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International courts and compliance

The number of international agreements has exploded since World War II. As of today, some 3,000 multilateral and 27,000 bilateral treaties are in force.[1] These agreements cover an enormous array of activity. As a result, international laws are now in place to regulate trade relations, human rights, environmental policy, social policy, immigration rights, and competition (antitrust) policy, among other areas. In joining these international agreements, signatories make written commitments to bring national policies and practices in line with the rules of the common regulatory regime. These agreements are typically necessary because signatories would not adopt the prescribed behavior voluntarily as a result of domestic political, economic, or social pressures.

Of course, adoption of the agreement does not, by itself, change those domestic pressures. Consequently, once the agreement is signed, governments still may not follow through on their commitments. To help ensure government compliance with these agreements, countries often create international institutions, and legal institutions – permanent and ostensibly neutral third-party institutions to review potential violations of these agreements – in particular (Smith 2000). Table 1.1 lists 54 recent and current multilateral international regulatory regimes and describes characteristics of their dispute settlement mechanisms (DSMs).[2] Although not exhaustive, this list gives a general sense of the prevalence of various legal institutions prescribed in international agreements. Two-thirds (42) of these regimes feature a means of third-party review by a panel to which member states (and others, depending

[1] Numbers reported in Simmons (2010).

[2] The information in the table was derived from the treaty and, where available, the rules of procedure of the dispute resolution mechanism. The table identifies whether certain features are stipulated in the treaty or rules of procedure, not whether these features are currently operational. Our list does not include subsidiary agreements because they often share the DSM of the overarching organization.

TABLE 1.1 *Multilateral international regulatory regimes*[a]

Organization	Third-party review	Standing tribunal	Amicus briefs
African Economic Community	Yes	Yes	
African Union	Yes	Yes	Yes
Agadir Agreement	Yes	No	
Andean Community	Yes	Yes	Yes
Arab Maghreb Union	Yes	Yes	
ASEAN Free Trade Agreement	Yes	No	
Asia-Pacific Economic Cooperation	No	No	
Asia-Pacific Trade Agreement	Yes	No	No
Association of Caribbean States	Yes		
Association of Southeast Asian Nations	Yes	No	Yes
Benelux Economic Union	Yes	Yes	Yes
Caribbean Community	Yes	Yes	Yes
Central American Common Market	Yes	Yes	No
Central American Integration System	Yes	Yes	No
Central European Free Trade Agreement	Yes	No	Yes
Common Market for Eastern and Southern Africa	Yes	Yes	Yes
Common Market of the South	Yes	Yes	No
Commonwealth of Independent States	Yes	Yes	Yes
Community of Latin American and Caribbean States	No	No	No
Community of Sahel-Saharan States	No	No	No
Council of Arab Economic Unity	Yes	Yes	
Dominican Republic-Central America-US FTA	Yes	No	Yes
East African Community	Yes	Yes	Yes
Economic and Monetary Community of Central Africa	Yes	Yes	
Economic Community of Central African States	Yes	Yes	
Economic Community of the Great Lakes Countries	Yes	Yes	
Economic Community of West African States	Yes	Yes	Yes
Eurasian Economic Community	Yes	Yes	
European Economic Area	Yes	Yes	Yes
European Free Trade Association	No	No	No
European Union	Yes	Yes	Yes
Georgia, Ukraine, Azerbaijan, Moldova Free Trade Agreement	No	No	No
Greater Arab Free Trade Area	Yes	No	
Gulf Cooperation Council	Yes	No	No

TABLE 1.1 (*cont.*)

