

ASSESSING THE EFFECTIVENESS OF INTERNATIONAL ADJUDICATION

By Anne-Marie Slaughter and Alec Stone*

Our project is an interdisciplinary one, engaging the theoretical and empirical concerns of both political science and international law. Contrary to what mainstream political science/international relations theory has been predicting for more than a decade, there appears to be an increased reliance not only on international institutions to help govern international affairs, but also on formal dispute resolution and law. In the past decade, previously existing courts have become more assertive, new courts have been created and a range of formally nonjudicial institutions have begun to behave in quasi-judicial ways (e.g., the UN Human Rights Committee and the General Agreement on Tariffs and Trade (the GATT) dispute-settlement panels). One might ask if we are not seeing something like a judicialization of international life, and one might try to account for this process.

We have begun a comparative examination of supranational courts as a means of generating a framework for understanding the effectiveness of adjudication at the international level. We are only in the initial stages but, simplified, our framework has three main components:

- (1) the identification of a set of factors, or initial conditions, that facilitate the development of effective supranational adjudication;
- (2) the schematization of a dynamic process that we will call the judicialization of international or transnational relations;
- (3) a description of what a judicialized world might look like as it begins to take shape. We will take each of these, briefly, in turn.

The most important systemic or general condition, we argue, is the nature of the international community in which the court is embedded. Our central claim is that relations within a community of states—both political and legal relations—will meaningfully differ as a function of the kind of states that make up this community. Recent work in international law and international relations has made the point that we need to go beyond the traditional models that emphasize the similarity of like units—sovereign states. In its most basic guise, we can distinguish international communities—or zones—of liberal states from communities of illiberal states or from zones including liberal and illiberal states. Liberal states are those in which we find more or less representative government, competitive elections, the commitment to the protection of civil and political rights and a judiciary capable of ensuring respect for the rule of law. Economically, we find market economies and a system of property rights.

Why distinguish among liberal and illiberal states? Most importantly, when compared with international relations outside of liberal communities, we notice that within zones of liberal states: (1) wars do not occur; disputes occur, but their resolution is effected peacefully; and (2) partly in consequence of the first and partly in consequence of the liberal conditions themselves, relatively more dense networks of transnational transactions develop. Theoretically and empirically, the arguments for why this is so are complex and somewhat inconclusive, but we can make some deductions. Relative to international relations outside a zone of liberalism:

- (1) Liberal states will rely more heavily on legal rules—such as those established by treaties—to govern their relations, and they will more often rely on adjudication to resolve disputes, both intergovernmental and transnational.
- (2) International legal instruments will more often acknowledge, explicitly or implicitly,

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that the behavior of nonstate actors—individuals and groups (including firms)—is being regulated.

- (3) Monitoring compliance with and enforcing international legal agreements is facilitated by shared legal traditions of the contracting parties and by the relative transparency of government behavior.

Our second condition is dynamic, the judicialization of transnational legal relations. Judicialization is the process by which international legal norms—the norms of treaty law or the jurisprudence of a court—come to penetrate and be absorbed by transnational and transgovernmental society, including policy makers and self-interested firms and individuals. We are exploring what initiates and sustains this process. The end point of this process can be described in terms of effectiveness. As a rough definition of effectiveness, we use a domestic analogy: Supranational adjudication can be described as more effective to the extent that the decisions of international courts come to have more or less the same impact as judgments issued by domestic courts. Thus, we are interested in exploring the process by which effectiveness is enhanced over time.

Simplifying again, the main components of judicialization can be arranged into groups.

(1) *The structure and mandate of the court or dispute-resolution mechanism.* Within this first group, we are focusing on three propositions, for the most part quite standard.

First, courts that are established by specific treaties, codifying specific rights and duties, are in a much better position to develop the treaty community into a legal community. Judicial lawmaking, which is inevitable but which can also weaken a court's political legitimacy, is somewhat counterbalanced by the fact that the court is explicitly charged with enforcing what becomes in effect the constitution of the international regime.

Second, treaty communities that recognize nonstate actors' legal personality or legal interests are much more conducive to judicialization than are communities—or regimes—consecrated on the traditional model of states as monolithic, unitary actors (e.g., the European Convention on Human Rights, the Treaties of the European Communities and Union and, indirectly, the GATT and NAFTA).

Third, compulsory jurisdiction is more conducive to judicialization than is voluntary consent.

