How Does International Law Work?:
What Empirical Research Shows

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Like many other fields of legal scholarship, international law has seen an explosion in empirical work in recent years. On the one hand, this long-overdue change reflects developments in international relations (IR) theory, the sociology of law and globalization, economics (with its institutional turn), and the increasing influence of social science in legal scholarship. On the other hand, it reflects the objective expansion in the importance and visibility of international law in the 1990s, and the increased role played by international institutions, which has spurred this empirical work. Although the empirical project is still in an early phase, it is expanding through the efforts of scholars in multiple disciplines.

The earlier dearth of empirical work on international law reflected, in particular, the enduring importance of the realist tradition in international relations scholarship. For classical realists, state power determined outcomes on the international stage, and international law was “epiphenomenal,” without independent causal impact on outcomes. While realism is still an important paradigm and has been applied to international law, the mainstream of international relations scholarship now reflects the rational choice institutionalist tradition and (to a lesser extent) constructivist insights. For rational choice institutionalists, international institutions facilitate state cooperation by reducing the transaction costs of negotiating agreements with multiple parties, and by assuring states that compliance with them will be better monitored and enforced. For constructivists, international institutions exercise normative power, shaping states’ perceptions of problems, available solutions, and their own state interests. Legal institutions, as embodiments of international cooperation, are central objects of study within these traditions, and so political science has contributed a good deal to the recent expansion of empirical work on international law. In addition, economists have increasingly turned to study the role of institutions at the international level, whether for the supply of global public goods or to facilitate the resolution of other cooperation and coordination challenges.

In parallel, there has been a rise in scholarship on law and globalization that comes out of or is heavily informed by sociology. Halliday and Osinsky (2006) categorize four such approaches: world systems theory (focused, like IR realism, on structural power, but also attending to the role of transnational capital, with law again being epiphenomenal); world polity theory (a constructivist theory in which international legal scripts are conveyors of globalized cultural norms); postcolonial theory (focusing on the interaction of global legal norms and domestic systems in developing countries); and law and development theory (addressing the

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impact of transnational legal transplants). Scholarship linked to these approaches has also empirically studied the actors, mechanisms and arenas through which international and transnational law have effects within countries, as well as the limits of these impacts.

From the other end of the methodological spectrum, traditional international legal scholarship was mainly focused on doctrinal and normative concerns, and paid special attention to the International Court of Justice (ICJ), a relatively little-used tribunal. Such scholarship tended to assume rather than examine the efficacy of international law and cooperation, and was normative in character, bemoaning instances in which international legal institutions were unable to constrain power or affect domestic practice. In contrast, much of the new empirical scholarship, rooted in the various social science institutionalisms, takes the reach and efficacy of international law as empirical questions, to be neither assumed (as in traditional doctrinal scholarship) nor explained away as unimportant (as in the realist and world systems traditions). In tackling these questions of scope and efficacy, scholars are using a wide variety of methodologies, both qualitative and quantitative, and examining a diverse array of questions in various substantive areas of international law. A central question becomes the conditions under which international law is produced and has effects, as well as the actors and mechanisms involved. Both quantitative and qualitative methods are needed. Many discussions of “empirical legal studies” focus almost exclusively on quantitative work, and we thus complementarily stress the importance of qualitative research, particularly for uncovering the mechanisms and key actors involved. We point to leading examples of different empirical approaches suited for particular questions, as well as studies that use mixed methods.

This chapter is organized around three overarching questions: (i) why international law is produced and invoked in particular situations, focusing on the role of law in facilitating international cooperation, the legitimating role of law as a reflection of hard or soft power, and the expressive aspects of law; (ii) how international law is produced, focusing on the actors, institutions, mechanisms, and processes involved in such production; and (iii) how and under what conditions international law matters, in terms of affecting domestic law, the behavior of states and other relevant actors. These questions regarding different stages of the international law process are both interrelated and distinct. On the one hand, the questions are interrelated since, for example, the effectiveness of international law can be a function of how it is produced and invoked, and such effectiveness (or lack of effectiveness) recursively creates incentives (or disincentives) for the production of new international law. On the other hand, the questions are distinct since the answers to the questions why and how international law is produced do not necessarily tell us how international law has effects. The effects, for example, may be unintended. It is thus important to delink the questions and empirically investigate each stage of the international legal process (see e.g. Simmons 2009).1

For each of these organizing questions, we contend that future insights will require increased attention to the domestic bases of international law. Understanding state behavior requires “unpacking” the state and exploiting variation at the national and subnational level. This strategy applies to studying both the production of international law and its implementation, as well as to the dynamic interaction between these two processes. Understanding the interaction of international and domestic law, politics and institutions also requires continued use of diverse mixed-method research strategies. The combined effect of relaxing the assumption of the state as a unitary actor, and the introduction of more complex research strategies, requires a definitive

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1 We thank Karen Alter for her comments on this point.
break from the realist tradition of international relations. International empirical legal scholarship must remain a distinct interdisciplinary field that takes both law and power seriously. Finally, we should assess variation between different areas of international law. Different actors and institutions are present, and distinct processes and mechanisms are used in areas ranging from international human rights and criminal law to international trade, investment, and regulatory law.

I. Why Produce and Invoke International Law?

International law can help to resolve different types of common challenges that states and other actors face, ranging from collective action problems (such as addressing common environmental concerns) to coordination problems (such as harmonizing regulatory standards). International law, in addition, can serve to institutionalize and legitimize policy outcomes desired by particular states and other actors, advancing some positions over others. We can think of the former approach as focused on problems, and the latter on power as the primary explanatory factor in understanding international law. In many situations, problem-focused and power-based explanations may both have purchase. Finally, in some areas, such as human rights law, international law serves primarily expressive functions.

The problem-focused approach conceptualizes the question of why states use international law as a function of different types of challenges that states face. Stein (1983) classifies the problems that states confront in international politics into two categories: “dilemmas of common interests” and “dilemmas of common aversions.” Dilemmas of common interests arise when two or more states would benefit from cooperation but face incentives to renege on their agreements, as in prisoners’ dilemma and collective action problems. The solution to these dilemmas is cooperation, in which states may create formal legal regimes to provide monitoring, clarification, and enforcement of international agreements, thus reducing the temptation to renege. Dilemmas of common aversion arise when states seek to avoid a particular outcome, and need to coordinate their behavior in order to do so. This situation often arises in international standard setting because states have reasons to agree on one standard, but may disagree on which standard to use. International agreements regarding air travel and telecommunications are examples where states agree on common international rules to coordinate behavior. Certain problems by their nature involve trans-border externalities and collective action and coordination challenges, and there are numerous case studies that use process-tracing methods to assess what gives rise to international cooperation.

Related problem-oriented approaches examine how state leaders and other actors invoke international law to respond to domestic political challenges. States may invoke international law to make credible commitments to domestic audiences. Similarly, interest groups and institutions within states may seek to lock in particular policies through international agreements. Helfer et al (2009), for example, assess how “islands” of effective international adjudication arise in their study of the Andean Tribunal of Justice, which has issued over 1,400 decisions over a 25-year period, more than 90% of which concern intellectual property. Using a multi-method approach, they attribute the success of the IP “island” to demand from domestic institutions.