Organization	Third-party review	Standing tribunal	Amicus briefs
Intergovernmental Authority on Development	No	No	No
Latin American Integration Agreement	Yes	No	No
Mano River Union	No	No	No
Melanesian Spearhead Group	No	No	No
North American Free Trade Agreement	Yes	No	Yes
Organization for the Harmonization of Corporate Law in Africa	Yes	Yes	Yes
Organization of East Caribbean States	Yes	Yes	No
Organization of Islamic Cooperation	Yes	Yes	Yes
Pacific Island Countries Trade Agreement	Yes	No	Yes
Pacific Islands Forum	No	No	No
South African Customs Union	No	No	No
South African Development Community	Yes	Yes	Yes
South Asia Co-operative Environment Program	No	No	No
South Asian Association for Regional Cooperation	Yes	No	No
South Pacific Regional Trade and Economic Cooperation	No	No	No
Trans-Pacific Strategic Economic Partnership	Yes	No	Yes
United Nations Convention on the Law of the Sea	Yes	Yes	
West African Economic and Monetary Union	Yes	Yes	
World Intellectual Property Organization	Yes	Yes	No
World Trade Organization	Yes	Yes	Yes

[a] When we could not find relevant information, we left the cell blank.
Source: The classifications are based on the treaties governing the organization and official rules governing the dispute settlement procedure.

on the regime) can challenge a member-state government for alleged violations of treaty obligations. This third-party review is commonly executed by an independent standing body with a permanent staff. We refer to these panels as international "courts." Also note that, as will become important later, these courts often formally allow nonlitigant governments to intervene in a case through amicus briefs.

Are these international courts effective? There is fairly wide variation in activity, with some institutions lying dormant or wilting on the vine while

others thrive and appear to provide substantial benefits to their membership.[3] The most successful and deepest international agreements, such as the World Trade Organization (WTO)/General Agreement on Tariffs and Trade (GATT) and the European Union (EU), have vibrant courts that routinely review substantively important aspects of their agreements.[4] This suggests that international courts, where used regularly, support international cooperation in the face of the, sometimes severe, incentives for members to defect from the agreement.

Yet international courts are generally considered weak institutions. They lack the means (physical, financial, or political) to compel states to comply with their international obligations. Thus, it is far from obvious why international courts are both active in reviewing alleged violations of international agreements and apparently influential on the level of compliance with these agreements. The resulting puzzle – whether and how international courts can promote compliance with international agreements – is the central focus of this book.

This puzzle is substantively and normatively important. If international courts can constrain sovereign government actions through their rulings, these institutions can help solve many of the world's most pressing international policy challenges. For example, they can advance global economic prosperity by supporting increasingly liberalized trade through agreements such as the WTO, they can help resolve long-term environmental challenges (such as fisheries resources, pollution, global warming, and more), and they can improve the protection of human rights through such treaties as the European Convention on Human Rights. If not, the proliferation of these institutions is, at best, a distraction and waste of resources. At worst, these institutions are tools governments can use to deceive the global public into believing they are serious about solving major global challenges. Thus, solving this puzzle is important not just for knowing whether these courts facilitate global policy change but also for evaluating the goals and character of the governments that created these institutions.

In this chapter, we first review the classic arguments regarding the difficulty of international cooperation and the potential contribution of international

[3] For example, Gray (2012) provides a comprehensive overview of regional trade agreements and the state of their institutions. Gray finds that a large share of these are either dead or in a "zombie" state, where the organization exists in name only.

[4] On the coincidence of "deep" agreements and legalized DSMs, see Helfer and Slaughter (2005: 938). On the performance of legalized DSMs, see Gray and Slapin (2012), Helfer and Slaughter (2005), and Kono (2007), but see Posner and Yoo (2005).

institutions to overcoming these problems with government noncompliance. We then turn to international courts. Specifically, we engage arguments about how courts can facilitate cooperation in the absence of coercion. In the last part of this chapter, we sketch out our argument and describe our strategy for bringing evidence to bear on two of its implications. Our empirical focus is on one particularly important and successful international organization, the European Union (EU). We conclude the chapter by discussing our methodological approach and the organization of the book.

