THE RULE OF LAW IN THE GLOBAL ECONOMY: EXPLAINING INSTITUTIONAL DIVERSITY IN COMMERCIAL DISPUTE RESOLUTION

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Abstract

If the rule of law is essential for economic exchange, then how is it possible to sustain a global economy when both “rule” and “law” are divided between nearly 200 sovereign states? This study explains variation in the institutions that firms use to overcome this dilemma of collective action. Interestingly, arrangements for commercial dispute resolution differ from other key institutional pillars of world commerce. In many times and places, private arbitral tribunals, not public courts, are the primary adjudicators of merchant controversies. In all major economies today these private judgments carry the formal authority of public law, as states have collectively delegated authority to private tribunals via a series of intergovernmental treaties and domestic laws. The result is a tripartite, hybrid system in which transnational judges’ decisions are enforced in domestic courts under international law.

Two explanations for institutional variation are developed and tested. The first extends theories of rationalist institutionalism to include private governance arrangements, arguing that firms arbitrage across (partially) substitutable institutional outcomes at the domestic, intergovernmental, and transnational levels. The second, based in the existing literature on transnational commercial arbitration, argues that both firms and policymakers defer to legal expertise to guide their behavior. Institutional outcomes can therefore be explained by tracing the diffusion of relevant norms through legal fields.

The dissertation explores these ideas from the origins of the post-Industrial Revolution global economy to the present, including analysis of the negotiation of the relevant multilateral treaties and their diffusion, as well national case studies of the United States, Argentina, and China. Contra many existing accounts of commercial arbitration, broad support is found for the rationalist mechanism. Dispute settlement institutions (be they domestic, intergovernmental, or transnational) have almost never run against the interests of dominant economic groups. But at the same time, within the constraints imposed by material interests, ideational mechanisms have often been the most proximate drivers of institutional variation, unlike in other realms of global economic governance.
Acknowledgements

There is so much that goes into making a dissertation, from so many people, it is difficult to know where to begin acknowledging the various building blocks on which the present study sits. One may start, however, as the analysis below does, with the imperatives of material needs. I am deeply thankful for funding from several of Princeton’s research centers: the Program in Latin American Studies, the Program in East Asian Studies, the Program in International and Regional Studies, and the Political Economy Research Program. The Department of Politics has also been extraordinarily generous with material resources over the course of my studies. And the staff of the Woodrow Wilson School, my former institutional home at Princeton, have not ceased to provide support—particularly in the vital areas of computing and caffeinating—despite my decision to cross Scudder Plaza.

However, as the reader will discover below, ideas and epistemic communities can be just as important as material needs. Indeed, this is certainly much more true in graduate school than in commercial dispute resolution. I am therefore profoundly indebted to the individuals who have wrought those ideas and formed that community, and who have taught, advised, and mentored me at Princeton and elsewhere. It has been my great fortune and privilege, starting as an undergraduate, to work with scholars who not only lead their fields, but who count the success of their students amongst their chief accolades. I have often felt both humbled and inspired by the generosity I have received from these individuals. This study is dedicated to them.

Finally, but most fundamentally, the material and ideational inputs require an author, but an author cannot subsist on research alone (although sometimes it may seem that he does). This dissertation would not have been possible without my partner, my parents, my expanding family, and my friends. Prima facie, one can identify some tensions between this element of life and the exigencies of dissertation writing. Indeed, over the course of this project I have experienced significant shifts in the former—crossing continents, midnight feedings—that did not always seem, in the moment, copasetic with the latter. On a more profound level, however, the personal has undergirded the professional. It is the bedrock on which this work sits. For all this and more, I am grateful.
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For those who taught me,
and who teach me still.
1. INTRODUCTION

At the beginning of the medieval era it would have been difficult to guess that Venice, a muddy archipelago in the northwest Adriatic, would become the dominant trading power of the Renaissance (Crowley 2012). It had limited access to fertile land until it was strong enough to impose suzerainty over the eastern Po river valley. It faced the lucrative trade routes of the eastern Mediterranean, but contemporary seafaring technology also put these within the reach of rivals like Genoa, Pisa, and Amalfi. It achieved a string of early military victories, but these were as much a product of luck as prowess in combat.

Venetian prosperity sprang, instead, from a less tangible source—its institutions. Unencumbered by feudal practices, the city developed one of the most inclusive political systems of its time, with a broad base of *citadini orignarii* and noble families represented in government (Finer 1997). Without strong feudal hierarchies to order social relations, and with a somewhat tenuous connection to the Church, the Venetians turned to a different source of authority: law (Ikins Stern 2004). This commitment can be seen today in the statue of Justice, with her sword and scales, which stands atop the *Porta della Carta*, the ceremonial entrance to the ducal palace on St. Mark’s Square.

Venice’s strong rule of law nearly killed the title character of Shakespeare’s *The Merchant of Venice*. Antonio wanted to help his friend Bassanio finance his courtship of the lovely heiress Portia. But Antonio’s wealth, though substantial, was tied up in a number of foreign trading expeditions. He therefore borrowed some 3,000 ducats from
Shylock, a Jewish moneylender, offering a pound of his own flesh as collateral. Antonio obviously hoped this was a non-credible commitment. After all, who would demand such a forfeiture, much less enforce it? This proved a mistake. Antonio’s ships were lost at sea, and Shylock, driven mad with grief when his only daughter ran off with a Christian (Bassanio’s friend, it turned out), demanded payment. The dispute thus came before the ducal court, with the Doge himself presiding. Shylock was adamant:

The pound of flesh, which I demand of him,  
Is dearly bought; ’tis mine and I will have it.  
If you deny me, fie upon your law!  
There is no force in the decrees of Venice.  
I stand for judgment: answer; shall I have it?

Even after being showered with insults and appeals to mercy, he maintained:

Till thou canst rail the seal from off my bond,  
Thou but offend'st thy lungs to speak so loud:  
Repair thy wit, good youth, or it will fall  
To cureless ruin. I stand here for law.

The Doge was at a loss. If he refused Shylock’s claim, he would undermine Venetian law and thus the source of its prosperity. But upholding the bond would endorse Shylock’s brutal and unreasonable vengeance. As many courts have done, the Doge decided to refer this vexing question to a private legal expert, an individual we might today call an arbitrator. Conveniently, one had just arrived from Padua.

The arbitrator, “a young and learned doctor,” knew that the law must not be ignored:

It must not be; there is no power in Venice  
Can alter a decree established:  
’Twill be recorded for a precedent,  
And many an error by the same example  
Will rush into the state: it cannot be.
And so bade Shylock claim his gory award. But fortunately for Antonio, the contract only specified a pound of flesh as collateral. It said nothing about blood. The young doctor interpreted this language literally:

Take then thy bond, take thou thy pound of flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.

In this way the young arbitrator—who was actually, in typical Shakespearean fashion, the newlywed Portia dressed as a man—elided the difficulty before the court.

Shylock’s claim dramatized a quotidian but essential problem that Venice had to solve as its trading empire expanded across the Mediterranean world. How could disputes between different communities be resolved? As Shylock saw, the courts of the Venetian state could be biased against outsiders. But as the Doge knew, blatant partiality would undermine the ability of Venetian merchants to make credible contracts. Debt enforcement within the city-state was difficult enough, but how could the rule of law be imposed on commercial relations that ranged from Cadiz to Alexandria? And, and on an even broader scale, how can it be extended to today’s global economy?

1. The rule of law beyond the state

This study addresses a fundamental dilemma of world politics. Many of the problems societies confront—from economic management, to environmental degradation, to disease, to basic security—increasingly cross national boundaries. This creates
interdependence (Keohane and Nye 1977), a situation under which policies in one part of
the world have repercussions in other jurisdictions. Our preeminent political institution,
however, remains the territorial state, of which nearly 200 now exist. How can this
heterogeneous group of self-interested, sovereign entities manage policy problems that
extend far beyond their borders?

The (partial) answer is what we now term global governance, or “the processes and
institutions, formal and informal, whereby rules are created, compliance elicited, and
goods are provided in pursuit of collective goals” beyond the state (Hale and Held 2011,
p. 12). Today, following the explosion of postwar interdependence and corresponding
institutionalization, global governance institutions influence nearly every aspect of
policy. The most prominent are the modern intergovernmental organizations that first
emerged in the late 19th century and then expanded enormously in postwar period. In
1909, 37 such organizations existed; in 2011, the number had grown to 7608 (Union of
International Associations 2011). Some of these institutions, like the United Nations or
the World Trade Organization, are the most important political institutions alongside the
nation states that create them. A significant area of international relations scholarship has
grown around explaining the conditions under which states cooperate through
international organizations, and the role such institutions play in world politics.

But these are not the only kinds of institutions used to manage interdependence. In recent
years, there has been a proliferation of global governance institutions that have few
characteristics in common with their multilateral counterparts (Hale and Held 2011), and
yet have a significant and increasing role in policy outcomes for a wide range of issue areas. For example, networks of bureaucrats, leaders of municipalities, judges, and legislators—that is, ostensibly domestic government officials—have increasingly linked together peers from different countries to govern areas of shared concern. These “transgovernmental networks” play a large role in environmental politics, financial governance, law enforcement, and other areas (Nye and Keohane 1971; Slaughter 2004; Slaughter and Hale 2010). Another relatively new institutional form is the so-called “multi-stakeholder initiative” or “public private partnership” that brings together coalitions of actors—including corporations, NGOs, national governments, local governments, and intergovernmental bodies—to tackle some common problem (Benner, Streck et al. 2003; Schäferhoff, Campe et al. 2009). Examples of these can be found in a wide array of development issues, including global health, energy efficiency, and social justice. Finally, and of most direct relevance to the present study, private actors are increasingly forming their own governance mechanisms to solve collective action problems with little or no state intervention (Büthe 2010). Prominent examples include voluntary social or environmental regulations to which corporations subscribe, which are sometimes negotiated and implemented with NGOs (Abbott and Snidal 2000; Pattberg 2007; Vogel 2008).

The understanding of these new institutions within political scholarship has remained relatively underdeveloped. This is not necessarily surprising. It took until the 1970s before IR theorists first articulated what is today considered the most plausible explanation for postwar international organization. The theory remained contested until
after the Cold War, a half century after the principal institutions it sought to explain were created. Non-multilateral forms of global governance were recognized by political scientists in the 1970s as well, but then largely ignored until the 1990s.\(^1\) It is perhaps understandable, then, that the field has yet to cohere around widely accepted explanations for institutional diversity in global governance.

This study seeks to advance that cause. It examines one of the oldest and most fundamental transnational governance institutions, the private tribunals through which merchants resolve commercial disputes. Centuries before the nation state took its modern form, merchant tribunals were providing the rule of law for economic exchanges between different communities. Today, private arbitral institutions fulfill the same task for vast swaths of global trade. The subject deserves study on its own merit—students of the global economy should understand how firms make the credible commitments that underpin their trade—but it also affords a unique opportunity to consider larger questions of institutional variation in the provision of global public goods. Many of the transnational institutions that have kindled scholars’ interest are quite new, and so only offer small empirical records to study. This novelty makes it difficult to separate the generalizable dynamics of such institutions from historically contingent factors. Moreover, many of the new transnational institutions confront issues like environmental

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degradation or social rights, which can be seen (wrongly) as secondary policy concerns that only prosperous and peaceful societies can afford to care about.

Commercial dispute resolution avoids these difficulties. Its history stretches back to the first trades between different communities, offering a vast empirical record for analysis. It is also fundamental to contemporary political economy; without a mechanism for credible deal-making across borders, our economy would look far different. And this substantive importance is matched by its relevance to theories of the state and social institutions; few functions are more fundamental to the concept of the modern state than the rule of law.

This last point highlights the central puzzle transborder commercial dispute resolution raises. Economic transactions depend on the rule of law, but yet take place across national borders in an anarchic world in which no single state rules, and to which no common set of laws applies. The fact that a private institution provides the rule of law for much of the global economy is even more perplexing, as it suggests that even such as basic a governance function as dispute resolution need not be performed by states, or even the intergovernmental institutions they create.

And there is yet another layer of complexity. Though private tribunals adjudicate many transborder disputes and issue awards, governments in all major trading nations have made these awards enforceable in public courts. This policy has been adopted on a domestic level in many countries, but also institutionalized through an array of bilateral,
regional, and multilateral treaties, the most important being the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The total regime for commercial dispute resolution is therefore best thought of as a *hybrid system* in which transnational tribunals, intergovernmental commitments, and domestic courts all play a role.

In addition to the question of institutional variation in global governance, a second overarching theme running through the study is, inevitably, the relationship between politics and the law. For the political scientist, policy outcomes are explained by contestation between different interests, and vary by the constellation of power and preferences that surround an issue area. Law is largely the outcome of this process. For the legal scholar, in turn, the rules laid down by political institutions are merely a starting point. They must be implemented and interpreted in the context of a body of rules, practices, norms, and procedures, and it is this process that shapes outcomes. The relationship between these dynamics is complicated even within the context of a nation state, and has been much discussed in both legal and political literatures (Dworkin 1986; Slaughter Burley 1993). The present project offers a perspective on these issues from a rather different context in which a) no overarching state exists, b) public law is contingent on voluntary cooperation amongst sovereign entities, and c) private actors create, apply, and enforce law themselves. This places a fascinating set of questions before the reader, to which the study does only partial justice. To be sure, the relationship between law and politics is central to the analytic approach employed in the study. I ask whether dispute resolution institutions can be explained by interest groups competing for
policies that bring them material gain, or by the evolving norms and practices of the legal system, or some combination of the two. Ultimately, however, the study’s treatment of the law-politics relationship remains at this instrumental level, as the chief theoretical concern is to explain institutional variation in the provision of public goods beyond the state. While the conclusion considers some implications for our understanding of the law-politics relationship, these are ancillary to the findings regarding institutional diversity in global governance.

2. Providing “fidelity of promises” for economic exchange in history and today

Let us now consider the specific policy problem addressed in the study. Economic exchange depends on the ability to make credible deals, or, as Hume put it, “The freedom and extent of human commerce depend entirely on a fidelity with regard to promises.”

Achieving this trust is straightforward for basic, face-to-face transactions; a deal is negotiated, the two goods (or their monetary equivalents) are presented, and each party hands his good to the other. Credibility is established by the physical presence of the goods in the extended palm of the other party.