State leaders may also invoke international law to provide themselves with domestic political cover in situations where there is domestic resistance to policy change. Allee and Huth (2006) examine 348 territorial disputes across all regions for the period 1919-1995, and assess whether decisions were made to resolve the dispute (politically) through bilateral negotiations or
(legally) through a third party arbitrator or tribunal. Their statistical analysis supports the argument that leaders pursue international dispute settlement when they anticipate considerable domestic political opposition to the making of concessions regarding an international boundary dispute. The litigation outcome provides leaders with political cover when they eventually settle the dispute. Their work complements the findings of Ginsburg and McAdams (2004) whose empirical analysis of ICJ decision making illustrates that international courts are most effective when they help facilitate coordination by disputants through creating a focal point for settlement, rather than imposing a solution. They show that the ICJ is relatively effective in helping states coordinate their behavior in areas such as border disputes, but less effective when conflict has already broken out.

Other scholars focus on power as a determining factor in the production of international law. They argue that where the selection of different terms in an international agreement has distributive implications, power is likely to be a central factor in shaping these terms. In the case of global communications Krasner (1991) examines how powerful states can use their superior bargaining power to dictate the terms of cooperation to weaker states. A synthetic approach views international agreements as involving both negotiation over the terms of cooperation and the subsequent monitoring and enforcement of these terms, such that power-based mechanisms are always present in the production of international law.

A related empirical literature examines the extent to which power attributes affect law’s invocation after states agree to an international treaty. This issue has been most thoroughly considered in the rich empirical literature assessing the patterns of invocation of the dispute settlement system of the World Trade Organization (WTO), and, in particular, whether the system’s use reflects bias in favor of large and wealthy countries. Bown (2005) examines whether the legal system’s operation is biased because of power-oriented factors, contending that the WTO’s enforcement mechanism favors use of the legal system by powerful countries with large markets. He finds that, controlling for other factors, a country is less likely to initiate legal claims when it is poor or small, when it is particularly reliant on the respondent for bilateral assistance, and when it lacks the capacity to retaliate against the respondent by withdrawing trade concessions. Busch et al. (2009), in parallel, assess the impact of legal capacity in international dispute settlement. They conducted a survey of all WTO members to derive a new measure of WTO-related legal capacity based on survey responses. They find that WTO members who possess greater legal capacity are more likely to challenge domestic antidumping (AD) measures before the WTO, and less likely to be targeted by national AD measures. Their data indicate that legal capacity affects patterns of dispute initiation and underlying antidumping protection among WTO members at least as much as market power.

Where states choose to cooperate, they have choices over the form and legal nature of the instrument used. These instruments can assume a more or less binding nature, be more or less precise in their terms, and involve more or less delegation to third parties for the monitoring and enforcement of legal commitments (Abbott & Snidal 2000). Quantitative empirical work which examines choices in the design of international law instruments is still in its infancy, but scholars are increasingly producing large-n databases regarding treaties. Koremenos (2005, 2007) uses a random sample of treaties to assess when and why states choose to delegate issues to international organizations. She shows (2005) that states are more likely to include dispute settlement provisions in treaties when they face complex cooperation problems characterized by uncertainty, incentives to defect, or time inconsistency. She also finds (2007) that states respond to uncertainty through limiting the duration of treaties and including escape clauses. Mitchell
(2003) and Gamble et al. (2006) also have compiled databases which will facilitate future quantitative empirical research within and across issues. Mitchell comprehensively surveys international environmental agreements regarding their features and formation, while Gamble’s Comprehensive Statistical Database of Multilateral Treaties focuses on multilateral treaties of all types over an extended time period. In comparison, there is significantly less quantitative work on state decisions to use customary international law or general principles of law. These sources of law have been subject to much speculation but need more empirical analysis.

These two approaches (problem-focused and power-based) are less helpful in explaining the production of human rights treaties that address the treatment of individuals within states. Both rationalists and constructivists have advanced and empirically tested expressive theories regarding why states ratify international human rights treaties. The world polity school (introduced above) contends that states enter into international human rights treaties to signal their adherence to global cultural norms, variably stylized as “universal,” “modern” and “advanced”; these scholars maintain that treaties expressively reflect and convey a global acculturation process. Simmons (2009), working in the rationalist tradition, provides quantitative evidence in support of the claim that states indeed ratify international human rights treaties for expressive reasons, but they are more likely to do so if they believe in the norms and can comply with them at a reasonable cost.

Beyond examining the legitimating and expressive functions of international law in international and domestic politics, we have relatively little literature on the interaction of national characteristics (such as levels of democracy, type of legal system, trade integration, and internal heterogeneity) and the decision to invoke international legal institutions. Miles and Posner (2008) have created a dataset of over 50,000 treaties to examine which states enter into treaties and their reasons for doing so, finding that “older, less corrupt and larger states… enter into more bilateral treaties and ‘closed multilateral treaties’” while small states are relatively more likely to join “universal multilateral treaties.” In the rationalist tradition, they explain these findings based on differential benefits and costs, particularly transaction costs. Powell and Mitchell (2007) analyze the domestic legal system as a determinant of the propensity to accept and maintain the compulsory jurisdiction of the International Court of Justice. They find that civil law countries are more likely than common law or Islamic legal systems to accept compulsory jurisdiction, and that common law systems are more likely to include reservations when accepting compulsory jurisdiction. They show that states accepting compulsory jurisdiction are also more likely to include mandatory reference to the ICJ in compromissory clauses of treaties.2

In sum, empirical studies have assessed the reasons why international law is produced and invoked, including, in particular, functional problem-based, power-oriented, and expressive explanations. A key ongoing role for empirical work will be to document variation in the explanatory factors giving rise to international law in different domains, both generally and regarding the particular terms agreed. The literature’s evolution suggests, in particular, the payoff from unpacking the state in the empirical assessment of why international law is produced and invoked. This approach opens up the black box of the state to examine how international law provides tools for a wide variety of actors on the domestic plane in different national contexts.

2 A compromissory clause is a clause which provides for the submission of disputes to a specified forum, such as the ICJ.
II. How is International Law Produced?

The discussion of why international law is produced and invoked is closely related to the question of how international law is produced. Empirical work, and in particular resulting from qualitative research, depict the range of actors engaged in international law’s production and the key mechanisms and processes they use. This section continues to examine how empirical work has broken down the state in assessing the production of international law, looking at the role of state bureaucracies and private actors, together with the independent role of international institutions, and in particular international tribunals, in producing, consolidating, and clarifying international law. It concludes by examining the various mechanisms and processes used in producing international law in distinct domains. International law can be constituted from above by powerful states and international organizations, from below by sub-national public and private actors, or by a combination of forces working transversally across borders.

A. The role of states and state bureaucracies

The modern system of international law as usually understood emerges with the rise of the modern inter-state system, canonically originating with the Peace of Westphalia. International law for its first centuries was inter-state law, and hence states are the main object of analysis. This tradition continued with the rise of American political science and international relations theory, and states remain central actors in most empirical analyses of international law and politics. International law, it is often argued, develops as a function of state interest and state power, as discussed in Part I. States are traditionally modeled as having a unitary preference function on the international plane.

Focusing on states has certain methodological advantages. Because there is a discrete number of states in the international system, and because all states share certain characteristics, the state forms a workable unit of analysis in studying international phenomena. The range and variety among states, the concepts used for assessing variation among states in comparative politics, and the availability of state-level data on a wide range of variables, all serve to make state-centered research questions amenable to large-n statistical analysis.

Yet states are also arenas for the interaction of sub-state entities, non-governmental actors, and individuals. Analysis of how the interaction of sub-state forces produces a “preference” thus provides a useful supplement for many state-level studies. Such analysis leads us to consider, first, the role of state bureaucracies, which may be in competition with each other for policy leadership, and then the role of private actors, who may work with public actors or independently of them.