(2) *The politicization (the self-interested use) of dispute resolution.* "Politicization" is a charged word; we mean generally that petitioners to supranational courts seek outcomes that they are unable to achieve either in their own domestic legal and political systems, or in normal international political processes. Put differently, litigators are asking supranational courts to provide them with policies that they believe they either cannot get or are unlikely to get by other means. Thus, self-interested behavior on the part of litigators drives judicialization. Because these legal regimes are porous—they admit the legal interests of nonstate actors—the level of litigation is potentially far higher.

(3) *Dispute resolution itself.* This is a set of components including: the quality of the court's reasoning; the court's use of precedent and the building of a case law; the court's balancing of the respective and legitimate interests of the parties to the case relative to the development of the law of the community of the regime; and the court's development of special expertise in the area of the law being interpreted. These factors reinforce the perceived neutrality and thus the legitimacy of the court and of the rule of law. In Professor Franck's language, these factors enhance "compliance pull." Additionally, they facilitate indirect—or feedback—effects on the law and politics of litigation, structuring the future.

Bringing these components together suggests that a metaphor drawn from Alec Stone's work on comparative constitutional politics—the "jurisprudential transmission belt"—may be appropriate: self-interested litigants use courts to obtain desired politico-legal goals; the courts, unable to activate themselves, rely on litigation to provide themselves with the necessary opportunities to develop the law of the international regime; a

court's jurisprudence—its legal reasoning, its balancing techniques, its principled application of expertise in both the law and the substance of the issue area being regulated—in turn enables, but also constrains, by channeling future litigation activity. The result is a diffusion of legal norms throughout the regime and the gradual accommodation of the language of law with the language of policy.

A third component of our framework is more speculative: to map what a supranational rule of law community might look like. We are particularly interested in how links between supranational and national levels of governance are forged and tightened. Vertically, we already see highly structured interjudicial dialogues between supranational and national courts, and the beginnings of a kind of mutual recognition of each level's authority. We also see that governments and legislators participate in the embedding of the regime's norms within the national legal system, for example, by transposing these norms into national law. Horizontally, we see that as the regime's legal norms diffuse and take on more formalization and clarity, a move to harmonize law and administration is occurring in the interest of reciprocity and—with respect to transnational society—in the interest of equality before the law.

When we have reached the stage (and we are moving in that direction) where political and judicial authorities at both the national and supranational levels begin to coordinate their behavior and become concerned with guaranteeing what is in effect equal protection under the regime's laws across the regime's territory, we are in the presence of a supranational rule-of-law community.

PEACE IN OUR TIME? CAUSALITY, SOCIAL FACTS AND NARRATIVE KNOWING

By John Gerard Ruggie*

Introduction

In one form or another, a rivalry between realism and institutionalism has been an enduring feature of systematic thinking about international politics since the eighteenth century. Over the past decade or so, realism has taken a decisive turn away from the practical reasoning that had characterized its epistemology for the better part of two centuries, toward a narrowly construed positivism.¹ This development has substantially compounded the differences between the two intellectual traditions. John Mearsheimer, in a recent neorealist revival of the rivalry, subjected institutionalism to the standards of that positivism and found it wanting.² By imputing "causal logics" to various institutionalist theories and adducing contrary "empirical evidence," he claims to have shown that international institutions are not a significant factor in promoting peace, and that neorealism, by implication, offers a better guide to foreign policy in the new era.

For neorealists even the existence of a West European "security community"—a geopolitical formation in which war is highly improbable if not unthinkable³—illustrates, rather than challenges, their argument. They understand peace in that part of Europe to be simply an unproblematic by-product of America's response to the Soviet threat. Now

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¹ This shift was inaugurated by KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

² John J. Mearsheimer, *The False Promise of International Institutions*, *INT'L SEC.*, Winter 1994/95, 5–49. I have commented on the substance of Mearsheimer's argument in John Gerard Ruggie, *The False Promise of Realism*, *INT'L SEC.*, Summer 95, 62; here I focus on epistemological differences between the two positions.

³ The concept of "pluralistic security community" is due to KARL W. DEUTSCH ET AL., *POLITICAL COMMUNITY IN THE NORTH ATLANTIC AREA* (1957). Western Europe is, if anything, more institutionalized than the ideal-type that Deutsch and his colleagues envisioned.