But few exchanges are so simple. Imagine that one party is much stronger than the other. The strong party may, after agreeing to certain terms of exchange, later break her promise. When this occurs the weaker party will be left without recourse, and may thus refrain from trading in the first place. Both parties will be worse off. Alternatively, consider an exchange that occurs across time or space, so that neither party can verify

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that the other will uphold his part of the bargain. Put another way, each knows he could cheat and get away with it. Again, this risk may scare both parties into forgoing an otherwise beneficial exchange.

The solution to these and other credibility problems, which characterize the vast majority of commercial exchanges, particularly those that cross borders, is an institution. Many are possible. At the most basic end of the spectrum, a contract-enforcement institution could be something as simple as a shared understanding that those who cheat will not be bargained with in the future. Alternatively, we could imagine something as formal as a legal contract that gives an aggrieved party recourse to a public court of law that can adjudicate claims and rely on the power of a state to enforce decisions. Whatever the arrangement, dispute resolution—a process through which parties can raise disagreements, determine a solution, and enforce it—is a key function. Creating and maintaining an institution to provide this function is a collective action problem that all traders must solve.

Many different institutional solutions have arisen across time and space, and a comprehensive historical treatment has yet to be written.3 No attempt at completeness is made here. However, even a brief survey of the past reveals the great extent of institutional variation within this issue area.

For much of the history of imperial China, traders relied on territorially based private merchant guilds to hear disputes. Violators of communal rules were threatened with exclusion from the trading networks on which they depended (Ma 2004; Hamilton 2006). Similar arrangements relying on social networks could be found in medieval Jewish traders and other groups (Greif 1993; Greif, Milgrom et al. 1994).

In other cases, these private arrangements have extended beyond a single guild or network. In late-medieval and early modern Europe, a variety of private courts heard cases from a mix of merchants. The literature has paid significant attention to the merchant courts of the Champagne trade fairs (Milgrom, North et al. 1990), but similar arrangements can be found in the city of London, amongst the budding industrial and textile manufacturers and traders in the Low Countries, within the Hanse merchants and their competitors along the Baltic Sea, on the Iberian peninsula and its early American colonies, and in Edo Japan (Mitchell 1904; Tjarks 1962; Trakman 1983; Kraselsky 2007) (Wolaver 1935; Okazaki 2005). Some of these private bodies operated with the explicit permission of governmental authorities, a fact that is not always emphasized in current literature. For example, Milgrom, Greif, and Weingast’s seminal article on the Champagne fairs has been widely recognized in the political economy literature as a quintessential example of a private ordering. Interestingly, however, these fairs operated with the explicit permission of local authorities, and depended on their goodwill (Sachs 2005). Other merchant courts, like the consulados that regulated trade throughout the Spanish Empire from the medieval era until the 19th century (see Chapter six), eventually obtained a quasi-official status, and were backed by the police powers of the state.
Fascinatingly, these private institutions have often existed alongside public courts. The Venice of Shylock is an example. Though private dispute resolution institutions were common across late-medieval Europe, in Venice, public courts like the one dramatized by Shakespeare served this function. Venetian law was even enforced extraterritorially by Venetian consuls—4—and their soldiers—across the Mediterranean (González de Lara 2008).

In London, private and public courts competed for business throughout much of the 16th and 17th centuries—both judges’ and arbitrators’ salaries depended on fees paid by disputants—even after the merchants’ private rules governing disputes were incorporated into the laws of the realm (Cohen 1918; Wolaver 1935; Trakman 1983; Benson 1989). In 1609, the common law judges began to chip away at arbitral authority in Vynior’s Case, a decision that allowed individuals to renounce the authority they delegated to arbitration, effectively making it impossible to enforce arbitral awards in public courts. This ruling and the jurisprudence that followed it would effectively limit the autonomy of private arbitration in Britain and its colonies until the mid 19th century, and in the United States until the 1920s. Nonetheless, the practice of submitting disputes to private arbitration continued throughout the British Empire through the modern era (see Chapter five).

After the emergence of the nation state, France may have gone the furthest, at least amongst European states, toward imposing state institutions over private ones. The Napoleonic Code of 1804 allowed for private arbitration, but only after a dispute had

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4 Another Shakespeare play, Othello, centers around such a consul.
arisen, preventing parties from committing themselves to a private form of dispute resolution by contract. This rule would diffuse to most of the Latin American countries via the 1829 Spanish Code as part of their own state-building processes.

But the emergence of the modern state did not always imply the dominance of public courts over commercial dispute resolution. The rise of a modern, bureaucratic state in Germany did nothing to shrink the autonomy enjoyed by commercial organizations (Nussbaum 1942). Indeed, after the 1897 Commercial Code, these private bodies received the formal backing of public institutions. By the mid 19th century, then, the rise of the modern nation state and its public courts had only partially supplanted the existing private dispute settlement institutions.

The origins of modern commercial arbitration, where this study begins, date from this period. The practice can be traced to the wave of globalization unleashed by the Industrial Revolution. Manufacturing created new demand for mass quantities of raw materials in Britain and, later, other industrialized countries, as well as for foodstuffs to feed the urbanizing population. Merchant associations rose to manage the vast new trade in commodities like wool, cotton, grains, and sugar. Several scholars cite the disruptions the American Civil War caused in English courts as a seminal event (Birdseye 1926; Benson 1989). The American South was a major source of the cotton British factories turned into cloth, which was in turn a major component of the country’s growing manufacturing industry. When this supply fell afoul of the Union blockade, the English courts became clogged with a flurry of contract disputes as merchants failed to deliver
promised goods, and also ran into difficulties with British neutrality and contraband laws. In order to mitigate further disruptions, the members of the Liverpool Cotton Association (the primary industry body) began to insert clauses in their standard contracts referring disputes to private arbitration and thus avoiding lengthy court delays (Birdseye 1926; Benson 1989). The results were sufficiently compelling to convince other trade associations to follow suit, and trade association arbitration proliferated across the important commercial centers of the late 19th century.

As what is sometimes called the “first wave” of globalization reached its apex in the years before the First World War, another seminal shift toward the modern arbitration system took place. The trade association system was joined by more generalist and legalistic arbitral institutions, and these new entities ultimately gained the enforcement power of the state both domestically and multilaterally. Beginning in the late 19th century, businessmen began meeting in broad international congresses. At the second of these, in Milan in 1906, delegates first raised the idea of a better global system of commercial dispute resolution. The ideas were discussed in more depth in Boston in 1912, and specific proposals were debated at Paris in 1914 (see Chapter Four). Businesses sought both new private institutions to adjudicate claims between companies of different nationalities, and a convergence of national laws toward a common policy of recognizing and enforcing the awards of foreign arbitral bodies.

Interest in global-level institutions for arbitration coincided with domestic shifts in the major economies. London had long been the leading center for commodity arbitration,
but in 1889 it enhanced the legal standing of arbitral awards in public courts. In 1892 a
generalist arbitral institution was founded, the London Court of Arbitration, which was
not attached to any particular commodity. Mercantile associations in Germany had long
provided arbitral services, and their awards were binding in courts from at least 1896.
The United States developed these institutions somewhat later. Though the New York
Chamber of Commerce had been amongst the first mercantile organizations to offer
generalist arbitration services (since 1768), the system had fallen into disuse during the
late 19th century. The arbitration committee was re-established, however, in 1911, and in
1920 the New York Chamber succeeded in securing legal standing for arbitral awards in
New York State, and, in 1925, at the federal level. A similar law was passed in France in
the same year.

Changes were not limited to the industrialized countries. In Argentina a robust system of
commodity arbitration governed that country’s explosive growth. Even in China, just a
few years after the 1911 revolution, the republican government promulgated laws that
placed authority over commercial dispute resolution into the hands of chambers of
commerce, though their authority was undercut by the weakness of the Chinese state and,
crucially, the treaty port system, which imposed foreign law on Chinese trade (Chan
1977).

By the onset of the Great Depression, then, generalist, private arbitral institutions
operated in all major economies, and enjoyed significant deference from public courts.
These policies were also institutionalized beyond the state. After WWI the annual
meetings of businessmen had been organized into the International Chamber of Commerce, headquartered in Paris. In 1921 this group created an International Court of Arbitration, a private arbitral tribunal that remains one of the most important institutions of transborder dispute resolution today. The League of Nations also negotiated two treaties that aimed to commit countries to mutual recognition and enforcement of arbitral awards rendered in foreign jurisdictions, the 1924 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Enforcement of Foreign Arbitral Awards.

These agreements ultimately did not secure much ratification outside of Europe, though the Latin American countries had actually negotiated a similar agreement, on a regional level, some four decades before, the 1889 Treaty of Montevideo. This regional approach was developed further in the subsequent decades. Private agreements between the Chambers of Commerce of the United States and Argentina and Brazil were signed in the 1910s. The Conference of American States called in 1923 and 1928 for the creation of an inter-American arbitration system (Domke and Kellor 1946), and in 1934 that body officially tasked the American Arbitration Association with creating a private body to handle inter-American disputes. The result was the Inter-American Commercial Arbitration Commission, based in New York. A series of treaties (negotiated in 1889, 1928, and 1940) among the Latin American states also dealt with enforcement of arbitral awards, as did a number of bilateral agreements in the region, although these agreements did not have significant practical effects.

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Few changes occurred in crossborder dispute settlement institutions during the Great Depression or the Second World War, though, importantly, the arbitration providers became increasingly institutionalized and legalized. The subject also became a mainstream subject of legal scholarship, with law schools beginning to offer courses on the subject and lawyers becoming specialized in its practice.

A resurgence of activity came in the 1950s. The postwar patchwork of the European-centric treaties, the inter-American system, and various bilateral deals had left the enforcement of arbitral awards uncertain across much of the world (Nussbaum 1942). This proved inadequate to the needs of a rebounding world economy. In 1953 the ICC drafted a new convention on the enforcement of arbitral awards, which it submitted to the UN’s Economic and Social Council. In 1958 this body produced the New York Convention on the Recognition and Enforcement of Arbitral Award, which required countries to enforce arbitral awards granted in other jurisdictions. Today the New York Convention has 144 signatories, including every major trading economy.

The history of commercial arbitration in the second half of the 20th century runs against some conventional wisdom regarding private authority in global governance. Private arbitration was promoted not only by Western commercial powers, but by revolutionary Third World governments, the members of the Non-Aligned Movement, and the Eastern Bloc. These actors, hardly champions of global capitalism or of privatization, found important uses for private commercial arbitration that seemed to trump their ideologies.
The anti-colonial movement of the 1960s and 1970s brought to power a number of governments who wished to change their participation in the global economy, often by nationalizing the country’s major resource extraction (oil, minerals, etc.) industries. The Western multinationals that controlled these industries responded by suing the new governments in whatever foreign jurisdictions the countries possessed assets, sometimes launching a multi-pronged attack in several jurisdictions at once (Dezalay and Garth 1996). These tactics threatened the new governments’ hard-won assets, and particularly those of the countries’ new elites, which were often sheltered abroad. Revolutionary governments found themselves forced to retain elite Western law firms to defend their interests in foreign courts, while the law firms themselves, responding to a new generation of left-leaning lawyers educated in the 1960s, were eager for the new clients (Dezalay and Garth 1996).

Given the difficulties of simultaneous multi-jurisdictional litigation, arbitration arose as a tempting alternative. Not only did arbitration ensure that decisions would be made outside of potentially biased national courts, but the secrecy of the proceedings would allow revolutionary governments to save face vis-à-vis both domestic and international audiences. They would not be seen compromising with the enemy, even though that was exactly what they were doing (Dezalay and Garth 1996).

At the same time, the Global South was establishing its own arbitration institutions. One of the outcomes of the 1955 Bandung Conference was the Asian-African Legal
Consultative Organization (AALCO), designed to strengthen legal institutions in developing countries. In 1973 this intergovernmental body began to study the creation of commercial arbitration institutions in order to “promote the development of the Afro-Asian region” and provide “a viable alternative to the traditional institutions in the West.” In 1978 AALCO created the first Regional Centre for Arbitration in Kuala Lumpur. Three other centers followed in Cairo (1979), Lagos (1980), and Tehran (1997). While framed as an indigenous alternative to Western institutions, the centers are in fact closely modeled on their Western counterparts.

However, perhaps the most important role that arbitration took in the second half of the 20th century was to facilitate East-West trade. Because each side had reason to distrust the other’s court system, arbitration proved a useful alternative (Holtzmann 1979). Most communist countries had a tradition of commercial arbitration under the auspices of their national Foreign Trade Arbitration Commissions (operating since 1932 in the USSR), public bodies staffed by technocrats. In the 1970s, however, as trade between East and West increased, the commercial entities of the communist countries began naming foreign bodies, especially the Stockholm Chamber of Commerce as their preferred venue for arbitration. A model US-USSR arbitration clause was developed by the AAA and the Soviet Chamber of Commerce and Industry to make it easier for firms to write contracts across the Iron Curtain (Holtzmann 1979).

The United Nations Commission on International Trade Law (UNCITRAL) also played an important role in legitimizing arbitration and standardizing across diverse national

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6 See the organization’s website: [http://www.aalco.int/content/arbitration-centres](http://www.aalco.int/content/arbitration-centres)
Introduction

contexts. In 1976 the intergovernmental body developed a set of model arbitration rules that were adopted by numerous arbitral institutions “primarily due to the text’s reliance upon the principle of party autonomy and purposeful consideration and incorporation of international consensus and opinion” (Cutler 2003). These rules largely codified the existing practice of the major arbitration institutions, but because they carried the imprimatur of the United Nations—and because both developed and developing and Western and Eastern countries were involved in the process—they helped to legitimize arbitration in the eyes of non-Western powers.

But even as arbitration was becoming adopted in quarters not typically receptive to private governance, TCA was itself changing. Once the rarefied province of distinguished, mainly European law professors, arbitration is now dominated by the globalized, primarily Anglo-American law firms that provide legal services to most of the world’s major corporations. The process has become more institutionalized and commercial, and, in the eyes of some, “American-ized” in the sense that it much more closely resembles the contentious litigation practices common in the United States.