Particular state agencies often take the lead in representing the state in different functional domains of international law. State-level agencies realize the need to coordinate and cooperate with their counterparts in other countries to achieve domestic regulatory goals, spurring the production of international law in specific areas. They respond, in particular, to the mismatch between the spread of global markets and the limited reach of national law, which has permitted private actors to engage in jurisdictional arbitrage. Moreover, the externalities of foreign regulation (or the lack of regulation) on domestic constituencies mobilize these constituencies to press regulatory agencies to take action. These two phenomena have spurred agencies, particularly in larger states, to take the initiative in developing trans-governmental
regulatory networks that operate under treaties or in less formal ways. These networks can, in turn, be in competition with each other where a particular problem falls within the jurisdiction of multiple agencies (such as the regulation of agricultural biotechnology, to give one example) (Pollack and Shaffer 2009). Scholars have used case studies to assess how these trans-governmental regulatory networks operate in many different domains to produce international hard and soft law instruments, including for the regulation of finance, competition, and environmental and health and safety protection (Raustiala 2002; Pollack and Shaffer 2001). These attempts to unpack the state provide a richer account of state actors and their motivations, and are useful for understanding the micro-processes of international law production.

B. The role of private actors

Private actors such as corporations, non-governmental organizations (NGOs), and activist networks also play significant roles in producing international law and in creating international institutions to apply it. Sometimes these actors seek to work through national governments, while at other times they are direct participants in international law’s construction. Empirical studies which examine the role of private actors “unpack” the state to understand how sub-national interest groups attempt to advance or entrench policy commitments through shaping international law.

Private actors often enroll states to act on their behalf in the production of international law. Braithwaite and Drahos (2000) interviewed over five hundred individuals from international organizations, government, business, labor and civil society associations to map the webs of influence that work to define regulatory principles and standards in thirteen areas of global business regulation. They show how US and European businesses are often favored because of their ability to enroll the world’s most powerful states to act on their behalf, working through public-private partnerships. Scholars have studied how these strategies operate in WTO dispute settlement. Shaffer (2003) has done extensive field work on the WTO to uncover how private businesses hire lawyers to develop WTO claims and use the threat of bringing a complaint as leverage in bargaining to settle international trade disputes. Judicialization of WTO dispute settlement has unleashed competition for expertise in trade law, which in turn has affected the dynamics of WTO litigation. In this bottom-up way, public-private actor networks shape WTO jurisprudence over time.

Private actors, whether they are businesses, NGO activists, or knowledge-based epistemic communities composed of scientists or members of professions, also act independently of states in shaping perceptions of international problems and solutions. In indirect ways, they affect the development of international legal norms and the institutions that enforce them. In international environmental and human rights law, many studies have addressed the key role of NGOs in shaping outcomes in various domains. For example, Meidinger (2006) shows how transnational civil society networks have created new forest stewardship norms and institutions to enforce them. He assesses the role of these networks in defining and implementing soft law standards, including through labeling regimes that convey whether lumber has been harvested in an environmentally sustainable manner. Civil society programs frequently stimulate competition by business-based programs, spurring dynamic processes of competitive standard setting.

Mattli and Büthe (2003) have taken the lead in empirical work on private standard setting, using an internet-based survey to create a comprehensive data set on international standardization. While realists in international relations theory contend that state power explains
the outcome of international standards negotiations (Krasner 1991), Mattli and Büthe find this explanation to be insufficient. They argue that domestic institutional arrangements also matter because they affect the mobilization of domestic business interests. From their survey data, they find that European firms are much more involved than U.S. firms in international standard-setting institutions because the European Union domestic regulatory context gives them an advantage compared to the more decentralized US model in which authority is frequently retained by sub-national units of government. The result is that US institutions are less conducive to US business coordination for purposes of international standard setting.

Some international law is privately produced, and private parties then invoke it before domestic courts. Private actors directly produce international commercial law. Levit (2008) has engaged in extensive field work and interviewing regarding the creation and application of the law of documentary credits by the International Chamber of Commerce (ICC) based in Paris, France. She shows how the ICC has adopted a set of rules, known as the Uniform Customs and Practice for Documentary Credits (UCP), which governs business practice. The ICC interprets its rules through issuing hundreds of “advisory opinions” intended to clarify ambiguities. Most banks will not issue letters-of-credit unless they are subject to the UCP. When exporters and importers identify the UCP as their chosen law, these rules are applied by national courts and arbitral bodies that enforce them.

Because international commercial law is typically applied by national courts, private international law scholars stress the importance of analyzing how international law interfaces with domestic legal systems. Empirical studies of private transnational litigation show how international, and national law and institutions, interrelate. Whytock (2008) finds that while transnational arbitration rates in the U.S are increasing and transnational litigation rates are declining, both arbitration and litigation remain important methods of transnational dispute resolution. He finds that there is considerable judicial involvement at the post-award stage of the transnational arbitration process, and thus contends that national courts remain very involved even when arbitration is used. International commercial law thus does not displace national law, but rather supplements it.

C. The role of international institutions: international tribunals

The rise of international organizations has forced scholars to consider them as independent actors worthy of analysis. International organizations are not only a product of inter-state interaction, but are also forums for state negotiation, and themselves sources of international norms). Scholars have undertaken ethnographic work to understand how international organizations operate internally, affecting the role that they play in international policy formation and the production of international law (see e.g. Merry 2006). These organizations sometimes compete with each other for primacy in establishing international legal norms (Halliday & Carruthers 2009). In this section, we focus on the role of international tribunals, an increasingly important international organizational form for the construction and clarification of international law.

Recent years have seen a proliferation of international tribunals exercising jurisdiction over trade, human rights, investment, criminal and other matters. While there were only a handful of standing international courts in the mid-1980s, the Project on International Courts and Tribunals (PICT) identifies twenty-five as of this writing. These tribunals include twelve international courts and arbitral bodies, nine regional bodies, and four hybrid criminal courts
involving a mix of domestic and international judges. This development has generated some descriptive comment, analysis of judicial biography and much normative speculation as to whether or not the tribunals can be considered “independent” of the states that create them, and thus whether they exercise independent authority in the production, consolidation, and application of international law. Critics have argued that international tribunals are simply agents of states that create them, and are of minor importance. Others have responded that international courts do in fact play important roles, if not as central as the doctrinalists might wish. The key analytic question concerns whether the institutionalization of dispute settlement affects the production, consolidation, and application of international law, and, as a result, policy outcomes.

Much of this debate echoes an earlier one concerning the European Court of Justice (ECJ), whose critical role in the construction of the European Union is now uncontested. Virtually all agree that, by making European law directly effective and superior to national law, the ECJ spurred member states to closer cooperation. Scholars disagree, however, as to whether or not the ECJ should be understood as an agent of its member states (simply facilitating states’ ability to accomplish their goals, and thus implying a lack of independence in some sense), or as an actor that, once established and institutionalized, exerts an independent influence on the production of European Community law and on downstream outcomes. Stone-Sweet and Brunell (1998) developed a comprehensive dataset of preliminary references to the Court. From their analysis of this data, they argue that the process of integration through ECJ case law was unanticipated by national governments and that private litigants as well as the ECJ played an active role. Alter explains how ECJ decisions mobilized domestic actors, including lower court national judges that helped to consolidate EU law (Alter 2001). Nonetheless, Carruba et al (2008), while they do not call into question the ECJ’s significant role in European integration, present quantitative evidence that political constraints do affect ECJ resolution of particular legal issues within cases, whether out of judges’ concern with potential legislative override or (especially) with noncompliance. The unit of analysis in their study is the within-case legal issue rather than the case outcome as pro-plaintiff or pro-defendant.