1. THE DEBATE ON INTERNATIONAL INSTITUTIONS

Historically, international relations scholars have been fairly skeptical of the value of international agreements and the institutions created to implement them. In particular, realists believe the international environment is fundamentally anarchic and therefore hostile to international cooperation. As Hoffman (1956: 364) described it, a state is "a legally sovereign unit in a tenuous net of breakable obligations." International agreements and institutions therefore can do little to shape or constrain state behavior (Bork 1989–90; Boyle 1980). These scholars are particularly dubious of the ability of international legal processes to influence state behavior (Bulterman and Kuijer 1996; Diehl 1996; Fischer 1981, 1982). Rather, power relations among states determine when and how governments obey international law (Morgenthau 1985). This does not preclude all compliance with international agreements. But any such cooperation should reflect a convergence of interests among states and the fact that these agreements reflect the international balance of power (Morgenthau 1985). Similarly, Aron (1981: 820) concludes, "International law can merely ratify the fate of arms and the arbitration of force."[5] International institutions are therefore epiphenomenal and have no influence on the behavior of sovereign states.

The first principles of the realist position seem compelling. It is certainly true that states are powerful, sovereign entities in the international environment. It also is true that these agreements cannot literally compel states. And finally, it is hard to imagine that the agreements do not reflect power politics among these states. However, many scholars ultimately reject the realists' conclusions. We observe states creating and maintaining international agreements, some of which involve the creation of enduring independent institutions. What is more, governments frequently appear to comply with agreements and

[5] See Simmons (1998: 79–80) for a more extended summary of the realist position.

participate in their institutions. Traditional realists are at a loss to explain why (Keohane and Martin 1995).

What might the realists be missing? One set of responses, based in constructivist and normative arguments, revolves around the notion that legally formalizing an international agreement ultimately constrains state behavior. For example, the managerial model argues that treaties are consent-based arrangements designed to serve the interests of the participating states. As such, incentives to deviate should be weak by definition. Further, when such occasions do arise, the norm of compliance with legal obligations should constrain potentially deviant behavior (Chayes and Chayes 1995: 8). Others argue that the notion of consent itself drives compliance. Because treaties are voluntary agreements consented to by the signing states, once a treaty is signed it creates a general legal obligation that necessitates compliance (Byers 1999: 7; Setear 1997: 156; Smith 1991: 1565–6).

The domestic political context could also be important. For example, democracies are accustomed to using negotiation rather than violence as a resolution to conflict, which may reinforce a norm among democracies of resolving international disputes through international institutions (Dixon 1993). Alternatively, the domestic interaction of state and nonstate actors under a new international agreement could promote compliance with the agreement (Koh 1996: 204).[6]

In one sense, these arguments answer the realists' concerns about the effectiveness of international agreements. However, they do so, in part, by assuming away the realists' challenge. They claim that exogenous factors ultimately constrain governments so as to reduce, if not eliminate, the temptation to renege on agreements. Consequently, there is no compliance problem for which international institutions or courts could offer a solution.[7]

For a different set of scholars, this line of argument does not provide compelling answers for why states comply and why international institutions influence the level of compliance with agreements. These scholars, coming from

[6] Scholars have criticized these types of arguments along a number of lines (e.g., see Guzman 2002a). For our purposes here, these theories do not provide the theoretical foundations for when and why noncompliance should occur. For example, Dixon (1993) argues that democracies are more likely to engage in dispute resolution at the international level when engaged in conflicts with each other. But why do we sometimes see democracies following rulings issued by third-party DSMs and sometimes not? Similarly, an argument that the act of consenting to these agreements gives them a self-sustaining normative force cannot explain the conditions under which we should observe noncompliance.