The ICC was a key venue for this shift, which Dezalay and Garth describe as a generational conflict between “grand old men” and “technocrats.” When the number of arbitration cases was small and the ICC was the primary venue, the world of arbitration was quite hermetic, they argue, composed mainly of elite European legal experts based around Paris. The arbitrators all knew one another and used their contacts with business elites to recommend cases to one another, reinforcing their monopoly over the field.
(Dezalay and Garth 1996). However the increase in arbitration in the 1960s and 1970s, driven by the resource extraction cases, disrupted this closed world. American law firms, which had been developing contentious litigation tactics domestically, saw a large new market for their skills. Whereas the old guard had relied on their gravitas and reputations to command the respect of firms, the new arbitration providers offered technocratic expertise and sophisticated case-management. At the same time, new arbitration centers opened to compete with the ICC. The result was a commercial rationalization of arbitration itself. What was once seen as the duty of businessmen, and then of eminent jurists, became a highly profitable legal business (Dezalay and Garth 1996).

2.1 The contemporary system of transnational commercial arbitration

What are these private courts like? Even that basic question is difficult to answer, as there are probably around 1000 private arbitration providers in the world, with varying rules and structures. Indeed, this flexibility is a defining characteristic of TCA. However, a core set of rules and practices apply to the majority of arbitrations.⁷

First, firms must select arbitration as the way to resolve disputes between them. In the majority of cases this choice is made when a contract is signed, and applies only to the commitments stated in the contract. Firms that find themselves in conflict may also select arbitration ex post, although this is typically more difficult as parties can see more clearly

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⁷ More detailed descriptions can be found in the large number of legal treatises on the subject, for example Moses, M. L. (2008). The Principles and Practice of International Commercial Arbitration. Cambridge, Cambridge University Press.
how the rules chosen to resolve the dispute—on which they both must agree—may favor one party over another.

Second, firms choose the type of arbitration they want. “Ad hoc arbitration,” in which parties or arbitrators organize the arbitration proceedings themselves, is less common than “institutional arbitration,” in which an organization manages the process, the vast majority of them private. The largest and most respected is the International Chamber of Commerce’s International Court of Arbitration, based in Paris.

Third, firms may also choose the rules that govern the dispute. They may select the national laws of any country, rules laid out in international agreements, rules specified in the contract itself, or general commercial practices. This last category may include lex mercatoria, a body of private law that codifies the practice of merchants. Firms may also select a combination of different rules to govern either the entire dispute or various parts of it, and may give the arbitrators more or less leeway to apply the body or bodies of law that they see fit. Even simply the reasoned judgment of the arbitrator may be selected as a commanding legal authority.

One constraint on this flexibility is the choice of the seat of arbitration—where the proceedings take place—which parties may or may not specify in advance. National laws on arbitration vary, and some impose conditions on arbitrations that occur within their boundaries. For example, some jurisdictions do not allow parties to challenge any substantive aspects of an arbitral decisions in public courts. Others are less deferential,
granting firms the right to appeal under some conditions. Jurisdictions also differ in the extent to which they allow public policy concerns to enter into judicial review of arbitral awards. The amount of deference granted to private arbitral institutions thus varies across countries.

Fourth, firms typically choose the arbitrators who hear the case. In most cases, one arbitrator is selected by each party, and these two select a third. Arbitrators are mostly drawn from a relatively small pool of legal specialists, elite lawyers who trade on their reputations and contacts. Less commonly, non-lawyers like accountants or industry experts may be selected as well. In large disputes, arbitrators can receive sizeable payments for their services. As in public courts, parties to a dispute typically employ their own lawyers as well.

Fifth, once an arbitral award is made, adjustments and appeals are typically not possible, and voluntary compliance is the norm. However, should one of the parties fail to comply with the ruling, the other party may seek recognition and enforcement of the arbitral award in a public court. Most countries have made arbitral awards granted by any arbitral institution enforceable in state courts, either through their domestic laws or by joining the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) or other treaties, which make foreign arbitration decisions binding in their courts. Strikingly, these public laws and treaties make arbitral awards significantly easier to enforce around the world than decisions rendered by public courts, which are often quite difficult to enforce in foreign jurisdictions.
The result of this system is a strong level of delegation to private decision makers. To take a striking example, in 1990 a US Federal district court sided with the Libyan government to enforce a private arbitral agreement against Sun Oil, a US firm. The company had failed to carry out an exploration contract with the Libyan government in order to comply with US sanctions on that country. Though the company pleaded that enforcing the award would impair “the ability of the US government to make and enforce policies with economic costs to US citizens and corporations,” the district court nonetheless ordered it to compensate the Libyan government as per the terms of the private arbitral award (Stone Sweet 2006).

2.2 Distinguishing TCA from other dispute settlement institutions

Before proceeding, it is important distinguish transborder commercial arbitration from other forms of dispute resolution with which it might be confused (figure one).
First, commercial dispute resolution across borders may occur in a variety of processes and institutions. The most common and least institutionalized are informal negotiations between the parties. Should more organized proceedings be desired, a professional mediator or conciliator may be brought in (indeed, many arbitral institutions offer such services). This option may also be required in a contract. If third party adjudication is required, firms may choose arbitration or litigation. In this study I focus chiefly on these later two options, which are the most institutionalized and “governance”-like functions.

Second, it should be remembered that arbitration is used domestically as well as internationally. It is not uncommon for the same institution to provide both types of services. While the present study focuses on transborder dispute resolution, it necessarily must also discuss domestic arbitration as the two are obviously closely related, and informative comparisons can be drawn between them.
Third, arbitration is used for many types of disputes, not just those surrounding commercial transactions between firms. For example, employment contracts and collective bargaining agreement often rely on arbitrators to resolve labor disputes. Companies that sign contracts with consumers (e.g. in insurance or telephone contracts) often include clauses requiring any legal disputes to first go to arbitration.

At the international level, state-to-state arbitration has a long history in the resolution of border disputes and other conflicts. Indeed, the rise of modern arbitration in the early 20th century was often conflated with this public form of the institution (see chapter four). International arbitration has also, interesting, long given individuals, not just states, standing under international law. War claims tribunals were commonly used to settle private disputes resulting from interstate war.

Another, more widely known example of an arbitral arrangement that gives private individuals standing under international law is the investment protection regime. In the postwar era, numerous countries have signed bilateral treaties in which they pledge not to expropriate the investments of companies from the other country. Should a company feel that its property rights have been violated, it may bring a complaint against its host country in an arbitral institution. The vast majority of these disputes take place in a special intergovernmental organization, the International Centre for the Settlement of Investment Disputes (ICSID), which is housed within the World Bank, or under the UNCITRAL rules, but other arbitral institutions, including private ones, may be selected.
Of the 390 investor-state arbitrations recorded by UNCTAD by 2010,\(^8\) 245 were held under ICSID, and 109 under UNCITRAL rules, with the only private involvement coming from the Stockholm Chamber of Commerce\(^9\) (19 cases), the ICC (six cases), and the Cairo Regional Centre for International Commercial Arbitration (one case). There were also four ad hoc cases. Public institutions thus governed over 90 percent of known state-investor arbitrations (UNCTAD 2011).

This regime has received significant attention in the IPE literature (Van Harten 2005; Simmons, Elkins et al. 2006; Simmons 2011). The procedures of investment arbitration are quite similar to TCA, and both seek to allow actors to make credible commitments, but there the similarities end. Commercial arbitration is for disputes between two traders; investment arbitration is between an investor and a government. Commercial arbitration deals with disputes arising from business contracts; investment arbitration handles disputes arising from the policies of a government. Commercial arbitration is based in a private contract. Investment arbitration is based in a public treaty. Modern investment arbitration, which developed in the 1960s, is also much younger than modern commercial arbitration. Interestingly, however, the lawyers and legal scholars who deal with these issues overlap significantly, allowing arbitration norms to develop and diffuse in tandem (an issue explored in Chapter Six).

2.3 Empirical Challenges

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\(^8\) This is likely close to the total universe of cases, though we cannot rule out that other cases have been conducted in secret under ad hoc arrangements.

\(^9\) This body has traditionally been the main body in for arbitration between Western firms and Russian counterparts, which accounts for its large caseload.
At the outset it is important to recognize some difficulties studies of transborder commercial dispute resolution cannot avoid. Several characteristics of transnational commercial arbitration make it challenging to study (which may also help account for its underrepresentation in the IPE literature). First, while a core set of characteristics can be identified, the exact rules and processes of arbitration vary significantly as parties to an agreement have significant leeway to design the rules as they see fit. This variability makes it difficult to compare cases or to generalize about TCA as a whole.

Second, the universe of cases is practically impossible to define. Not only is transnational arbitration dispersed across scores of arbitral institutions in dozens of countries, some of it is ad hoc, not connected to any institution at all. So we do not know how many disputes are settled through TCA. Furthermore, we do know how many disputes are settled through other types of institutions like public courts, ADR, and trade association arbitration.

Third, and related, arbitration is almost always secret. While some arbitral institutions have released basic data about the number of cases they handle, they closely guard information about the parties, the governing rules, decisions, and outcomes. Some more famous cases are reported in the business and legal press, but these are of course the exceptions.
3. The Role of TCA in the Global Economy

How much of international trade relies on private arbitration? In the international law literature it is standard for scholars to claim that TCA is the dominant form of dispute resolution for international contracts. However, empirical verification of this claim is difficult for the reasons cited above (Drahozal 2008; Whytock 2008). The question is crucial, however, if we are to gauge the importance of TCA for the global economy.

Existing work, none of which can be considered definitive, paints a contradictory picture of how widespread reliance on TCA actually is. The literature relies on three basic sources to determine the extent to which TCA governs business disputes: the impressions and experiences of firms and their lawyers gathered in interviews or surveys, analysis of samples of contracts, and the reported caseloads of arbitral institutions. Consider each in turn.

First, it is clear that the caseloads of the major arbitral institutions are large, and have increased. Unfortunately, not all major centers publish these data. Furthermore, some institutions publish caseload data but do not distinguish between international and domestic arbitrations. And, of course, ad hoc arbitration is not recorded in any central registry. Therefore, we have data on only a fraction of the total number of arbitrations (see figure two). Looking only at four of the major arbitration institutions that publish their caseloads—the China International Economic and Trade Arbitration Commission (CIETAC), the ICC’s International Court of Arbitration, the American Arbitration
Association, and the London Court of International Arbitration, we see that, in 2009, the
ICC handled 817 arbitrations, the AAA 836, CIETAC 559, and the LICA 232.

We would like to compare these data to the number of international contract disputes that
are litigated in public courts. Unfortunately, those data are impossible to aggregate, even
on a national level, for most countries. ¹⁰

A second way to judge the scope of TCA is to analyze the contracts firms employ in their
international dealings. Eisenberg and Miller (2007) do this for 2858 contracts American

¹⁰ Whytock (2008) attempts to provide a reasonable comparison, but it is ultimately of limited value. Using
data from the U.S. Federal Judicial Center, he is able to count the number of “alienage” cases (disputes
between a U.S. citizen and a non-U.S. party) in U.S. federal courts between 1992 and 2005, and to count
the number that involved contractual disputes, which are perhaps most comparable to commercial
arbitration. Though he notes a decrease in alienage cases and an increase in arbitration, alienage cases
likely decreased due to a change in how federal courts processed them (as Whytock acknowledges),
making it uncertain whether their decrease represents a reduction in transborder litigation generally.
publicly owned companies filed with the U.S. Securities and Exchange Commission (SEC) in 2002, the largest and most general sample of contracts that has been studied in this way.\textsuperscript{11} Surprisingly, considering the frequent claims about the dominance of arbitration, they find that only 20.2 percent of international contracts contain arbitration clauses. They conclude, “Little evidence was found to support the proposition that these parties [large, listed firms] routinely regard arbitration clauses as efficient or otherwise desirable contract terms” (Eisenberg and Miller 2007).

Drahozal and Ware (2010), however, challenge these claims. They point out that the contracts studied by Eisenberg and Miller include exactly the types of agreements for which arbitration is most rare—mergers, securities purchases, credit commitments, underwriting agreements, and other so-called “material” issues. Because these issues are often fundamental to the very survival of a company, firms tend to prefer the more elaborate legal procedures and protections offered by public courts, they argue (Drahozal and Ware 2010). Arbitration, instead, is thought to be more regular in more mundane contracts like sale-of-goods agreements, construction, and joint ventures. This example highlights the difficulty of obtaining useful samples from the TCA universe. Eisenberg and Miller’s sample is large, and was quite labor-intensive to gather and analyze. But selection problems make it difficult to draw strong generalizations from the data.

\textsuperscript{11} As Drahozal notes, there have been numerous studies of on the treatment of arbitration in specific types of contracts (e.g. employment), but not a general sample, and not attuned to international, as opposed to domestic arbitration. Drahozal, C. R. and S. J. Ware (2010). “Why Do Businesses Use (or Not Use) Arbitration Clauses?” Ohio State Journal on Dispute Resolution \textbf{25}.
Given these challenges, the third way of judging the extent to which TCA applies is perhaps best—gauging the impressions of the businesses and legal practitioners who are involved in the disputes TCA seeks resolve. Unfortunately, also here the existing work allows for only partial conclusions. The best surveys to my knowledge come from the Queen Mary School of Law in London, which polled the legal departments of major corporations in 2006, 2008, and 2010. The total number of respondents, however, was not high, numbering only 82 in 2008 and 136 in 2010, though this reflects a response rate of about eight to ten percent of their sample. Furthermore, it is not clear how well the respondents represent all users of TCA. Because the companies were selected from the Fortune 1000 list and similar sources, there is a bias toward large corporations (68 percent of the 2008 respondents had annual turnover greater than US $5 billion, 53 percent in 2010). The results may also overemphasize European experiences, as 40 percent of 2008 respondents and 31 percent in 2010 were based there. North American corporations were well represented in the 2008 survey (30 percent), but not the 2010 version (12 percent), while the reverse was true for Asian firms (15 percent in 2008, 35 percent in 2010). Nonetheless, even if the sample is not representative of the total universe of TCA users, it certainly captures the behavior of a large and important section of global businesses (Mistelis and Baltag 2008; Mistelis and Martin 2010).