Ultimately, the independence of international judges from the states that designate them (and thus judges’ role in the production, consolidation, and application of international law) is an empirical question which a small but increasingly sophisticated literature has begun to address. In some ways, the independence of judges is easier to analyze at the national level because judges are typically appointed by states that are parties to international agreements. A relatively straightforward hypothesis is that judges will favor their own state when given a chance. This hypothesis is somewhat easier to test at the international level than at the national level because judges are typically appointed by states that are parties to international agreements. The identity of the appointing state for international judges is easy to identify. The relative independence of individual judges from the states that appoint them does not in itself mean that international tribunals as a whole do (or do not play) an independent role in producing, consolidating, and applying international law. Yet everything else being equal, evidence that judges decide cases independently of the positions of their appointing state suggests that international tribunals are more likely to adopt independent roles based on their own policy preferences in interpreting and constructing the law’s meaning over time.

Empirical research has reached conflicting results regarding the independence of judges from the states that appoint them, which could reflect differences in the jurisdiction of the courts
studied. Analyzing the International Court of Justice, Posner and de Figuierdo (2005) use a multivariate analysis and find that judges rarely vote against their home state, and that they favor states whose wealth level is close to that of their own state. They also show weaker connections between voting patterns and political and cultural similarity of the states that are parties to a dispute, but find no evidence of regional bias (although they have little data regarding this last issue because of the lack of participation of two-thirds of the UN membership).

Voeten (2008) takes a similar approach in his comprehensive analysis of voting patterns on the European Court of Human Rights (ECtHR), the judicial body that oversees compliance, by the 47 states belonging to the Council of Europe, with the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Voeten concludes that the overall picture of the ECtHR is mostly favorable in terms of judicial independence. He finds that ECtHR judges frequently vote against their home state, although they are somewhat less likely to vote against this state than are the other judges on a panel. When the state in question loses the case, judges from the state vote against it 84.2% of the time, as opposed to the base rate of 92.3% for non-national judges. When the state in question wins, the judge from the state is likely to vote against it only 4.7% of the time, compared with the base rate of 19.4%. Thus, judges exhibit considerable independence, but cannot be considered fully impartial. Judges deciding cases in which their country is not a party are not more likely to vote in favor of the positions of countries with whom their own state trades or otherwise shares similar interests, compared to other countries (Voeten 2008: 429). These findings contrast with those of Posner and de Figueirdo who find bias at the ICJ. This contrast could reflect the fact that the membership of the ECtHR, and thus the appointment of judges to it, is limited to European countries, which are relatively more homogeneous in their interests and views than is the overall body of UN members, as well as the fact that the ICJ is structured more like an arbitral body than a court (Ginsburg and McAdams 2004), and so there is some expectation of loyalty on the part of national judges.

Voeten also finds considerable evidence that ECtHR judges exhibit policy preferences along a spectrum of activism and restraint. He finds, in particular, that judges from former socialist countries were more likely to be activists in rectifying human rights injustices. They were also less likely than judges from other European states to support their own government, or to support governments from other former socialist countries when their government was not a party. This latter finding is (nonetheless) consistent with arguments in the rationalist tradition regarding underlying state preferences. New democracies, it is argued, are using international legal devices as a pre-commitment mechanism, tying their own hands at the international level (Moravcsik 2000).

Given its status as the most mature and productive of the international criminal tribunals, and its role in producing and consolidating the field of international criminal law, it is natural that much attention has focused on the International Criminal Tribunal for the former Yugoslavia, commonly referred to as the ICTY (Hagan 2003). Some of this literature has addressed whether the tribunal has been biased. Meernik and King (2003) found no evidence that Serbs were treated more harshly by the Tribunal, allaying concerns of “victor’s justice.” Meernik (2003) also finds that the presence on a panel of more judges from NATO countries is associated with higher rates of acquittal, and no higher levels of sentencing. From a constructivist perspective, such exercises of impartiality help to legitimize an international court, empowering it as an actor in constructing the emerging field of international criminal law.

In the field of international trade, studies have examined whether WTO jurisprudence has shaped the meaning of WTO law in ways not anticipated by states. These studies focus on the
fact that complainants win far more frequently than respondents at the WTO (about a 90% complainant success rate for panel and Appellate Body decisions combined). This pattern raises the empirical question of whether international trade tribunals have been biased in favor of free trade outcomes. Maton and Maton (2007) use multivariate analysis to show that the complainant advantage in winning cases is not explained by such external factors as economic power, involvement of third parties, or status of the complainant as an experienced repeat player. Colares (2009) covers a broader set of cases, and adds additional control variables, such as case type and subject matter, party identity, and product type, but uses a bivariate approach. He finds that selection effects, asymmetric incentives, and “playing for rules” cannot explain the finding that complainants win some 90% of cases. Instead he contends that interpretation of the WTO agreements has favored a free-trade normative vision, indicating biased rule development, and providing some evidence of judicial lawmaking.

Colares, however, does not examine the possible explanation that respondents are systematically contesting low-quality cases for domestic political reasons, even though they know they will lose these cases. That is, respondents may be using WTO dispute settlement to provide political cover, attempting to show the affected domestic industry and its political supporters that the government is doing everything possible to uphold the trade-restrictive measure. The fact that the WTO system lacks retrospective remedies facilitates this political response because a member can effectively maintain an illegal trade measure for almost three years of litigation without being subject to any retrospective legal sanction. Complementary qualitative research would help to explain the quantitative findings.

Individuals and individual backgrounds can have an impact on the institutional development of courts, which, in turn, affects the construction and production of international law. Hagan (2003) examines how a charismatic chief prosecutor, Louise Arbour, strategically chose key cases and worked the media to establish the legitimacy of the ICTY and help build the evolving field of international criminal law. Dezalay and Garth (1996) assess the backgrounds of international arbitrators in the construction of the field of international arbitration. They find that Americans from elite law firms played a central role, transforming international arbitration to become more formalized and litigious, reflecting a more American litigation model and a less continental European one. More ethnographic work on international tribunals would help to round out the picture of judicial motivation in issuing decisions, shaping procedure, and generating jurisprudence. It would complement the better-developed quantitative research program on the independence of international judges from their appointing states.

In sum, international tribunals have become increasingly important players in producing, consolidating and applying international law. There remains disagreement as to whether they are facilitating states’ abilities to advance interests, or whether they are acting independently of states’ intentions. Regardless of the resolution of this debate, the bulk of evidence indicates that international tribunals do affect policy outcomes in a wide array of contexts, contrary to IR realist contentions.

D. Processes and Mechanisms

Different processes and mechanisms give rise to international law in distinct contexts. The predominant mechanisms used are reciprocity, coercion, persuasion, and acculturation. Through the mechanism of reciprocity, states agree to coordinate policy around international law standards to advance mutual interests, sometimes involving exchanges of reciprocal concessions.
on different issues. States exercise coercion when they use systems of punishment and reward to get other states to agree to particular outcomes. Through the mechanisms of persuasion and acculturation, in contrast, states change their policies because they become convinced of the “correct” or “appropriate” policy, whether by observing and learning from each other’s policies, or by becoming socialized over time (Goodman & Jinks 2004). These mechanisms can, in turn, interact.