[7] We discuss how our theoretical approach does and does not complement these arguments in the conclusion.

a liberal institutional (or functional rationalist) perspective, propose answers more closely rooted to the first principles of the realist position.

a. *International agreements from a liberal institutional perspective*

As with the realists, liberal institutionalists start with the assumption that governments must voluntarily choose to comply with international agreements. However, they elaborate on this challenge by more fully characterizing what governments hope to gain from signing an international agreement. Specifically, they argue that governments sign international agreements to help resolve common problems that require some collective action, or coordination, among the signatories (Bilder 1989; Keohane 1984). Generally, the collective action challenges are described as a prisoners' dilemma. Two or more governments identify policies that, if adopted by each government, leave the participant states jointly better off. However, each government individually has an incentive to defect and retain its original policies. The challenge is to find a mechanism that helps governments realize the benefits of mutual cooperation despite the incentive to defect. International trade is a typical example of this kind of policy area: two governments might benefit from each lowering trade barriers on goods the other state wants to export, but each government individually has an incentive to cheat and to try to keep its trade barriers high in order to protect its import-competing firms.

According to liberal institutionalists, international agreements can help governments realize the benefits of international cooperation by overcoming the collective action problem. International agreements lay down a codified set of rules that establish expectations for behavior among the agreements' participants. These clearly coordinated expectations of what is and is not permissible behavior allow states to build and cue off of reputations. Specifically, if a state develops a bad reputation for not following the rules, the other participants can point to the violations and punish the state for its bad behavior (e.g., by retaliating in turn). Assuming the threatened punishment is sufficiently severe, the potential transgressor will prefer to obey the agreement (despite the incentive to defect), and otherwise unsustainable international cooperation can be supported (e.g., see Keohane 1984; Schachter 1991). Thus, these scholars argue that governments, motivated by the same first principles identified by realists, have a rational incentive to make and comply with international agreements.[8]

[8] These scholars also argue that the international institutions that often accompany these agreements can help states overcome informational problems that might otherwise undermine

Although a compelling argument, the liberal institutional perspective suffers from two limitations. First, Downs, Rocke, and Barsoom (1996) demonstrate that this liberal institutional logic can explain only *shallow* (as opposed to *deep*) agreements. They show that governments will agree to policy change under an international agreement only that they would agree to without the formal agreement (because reputation building is possible without a formal, written agreement). Yet, as stated earlier, agreements seemingly deeper than those described by Downs, Rocke, and Barsoom (1996) exist. For example, both the WTO and the EU appear to be much more than simple, shallow agreements. That we observe governments frequently obeying the rules and regulations of these regimes is something for which the standard liberal international argument cannot account.

Second, the liberal institutional argument is predicated on the traditional prisoners' dilemma. In this model the costs and benefits of cooperation do not change over time. However, we know this is not the case. And, critically, not only can the costs of complying with the regime's rules vary but sometimes those costs can be large enough relative to the benefits that the governments are no longer playing a prisoners' dilemma (e.g., Carrubba 2005). In this extreme case the governments would be better off with mutual defection than with mutual cooperation. This raises challenges for the traditional liberal institutionalist arguments about the value of international institutions for sustaining cooperation.

In sum, the standard liberal institutionalist argument cannot explain why we see deep agreements, and it cannot explain how states can maintain cooperation in the face of potentially severe variability in the costs of compliance. These two concerns reinforce each other because it is exactly the deeper agreements that are likely to have the more problematic, higher-variability costs. We are therefore left with the questions of how governments sustain cooperation in deeper agreements and what role, if any, international institutions play. Scholarship in what has become known as the rational design literature addresses these issues.

cooperation (Keohane 1984). For example, mutually beneficial agreements can be undermined if there is asymmetric information among the contracting parties (Keohane 1984: 92–5). Suppose one state knows more about the likely consequences of a potential international agreement than its contracting party does. Even if the agreement would be mutually beneficial in reality, the less informed party might be sufficiently concerned with the possibility of deception that it will not sign the agreement. International institutions can help resolve this dilemma if they can act as neutral third parties that facilitate information transmission (Keohane 1984: 94). Our argument explicitly incorporates informational challenges in international agreements, but in a very different way.

b. *International institutions from a rational design perspective*

Building off of liberal institutionalism, rational design scholars start from the premise that "states use international institutions to further their own goals, and they design institutions accordingly" (Koremenos, Lipson, and Snidal 2001: 762). However, unlike the previous work, the rational design literature focuses on the specific design features of international agreements. Koremenos et al. (2001: 764) argue that these design features are of interest because they can help make international cooperation "more feasible and durable." Stated slightly differently, the rational design literature argues that international institutions can help governments achieve otherwise unsustainable – in Downs, Rocke, and Barsoom's (1996) terms, deeper – international cooperation, in part because they can help sustain cooperation in the face of sometimes highly costly shocks to the incentive to cooperate.