The 2008 survey revealed that 88 percent of corporate counsels have used arbitration at least once (Mistelis and Baltag 2008). When asked which system they used more, 44 percent of the participating corporations indicated they mostly used TCA, while 41 percent mostly used transnational litigation (Mistelis and Baltag 2008). The 2010 survey
found that 68 percent of companies have a policy on dispute resolution that dictates how the company will design its contracts. Of those, 10 percent mandate arbitration. A further forty percent designate arbitration as the strong preference, but allow deviation if it is considered a “deal breaker” by the other party, while another 31 percent leave it as a general guideline, up to the negotiator’s discretion. Thus, only the remaining 19 percent of firms’ dispute resolution policies do not express any preference (hard, medium, or weak) for arbitration (Mistelis and Martin 2010).

The surveys also found a strong preference for institutional as opposed to ad hoc arbitration, with 86 percent of the awards respondents reported being rendered through an institution (Mistelis and Baltag 2008). Last, they confirmed the conventional wisdom that TCA appears predominantly in certain types of contracts. Respondents indicated the areas in which they had been involved in TCA proceedings, with 38 percent citing commercial exchanges, 14 percent construction, 11 percent shipping, and nine percent joint ventures.

The conclusions that can be drawn from the existing empirical literature on TCA are necessarily limited. However, it seems reasonable to surmise that TCA plays a major role in cross-border dispute settlement. Whether or not it is “dominant,” remains an open question—and probably an overly simplistic one, as the data seem to show that the importance of TCA varies across different types of contract, industries, and regions. Certainly, however, TCA is a key element of global trade.
3.1 The Impact of the New York Convention on Trade

Another way to evaluate the role of arbitration in the global economy is to estimate its impact on trade. In this section I estimate the effect of participation in the transnational arbitration regime—i.e. treaty-based reciprocal national commitments to enforce foreign arbitral awards—on global trade. I find this effect is comparable in magnitude to the effect of participation in the GATT / WTO. The implication is that transnational commercial arbitration should be understood as a central pillar of the global economy.

The trade literature has focused primarily on tariffs, quotas, and other trade barriers. Removing these impediments is the reason states have created the GATT / WTO, PTAs, common markets, and other political institutions that IPE scholars typically study. But so thorough has the focus on these organizations been, the literature today essentially reduces the study of the trade regime to the study of what we might more accurately call the “trade barrier reduction regime.” However, other kinds of institutions are also important for the maintenance of cross-border commercial exchange. Transnational commercial arbitration is one.

It is only relatively recently that a rough consensus has emerged on the effect of the GATT/WTO on trade (Rose 2004; Gowa and Kim 2005; Goldstein, Rivers et al. 2007; Tomz, Goldstein et al. 2007). I build directly on this literature, and in particular the work of Tomz, Goldstein, and Rivers (TGR) to estimate the effect of transnational commercial
arbitration. The following analysis uses the same data and gravity model as TGR, supplemented with data regarding participation in the arbitration regime. For a description of the data and model, see Tomz, Goldstein, and Rivers (2007).

Countries participate in the arbitration regime to varying degrees. Fundamentally, domestic politics determine the exact level of deference arbitration is shown by state courts. In many countries, such as the United States, decisions made by judges—operating at some distance from interest group politics—shape the extent to which transnational arbitration is binding domestically (see Chapter Five). At the same time, a number of international instruments have sought to harmonize national policies toward arbitration. The 1985 UNCITRAL Model Law on International Commercial Arbitration is a “soft law” set of expert-generated guidelines that countries can choose the follow. The core the arbitration regime, however, is the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). This treaty commits countries to enforce foreign arbitral decisions in their own courts, but at the same time largely bars countries from re-hearing or altering arbitral decisions. Today 146 countries are members (figure three). Membership in the New York Convention, therefore, can be considered a rough approximation of a country’s involvement in the arbitration regime generally.
To my knowledge, only one other econometric study has sought to evaluate the effect of transnational arbitration on trade (Leeson 2008). This uses the data and model employed by Rose (2004), and finds that participation in transnational commercial arbitration increases a country’s trade by 15-38 percent. Leeson characterizes this effect as “modest,” given how central contract enforcement is thought to be to economic exchange, but this is a misleading interpretation. After all, countries that do not participate in the New York Convention do not render contracts unenforceable. Rather, they simply retain that function in public courts. The increase in trade that Leeson attributes to the mere delegation of contract enforcement to private courts is, in fact, remarkable.

But as important as Leeson’s finding, correctly interpreted, is, it actually underestimates the impact of TCA on trade. Leeson’s model, like Rose’s, does not accurately measure participation in the GATT/WTO by including non-member participants in the analysis.
(Tomz, Goldstein et al. 2007). This is an important control variable. There are also some straightforward errors in the Rose data that TGR correct. I re-estimate the effect of the New York Convention on trade using the superior TGR data and model (for a description, see the original TGR paper).

To test whether membership in the New York Convention affects a country’s trade, I add two dummy variables to TGR’s analysis, one to identify those dyads in which one of the countries is a current member of the New York Convention and another for dyads in which both countries are members. I also add a control variable that measures judicial independence in each country to make sure that the effect of NYC ratification on trade is not simply a product of increasing legal professionalization (Linzer and Staton 2012).

The results are reported in table one.

<table>
<thead>
<tr>
<th></th>
<th>Year FE</th>
<th>Year, country FE</th>
<th>Year, dyad FE</th>
</tr>
</thead>
<tbody>
<tr>
<td>One member in New York Convention</td>
<td>0.06</td>
<td>0.27***</td>
<td>0.180***</td>
</tr>
<tr>
<td></td>
<td>(0.036)</td>
<td>(0.032)</td>
<td>(0.025)</td>
</tr>
<tr>
<td>Both members in New York Convention</td>
<td>0.07*</td>
<td>0.46***</td>
<td>0.43***</td>
</tr>
<tr>
<td></td>
<td>(0.045)</td>
<td>(0.039)</td>
<td>(0.034)</td>
</tr>
<tr>
<td>Both formal members of GATT/WTO</td>
<td>-0.07</td>
<td>0.45***</td>
<td>0.38***</td>
</tr>
<tr>
<td></td>
<td>(0.077)</td>
<td>(0.071)</td>
<td>(0.069)</td>
</tr>
<tr>
<td>Both non-member participants</td>
<td>0.16*</td>
<td>0.49***</td>
<td>0.43***</td>
</tr>
<tr>
<td></td>
<td>(0.082)</td>
<td>(0.072)</td>
<td>(0.071)</td>
</tr>
<tr>
<td>Formal member and non-member participant</td>
<td>0.29</td>
<td>0.55***</td>
<td>0.70***</td>
</tr>
<tr>
<td></td>
<td>(0.198)</td>
<td>(0.174)</td>
<td>(0.122)</td>
</tr>
<tr>
<td>Formal member and non-participant</td>
<td>-0.11</td>
<td>0.18***</td>
<td>0.15**</td>
</tr>
<tr>
<td></td>
<td>(0.076)</td>
<td>(0.066)</td>
<td>(0.065)</td>
</tr>
<tr>
<td>Non-member participant and non-participant</td>
<td>0.16</td>
<td>0.28***</td>
<td>0.21***</td>
</tr>
<tr>
<td></td>
<td>(0.113)</td>
<td>(0.099)</td>
<td>(0.079)</td>
</tr>
<tr>
<td>GSP</td>
<td>0.73***</td>
<td>0.72***</td>
<td>0.14***</td>
</tr>
</tbody>
</table>
From the results, we can calculate the estimated average percentage increase in trade that results from participation in the arbitration regime via the formula $e^\beta - 1$. These results are reported in table two.
Table 2: Average increase in trade from participation in the New York Convention and the GATT/WTO

<table>
<thead>
<tr>
<th></th>
<th>Year FE</th>
<th>Year &amp; country FE</th>
<th>Year &amp; dyad FE</th>
</tr>
</thead>
<tbody>
<tr>
<td>One in NYC</td>
<td>No result</td>
<td>31%</td>
<td>20%</td>
</tr>
<tr>
<td>One in GATT/WTO</td>
<td>No result</td>
<td>27%</td>
<td>28%</td>
</tr>
<tr>
<td>Both in NYC</td>
<td>7%</td>
<td>60%</td>
<td>54%</td>
</tr>
<tr>
<td>Both in GATT/WTO</td>
<td>18%</td>
<td>72%</td>
<td>61%</td>
</tr>
</tbody>
</table>

The results are robust to the various sensitivity measures performed by TGR. Though these kinds of estimations face limitations, the conclusion is striking. If one were to look only at this analysis, one would be forced to conclude that the New York Convention on the Enforcement of Foreign Arbitral Awards is very nearly as important for global trade as the GATT/WTO.

4. Explaining institutional variation in transborder commercial dispute resolution

How can we explain variation in institutions for transborder commercial dispute resolution, as well as the emergence of the present hybrid arrangement? The dissertation aims to answer these questions with a theory of variation in institutions for transborder commercial dispute resolution. Following Keohane (1982), I break this research question into two parts. First, why do actors demand certain institutions? When firms sign a contract, they typically choose what form of dispute resolution will be employed. Why do they choose one or another? Second, why are different institutional alternatives supplied? This second part can itself be split in two. Why do private actors form institutions to

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12 There are limitations to this type of analysis. The size of the economy and judicial independence are shown to be strong predictors of trade, a confirmation of our theoretical expectations. But GDP and judicial independence are also shown to drive NYC ratification (see Chapter four). We are therefore confronted with an endogeneity problem similar to the one that confronts TGR or Rose’s work.
supply dispute resolution, and why do states delegate private tribunals this authority? A comprehensive theory of variation should answer all these questions. The next chapter takes up this task, but a brief summary is given below.

While several literatures obviously bear on the topic, the question of institutional variation has never been asked in these terms. Existing accounts of commercial dispute resolution come mainly from socio-legal perspectives that, understandably, focus on legal questions or describe the practice of commercial arbitration in different contexts or vis-à-vis different types of legal problems. With very few exceptions, the question of how or why private arbitration institutions emerged is not theorized or examined. Instead, most authors are content to assume that arbitration provides functional advantages over litigation—it is less costly, faster, more technically proficient, less damaging to business relationships, etc.—and is chosen for that reason. This basic functionalist explanation is likely a product of the limited empirical range most authors consider. If one were to look only at advanced economies in the postwar period, one would indeed only observe variation between courts and private tribunals with regard to functional characteristics. Other attributes—such as partiality—differ much less. But this simply begs the question how this striking convergence was achieved. Even the most influential and comprehensive study of the development of modern commercial arbitration, Dezalay and Garth’s *Trading in Virtue* (1997), does not present testable hypotheses of institutional variation. Instead, it presents a rich, context-driven narrative of commercial arbitration as it developed around the world, focusing mostly on the postwar period.
Theories of institutional variation are, instead, the province of what we might term rationalist IPE. Many scholars in this field seek to explain the origins, nature, and effects of institutions in global political economy, such as the World Trade Organization (WTO), preferential trade agreements (PTAs), bilateral investment treaties (BITs), the International Monetary Fund (IMF), the multilateral development banks, transgovernmental networks for financial governance, and many more. With, again, almost no exceptions, scholars using this approach have not considered how the theories they have developed relate to the problem of transborder commercial dispute resolution. Part of this oversight may result from the fact that most IPE scholars—and the bulk of IPE theory—focus on intergovernmental institutions. Indeed, the only book-length treatment of commercial arbitration in political science is Claire Cutler’s *Private Power and Global Authority* (2003), a neo-Gramscian study that contends that commercial arbitral institutions represent an anomaly for rationalist institutionalism because such theories cannot account for such forms of private authority. This critique is significantly less trenchant a decade later, as IPE scholarship on private governance has grown in scope and sophistication. It nonetheless retains a core insight: the role of private institutions in global governance is under-theorized, a fact widely recognized by scholars studying such institutions (Büthe 2010). This study seeks to advance this agenda by presenting a theory of variation across the public-private dimension. In other words, the goal is to know when we should expect private institutions to meet some collective action problem, and when should we expect public institutions to do so.
Introduction

In sum, the present study combines a subject that has been studied mostly in the socio-legal fields with the epistemology, theories, and methods of rationalist IPE. But while the study employs a social scientific research design, it also seeks to take seriously the concepts highlighted in the socio-legal literature. The political scientist tends to see institutions as the products of political contestation, while socio-legal approaches instead emphasize the role of legal norms in shaping policy outcomes. IPE scholars are sometimes dismissive of the explanatory value of such mechanisms, emphasizing instead the material interests of powerful groups. Less controversially, it is common to observe that including ideational variables and mechanisms in a positivist analysis presents significant challenges of research design and execution. It is simply more difficult to, for example, develop cross-unit measures of commitment to a norm, as opposed to, say, the importance of trade to a country’s economy. These difficulties aside, the present subject, given its current, highly legalized form, would seem to require a close engagement with legal arguments and mechanisms. Moreover, it would be arrogant and unwise to omit the arguments of the literature that has explored the topic most deeply.

The theoretical tasks of the study are therefore twofold. First, rationalist IPE theories must be extended to the field of commercial dispute resolution. While the hypotheses developed here are specific to this issue area, they derive from a general approach that offers insights into public-private variation in other areas of global governance as well. I term this approach “three-level games.” The logic is as follows. Private groups seek to realize their policy goals at multiple “sites” of political contestation: within the state, in state-to-state interactions, and in transnational private-private interactions.
Institutionalization is a possible strategy within each sphere, creating either domestic laws/institutions, intergovernmental agreements or organizations, or transnational private governance. The effect of these institutions on the policy that concerns the actor in question will vary based on a) the innate functional attributes of the institutions (e.g. domestic institutions can call upon the police powers of the state, but lack scope), and b) the constellations of power and interest that attend to each. To the extent the policy outcomes of the three different institutions are substitutable, actors arbitrage across them to obtain their preferred policy outcome.

Second, we must fashion the concepts employed in the socio-legal literature into social scientific theories of institutional variation. Chapter two does this by positing the existence of an “organizational field” of law that imposes common norms and behaviors on a set of legal actors. Pro-arbitration norms may come to dominate legal fields through a process of legal contestation. Should this occur, arbitration will be adopted by both firms and policymakers to the extent these actors defer to legal expertise. Moreover, such norms can be transmitted across legal fields via the epistemic network of private arbitration institutions, scholars, and practitioners.