These mechanisms can be further broken down or consolidated. For example, Braithwaite and Drahos (2000) list the following seven mechanisms used in the area of global business regulation: military coercion, economic coercion, systems of reward, modeling, reciprocal adjustment, non-reciprocal coordination, and capacity-building. Halliday and Osinsky (2006) add persuasion as an eighth mechanism. We consolidate their more expansive lists. For us, both reciprocal adjustment and non-reciprocal coordination entail mechanisms of reciprocity, the former involving agreement around a single standard and the latter involving exchanges of concessions through issue linkage. Similarly, we see military coercion, economic coercion, and systems of reward as involving the exercise of power in that powerful states can use political and economic rewards and punishments to influence other state behavior. Likewise, we view modeling (which Braithwaite and Drahos define as “observational learning”) and capacity-building as involving different forms of the mechanism of persuasion, but they operate in more or less direct ways. In contrast, Goodman & Jinks (2004) only refer to the three mechanisms of coercion, persuasion, and acculturation in the area of human rights, probably because they do not view the mechanism of reciprocity as operating in this area.

A number of empirical studies examine variation in the use of these mechanisms in different contexts, whether in distinct domains of international law (Braithwaite and Drahos 2000; Simmons et al. 2008), or in relation to particular countries in a single area of law, reflecting variations in the power of the target state and its social context (Halliday & Carruthers 2009), discussed further in Part III. Scholars often uncover the mechanisms at work through case studies using process-tracing methods. A number of scholars have applied ethnographic tools to study how these processes operate in particular domains (Merry 2006; Halliday & Carruthers 2009). Other scholars test these findings more systematically (Simmons 2009).

In the area of economic regulation, studies focus primarily (although not exclusively) on the role of state interest and power in determining outcomes. Studies that focus on power as the primary causal mechanism generally measure it in terms of a country’s market power—that is, its ability to exercise leverage by threatening to curtail market access. Studies that examine how international economic law facilitates mutual gains tend to focus on the mechanism of reciprocity, which permits states to realize these gains. In international trade negotiations, for example, states obtain trade concessions of importance to them by offering reciprocal trade concessions in other sectors. In practice, the mechanisms of reciprocity and coercion through the exercise of market power can overlap in international trade negotiations in some cases, since states with small markets are unable to obtain concessions from other states, so that they have little power to shape the terms of international trade agreements. They are largely takers, and not makers of international trade law, joining the regime only because they would be worse off if they did not.

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3 Researchers engaged in process-tracing attempt to trace the links between causes and outcomes in a case, identifying sequences and the relative importance of different variables.
Market power is exercised to shape not only multilateral regimes, but also bilateral arrangements. Here the driving mechanism is competition among states. Sometimes states compete for inbound investment from large, wealthy countries, and at other times for outbound access to these countries’ markets. Powerful states enter serial bilateral treaties with weaker states in a particular area, which, in turn, can shape an area of law over time. Elkins et al. (2006), for example, examine the spread of bilateral investment treaties (BITs) and find evidence that developing countries compete against each other to conclude BITs with capital exporters. In the process, developing countries agree to terms in bilateral negotiations which conflict with the positions they advance in multilateral fora. We see a similar dynamic in bilateral free-trade agreements where developing countries commit to greater intellectual property protection.

Other studies complement market power-based explanations with domestic ones, showing how institutional developments affect a state’s ability to exercise market power. Elliott Posner (2005), for example, finds that US and EU bargaining power over financial services regulation is affected by each side’s institutional characteristics. He observes that once the EU established and exercised regulatory competence over financial services regulation, US firms pressed the US Securities and Exchange Commission to work with EU authorities to accommodate and recognize EU standards in a number of areas, following an extended period of benign (or malign) US neglect of European approaches. Changes in domestic and regional institutions thus enhance a state’s ability to exercise market power to affect international harmonization processes (see also Mattli & Büthe 2003).

Many empirical scholars nonetheless caution that the production of international law should not be reduced to power-based explanations. In their study of thirteen areas of global business regulation, Braithwaite and Drahos (2000) find that powerful states and business actors indeed play leading roles, but that other mechanisms are more important than coercion (see also Simmons et al. 2008). They contend that the mechanism of “modeling” is “the most consistently important mechanism” used in the harmonization of business regulation. Modeling consists of observational learning through which one state’s regulatory approach becomes a model for others, and may be harmonized through international soft-law guidelines, provisions of technical assistance, or hard-law instruments. They find that US and European regulatory models are most frequently chosen as global templates, with the result that global legal norms actually reflect local ones, constituting a form of “globalized localisms.” Yet these models are not chosen simply because the US and EU exercise political and economic power. Rather, the depth of US and European regulatory expertise and the detailed analytic reasoning that their agencies offer in relation to particular regulatory problems persuade other countries to adopt their models. These models are often conveyed through the intermediary of international institutions that operate as nodes for networks of public and private actors, including elite business, legal and government representatives. Braithwaite and Drahos (2000: 546-47) find that modeling has “a significance neglected in the regulatory and international relations literature”.

Finally, scholars have assessed how international law can be produced through processes of persuasion and acculturation. Scholars refer to these processes in explaining, for example, the creation and ratification of international human rights treaties, where the mechanisms of reciprocity and coercion are less frequently used. Since states may not intend to change their human rights practices, scholars often find it a paradox that states sign and ratify these agreements. Most scholars contend that states do so largely for expressive reasons to obtain legitimacy, but scholars diverge regarding whether they do so rationally or through acculturation processes (Goodman & Jinks 2004), and whether these expressions have any effect (Hathaway...
We address this latter question in the next section. We reiterate here, however, that the processes of international law production and international law implementation are not necessarily dichotomous, but are part of dynamic, recursive processes that affect the production of international law over time (Halliday & Carruthers 2009). The domestic reception of international law can feed back into the understanding of existing international legal norms and the production of new ones.

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In sum, an array of actors and mechanisms are involved in the production of international law. US and European public and private actors have been the most influential. In economic and regulatory fields, this influence can often be traced to the power that the US and the EU wield because of the size of their markets and the desire of other countries to gain access to them. However, mechanisms besides coercion are also critical for explaining how international law is produced, and in particular the mechanism of modeling, which can reflect processes of active persuasion and diffuse acculturation. We will see these mechanisms at play in the domestic reception of international law as well.

III. Does International Law Matter?

Louis Henkin (1979) famously observed that almost all states observe almost all their obligations almost all of the time. Downs et al (1996) have pointed out that this observation tells us little about the efficacy of international law because states may be selecting those obligations with which it is easy to comply. Generally, issues of selection effects, endogeneity and reverse causation lie at the center of empirical debates over whether international law matters. Skeptics argue that international agreements can merely reflect state intentions, and do not change state behavior. For example, Von Stein (2005) shows how treaties can serve as a screening device that signals a signatory’s future policy intentions. Thus, failing to control for the sources of selection can lead one to overstate considerably the effect of international treaty commitments on compliant behavior. States may begin their compliant behavior before signing a treaty because of the extensive requirements to become a member.