To see how, consider the flexibility of an international agreement. These scholars believe that the flexibility of an international agreement allows otherwise unsustainable cooperation (Koremenos, Lipson, and Snidal 2001: 773). As the incentives to comply with the regime's rules change, introducing flexibility into the agreement can help keep states from either violating or leaving the agreement. For example, Rosendorff and Milner (2001) demonstrate how escape clauses in the WTO agreement can help governments sustain otherwise unsustainable international cooperation in trade. These authors do so by explicitly modeling the costs of cooperation as changing over time. Escape clauses allow governments to opt out of complying when the costs are sufficiently high such that the government would defect from the regime if not allowed to use the escape clause. As a result, the international agreement survives. Another institutional feature that can facilitate cooperation is a formalized adjudication process. We now turn to that institutional feature in detail.

c. *Courts as rational design*

From one perspective, courts are a straightforward solution to the challenge of maintaining government compliance with international agreements. By construction, courts are designed to be the institution that parties turn to when they feel their legal rights have been violated. Upon an appeal, courts are responsible for interpreting and applying existing law, and their decisions, once made, are supposed to be binding. Further, some argue that highly legalized international courts are in a particularly strong position to enjoy compliance by the agreement's member states (Keohane, Moravscik, and

Slaughter 2000a; Kono 2007: 749; Smith 2000). A highly legalized international court issues binding rulings that are integrated into the domestic legal systems of the member states through *direct effect*, which means the international agreement and its rulings can be invoked and enforced in domestic courts. Thus, to the extent national governments change policy when confronted by an adverse ruling in a national court, highly legalized international courts can overcome the compliance problem. Yet, although legalized international courts are commonly associated with enduring and successful international agreements, existing evidence does not support the argument that legalization *causes* success (Kono 2007).[9]

This empirical finding is hardly surprising given the long tradition of research on judicial impact that shows the limited effect of national court rulings on government policy. The primary actor in the domestic setting that enforces court decisions is the government. Thus, the policy impact of a national court depends critically on the willingness of the national government to change policy as prescribed by the court's rulings. Governments often do so only grudgingly. This is the general point made by Epp (1998) in his seminal work on the "rights revolutions" in the United States, Canada, India, and the United Kingdom. Furthermore, a vast body of research on the United States and, increasingly, other countries indicates that the executive and legislative branches do not routinely acquiesce to adverse court rulings (e.g., Canon 1991; Staton and Moore 2011; Vanberg 2005; Wood and Waterman 1991, 1993).[10]

This is not to say that domestic courts are completely impotent to change government policy – they could provide some leverage over governments for international courts. But the judicial impact literature does highlight that such judicial power should not be assumed; rather, we need an argument for how and under what conditions a domestic court ruling can influence government behavior. A relatively recent and growing set of studies does just that (e.g., Carrubba and Zorn 2010; Conant 2002; Staton 2010; Vanberg 2005). In sum, existing work on domestic courts suggests that domestic court influence on government behavior is no more than conditional and therefore casts doubt on the argument that highly legalized international courts, by borrowing on the authority of national courts, automatically gain compliance with their rulings.

[9] Kono (2007) investigated whether more legalized dispute settlement mechanisms (DSMs) promoted greater trade liberalization in preferential trade agreements than less legalized DSMs did. He found that the existence of a standing third-party review body was associated with greater trade liberalization. But there was no difference in trade liberalization that resulted from more legalized attributes of the DSM, including whether the rulings could be enforced through domestic courts.

[10] We provide a detailed discussion of this subject in Chapter 6.