

# **Strengthening International Courts: The Hidden Costs of Legalization**

## **Book Overview**

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Under Review

## Overview

International politics has become substantially legalized in recent years. States increasingly rely on international courts to interpret treaty commitments and adjudicate disputes. This increased emphasis on law---as opposed to diplomacy---has dramatically strengthened the influence of courts on international politics.

For example, the creation of the World Trade Organization in 1995 significantly increased the use of litigation---rather than diplomatic negotiations---to resolve trade disputes. Recent decades have seen the creation of new courts to regulate international issues, including the International Centre for the Settlement of Investment Disputes and the International Criminal Court. International environmental agreements increasingly adopt quasi-judicial procedures for dealing with noncompliance. Finally, many regional courts---such as the European Court of Human Rights and the European Court of Justice---have grown stronger as jurists have asserted broader jurisdiction over international disputes and states have increased deference to court rulings.

This rise in the number, influence, and scope of international courts has been the subject of heated debates in foreign policy communities. Since the Treaty of Westphalia of 1648, sovereign nation-states have been the basic unit of the international system. In 2001 former US Secretary of State Henry Kissinger has described the growth of international judicial institutions as a “revolution” in the Westphalian conception of state sovereignty. He argues: “advocates [of international courts] trust jurists more than they do statesmen. The advocates of the Westphalian principles trust statesmen more than jurists.”<sup>1</sup>

Despite this growth in legalization, we lack a firm understanding of how courts affect international relations. I analyze the impact of three different elements of legal design: delegation, obligation, and precision. Delegation refers to the ability of a court to rule on substantive matters of law. Obligation refers to the degree to which court rulings affect final political and economic outcomes. Finally, precision refers to the amount of uncertainty about substantive legal obligations. Strong

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<sup>1</sup> Kissinger, Henry A. 2001. *Does America Need a Foreign Policy? Toward a Diplomacy for the 21st Century*. Simon and Schuster. pp. 235 and 237.

courts have high levels of delegation and obligation. That is, strong courts are more likely than weak courts to rule in contentious cases, and their rulings have a more significant impact on final outcomes. I ask how changes in delegation and obligation affect international cooperation. Do strong judicial institutions hinder cooperation by constraining state behavior? Or do they promote cooperation by, for example, reducing tariffs, peacefully settling territorial disputes, and regulating the environment?

Opponents of legalization believe that courts hinder cooperation by constraining sovereignty. They can point to the experience of the International Court of Justice (ICJ). Since its creation in 1946 as the main judicial organ of the United Nations, the ICJ has been a relatively weak institution. Periodic attempts by ICJ jurists to strengthen the court have largely failed. As jurists have asserted stronger powers for the ICJ, many states have simply exited the jurisdiction of the Court or withdrawn from treaty obligations rather than complying with the constraints laid down by the Court.<sup>2</sup>

In contrast, supporters of legalization believe that strong courts facilitate cooperation. They can point to the development of the dispute settlement system for international trade. From the General Agreement on Tariffs and Trade (GATT) of 1947 to the contemporary World Trade Organization (WTO), the international trade regime has grown more legalized over time. At the same time, tariffs have fallen, trade flows have become less volatile, and the membership of the GATT/WTO has steadily expanded. While it is difficult to establish whether legalization is the cause of this enhanced cooperation, many scholars believe that the dispute settlement system of the WTO is arguably the most successful international legal institution.

This book views courts through the lens of rational choice theory. This means that I begin with the baseline assumptions that international actors have well-defined preferences over outcomes, and act strategically in trying to achieve their objectives. While cooperation can be mutually beneficial in solving international problems, I take very seriously the idea that leaders will sometimes be tempted to

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<sup>2</sup> Notable examples include the renouncement of compulsory jurisdiction by France and the US in 1974 and 1985, respectively.

defect on their commitments by either actively violating their previous pledges or by passively free-riding on the efforts of others. This means that my account of international courts takes seriously the dual problems of both cooperation and conflict. All theoretical arguments are presented informally and intuitively so that the book will appeal to a diverse audience. However, an Appendix contains the mathematical details of my models and proofs for those readers who wish to delve more deeply into my analysis.

I show that the legalization of international politics is a double-edged sword that both promotes and hinders international cooperation. High levels of delegation and obligation increase the expected punishment from violating cooperative agreements. This fact increases compliance rates with existing treaties. So legalization can be an effective tool in promoting outcomes as diverse as environmental protection, trade liberalization, and the protection of human rights.

However, strong courts come with hidden costs. An increase in international cooperation presents opportunities for new disputes between states. States will have different beliefs and information about the proper interpretation and application of the law. As delegation or obligation to a court increases, these informational problems between states grow larger and states become more likely to litigate their differences rather than negotiate diplomatic settlements. The resulting increase in litigation costs makes membership in a cooperative treaty less desirable. Additionally, strong courts increase the punishment that states expect to face when they violate their treaty commitments. While this effect can increase the likelihood of compliance, it also increases the likelihood of exit from the treaty. When a political leader faces tough times in which cooperation is difficult, she will be tempted to simply leave the treaty rather than face the punishment handed down by the court. This fact decreases the stability of the cooperative regime.

Since legalization has such mixed and subtle effects, a key prescriptive question is: should courts be made stronger? I argue that precision of international law is an important factor affecting the balance between the benefits and costs of legalization. When states are relatively uncertain about what the law requires or how the court will apply it, a strong court increases bargaining failure. So if the law

is imprecise, then the costs of legalization outweigh the benefits. This means that attempts to promote cooperation by strengthening courts must be accompanied by increased precision of the legal obligations.