These contentions have driven empirical work regarding not only whether international law “matters,” but also the conditions under which it matters, and the processes through which it has effects. We find that most empirical work indicates that international law indeed matters, but only under certain conditions. International law’s impact varies in light of such factors as the situation of the state in question (including its regime type and level of wealth); the congruity of the issue with domestic political contests; and the role of intermediaries such as government elites or civil society in conveying international law norms into domestic systems. Often international law works in indirect ways, involving the local appropriation of international legal norms to advance positions in local political struggles. Scholars need to unpack the state to understand the mechanisms leading to the implementation of international law, including the ways in which international law can become embedded in domestic law and institutions. Trends in scholarship in this direction are welcome, especially because taking the state as the basic unit of analysis is more difficult to maintain when the state is itself transformed through international interactions (Shaffer 2010). Since international law has impacts in varying ways in different domains, this section divides its coverage by functional domain, respectively examining international human rights law, criminal law, the law of war, trade law, investment law, and
regulatory law.

A. International Human Rights Law

What does it mean to say that law matters? Social science tends to look for associations between events, say the passage of the law and some outcome of interest such as compliance or implementation. Thus a common research strategy is to ask whether the accession to a human rights treaty predicts subsequent improvement in human rights protection. An increasing number of large-n studies take this approach regarding the efficacy of the human rights instruments that emerged in the aftermath of World War II. Given the persistence of massive human rights violations, critics have suggested that these forms of international cooperation are mere “cheap talk” and have no independent effect on state behavior. Hathaway (2002) showed that states ratifying human rights agreements were, on average, actually more likely to violate the agreements than other states. Hathaway’s claim has prompted numerous responses both theoretically and empirically (e.g. Simmons 2009).

Answers to the key question of whether improvements are associated with international law are typically linked to the existence of certain conditions. One emerging theme in this literature is that effective human rights protection requires domestic institutions, so that accession is more likely to improve performance in democracies than in autocracies (Hathaway 2002). The engagement of civil society, in particular, appears critical.

Because the nature of the state and institutions within it affects whether international law matters, one potential problem with empirical studies is the use of over-inclusive samples. In a subtle book-length treatment of international human rights law, Simmons (2009) takes the important methodological step of disaggregating the sample of countries so as to exclude both false positives (countries that ratify treaties without intending to comply) and false negatives (countries that credibly enforce human rights guarantees but do not ratify human rights treaties for domestic institutional reasons). She finds that for the middle group of countries (after excluding the outliers), ratification of human rights instruments is associated with positive improvements in rights protection. In her words, “[a]t least in the case of civil and political rights, a treaty’s greatest impact is likely to be found not in the stable extremes of democracy and autocracy, but in the mass of nations with institutions in flux, where citizens potentially have both the motive and the means to succeed in demanding their rights” (Simmons 2009: 155).

Empirical studies on international human rights consistently find that the effectiveness of international law is mediated by domestic institutions and domestic actors. Because international human rights law largely depends on mechanisms of norm diffusion, the effect of human rights treaties is typically indirect, depending on the domestic channels used in specific contexts. Simmons, for example, finds that international human rights treaties have effects on domestic policy and practice through shaping executive agendas, through supporting litigation of human rights issues before domestic courts, and through sparking domestic popular mobilization.

Most empirical studies stress the role of civil society mobilization in domestic settings where international human rights law is implemented effectively. Local actors, NGOs, cause lawyers and others interested in advancing particular claims use materials from the international plane when instrumentally valuable. The international, then, becomes not just an arena but also a repository of materials available for invocation in the domestic sphere. In an important ethnographic study, Merry (2006) investigates the links between the global production of human rights instruments and their local appropriation in five countries in the Asia-Pacific region,
showing how international human rights law provides tools for domestic actors seeking to advance agendas and legitimize actions in domestic politics. She casts light, in particular, on “the role of activists who serve as intermediaries between different cultural understandings of gender, violence, and justice,” and who appropriate international legal norms for local ends (Merry 2006: 2). Her work indicates that international human rights law is more likely to matter where non-state actors operate effectively as intermediaries to convey and adapt international human rights norms to address particular domestic contexts. These processes of local adaptation of international law constitute forms of indigenization, or “localized globalisms.”

Kim et al. (2010) reach similar conclusions regarding the role of NGOs in their quantitative assessment of the impact of conflicting human rights and neo-liberal development norms on education policy in low-income and middle-income developing countries, although they focus on the issue of convergence toward global norms (in the world polity tradition), as opposed to indigenization. Hafner-Burton and Tsutsui (2005) also use quantitative methods to show that the larger the number of international NGOs operating in a country, the higher the protection of human rights in that country, holding other factors constant. These findings regarding NGO-mobilization as a causal factor may be challenged since it is possible that countries with relatively good or improving human rights records are more likely to allow international NGOs to operate. That is, the causal mechanism may go in the opposite direction, although the authors try to address this concern through the use of time lags. The presence of international NGOs and human rights improvements, nonetheless, can also reciprocally play off each other, with improved human rights facilitating greater international NGO access, and with greater international NGO access facilitating the conveyance of international human rights norms.

The questions of whether, when, and how international human rights law makes a difference will remain important, and there is still a long way to go in this area of research. We see three major next steps for this literature. First, there is a continuing need to follow Simmons’ approach of disaggregating large-n analysis, discarding outliers that either sign international human rights agreements with no intention of enforcing them (Zimbabwe), or comply with international human rights provisions without any need for signing them (the US). Second, the literature desperately needs better measures for human rights outcomes (the dependent variable in quantitative research). Much of the existing quantitative work relies on subjective indicators of human rights violations. The US State Department Annual Reports, for example, are attractive because of their breadth and longitudinal coverage, but are subject to some political biases. Indeed, a small but important literature on the challenges of measuring human rights has arisen, and is likely to produce incremental improvements in the indicators used in evaluating human rights performance (see, for example, Landman and Carvalho 2010). Producing new indicators is difficult, but all the standard indicators of human rights abuses have their flaws. Finally, a combination of quantitative methods and case studies involving sustained field work would be helpful in assessing patterns of variation regarding the conditions under which international human rights law matters.

B. *International Criminal Law and the Law of War*

The explosive growth of international criminal law has without a doubt been one of the

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4 Cingranelli & Richard, for example, have developed a database available at http://ciri.binghamton.edu/index.asp.
major developments of the past two decades. Nearly fifty years after Nuremberg, the international community created two major ad-hoc international criminal tribunals (the ICTR for Rwanda and the ICTY for the former Yugoslavia), followed by the standing International Criminal Court (which was created pursuant to the Rome Treaty in 2002), as well as further ad-hoc tribunals for the Lockerbie bombing, the assassination of former Lebanese Prime Minister Rafik al Hariri, and for war crimes committed in Sierra Leone, among others.

A growing body of theoretical and empirical literature addresses the effects of international criminal law in which individuals, as opposed to states, are held accountable for human rights violations. A central claim of the anti-impunity movement, from Nuremberg onward, has been that criminal prosecutions for grave violations of human rights will have a significant deterrent effect, will facilitate democratic transitions, and will help shape collective memories in ways more conducive to enduring peace. Others argue, however, that the prosecution of war crimes may spur leaders and insurgents to resist negotiations to cease combat because of fear of prosecution, perversely leading to exacerbated human rights abuses. Empirical work on the effects of such prosecutions has important implications in light of these divisions.

The empirical evidence to date suggests that the impact of international criminal law enforcement should be broken down in terms of long-term and short-term effects under different scope conditions.5 Regarding long-term effects, evidence exists that Nuremberg had an important educative effect on reconstituting German national identity (Karstedt 1998). International criminal tribunals can serve a long-term educative purpose, affecting national reconciliation efforts and, over time, collective memories of the past, implicating future inter-state relations. Scholars have empirically shown that the development of domestic criminal law and legal institutions has significantly reduced violence within countries. Whether the recent rise of international criminal law and criminal law institutions under very different conditions of legitimacy will have long-term deterrent effects, especially in situations involving civil conflict, remains an important empirical question.

