegation.”<sup>10</sup> Finally, as in all functional explanations, the starting point does not tell us about the ending destination.

**TABLE 2: DESIGN OF IC BY ROLE**

Judicial Role	Expected Minimum Functional Design Requirements	ICs with role	Compulsory Jurisdiction	Private Access
<b>Dispute Resolution</b> Jurisdiction to “interpret the meaning of the law” or to “ensure that the law is respected,” jurisdiction to resolve disputes.	<b>No minimum requirements</b> but according to PICT’s definition of an IC, it must be possible for one litigant to be a state or government entity. ITLOS- compulsory jurisdiction & private access exists only in cases involving the seizing of vessels, and the plaintiff’s government must consent to the case being raised. EFTAC can review preliminary ruling requests, but its opinions are not binding. CCJ is authorized to decide on case a by case basis if the needs of “justice” require allowing private access for the case. OHADA- Private actors can directly appeal national court rulings to OHADA court. COMESA- private actor access is limited to contracts between private actors and COMESA institutions.	ICJ		
		ITLOS	← see note	← see note
		WTO	X	
		EFTAC	X	←see note
		ECJ	X	
		OAPEC		
		CCJ	X	← see note
		ECCIS	X	
		CACJ	X	X
		OHADA	X	X ← see note
		COMESA	X	X ← see note
		BCJ	X	
		ACJ	X	
<b>Criminal Enforcement</b> Jurisdiction regarding an enumerated list of crimes or jurisdiction to hear infringement suits against states.	<b>Compulsory Jurisdiction</b> <b>Access rules</b> -Public plaintiff, public or private defendants.  ECHR- Pre- 1998 only a Commission could raise cases. In 1998 the Commission was eliminated and direct access for private actors was allowed (Protocol 11), substantially altering the role the	ICC	X	As Defendant
		ICTY	X	As Defendant
		ICTR	X	As Defendant
		ICTSL	X	As Defendant
		EFTAC	X	
		ECJ	X	
		ACJ	X	X (Post 1996)
		COMESA	X	

<sup>10</sup> The Legalization Volume also does not capture the importance of compulsory jurisdiction, focusing instead on private access. McCall-Smith does, however, incorporate this variable in his analysis. Based on my analysis of usage of private access provisions, I am starting to think that compulsory jurisdiction is as important, if not more important, than private access in explaining variation in IC politics.

	ECHR de facto plays. CACJ-Has general authority to hear infringement suits brought by any actor with standing, including states, private actors, and community institutions but no designated supra-national prosecutor.	CACJ	X	X
		IACHR		
		ECHR	X	X (post 1998, by optional protocol)
<b>Administrative Review</b> 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.”	<b>Compulsory Jurisdiction</b> Defendant will be a public actor. If administrative review is to have any meaning, the public defendant must be required to participate in proceedings. <b>Access rules-</b> Actors subject to the decisions of administrative agencies must have access to court to challenge administrative decisions affecting them.	ITLOS-Seabed Authority	X	X
		ECJ & CFI	X	X
		EFTAC	X	X
		ACJ	X	X
		COMESA	X	X
		BCJ	X	X
		CACJ	X	X
<b>Constitutional Review</b> Jurisdiction to review the legality of any legislative act, regulation, directive, of an IO.	<b>Compulsory Jurisdiction</b> <b>Access rules:</b> Can be limited to states, or allow private access too.	COMESA	X	X
		ECJ	X	X
		ACJ	X	X
		CACJ	X	X