While these theories generate contrasting hypotheses to explain institutional variation, and subsequent chapters test them as alternatives, I also consider, in the conclusion, how they may interact. While taking socio-legal theories seriously, I argue that rationalist IPE approaches show how material factors constrain them. Ultimately, the material interests of powerful groups delimit the types of institutions that transnational legal elites can
construct. But these constraints can be broad, often permitting a variety of potential institutions (i.e. multiple equilibria). Furthermore, institutionalized delegation to legal experts can be self-reinforcing. As the legal apparatus expands, entrenches, and grows more complex, the influence of legal experts and norms increases. Contra the rationalist view, this process can supply institutions for which there is little demand. A full explanation of institutional variation and evolution requires this second stage of analysis to understand the combined effects of rationalist and ideational mechanisms.

5. Research Design and Overview

Today, the field of transborder commercial dispute resolution displays significant convergence. Private arbitral institutions hear disputes in all commercially important countries, and their decisions have been rendered almost universally enforceable under the New York Convention and other instruments. At the same time, the key independent variables of market structure, the professionalism and efficiency of courts, and legal norms have also grown more similar across countries. That is not to say that variation across countries does not exist in the present period; it does, and subsequent chapters exploit it to extract causal explanations. However, in this issue area cross-national variation is on average less significant than cross-temporal variation, and cross-national variation was much more significant in the past than today. If one were to focus only on the present period, as much of the existing literature on TCA does, one would not observe
wide variation, which perhaps helps to explain why scholars of TCA have largely avoided such questions.\textsuperscript{13}

But it is not possible to explain the current system unless previous arrangements are also considered. The present study therefore examines a longer swath of empirical material than most IPE studies, which tend to focus on the postwar world. Lengthening the historical reach of the study in this way is necessary if we are to observe significant variation in many of the key variables. However, it also comes at a cost, forcing the study to rely on data and sources that differ in nature and quality from case to case. It also forces the hypotheses to be stated in relatively general terms in order to apply across the diverse range of cases considered, although this also affords the advantage of allowing for testing a wider array of observable implications.

The empirical portion of the study begins at the most general level, in Chapter Three, with an analysis of contemporary surveys of firms’ preferences regarding transborder commercial dispute resolution. This allows us to examine the logic of the demand hypotheses, answering why firms choose certain dispute resolution institutions over others.

Chapter four then turns to the “supply” side, considering the evolution of the global institutions through which private arbitral tribunals have been delegated authority over

commercial dispute resolution. Case studies of two treaty negotiation episodes are presented, from the 1920s and the 1950s, and a quantitative analysis of national decisions to ratify the New York Convention is performed.

The remaining three empirical chapters present case studies of the United States, Argentina, and China from the colonial period to the present. Each national chapter compares several historical sub-cases (five for the United States, six for Argentina, and three for China). Supply and demand hypotheses are analyzed for each. These countries are chosen both because of their substantive importance and the range of variation they contain over time and between each other. Though all three have played a major role in global trade, they have done so in starkly different ways. The United States went from a commodity exporter to a diversified industrial economy, always as a relatively liberal market democracy in which legal institutions played a strong role. Argentina, in turn, developed from a colonial backwater to one of the world’s most important agricultural exporters (and one of its wealthiest countries) in less than a century, but then gyrated between opposing economic policy extremes. China, in turn, had commercial dispute resolution institutions imposed on it from the mid 19th century until the end of WWII. It then entered a period of near autarky, before returning to global markets and, in just three decades, becoming one of the most important trading states in the world.

Each country also inherited a very different set of legal institutions: British common law in the United States; Spanish law in Argentina, later influenced by French norms; and in China a mixture of pre-modern traditions, borrowed European codes, and, following
1949, Soviet laws and institutions. The countries continue to posses starkly contrasting legal fields to this day, and are connected to the transnational epistemic community around arbitration to different degrees.

Though the study does not include a European case study, the other chapters discuss dispute resolution policies in France, Germany, Spain, and, especially, the United Kingdom, as these bear heavily on both the international regime and the national cases. Limiting the national cases to non-European countries, though, facilitates comparison across cases. Because commercial arbitration, at least in its modern form, was most developed in Europe, and because it built upon numerous historical antecedents in European political economy, the important European cases involve additional complexities and historical contingencies. The United States, Argentina, and China, as more recent entrants into both the modern state system and the global economy, are more directly comparable in this regard.

A variety of methods are employed to deal with the diversity of the empirical material. Most of the chapters comprise historical case studies that explain cross-temporal variation for global and national institutions. These chapters rely on both secondary and primary sources, including materials from the archives of the League of Nations, the United Nations, the US, British, Chinese, and Argentine governments, the Chamber of Commerce of New York, the International Chamber of Commerce, and various international trade associations. The author also conducted interviews with legal practitioners, arbitrators, business people, judges, policymakers, and arbitral institutions.
in the United States, Argentina, China, and the United Kingdom. Unless otherwise noted, digital copies of both archival documents and interview notes are available from the author. Primary and secondary materials in English, Spanish, Chinese, French, and Italian have been consulted. Translations are provided when quoting from non-English sources, and the original language version is provided in footnotes.
2. EXPLAINING INSTITUTIONAL VARIATION

1. Introduction

A range of institutions can be, and has been, used to adjudicate and enforce crossborder commercial contracts, including domestic courts, international institutions, private tribunals, and hybrid mixes of these three. How can we explain this variation in the institutions that provide the rule of law for global trade? Following Keohane (1982), we can usefully break this question in two. Why do firms demand public or private institutions for this purpose, and what leads public or private actors to supply them, or, in the case of state deference to private authority, to allow them to be supplied?

This chapter develops two broad alternative theoretical explanations. Existing accounts of TCA come mainly from socio-legal perspectives, which emphasize the practices and norms of legal experts as the primary drivers of institutional outcomes. These ideas differ from the dominant explanations in the IPE literature for global economic governance, which instead understand institutions as the negotiated outcomes of economic agents and the states they influence. This chapter explores both of these theoretical approaches, which I refer to as the rationalist and ideational alternatives, in the context of transborder commercial dispute resolution, and outlines sets of alternative conditions under which one or the other can be expected to apply.
The chapter begins by reviewing existing explanations in the literature. A number of important mechanisms and drivers of institutional outcomes can be identified across the political economy literature on the rule of law, the international relations literature on international cooperation, the international relations literature on private governance, and the broad range of sociological and legal work that has addressed TCA specifically. But these ideas leave the question of institutional variation in public and private institutions under-theorized. A central task of the chapter, then, is to develop the rationalist and ideational accounts into well-specified mechanisms, by which I mean an internally coherent argument regarding the effect of the highlighted causes on institutional outcomes.

For the rationalist approach, this requires expanding institutionalist theories to account for the role of private actors in building and operating institutions, and to understand the extent to which public and private institutions are substitutable. Actors arbitrage across domestic, intergovernmental, and transnational institutions—a process I term “three-level” games—as well as combinations of these alternatives, in pursuit of the dispute settlement tool most amenable to their interests. For the socio-legal tradition, the central task is to translate non-positivist theories into social scientific mechanisms. Drawing on the sociological concept of an organizational field, I specify pathways through which legal norms may be spread by networks of transnational legal elites. To the extent these legal elites enjoy the deference of firms and policymakers, these norms will directly influence both the demand and supply of dispute settlement institutions. Thus refined, both logics specify the conditions under which different institutions—domestic,
intergovernmental, transnational, and hybrid—will vary, and the conditions under which actors’ demand for them will vary.

2. The Puzzle: What Institutions Make Transborder Commitments Credible?

Under what conditions do public institutions govern transborder commercial disputes, and under what conditions do private institutions provide this function? How do we make sense of all this variation, and of the complex, hybrid system of transnational commercial dispute resolution that has emerged today?

At least three literatures spanning law and political science provide some answers: the political economy literature on the rule of law and other market-facilitating institutions, theories of international cooperation and organization, including a growing strain of research on transnational private governance, and, in a distinct epistemological tradition, socio-legal and critical theories. Broadly speaking, the first two see politics as the behavior of rational actors pursuing their goals strategically. The second is more concerned with the context in which various actors operate, and how norms, knowledge, and ideas—especially those in the field of law—shape their actions along with material interests.

This section highlights the key contributions and gaps in these theories. To summarize, the political economy literature has explained how public and private dispute resolution institutions have operated, and documented important historical incidences of the phenomenon. These theories cast institutions as the results of bargains between various
actors, public and private, who strive to ensure that an institutions’ features and functional characteristics serve their interests. But political economists have not offered general theories of institutional variation across the private-public dimension, and so these ideas must be developed further to explain why we sometimes see public institutions for transborder dispute settlement and sometimes private ones. Similarly, theorists of international cooperation have documented the conditions under which states will delegate authority to intergovernmental bodies and, more rarely, to private bodies. They have also recently taken up the challenge of explaining why private actors create their own transborder governance institutions. But again, theories that explain variation between these two, or that explain regimes that combine public and private institutions, are underdeveloped. Moreover, apart from theoretical considerations, the topic of transborder commercial dispute resolution has, with one exception, never been considered by rationalist IPE scholars.

Instead, it is socio-legal and critical theorists whom have explicitly discussed TCA at length. The literature is diverse, but a common emphasis can be found on the legal and normative context in which disputes occur, and the role of legal practitioners and legal practices in shaping and constituting this context. The only book-length treatment of arbitration in political science argues, from a critical theory perspective, that the importance of private authority represents an anomaly mainstream IPE—focused on state-behavior and interest group politics—cannot understand.
Unfortunately, scholars in the socio-legal or critical literatures have not typically presented their theories in a way that allows for the generation of falsifiable hypotheses. Indeed, most of the literature is not engaged in social scientific testing at all. The task of the political scientist is therefore to derive falsifiable hypotheses from this rich literature and put them to the test.

The theoretical work of the dissertation is therefore twofold. First, the logic of existing approaches requires refinement and specification. Rationalist IR must be adapted to explain variation in transborder commercial dispute resolutions, and testable hypotheses must be derived from the socio-legal and critical theories. Second, we must find a theory that adjudicates between or synthesizes these diverse mechanisms.

2.1 The political economy of market-facilitating institutions

The classic political economy literature highlights the role of the state in providing institutional foundations for market relations, especially the rule of law. For North, the “provision of a set of public (or semi-public) goods and services designed to lower the cost of specifying, negotiating, and enforcing contracts which underlie economic exchange” is the central task of the state, so much so that “the creation of the state in the millennia following the first economic revolution was the necessary condition for all subsequent economic development” (North 1981, p. 24). Indeed, neoclassical economic theory typically saw this function as the very raison d’être of the state, a canonical example being Coase’s 1960 article “The Problem of Social Costs.” In a perfect market with no transaction costs, Coase argued, there would be no need for a state other than to
guarantee basic property rights, because individuals could make deals with one another to satisfy all their needs and achieve Pareto optimality.

A second literature within political economy focuses on the “private orderings” that underpin economic exchange, that is, institutions developed by the market participants themselves. This literature is on average smaller and newer than that focused on the state, and represents, in many ways a reaction to it. Discussed by authors as diverse as Hayek, Nozick, Ostrom, and Greif, it notes the ways in which social actors can and do create market-enabling institutions (or those that provide any kind of public good) without the “top down” intervention of the state.¹

Seminal treatments of private orderings in the context of dispute resolution have included Ellikson’s *Order without Law* (1991), an anthropological discussion of how Californian ranchers and farmers resolved disputes amongst themselves, and Milgrom, North, and Weingast’s formal theory of medieval trade fairs (1990). Subsequent work has explored specific instances of private orderings (Bernstein 2001), how private orderings may substitute for deficient public institutions, especially in the transition economies of the 1990s (McMillan and Woodruff 2000; Peerenboom 2002), and noted the complexity of institutions (e.g. social norms, gentlemen’s agreements) surrounding the rule of law (Hadfield 2004; Davis 2010).

¹ Within this literature we might differentiate the libertarian, Hayekian perspective, which emphasizes the efficiency of market-driven institutions over centralized ones, from what we might call “institutionalist” writers like Ostrom or Greif who explain how non-state governance institutions operate.
Despite this wealth of scholarly interest, the literature on both these “solutions” to the collective action problem does not answer the core question of this study: when do public institutions govern the economy, and when do private ones? The way in which different types of institutions provide the rule of law has been documented and explained, but not the variation between them. Consider each “solution” in turn.

The state-centric literature considers the state the only—and if not the only, then certainly the best—institution for market facilitation. This argument is more often than not assumed and implicit. North’s earlier work, for example, recognizes institutions, broadly, as “the humanly devised constraints that shape human interaction” (North 1990, p. 3), which would seem to admit a wide range of state and non-state institutions and organizations. In practice, however, his empirical arguments consider only the state, firms, and broad social norms. This raises an anomaly: it does not consider, much less account for, the vast number of private institutions (other than social norms) that have undergirded dispute resolution throughout history. Nor does it explain the contemporary hybrid system. At best, it renders such arrangements epiphenomenal.

The private orderings literature (to which North himself has also, later, contributed), in contrast, explicitly recognizes private arrangements as an alternative to public institutions. Indeed, its greatest contribution has been to recognize the logic of private orderings, to document instances in which they have arisen, and to explain how they function. This corrects the anomaly identified above. It does not, however, answer the broader question of why such private orderings sometimes dominate dispute resolution,
but sometimes do not. Instead, the literature has largely focused on explaining specific instances of private order, a choice merited by the research concerns and epistemological commitments of the authors.\(^2\) In sum, the political economy literature has not attempted to explain institutional variation in the provision of transborder dispute resolution. While various writers imply or assume that private arrangements will help to fill the gap when public order is impossible, this process is not theorized.