There is mixed evidence regarding the short- and medium-term impacts of international criminal tribunals, and further empirical work is needed. Impacts likely vary as a function of different scope conditions, such as the level and nature of the civil conflict, the timing of the trial in relation to the conflict, and whether a country is on the road to democratization. Scholars should also assess the impact of factors such as the location of trials and the identity of those conducting them: that is, whether the trials are international, foreign, domestic, or hybrid. Some empirical work conducted by security-oriented scholars is skeptical of the role of international criminal trials, and suggests that amnesties are preferable to international criminal trials in resolving civil wars. Snyder and Vinjamuri (2003/2004) survey the claims of proponents of international prosecution and, in a study of thirty-two cases of civil war, find that prosecution according to universal standards is often not helpful in reducing violations. In contrast, they find that credible amnesties are generally associated with better outcomes. Similarly, Ku and Nzelibe (2007) find that coup-leaders in Africa are unlikely to be deterred by the threat of prosecution before an international criminal tribunal. However, a large number of other studies, both case-specific and general, suggest that the use of criminal trials for human rights abuses has had some positive effects.

The literature on international criminal law and criminal law trials overlaps with the broader literature on mechanisms of transitional justice following civil conflicts. The most

5 “Scope conditions” refers to the conditions under which a particular event or class of events is likely to occur.
prominent transitional justice mechanisms used are criminal trials, truth commissions, and the barring of individuals from future public employment. International institutions are often linked, directly or indirectly, with the use of these transitional justice mechanisms, and international criminal law developments can affect them. Much of the empirical work in this area is case-specific, which makes sense given the importance of contextual factors for the effective use of particular transitional justice mechanisms. Yet it is difficult to generalize from this work.

A number of scholars, however, have engaged in broader cross-national studies. The majority of studies find that the use of transitional justice mechanisms results in modest or limited improvements in human rights protection, though it is too early to reach definitive conclusions. Sikkink and Walling (2007) find a significant increase in truth commissions and criminal trials for human rights violations throughout the world from 1979 to 2004, representing a judicialization of politics. Their data counter the findings of skeptics such as Snyder and Vinjamuri that amnesties are preferable to criminal trials in resolving civil conflicts and that criminal trials will worsen human rights outcomes. Sikkink and Walling, moreover, find that amnesties and trials for human rights violations are typically used in combination over time, with earlier amnesties sometimes being eroded, so that it is wrong to contrast the use of amnesties and trials in a dichotomous manner. They stress the importance of diachronic studies.

In an important follow-up to this analysis, Kim and Sikkink (2010) conducted the first large-n analysis to assess whether domestic criminal trials for human rights abuses have reduced such violations. Similar to the approach of Simmons (2009) in studying the impact of human rights treaties, their data excludes fully democratic and authoritarian regimes because human rights trials are less likely to be a cause of change in human rights practices in those countries. Their data relate to domestic criminal trials for human rights abuses in 100 transitional countries during the period 1980-2004. They find that “countries with human rights trials after transition have better human rights practices than countries without trials.” However, because they focus on the role of domestic institutions, in this case on domestic human rights trials, their findings do not speak directly to the debate on the impact of international prosecutions and trials.

Empirical research has also begun to address the related question of the effect of international treaties regarding the conduct of war, and the evidence is again mixed. Morrow (2007) analyzes when states follow the international laws of war, focusing on reciprocity as the primary mechanism which explains countries’ compliance. He finds that ratification of treaties does not affect the behavior of non-democracies, but does affect that of democracies. This finding is consistent with work regarding the role of domestic institutions in explaining variation in compliance with human rights treaties, discussed above. However, Valentino, Huth and Croco (2006), using statistical analysis of interstate wars from 1900 to 2003, find no evidence that signatories to the Hague Convention of 1907 or Geneva Conventions of 1949 killed fewer civilians than did non-signatories, nor that democratic signatories killed fewer than others. They find that strategic incentives overwhelmed any pressure to exercise restraint attributable to the treaties. Given the security threat to the state in war, it is not surprising that international law has less impact in this area.

Overall, given the conflicting claims regarding the impact of criminal-law enforcement for human rights abuses, and the impact of international humanitarian law, further empirical work will be required to assess the conditions under which they are more likely to have positive effects. The Kim and Sikkink (2010) study nonetheless represents an important step regarding the assessment of law’s effectiveness in this area over time.
C. International Trade Law

The question of whether international trade law matters has also attracted considerable empirical attention, probably because this area of international law is particularly legalized and judicialized, and because economists have long been interested in international trade matters and have applied their methodological tools to studying them. The resulting empirical work examines both the impact of international trade law on trade commitments and trade flows, and the effect of the WTO dispute-settlement system on member compliance and member practice.

A number of studies assess the impact of international trade institutions and institutional design on trade commitments and trade flows. Empirical studies suggest that countries are more willing to make trade commitments where there are escape valves to deal with economic shocks or unanticipated political demands. Kucik and Reinhardt (2008), for example, find that those states who take advantage of the WTO’s flexibility provisions agree, on average, to more and deeper tariff commitments under WTO agreements and implement lower tariffs in practice than those states which do not use these provisions. They focus, in particular, on states taking advantage of antidumping provisions which permit them to raise tariffs on goods sold at “less than fair value.”

Whether the WTO and its predecessor regime, the General Agreement on Tariffs and Trade (GATT), have affected actual trade flows is a separate question. In a controversial study, Rose (2004) finds that joining the GATT/WTO regime has not affected bilateral trade flows, calling into question the relevance of international trade institutions and law. Goldstein et al. (2007), however, challenge this finding on account of the study’s measurement of trade effects. They conclude that the data show that the GATT/WTO regime has had a positive impact on trade flows once one includes its effects on colonies, newly independent states, and provisional applicants.

Many empirical studies have assessed the impact of the WTO/GATT regimes’ renowned dispute-settlement system in terms of member-compliance and actual effectiveness. It is widely acknowledged that WTO members have largely complied with the dispute-settlement system’s rulings. Hudec’s (1993) comprehensive analysis of GATT dispute resolution shows that the system successfully resolved some 90% of legally valid claims. Busch and Reinhardt (2000) find similarly high success rates under the more judicialized WTO system. The WTO system now includes an appellate process, as well as separate proceedings regarding respondent compliance with rulings, and regarding the amount of trade concessions that the complainant may withdraw if the respondent has failed to comply. Compliance with a ruling, however, does not necessarily guarantee that a market has been liberalized because a respondent might substitute a new trade barrier for the existing one. Bown (2004), however, has assessed the trade impact of WTO rulings and found that the concessions made following a WTO judicial decision have mattered economically. He found that three years after the date of adoption of the WTO decision in favor of the complainant, imports of the complainant’s goods that had been affected by the prior trade barrier increased substantially into the respondent member, controlling for other factors.

Actual litigation and formal rulings represent only the top of the pyramid of disputing. Dispute settlement systems are also important for their “shadow” effects on settlement negotiations. Scholars have empirically assessed the effect of WTO litigation on negotiations to settle disputes in the shadow of a potential litigation outcome. Busch and Reinhardt (2000) investigated the impact of the negotiating stage of WTO disputes after a WTO claim is filed and
before a decision is rendered. They find that, on average, complainants fare best (in obtaining
greater trade concessions) when they successfully settle a filed dispute before a final judgment is
reached. They explain that full litigation indicates that a defendant may face severe domestic
political constraints against modifying its trade-restrictive measures, and thus might refuse to
comply with a ruling or comply with it only partially. Interestingly, they find that although
developed and developing countries fare equally well in terms of their success as complainants in
fully litigated cases, large developed countries fare better in obtaining advantageous concessions
during the negotiating phase prior to a judicial decision being rendered. Thus, although the
evidence suggests that the system is not biased from a formal perspective, there is evidence of
some bias in the law-in-action as regards settlements, illustrating the continued relevance of
different forms of power disparities among members.