Second, I hope to encourage disaggregation of the concept of delegation to ICs, and of the analysis of IC outputs. Nearly every study of ICs highlight “poster child” cases that represent dramatic IC rulings as opposed to the everyday work of ICs. Nearly every quantitative study lumps together IC rulings as if they were all equivalent (e.g. ignoring, for example, that many ECJ rulings are administrative review and do not involve enforcing EU rules on member states). Such scholarship contributes to the sense that delegation to ICs represent an inherent threat to national sovereignty. From this typology we can see that dispute resolution in a context of no compulsory jurisdiction, and administrative and constitutional review of international public authorities are not sovereignty compromising. While criminal enforcement is sovereignty compromising, enforcement ICs are doing what they were asked to do. Really, only legal extensions from the initial delegation contract should be controversial. And these extensions are only likely to create controversy to the extent they move beyond the developed political consensus and affect state as opposed to IO actors. All told, the non-threatening and uncontroversial cases likely make up the vast majority of IC cases. It might change the debate to know that ICs do things other than dispute resolution, and that probably less than .006 percent of IC judicial activity involves compromising national sovereignty in ways that states did not intend and would not want (a generous estimate would be that 200 IC decisions, out of the over 29,000 rulings, decisions and opinions issued by ICs constitute unintended sovereignty compromising extensions of IC authority).

For me, the next analytical step in the argument is to think about variation in the types of cases litigated, and in levels of expected deference, and thus how judicial politics will vary by role. The designated roles channel what is litigated, by inviting only some actors to raise only some types of disputes. The roles also set the terrain of the rhetorical arguments that are made. Thus the first question is how do we explain which cases even appear in front of certain ICs, and the framing of the cases. The next question is what ICs do with cases that enter their domain.

An important issue for me is how roles create inherently different relationships between courts and the state. The “sovereignty compromising” paradigm of delegation is about self binding—relinquishing the state’s monopoly right to auto-interpret the international law that binds it. Yet the four roles show that in most cases of delegation to courts--domestic and international--is “other binding” meaning that states/legislators are giving courts the authority to

enforce the rules they created on other actors (which sometimes include public actors like police forces or regulatory actors). Other-binding delegation sets up an entirely different state-court dynamics than does self-binding delegation. I want to tease out this difference.

As Jon Elster points out, self-binding can also represent self-interested behavior (Elster 2000). The rule of law requires that all actors—including public actors—be bound by the formal rules of the game, by legislative edicts, and by constitutional meta-norms. By self-binding through delegation to courts, sovereigns can help convince the public that there is like application of rules for public and private actors, and that state will be constrained in the exercise of its power (Moravcsik 1997). Such self-binding will fail in its objective if the sovereign always wins—thus the state has to lose sometimes if the public is to believe that there is a rule of law. Thus I need to untangle the nature of self-binding delegation.

Sovereign actors often thump their chests loudly whenever they are thwarted. Not all chest thumping is the same, however. There is some chest thumping that few people take seriously, both within the screaming state or in other states. Other examples of chest thumping actually shift the political debate. The heart of the matter is when does the charge that a court stepped beyond its authority stick? When does chest thumping undermine the legitimacy of a court, and when is it largely ignored as state/government demagoguery?

In post-ruling legitimacy politics, powerful actors can more easily seize the bully pulpit compared to weak actors, but in most cases whether or not a charge of illegitimate IC rulings resonates internationally and deeply depends on the nature of the complaint combined with expectations about what courts are supposed to do. A blanket claim that international courts have no authority to challenge domestic policies will fail—many ICs were explicitly given authority to challenge sovereigns and public actors. Indeed in a context of constitutional and administrative review authority, courts are supposed to find limits to public authority. For a charge of IC illegitimacy to stick, critics must convincingly show that judge went beyond what observers (legal, state, and grass roots) expected them to be doing. Said differently—taking on public actors is part and parcel of the job description for administrative, constitutional, and criminal judges, and thus people expect states to be overruled from time to time. Yet sometimes there is a sense that the judge went too far beyond its pre-agreed “role.” By understanding the extent to which ICs mimic the variety of roles courts play in the domestic political process, and how these roles impact sovereignty differently in the domestic as compared to the international political process, we can better understand which aspects of IC authority are likely to be contested through rhetorical and legitimacy politics. Thus my next step is to develop a set of systematic (which is not the same as all encompassing) expectations about how legitimacy and rhetorical politics will vary by role, and across the domestic/international divide within a given role. I will certainly have to break down the rigidities in the categories, moving beyond the formal delegation contract. But I will start with the relationship between courts and the state in each role, and the delegation contract, and move from there.

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