2.2 International cooperation theory

Let us turn now to the literature on international cooperation, a close cousin of the political economy literature that focuses on the dilemmas of creating political institutions in a world of multiple sovereign states. Note that this literature ought to answer an important question the political economy literature, conceiving of the rule of law as a principally domestic phenomenon, leaves unaddressed: how can a global economy be maintained in the absence of a global state? A classic Northian approach might suggest

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\(^2\) Arguably the most sophisticated research in the private orderings literature has consciously chosen not to explain larger patterns of variation. Greif has examined private order institutions with a remarkable degree of theoretical and empirical richness Greif, A. (1992). "Institutions and International Trade: Lessons from the Commercial Revolution." American Economic Review 82: 128-133, Greif, A. (1993). "Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition." The American Economic Review 83(3): 525-548, Greif, A., P. Milgrom, et al. (1994). "Coordination, Commitment, and Enforcement: The Case of the Merchant Guild." The Journal of Political Economy 102(4): 745-776, Greif, A. (2006). Institutions and the Path to the Modern Economy: Lessons from Medieval Trade. Cambridge, Cambridge University Press. His 2006 Institutions and the Path to the Modern Economy presents a thorough model of institutions as rules and processes embedded in social practices and beliefs, and how these processes underpin economic exchange. He also shows how these arrangements may lead, endogenously, to new institutional equilibria. This process is rigorously documented in the rise and fall of Genoa, one of the principal trading powers of the medieval Mediterranean, and other cases. But precisely because this explanation is so rich, it is difficult to generalize. Indeed, Greif does not see general theories of institutions as desirable or even possible. Instead, he advocates a “theoretically informed, case study method that extensively relie[s] on contextual knowledge of the situation and its history, and context-specific modelling” (Greif 2006, p. 350). While he agrees that “institutions are not random—those that fulfill a particular function or interest respond to the same forces and considerations—they are inherently indeterminate, historically contingent, and context-specific. We don’t have a theory of institutions to guide their empirical analysis, and what we know about them suggests that seeking such a theory is likely to be a futile exercise” (Greif 2006, p. 350).
that 190-odd states, acting independently, provide the rule of law through their domestic institutions to citizens and foreigners alike. This is a possible solution to the collective action problem of ensuring transborder credibility, but not a likely one. In many cases we might expect a state to face incentives to favor its own citizens over outsiders. The purely domestic solution also contradicts the logic advanced by North and other authors, who see the economies of scale provided by national institutions, as opposed to local ones, as an important driver of growth.

Fortunately, IR theory provides insight into this gap, explaining how states can cooperate with each other through institutions to provide public goods they could not create individually (Keohane 1984). Under this logic, we might expect countries to create international courts to hear disputes between their firms. After all, such courts exist in the trade regime (the WTO dispute settlement mechanism) and the investment protection regime (ICSID). To my knowledge, no such court has ever been created for commercial disputes, not even in highly interdependent, highly institutionalized economies like the European common market.³ An alternative IR solution might be a treaty that regulated the way in which domestic courts handled transborder cases and provided international recognition for cases decided abroad. These kinds of arrangements do exist, but only for a small fraction of the global economy.

³ A possible exception could be war claims tribunals, which states have often created in the wake of a conflict to resolve the private property disputes and contract problems created by interstate war. Such institutions are, however, aimed a much narrower class of disputes than general commercial dispute resolution. Indeed, their existence makes the lack of a public court for commercial disputes even more puzzling, because it shows that states can and have played this role through intergovernmental agreements.
While traditional IR cooperation theory suggests the conditions under which states may collectively choose to delegate, it does not specify what institutional form they are likely to delegate to, and so is hard-pressed to account for institutional variation. That said, the choice to delegate at all is of course an important part of the story of TCA, and our theory can build on the IR work in this area. Very broadly, two kinds of explanations are relevant. First, under the traditional institutionalist logic, states will delegate to increase the credibility of their commitments if they have a national interest in doing so. A disarmament treaty is the classic example. States may have a shared national interest in lowering their ability to harm each other, but be unable to convince the other that their reductions are real because each has an incentive to cheat and take advantage of the other. An independent institution that verifies reductions provides the credibility needed to make a deal possible. Analogously, states may choose to delegate adjudication to private arbitration bodies because they both have a national interest in giving firms the ability to make credible commitments.

Second, a modified, “two-level games” or “liberal” version of institutionalist theory considers how domestic political struggles affect the need and prospects for cooperation. Trade is a classic example. In this view, international agreements to delegate authority serve as tools for one part of government, such as the executive, to bind its hands and thus increase leverage against other domestic interest groups. In this view, states may choose to delegate to private arbitral institutions because one branch of government or the interest groups behind it wish to circumvent another (e.g. local courts).
The investment regime shows that private actors can play an important role in making the state’s commitments credible, regardless of whether they stem from national interest or domestic wrangling. Bilateral investment treaties (BITs) commit countries to honor the property rights of foreign investors based in the contracting parties. Firms that feel a state has expropriated their property may sue that court in an international public court, the International Centre for the Settlement of Investment Disputes. While these arrangements give extraordinary power to private actors, empowering them to challenge national policies in international courts, investment arbitration is distinct from commercial arbitration in that the adjudicating body is a treaty-based intergovernmental organization. Simmons et al. have shown that national competition for FDI is the dominant reason why states delegate such authority to ICSID.

While the majority of IPE literature remains focused on public institutions, a small but growing group of scholars has taken up the challenge of explaining private transborder governance institutions (Cutler, Haufler et al. 1999; Hall and Biersteker 2002; Baron 2003; Cashore, Auld et al. 2004; Mattli and Buthe 2004-2005; Graz and Nölke 2008; Pattberg and Stripple 2008; Abbott and Snidal 2009; Büthe 2009; Mattli and Woods 2009; Bartley 2010; Büthe 2010; Green 2010). Much of this literature is orthogonal to what I have called the private orderings literature, in that it addresses different substantive areas (e.g. environmental or social governance, as opposed to institutions that underpin the economy), or does not theorize private governance in terms of collective action problems and solutions. In fact, much of the literature done little theorizing at all, focusing—as perhaps is warranted in a ‘young’ literature—on describing and
conceptualizing the phenomenon. For some, the rise of private governance marks a fundamental shift in the nature of political institutions, a return to a world before the nation state, in which political authority is distributed amongst a patchwork of overlapping institutions. Most scholars, however, take a more narrow approach, focusing, like the political economists, on specific private institutions. Relatively few scholars have presented generalizable conditions under which we are likely to see private transnational governance.

There are some important exceptions. To my knowledge, only one rationalist IPE study explicitly addresses institutional variation in transborder dispute resolution (Mattli 2001). Mattli seeks to apply the principles of the Rational Design (RD) project (Koremenos, Lipson et al. 2001) to international arbitration, showing how demand for institutions with certain functional characteristics has led to an increase in private arbitration. The basic argument is that “the surge in popularity of arbitration as a means of international commercial dispute resolution can be attributed to features of arbitration that the international business community values for a growing number of disputes, notably in the areas of technology transfer, intellectual property, engineering, and construction. These features include flexibility, technical expertise, privacy, confidentiality, and speed” (Mattli 2001, p. 921). Unfortunately, this approach marries only imprecisely with the RD framework that describes institutional variation in more abstract concepts like “centralization” and “flexibility” and relies, in Mattli’s application, on uncertainty about the state of the world as the chief independent variable. With increasing uncertainty, Mattli argues, firms will demand more centralized and flexible mechanisms for dispute
resolving. However, Mattli only finds variation between private arbitration and national courts on the flexibility dimension (Mattli 2001, p. 928), leaving essentially a single testable hypothesis: does greater uncertainty lead to more arbitration? Mattli discusses a number of cases in which firms faced significant uncertainty and chose arbitration, but lacks sufficient quantitative or qualitative data to link these causally. Still, the study shows the utility of explaining institutional variation through demand for the functional attributes they provide.

A recent book by Büthe and Mattli demonstrates how the study of private transnational governance has grown far more theoretically and empirically rigorous over the last decade. Instead of dispute resolution, the authors examine the politics of the (quasi)-private standard-setting organizations that increasingly set the rules for accounting and product standards in the world economy (Büthe and Mattli 2011). However, they are less concerned with explaining privatization than with examining its effects and the logic through which the private institutions operate. These are important questions in themselves, but certainly depend in part on the prior question: why has regulatory power been assigned to private bodies in the first place? Büthe and Mattli suggest two answers. First, that “governments’ lack of requisite technical expertise, financial resources, or

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4 Mattli also conjectures that uncertainty leads to greater centralization, but because public and private institutions do not, in his account, differ on this dimension, it is an impossible proposition to test.

5 For example, he notes that the caseload of the ICC court has more interregional cases than intraregional ones. Positing that interregional disputes face more uncertainty than intraregional ones (a contestable claim), he argues that this demonstrates a preference for flexible mechanisms (arbitration) under conditions of uncertainty. But the evidence is inadequate to support this claim. First, ICC cases represent only a small fraction of total arbitration cases, and a biased one. Because the ICC is the most globally recognized arbitration institution, we should expect it to have more interregional cases than a local arbitration organization would. Second, Mattli does not offer comparable data on national courts or other arbitration institutions, or on the universe of disputes generally, so it is unclear what the proportion of interregional to intraregional cases is compared to. As discussed above, these kinds of empirical difficulties have made the study of transborder dispute resolution difficult.
flexibility to deal expeditiously with ever more complex and urgent regulatory tasks” (Büthe and Mattli 2011, p. 5). Second, they speculate that interest groups may push for private governance when they see it “leading to more cost-effective rules more efficiently than government regulation” (Büthe and Mattli 2011, p. 5). That is, functions or interests. Unfortunately, the book, focused on different questions, does not further develop these promising conjectures.

Perhaps the closest work, theoretically, to the present study is a recent dissertation by Green, which explains the emergence of private authority in environmental governance through an institutionalist logic (Green 2010). In her argument private authority emerges when private actors set rules to which other actors defer, a process she links to demand and supply for global governance. Demand will exist if private authority offers functional benefits over public institutions. Supply, in turn, can take two forms: bottom-up “entrepreneurial” governance initiated by private actors, or top-down governance “delegated” from states. Two conditions shape this choice. When the preferences of states converge and a natural focal institution exists, private governance is more likely to be delegated. When the reverse is true, private actors will initiate governance themselves.

This theory, by linking intergovernmental and transnational institutions, and the politics around them, offers a promising template for the present project. Though it explains many of the environmental institutions Green examines, it faces two difficulties vis-à-vis transborder dispute resolution. First, Green conceptualizes variation in transborder political institutions as, essentially, intergovernmental agreements and organizations,
delegated private governance, and self-initiated private governance. In TCA we also observe hybrid governance arrangements that cannot be described as “mere” delegation of technical functions. Second, Green seems to attribute demand for private governance chiefly to functional characteristics, its potential to fulfill some task more efficiently. The theory therefore does not allow us to test the possibility that demand for private governance may result from its distributional implications, as, for example, authors in the critical theory field suggest.

2.3 Socio-legal and critical approaches

The most prominent study of TCA (outside of technical legal manuals) comes from a sociological perspective. Written by a sociologist and a lawyer, Trading in Virtue employs Bordieu’s concept of a sociological “field” to examine the development of TCA (interestingly, the eminent sociologist also wrote the book’s preface). A field in this sense is “a symbolic terrain with its own networks, hierarchical relationships, and expertise, and more generally its own rules of the game, all of which are subject to modification over time and in relation to other fields” (Dezalay and Garth, p. 16). A field is made up of more than simply the institutions for transborder dispute resolution; it includes the entire “social space” or “area of practice” around these institutions, including lawyers and firms, and their beliefs, motivations, and patterns of behavior. For this reason, Dezalay and Garth focus their study on the actors involved in TCA, the relationships between them, and the social structure in which they operate. The components of this field are both ideational—ideas about the appropriate way to adjudicate cases figure

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6 Dezalay and Garth (p. 15) notes that this concept “shares affinities” with IR concepts like epistemic communities (Haass 1992) or transnational issue networks (Keck and Sikkink 1994).
prominently—and material. Dezalay and Garth are precise in noting that arbitration is big business, and that different ways of resolving disputes have distributional implications.

Dezalay and Garth’s rich collection of narratives highlights the role of contestation in defining the nature of contemporary TCA. They provide accounts of how struggles between Continental legal scholars and large, corporate Anglo-American law firms, between post-colonial regimes and Western oil companies, and between different national legal systems have all shaped the nature of commercial arbitration today. Their account provides numerous examples of the importance of material interests, but also highlights the role of behaviors, practices, and legal cultures. Perhaps most importantly, they demonstrate arbitration is today a closely knit world of colleagues, an epistemic community, in political science parlance. Many of its practitioners are also passionate advocates, seeking to educate firms, governments, and other lawyers of the virtues of the system.

Dezalay and Garth also offer a general argument for the rise of TCA. “Of particular importance, we suggest, were the cold war [sic] and the interventionism of the welfare state and of third worldism” (Dezalay and Garth, p. 311). Because arbitration allowed business to resolve disputes at some remove from these political interferences, businesses turned to it in increasing numbers, they argue. Unfortunately this argument comes at the end of the book, and does not receive much empirical argumentation. In my analysis it is at best incomplete. If increased state intervention in the economy provoked a flight to arbitration, then we would expect to observe more arbitration in statist economies, and
Explaining institutional variation

less in more laissez-faire ones. In fact, the opposite seems true, with the more liberal market economies embracing arbitration relatively more than others. Under the Dezalay and Garth argument we might also have expected a turn to arbitration in the 1930s, when the state came to play a larger role in the economy. But the shift they document does not occur until the 1980s and 1990s, when the state’s role was on average diminishing in the advanced economies. The argument also does not explain why states have delegated authority to private tribunals just as, in Dezalay and Garth’s analysis, they are taking a more active role in the economy.

Another important strand of the literature on TCA describes itself, or can be described, as critical theory. According to the only book-length treatment of transborder dispute resolution in political science, this approach eschews the “problem-solving nature” of mainstream political science and law which “takes the world as it finds it, with the prevailing social and power relationships and the institutions into which they are organized, as the given framework for action” (Cutler 2003, p. 60-61). Instead, critical theory advocates an explicitly “normative and transformative” approach that is “informed by the values and goal of human emancipation” and aware of the social world as a “continuing process of social change” (Cutler 2003, p. 61).

Unlike much of the political economy and IR literature, Cutler argues that existing approaches have failed to explain transformations in global governance because they see law as “peripheral,” not a “historically effective material and ideological force” (Cutler 2003, p. 61). She instead advocates a Gramscian approach that treats law as a “form of
explaining institutional variation

praxis involving a dialectical relationship between theory and practice, thought and action, and law and politics” (p. 103). In other words, for Cutler, legal ideas are themselves the forces that shape policy outcomes. This approach draws Cutler’s attention to the “mercotocracy,” which she sees as the legal elites (and their beliefs and practices) who have, through “legal hegemony,” supplanted the state to create a more privatized system of dispute resolution (Cutler 2003, p. 180). The “hegemony of expertise” (Dezalay 2011) is a core idea in this literature, emphasizing how the control and construction of knowledge shapes actors’ behavior.