## **Annotated Table of Contents**

### Chapter 1: Rational Institutions and International Law

I begin by describing three measures of court effectiveness: the early settlement of disputes, compliance with international agreements, and stability of cooperative regimes. I then discuss three aspects of legal design: delegation (the ability of a court to rule on substantive matters of law), obligation (the degree to which court rulings affect the final allocation of disputed assets), and precision (the amount of uncertainty about substantive legal obligations). I then briefly outline the relationships between the design of a legal regime and the effectiveness of its international court. I discuss the major challenges to empirically evaluating my argument, including endogeneity and selection effects. It is difficult to systematically evaluate the impact of court strength on international cooperation because states do not have incentive to design ineffective institutions. I describe the criteria I use to select and structure case studies. I then briefly describe the policy implications of my theory.

### Chapter 2: Bargaining and Conflict in the Shadow of an International Court

I analyze the impact of an international court on an interstate dispute. Two states disagree about how to divide a valuable asset, such as compensation for a treaty violation. States differ in their beliefs about the strength of their legal claims. They can either reach a negotiated settlement or refer the dispute to the court. I argue that strong courts magnify the importance of asymmetric information about the quality of the disputants' legal claims. This fact increases the likelihood of bargaining failure and costly litigation. If a court is weak---because it has a low probability of deciding the case on the merits (low delegation), or has little impact on final outcomes because of weak enforcement (low obligation)---then the plaintiff's probability of winning on the merits is largely irrelevant. Asymmetric

information about the strength of legal claims has little effect on bargaining and disputants can more easily negotiate a pre-trial settlement. I also examine the impact of legal design on the likelihood that a legal dispute will escalate into armed conflict and the ability of disputants to learn new information about the law.

### Chapter 3: Cooperation in the Shadow of an International Court

I analyze the impact of an international court on compliance with an international agreement and the stability of a cooperative regime. In each period, states must decide how much effort to invest in international cooperation. A treaty specifies both a minimal level of cooperation, and the strength of the court in adjudicating disputes when a violation occurs. Each state's cost of cooperation fluctuates over time. When a government is under intense political and economic pressure, the cost of compliance will be high. When a government is experiencing little pressure, compliance is cheap. I prove that increasing the strength of a court indirectly increases a state's expected punishment for violating a cooperative agreement. A strong court makes compliance more likely if a state wishes to remain a member of an international agreement in the future. However, a strong court also limits "tolerated defection" from an international agreement. If a court is weak, then a government under intense political or economic pressure can afford to temporarily violate an international agreement, pay the penalty mandated by the court, and return to compliance when pressure subsides. As a court grows stronger the expected punishment for noncompliance grows, and tolerated defection becomes less desirable. Exit from the treaty regime becomes more attractive to leaders under intense political or economic pressure. Strong courts both increase compliance and decrease the stability of international agreements.

### Chapter 4: Strengthening the International Court of Justice

To test my theoretical arguments, I examine ICJ jurisprudence in two cases that unexpectedly altered beliefs about the level of delegation and obligation to the Court. I argue that we can treat these as quasi-exogenous shocks to the Court's strength since the motives of ICJ jurists did not fully align with those of the state

members of the Court. First, I examine the Court's 1966 ruling in the *South West Africa* cases. In this ruling, the court unexpectedly reversed its jurisprudence and refused to hear an African colonial dispute. This ruling caused immense disappointment and distrust among newly decolonized nations, which refrained from using the court for several decades because of its perceived weakness. Second, I examine three recent consular relations cases in which the US was sued for imposing the death penalty on foreign nationals without informing them of their right under international law to consular assistance. The ICJ used these cases to progressively strengthen its powers in multiple ways. The US attempted to comply with the ICJ's first major ruling. However, as jurists strengthened the Court further in their second ruling, the US found it easier to exit from its international legal obligations rather than to appease the growing power of the ICJ. I argue that the Court has been unable to grow into a strong institution because it rules on a diverse and imprecise body of law. Unlike more specialized courts, such as courts that oversee trade and investment disputes, there has been little increase in the precision of ICJ law over time. Strengthening the ICJ is unlikely to be successful because the costs from informational asymmetries will outweigh the benefits of a strong court.

#### Chapter 5: Strengthening the GATT/WTO Dispute Settlement System

I examine the transition from the GATT to the WTO in 1995. This transition dramatically strengthened the dispute settlement system (DSS) for trade disputes. The design of the DSS is endogenous to its expected effectiveness because the 1995 reforms were externally imposed by GATT/WTO members. This makes it impossible to directly test my theoretical arguments. However, I argue that if my theory is correct, then increases in the strength of an international court will be accompanied by enhanced precision of the substantive law on which the court rules. I examine three major areas of GATT/WTO law---safeguards, subsidies and countervailing duties, and antidumping duties---to see if the changes in the structure of the DSS were accompanied by increased precision. I show that the 1995 transition increased precision in each of these areas of law.

## Chapter 6: Designing International Courts

I summarize the theoretical arguments and the “lessons learned” from my analysis. I then describe five policy implications and illustrate each with examples from the ICJ and GATT/WTO case studies. First, I argue that stronger courts are not always better. Second, I argue that increased delegation or obligation to a court should be accompanied by increased precision of the law. The third implication of my theory is that courts that rule on an imprecise body of law may do more harm than good. I then argue that specialized courts will be more effective than general courts. Finally, I argue that limited membership agreements---currently in vogue in policy communities---may harm cooperation more than they help. I discuss how these implications apply to contemporary debates over international law in areas such as human rights, foreign direct investment, property rights, international criminal law, and regional trade and integration agreements.