D. International Investment Law

Another very rich debate concerns the question of whether bilateral investment treaties (BITs)
actually result in increased investment flows between the contracting states. A common
hypothesis is that BITs provide “credible commitments” to foreign investors when investors have
grounds to believe that a country’s domestic legal system is inadequate and thus cannot be
trusted to uphold a contractual bargain. Some studies find no positive relationship between BITs
and investment flow (Yackee 2008), while others show such a relationship (Büthe and Milner
2009). Yackee (2008) examines approximately 1,000 BITs between developing and major
capital-exporting countries, and divides them into two categories: “stronger” BITs that provide
automatic access to arbitration, and “weaker” BITs that do not. He finds that the stronger BITs
are not associated with increased investment, which he contends contradicts the “standard story”
that BITs make contractual commitments more credible to investors and thus enhance foreign
direct investment. Büthe and Milner, in contrast, find empirical support for the credible
commitments hypothesis. They (2009) survey existing empirical work on BITs, and argue that
BITs help signal commitment to a whole range of liberal policies, and thus improve all
investment flows, not simply the bilateral flows between the signatory countries. They also find
that membership in multilateral and preferential trade agreements results in increased overall
foreign direct investment flows into a country, and they contend that such membership provides
information that helps to assure investors of domestic political stability.

Existing studies’ conflicting findings are explained by their use of different measures of
investment flows. Studies focusing on only bilateral investment flows between BIT signatories
find that BITs have little impact, while studies focusing on overall investment flows into
signatories of BITs find that they have positive effects. The authors of the latter studies maintain
that the signature of BITs creates signals for investors generally regarding a country’s
commitments to investor protection.

E. International Regulatory Law

The impact of international regulatory law within states has likewise been the object of
sustained study, for the most part building from case studies. Scholars have closely assessed the

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6 We lack, however, empirical work on the issue of compliance with international investor-state arbitration awards,
probably on account of the relatively small number of awards and the lack of a clear data set.
variety of mechanisms that are used in light of such factors as the externalities of regulation (or the lack of regulation) in one jurisdiction on others, power asymmetries between a country and global actors, the role of modeling, learning and persuasion, and the affinity of transnational prescriptions with the demands of domestic elites and other constituencies (see e.g. Braithwaite & Drahos 2000; Halliday & Carruthers 2009; Shaffer 2010). In light of space limitations, and since we have also addressed the use of these mechanisms at the end of Part II, in this section we discuss only one exemplary work which again demonstrates the need for unpacking the state to understand the processes through which international regulatory law is implemented and has effects. Although international regulatory law often acts as a catalyst for change within domestic legal systems, domestic factors condition both the extent and the type of effects. As in the field of international human rights, international regulatory law is translated and appropriated into domestic contexts.

In their path-breaking work on the implementation of global bankruptcy law norms within Asia, Halliday and Carruthers (2009) build from years of field work to show how processes of modeling, persuasion, and learning work through recursive processes involving both the production of international bankruptcy law norms and their reception in Asian states. Using multiple empirical methods, they examine the different mechanisms used to implement international bankruptcy law norms within three Asian states in light of three key factors: the extent of asymmetric power between the target state and global actors; congruencies with local social and cultural contexts; and the availability and role of intermediaries between the national and international levels. They find that coercive measures (such as IMF loan conditionality) were used to a greater extent toward Indonesia than toward Korea, which required more active persuasion to effect legal change. In China, in contrast, change occurred primarily through the mechanism of modeling: China modeled its national bankruptcy law reforms on global templates. Similarly, they find that where discursive frames and policy prescriptions resonate in domestic settings, domestic actors more easily harness the transnational legal norm to further their goals. For example, the gap between local and global corporate insolvency norms constituted a greater challenge in Indonesia and China than in Korea, which is an OECD member and which had more local intermediaries and practitioners educated abroad.

Their account emphasizes the limits of coercive mechanisms to achieve effective domestic implementation, and the role of recursive interaction between international lawmaking and domestic implementation. Halliday and Carruthers stress, in particular, the role of feedback loops between the international and domestic levels in the production and diffusion of international legal norms over time, and contend that scholars need to assess the production of international law diachronically in response to domestic implementation challenges.

Conclusion

As recently as two decades ago, empirical work on international law was exceedingly rare. Scholarly discourse tended to focus on normative debates between proponents and opponents of international law, with lawyers focusing on cases, and international relations scholars focusing on international organizations. The end of the Cold War and intensified processes of economic and cultural globalization prompted extensive institutionalization on the international plane and enhanced international interaction. The growing number of international regimes and tribunals, combined with developments in the social sciences and legal scholarship, has spurred an increase in empirical scholarship on international law.
In contrast with the theoretical work on globalization and international relations, much of the empirical work on international law is focused on specific issues and areas, providing rich materials on which to build further theory. Yet coverage is uneven. Some questions, such as the efficacy of WTO dispute settlement or the effect of BITs on investment, have received a good deal of attention and are the subject of robust quantitative literatures. International criminal law has also been a popular topic, with in-depth sociological studies of the major tribunals and their functioning. Human rights law is the subject of a large and increasingly sophisticated literature that uses multiple methodologies, though lack of reliable dependent variables is a concern. Other issues, however, have been less well covered. The law of diplomatic protection and the law of the sea, for example, are considered areas of great success for international law, but have not been the subject of sustained empirical research. Private international law work has lagged behind, although there has been a burst of recent work to close the gap. There is much more to international law than human rights and trade, but the scholarly agenda seems dominated by those important areas, so that many lacunae remain to be addressed.

There is certainly more room for methodological pluralism. In particular, we have relatively few ethnographies of international law and organizations. The continued development of large-n datasets promises even more statistical work; hopefully this development will be accompanied by careful consideration of issues of conceptualization and measurement. To some degree, the state of the discipline in this regard reflects the great difficulties in gathering data and developing relevant concepts and measures. Other challenges result from the complexity of the topic. States are the primary actors on the international plane, but are themselves complex organizations with competing motivations. Identifying behavioral regularities is difficult enough, let alone attributing those behaviors to the effect of international law. Broadening out from states to examine international organizations, transnational corporations, and individuals as actors on the international plane creates additional challenges, but provides research payoffs as well.

Much of the work to date has focused on the three important overarching questions identified at the outset, namely why international law is produced and invoked, how international law is produced, and whether it is effective. We have relatively less empirical work on the first question, but a good amount on the second, using a wide range of methods. Study of the third question is plagued by problems of the counterfactual—namely that we do not know how a world without international law would look. The challenge posed by IR realists is to explain how international law induces states to behave differently than they otherwise would. The weight of studies reviewed here, including in areas such as human rights and criminal law, where the realist claims would seem to be particularly relevant, maintains that international law is effective under certain conditions. This process typically involves the mobilization of domestic interests and institutions which translate, appropriate and embed international law into domestic contexts. This work suggests that further inquiry into the domestic bases of international law production and implementation will be central to the future of empirical research in this field.
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