Such approaches have the benefit of addressing directly the big question political economists and IR scholars have shied away from: broad institutional change. For the present study, however, their answers to this question are ultimately unsatisfying, for two reasons. First, on the theoretical level critical theorists do not adopt a positivist view of cause and effect. This is not problematic \textit{per se}, as not all questions of theoretical interest need be causal ones. But it is difficult to have a theory of change if the starting assumption is to study the world as a “continuing process of social change.” Having rejected a positivist position, critical theory asks that we explain changes in the practice and form of law by considering exactly that: changes in the practice and form of law. But \textit{why} do legal norms change? Without causal factors to serve as an Archimedean point, the critical theorist possesses little leverage to escape this tautology. The approach also fails to illuminate \textit{why} and \textit{how} legal norms guide the behavior of policymakers and firms, simply assuming the “hegemony” of legal expertise. While legal experts certainly may hold sway over other actors, their influence surely varies; an ideational theory should be
able to say how. Again, demonstrating this process would require more attention to causal factors.

Second, critical theory approaches, though often richly descriptive, can find themselves at odds with empirical facts that fall outside their narrative. To wit, Cutler describes a macro-shift to a world of privatized law. Similarly, many legal scholars refer to TCA as the “dominant” form of dispute resolution. As described above, however, the contemporary regime for transborder dispute resolution is more complex—and thus more interesting—than a simple shift from public to private. Private and public institutions co-exist, compete, and join together in diverse ways. While Cutler and other authors are certainly correct to identify a general rise in private authority, actual institutional variation is in fact more complex, and must be understood as such in order to be explained.

2.4 Building blocks toward a theory

Table three summarizes what I see as the main contributions of existing literatures to the question at hand.
These ideas all explain pieces of the puzzle. Indeed, they offer competing explanations for parts of it. But these partial explanations do not add up to theories of variation. On the rationalist side, we require some way of analyzing the interactions between the different bargains being struck within states, between states, and amongst private actors. We also need some kind of metric to compare the institutions that result from these bargains. On the socio-legal side, the problem is instead to extract causal processes—theories of change—from a literature that has largely eschewed them. I undertake both these tasks below, developing two alternative theories for variation in institutions for transborder dispute resolution.

3. Conceptualizing the dependent variable(s): supply and demand
Before laying out theoretical explanations for dispute resolution institutions, it is necessary to describe the object to be explained. Ultimately, this project seeks to explain variation in the institutions that provide the rule of law for transborder commerce. Conceptually, we can envision “provision” as the portion of all transborder commercial disputes in which a certain class of institutions is engaged. If two-thirds of commercial disputes go to public courts, and one-third to private institutions, the goal of the hypotheses below is to explain why.

This dependent variable presents two analytical difficulties. The first is empirical. As discussed in the introduction, the portion of cases going to a certain class of institutions is never observable because the total universe of cases is unknown. Moreover, we are only able to estimate the ratio for a few times and places, and even when data are plentiful significant uncertainty remains.

Second, on a theoretical level, the final ratio of cases handled by each institutional alternative is a compound outcome, determined by the choices of firms and the options made available to them by policymakers and purveyors of private dispute settlement. In other words, the role an institution plays in dispute settlement is a product of supply and demand. Theories of each are therefore required for a complete explanation.

Fortunately, disaggregating the dependent variable in this way alleviates the empirical difficulty, as, it turns out, measures of supply and demand are more readily observable than their outcome. Evidence of firm demand for an institution can include several data
sources. First, firms’ declared views on dispute resolution (in surveys, interviews, and other statements) indicate how they conceptualize and articulate their preferences. Correctly interpreted (e.g. taking into account the context in which a statement is made, its potential strategic implications, its accuracy, etc.) such data provides a first indication of what firms demand. Second, the institutions that firms in fact select to resolve disputes provides a measure of realized preferences, though these are of course conditional on the supply of institutional alternatives. Finally, the strongest indicator of demand for a particular institution is firm mobilization to create or defend their preferred institution, although this is again contingent on the supply of alternatives. Because mobilization is costly, it implies strong support for a given institution.

Supply is relatively simpler, though it can also be observed in several ways. Most basically, an institution is supplied if it exists. Institutions of course change over time, however, so it is important to consider the supply of changes in institutions as well. We must also be attentive, however, to efforts at supply that do not result in real institutions. Efforts and even mere proposals to create or change an institution must also be considered in the realm of supply, then.
Figure 4: Conceptualizing the dependent variable

With this sense of the dependent variable in place, the chapter now turns to developing the alternative theories that explain it.

4. A Rationalist Theory

Rationalist theories see politics as the interaction of actors pursuing their interests strategically. Actors create and employ institutions because they perform functions that actors desire. We therefore need to understand a) how the preferences of firms and other concerned parties over institutions are formed and, b) the dynamics of political
contestation through which one or another of these preferences becomes institutionalized.\(^7\)

First, however, we need to specify the dimensions across which institutions vary so that preferences can be “mapped” across institutional alternatives. In general, rationalist theories describe institutions in terms of their policy outcomes and their functional characteristics. The first is the goal the institution seeks; the second are the attributes of the institution that serve to realize that goal to varying degrees. In the realm of dispute settlement, I propose that we can usefully evaluate any institution, public or private, by asking three questions. What kind of judgments does it render, who is bound by these judgments, and how efficiently are judgments reached and enforced?\(^8\) Let us call these dimensions *policy*, *authority*, and *efficiency*, respectively. The dependent variable of this study is the type of institution that governs transborder disputes: public (e.g. domestic court or intergovernmental institution), private (e.g. transnational arbitration), or some mixture thereof. These three dimensions—policy, authority, and efficiency—serve as intervening variables that connect preferences to outcomes.

Once institutions have been described in these terms, we can then outline the conditions that will lead actors to demand certain combinations of policy, authority, and efficiency for transborder dispute resolution, and also the conditions that determine what

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\(^7\) This arrangement is analogous to tripartite framework of preference-formation, bargaining, and institutionalization employed by, for example, Moravcsik, A. (1998). *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*. Ithaca, Cornell University Press.

combinations will be supplied. The relative power of economic actors—both in market relations, vis-à-vis potential commercial partners, and vis-à-vis other interest groups in various realms of political contestation—is the key explanatory factor. Actors will demand the institutions that best meet their material needs (in terms of policy, authority, and efficiency), based on their position in the market. Whether they can force their trade partners to accept this preference is a function of their market power, but also the availability of institutional alternatives. The supply of different institutions, in turn, is decided, as in other areas of IPE, by political contestation and bargaining. Groups compete for influence over policy domestically, and states represent the views of the dominant domestic groups in diplomatic fora (Evans, Jacobson et al. 1993; Milner 1997; Moravcsik 1997). But this “liberal” or “two-level games” approach must be extended to include private alternatives to domestic and intergovernmental institutions. Political contestation over institutions occurs not just in the domestic and international spheres, but also in the realm of transnational, private-to-private interactions. Moreover, hybrid institutions, crossing the different loci of political contestation, may also be selected. Actors arbitrage across all these institutional possibilities to meet their goals, a dynamic I term “three-level games.”

4.1 Dimensions of Institutional Variation

What kinds of institutions will actors desire, and what common dimensions can be used to describe the institutional alternatives supplied? I argue that three aspects of all dispute

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As is typical of such explanations, this rationalist model is useful for explaining outcomes not because it precisely describes the actual behavior of every interest group, but because general trends can be explained as if actors behaved in this fashion.
settlement institutions are particularly salient: *policy, authority, and efficiency*. Consider each in turn.

### 4.1.1 Policy

All institutions—at least all of interest—pursue some purpose or outcome. These goals can range from the United Nations’ lofty aim “to save succeeding generations from the scourge of war” to the more parochial interests of bureaucrats to preserve their own jobs. In formal terms we often represent this concept in a highly stylized fashion as a point along a continuous policy dimension (e.g. the tariff rate).

In the rationalist view, the interests an institution represents and the problem(s) it seeks to solve determine the goals it aims to achieve. Institutions do not select a certain policy at random, but rather choose the policy that best serves the groups or individuals that control that institution. When the groups in control change, or their interests change, policy changes as well. A classic IPE example comes from trade theory. When the owners a scarce factor of production control the government, they favor restrictions on trade; when abundant factor owners have power they tend to prefer free trade. The shift of the British government from a mercantilist to a free trade policy in the mid 19th century, driven by the Industrial Revolution and the expansion of the franchise to urban workers, is a classic illustration of this principle.
We can apply the same logic to a private institution. The “policy outcome” of a commercial contract is the terms of exchange between two parties. The farmer would like to sell his grain to the distributor for $10 per bushel, but the distributor may only like to pay $5 per bushel for it. The final price, or any other aspect of the contract with distributional implications, including the dispute resolution institution selected (if any), will be determined by bargaining.

For both of these examples—and, indeed, for all institutions following the rationalist logic—the key determinant of the policy outcome is the constellation of power amongst the groups and individuals with interests at stake. For 19th century Britain, these groups were rural landowners, on one side, and urban workers and capital owners, on the other. Their respective power was determined by their numbers, their political influence, and the constitutional rules governing political competition in the country. For the farmer and the grain merchant, power is understood in market terms, the general level of demand and supply for grain at the time of the transaction, the structure of the market, the competitiveness of each party, etc. And in international politics policy outcomes reflect the preferences of dominant states. An institution’s policy outcome, then, is determined by the preferences of the actor(s) that dominates a particular locus of political or economic contestation.

How should we think about policy outcomes with respect to dispute resolution institutions? The chief outcome of such institutions is the distribution of resources they allocate to the various parties to a dispute. Most important, then, is whether the institution
decides cases in favor of a certain group, or if it is neutral. Let us define neutral
institutions as those that, for a dispute with a given set of facts, render the same outcome
regardless of the nature of the parties. Biased institutions, in turn, are those whose
outcomes are not independent of the nature of the parties to a dispute. Note that this
understanding of the “policy outcomes” of dispute resolution institutions is non-
normative—it simply describes variation in the distributional outcomes of a given
institution—and the dimension is continuous, as bias/neutrality may range from more to
less severe.

Three aspects of a dispute settlement institution affect its neutrality. First, and most
obvious, is the independence of the adjudicator. If a judge or arbitrator is beholden to one
of the parties in some way (e.g. corruption, conflict of interest, national solidarity,
political exigency, etc.), he or she is unlikely to deliver an impartial verdict. The various
rules surrounding alternative dispute settlement institutions, such as the dependence of
judges on other governmental actors, the choice of arbitrators, etc., determine how
impartial it is likely to be on average. Modern judiciaries aim to insulate judges from
political pressures and economic incentives, and most private arbitration tribunals follow
strict rules related to conflict of interest.

Second, bias may also manifest in the rules used to govern a dispute. For example, in an
intellectual property dispute, national laws vary enormously on what constitutes “fair
use,” how rigorously patents are interpreted, and many other details with important
distributional implications to the parties. The rules, even fairly applied, may thus favor
one party over another. National laws also differ in the level of deference they give to the will of the parties, as defined in the contract, versus how strongly they insist on providing “justice” as defined by, for example, a national civil code. Parties to transborder commercial contracts typically have wide scope to select a variety of rules that includes national laws, international laws, private lex mercatoria, additional rules written into the contract itself, or, in some cases, the discretion of the judge or arbitrator. A combination of these may also be chosen. However, dispute settlement institutions differ in how much weight they give different kinds of rules. Private arbitral tribunals typically allow parties significant leeway to choose the laws governing a dispute, while governmental courts in some jurisdictions prioritize the public laws of the state.

Third, the processes employed by different institutions may affect their neutrality. Below the monetary cost of dispute resolution and the speed with which a case is processed are discussed in the context of efficiency, and they certainly have an impact on that dimension. But they may also affect an institution’s neutrality. If dispute settlement is costly, the party with greater resources to spend on it will be advantaged. Indeed, this tactic is commonly used in US courts, as wealthy parties hire top-tier law firms and escalate the scope of legal conflicts in order to intimidate and overwhelm their counterparty by making the dispute overly costly. Speed, in turn, is likely to matter more or less to parties depending on how eager they are to settle a dispute, which is typically the company that feels its rights have been violated. Foreign companies in China, for example, have accused local firms of violating the terms of the contract—e.g. stealing intellectual property—and then stalling the legal process until the economic value of the
violation has been maximized (see Chapter Seven). These examples are analytically distinct from efficiency concerns (which are discussed below), but derive from the same observable features of a given institution: cost and speed.

Finally, institutions may also represent the interests of third parties; that is, outcomes may be tilted toward someone other than the parties to a dispute. This is particularly true of public institutions, which are often influenced by a wide spectrum of social groups, or by the interests of the government itself. When these groups have interests in dispute resolution beyond simply ensuring that the parties find a solution, they may impose different outcomes on parties than they may have chosen for themselves. Let us call this ‘third party bias” in outcomes. Note that private institutions, because they are variable in scope (see below), are unlikely to have this feature: parties will only choose to form or join institutions with outcomes they like or are forced into by a trading partner. Third party bias may manifest in various ways, but, in the context of public courts, it most commonly takes the form of requirements like the public disclosure of dispute procedures and outcomes, the application of relevant public laws, etc.

4.1.2 Authority

Authority, the second dimension, refers to the ability of an institution to elicit compliance with its rules. In terms of commercial dispute resolution, an institution is authoritative to the extent parties to a dispute abide by the terms of its ruling.\(^\text{10}\)

\(^{10}\) Note that this definition is broader than others (e.g. Weber, M. (1964). The Theory Of Social And Economic Organization. New York, Simon and Schuster, Green, J. (2010). Dissertation - Private Authority,
Authority may stem either from an institution’s coercive capacity or its legitimacy, or a combination of the two. Coercive institutions compel compliance from the individuals and groups they govern through material sanctions. The police powers of the state are an obvious form of coercive power, as are, in the international setting, the use or threat of military force (e.g. gunboat diplomacy) or retaliatory trade sanctions, such as those that occur under the WTO’s dispute settlement mechanism. But it is also important to note that coercive authority need not be public or juridical. Greif (1993), for example, demonstrates how trading clans have used social opprobrium to deter their members from breaking common rules, and numerous students of pre-modern dispute resolution institutions have noted how the threat of market sanctions alone can sometimes induce compliance (Milgrom, North et al. 1990). Below I explain how certain market structures may make informal private punishment mechanisms extremely costly to rule-breakers, potentially far more damaging than the alternative public sanctions.

Authority can also stem from the legitimacy of an institution, understood as the deference it receives from the governed in the absence of coercion (cf. Green 2010, pp. 25-30). Dispute resolution institutions employ a version of what Weber terms “rational-legal authority,” which elicits compliance from the governed through the systematic application of known rules in a regular and logical process (Weber 1964). Weber saw...
such authority as emblematic of the modern state, but private dispute resolution institutions have employed similar techniques. Indeed, today the leading public and private dispute resolution institutions are largely similar in this regard, and so can be expected to elicit similar levels of legitimacy-induced compliance from parties. That said, there is of course significant variation on the rational-legal quality of many courts and private tribunals across countries and in different periods.

In sum, authority, in both its coercive and legitimate manifestations, cannot be assumed to obtain more in public institutions than in private ones, or vice-versa. Rather, we can expect authority to vary considerably across all dispute resolution institutions.

Finally, outside the domestic context the scope of authority is a key consideration. First, and most basically, for an institution to be authoritative it must be able to bring its coercive or legitimate resources to bear on the parties to a contract. The fact that national courts lack jurisdiction over companies and assets based in other countries thus limits their utility for transborder dispute resolution by eliminating their key coercive resource. Private arbitration and international institutions do not face this limitation, but their broader scope is only potential: firms and states must agree to be bound by them, so their authority is less automatic. As discussed below, the hybrid system of TCA ingeniously sidesteps this trade-off by combining the scope of transnational and intergovernmental mechanisms with the authority of the state.

4.1.3 Efficiency
Last, institutions vary in how efficiently they adjudicate a dispute and enforce a ruling. Efficiency can be understood in several dimensions. First and most basically, almost all formal institutions involve paying some monetary fee to adjudicators and legal counsel. These vary considerably across institutions. In the United States, for example, filing a case in public courts has a negligible cost, but legal counsel can be extremely expensive. In China, both courts and counsel involve only small fees, less than those charged by leading international private arbitration tribunals. In Argentina, in contrast, public courts charge litigants three percent of the value of the award. The fees of the many private arbitral bodies and the lawyers that represent them also fluctuate widely.

Second, the time it takes to resolve a dispute is a key consideration. Companies typically seek quick resolution of business disputes because ongoing conflicts often prevent the firm from making other transactions. For example, a company selling a high-value product may wish to re-sell it to another customer if the original contract falls through. Also, goods like agricultural commodities or inputs to just-in-time manufacturing processes can decrease quickly in value. Sometimes a delay may simply mean a competitor is able to seize the initiative. For these kinds of reasons, the opportunity costs of waiting to solve a dispute may be quite high.

Third, the technical quality of the decision may also be important. Many commercial disputes require highly specialized knowledge to determine what constitutes breach of contract, or what the customary practices of a certain industry entail. Specialized
knowledge thus enhances the certainty that a dispute resolution institution will render a judgment that corresponds to parties expectations, increasing predictability. Moreover, expertise likely enhances the rational-legal authority of institution, mentioned above, which enhances compliance. Some institutions may provide this expertise more efficiently than others. Public judges—or juries—are typically called upon to hear a wide range of cases, and so are forced to rely on expert witnesses to reach judgments. In private arbitration, in contrast, it is often the experts themselves who adjudicate a case.

Fourth, and less intuitively, institutions vary in how damaging dispute resolution is to the firm’s other activities. A highly publicized court case with a counterparty can do significant damage to a firm’s operations. Confidential or embarrassing business practices may be revealed to customers, investors, or regulators. Valuable commercial information can be exposed to competitors. And the confrontational nature of litigation can permanently poison an otherwise productive commercial relationship between the parties to dispute. Private arbitration, which is almost always conducted in secret, mitigates these costs by reducing the numerous risks associated with publicity.

4.2 Rationalist determinants of firm demand

Having established the dimensions across which institutions vary, let us now specify the conditions under which actors will demand institutions that offer certain combinations of these attributes.
First, it is important to note that the prerequisite conditions under which such preferences will be relevant at all. Firms must invest time and money to negotiate contracts, defining the terms of exchange across several dimensions, of which dispute resolution is only one. For dispute resolution to be worth actors’ attention, the future cost of the other party’s non-compliance with the transaction in question must be relatively high. Low value transactions should therefore not lead firms to spend significant time or effort negotiating dispute resolution provisions, unless standard contracts (which apply the same terms to many different transactions) are used. Nor should firms with high discount rates be as concerned as those who expect to extract value from a transaction in the future, or on an ongoing basis. These conditions suggest that more established firms (making larger transactions, and doing so on an ongoing basis) are likely to be the ones who care most about dispute resolution. They also remind us that, because dispute resolution is not likely to be consistently at the top of every firm’s concerns, individual firms are less likely to mobilize on this issue than business associations (the collective action problem is explored in more detail below).

Given demand for dispute resolution, what kinds of institutions will actors prefer? At the most basic level, a rationalist approach suggests that actors will prefer dispute resolution arrangements that favor their material interests. As in the example above, dispute resolution is one element of contract negotiations that, like the price of the traded good or service, distributes value between the two parties. Therefore, an ideal institution would always resolve disputes in an actor’s favor. In a non-institutionalized context, in which only the balance of power between parties determines outcomes, the result is the same in
business as in war: “the strong do as they can, while the weak suffer what they must” (Thucydides).

However, in a less-skewed bargaining context an actor may not be able to get the other party to agree to a transparently biased institution. This raises the question: under what conditions does a merchant prefer a neutral dispute resolution system? I argue that private actors will demand such a system when they expect to be equally or less powerful than the other party. Powerful actors can compel their trading partners to resolve disputes as they desire. A rule-based institution is thus only useful to the powerful if it reflects this power imbalance. Weak actors, however, will benefit from a neutral, rule-based system that corrects power imbalances. This logic will also apply to actors of equal power. Only when a power imbalance between actors is large enough to guarantee a certain biased outcome will there be demand from the institutionalization of such bias.

Power in this sense should be understood broadly as how much one actor is needed by the other. For example, a monopolistic firm that controls a key commodity will have significant power vis-à-vis its trading partners. In a more competitive market, this power is eroded as any given firm may be replaced. Firms that “have” to trade with another will find themselves beholden to that company, while those with exit options will be relatively empowered. The case studies consider several examples, such as the export cartel that dominated Argentina’s grain exports in the early 20th century to the incredibly dynamic market that characterizes many of China’s key manufacturing exports, in which numerous firms enter and exit the market each year.
Firms’ relative power is also influenced by the information available to them. In a dynamic market, firms may be uncertain as to whether they will be more or less powerful than trading partners in the future. Under such conditions, the power imbalance at the time a contract is negotiated is less likely to lead to demand for a biased institution, because the powerful actors at the time of contracting cannot be certain it will possess the coercive resources needed to ensure compliance when a dispute arises. Uncertainty will therefore tend to equalize bargaining power and increase demand for neutral dispute resolution institutions (and also, as discussed below in the context of supply, reduce the authority of private enforcement).

In terms of the institutional attributes listed above, we can therefore expect firms in dominant market positions, who are relatively certain they will remain in that position, to demand institutions with biased policy outcomes, while weak firms or those in uncertain or dynamic markets to desire neutral ones.

What about preferences over authority and efficiency? I argue that these follow from demand over neutrality. When firms are able to obtain the institution with the policy outcome they desire, they simultaneously wish it to be authoritative and efficient. When policy outcomes are not as they wish, they will not desire an institution to be authoritative, and may accept inefficient institutions if they do not impose a cost (e.g. if the inefficiency stems from an institution’s very slow work process, not from its high fees).
Stated in this way, the theory assumes that policy outcomes are the institutional attribute about which firms care most. This assumption reduces the generality of the theory, but is analytically useful because the conditions under which an institution’s policy outcome matters most to firms are also the conditions under which firms preferences over dispute resolution matter at all. As argued at the beginning of this section, firms’ will only care about dispute resolution if they expect the cost of future non-compliance to be high. When that is true, firms are very likely to be concerned that they get a judgment that distributes as much of the amount in dispute to them as the other party will accept.

The argument thus presents firms’ preferences as if they followed the decision tree in figure five. Any set of alternative dispute settlement institutions can be ranked via this mechanism. First we consider whether the institution’s neutrality matches the balance of power and information between the firms. Institutions that provide policy outcomes consistent with the relative power of the firms will be favored over those that do not. Second, we consider the institution’s authority. Institutions that are able to elicit compliance with the preferred policy are favored over those that cannot, with institutions that ensure compliance with the wrong policy—the one inconsistent with the underlying balance of power in the market—favored least. Finally, for any institution, those that impose heavy transaction costs are favored less than those that minimize them.
Let us now turn to the question of supply. The policy outcomes, authority, and efficiency of dispute resolution institutions are conditioned by a mixture of properties inherent to the type of institution and the constellations of power and interests that surround them. Both of these factors vary across the various “sites” of politics: the state, state-to-state negotiations, and private interactions. We can thus expect different institutional possibilities—domestic courts, intergovernmental agreements, transnational private governance, and hybrid combinations of these—to vary with respect to the dimensions of policy, authority, and cost (table four).
Table 4: Variation in dispute resolution institutions (Note: f(X) means that the variable corresponds to the preferences of the dominant actor within X)

<table>
<thead>
<tr>
<th>Institution</th>
<th>Locus of political contestation</th>
<th>Policy</th>
<th>Authority</th>
<th>Efficiency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic court</td>
<td>Domestic politics (DP)</td>
<td>f(DP)</td>
<td>Coercive but limited scope</td>
<td>f(DP)</td>
</tr>
<tr>
<td>Intergovernmental organization</td>
<td>Interstate politics (IP)</td>
<td>f(IP)</td>
<td>f(IP)</td>
<td>f(IP)</td>
</tr>
<tr>
<td>Private institution</td>
<td>Transnational politics (TP)</td>
<td>f(TP)</td>
<td>f(TP)</td>
<td>f(market)</td>
</tr>
<tr>
<td>TCA regime (hybrid)</td>
<td>Multiple</td>
<td>f(TP)</td>
<td>Coercive but scope variable f(IP; DP)</td>
<td>f(market) (adjudication) + f(DP) (enforcement)</td>
</tr>
</tbody>
</table>

4.3.1 Domestic courts

Domestic courts are creatures of national governments. Domestic political rules and competition therefore determine their institutional attributes. Should one of the disputants be better represented in the government, it may expect to find courts biased toward its interests, absent strong guarantees of judicial protection. In some cases we expect this dynamic to favor domestic firms over foreign ones. However, the extent to which this is true in any one case is, of course, an empirical question. Domestic interest groups are not the only actors that may influence domestic politics. The state itself may have sufficient autonomy from interest groups to impose its own preferences on dispute settlement policy outcomes, and this may include providing fair dispute resolution to foreign companies (in order to stimulate trade, for example). Alternatively, autonomous judicial systems may be relatively insulated from the interest group politics that lead to bias. It should also be noted that foreign parties may have direct influence in ostensibly domestic politics. In weak polities, for example, domestic courts and governments may be “bought off” by influential foreign actors (the case in some of the 19th century Latin American
examples). And even for strong states, like contemporary China, the interests of foreign firms may coincide with those of certain domestic actors, giving them additional leverage over domestic rivals. The central point is that only in countries with very independent judiciaries can firms be assured that political interests will not interfere in public courts.

Beyond the potential for bias, perhaps the defining feature of domestic courts is the trade-off they embody within the authority dimension between scope and coercion. They excel at the latter; the police powers of the state are, in most modern trading powers, highly authoritative. Of course, state capacity is not always given, but, for present purposes, it is almost always reasonable to assume that states of importance to international economic exchange will be strong enough to enforce domestic court orders. In terms of scope, however, domestic courts face severe limitations. If a company has few assets in a court’s jurisdiction, its decision will have little impact.

Last, we can expect at least some disjuncture between the transaction costs associated with domestic courts and their operators and users. States are resource constrained, and so policymakers will seek to minimize the cost of providing dispute resolution services. But states may not be sensitive to the transaction costs paid by users of their courts, which may be extremely large. Indeed, dysfunctional and costly courts—not just biased ones—are frequently cited as a significant obstacle to the rule of law in developing countries. Only when the users of public courts can influence their design (e.g. in a political system in which firms successfully lobby the government for efficient public courts) should we expect the costs associated with public courts to be relatively low.
In sum, we can describe the “payoff” associated with domestic courts as a function of:

1. The policy outcome desired by the dominant actor in domestic political struggles
2. Potentially strong authority, but rendered partial by limited scope
3. Transaction costs determined by the responsiveness of the state to firms

4.3.2 Intergovernmental organizations

Let us now consider the second institutional alternative—an intergovernmental organization. Policy outcomes for this institution will be determined by interstate bargaining—i.e. the power and interests of the states involved. Large power imbalances may lead to dispute settlement institutions—or a lack thereof—that are more favorable to one class of parties than another. This was clearly the case in, for example, 19th century Latin America, when Western powers regularly used diplomatic and military pressure to influence dispute resolution in their favor. Proposals for an institutional solution—such as the Argentine jurist Calvo’s proposal for an intergovernmental court (see Chapter 6)—were never adopted. A parallel dynamic occurred in China during the same period, although in that case foreign powers were able to institutionalize biased dispute settlement provisions in the form of treaties granting extraterritorial application of their laws on Chinese soil. In contrast, the multilateral treaties that have promoted the mutual recognition and enforcement of arbitral awards were negotiated between far more equal parties (Chapter four).
Consistent with the domestic politics literature in IR theory (Milner 1997; Moravcsik 1997), we can expect domestic politics to determine state preferences in intergovernmental fora. States will tend to pursue the dispute settlement policies that meet the needs of the domestically dominant actors. The policy outcomes of intergovernmental fora, then, can also be understood as the average of the outcomes of domestic political struggles of the various states, weighted by interstate politics.

But as the logic of three-level games suggests, actors other than governments may also influence intergovernmental organizations. First, International organizations themselves may influence policy outcomes, provided they have autonomy to do so. In the field of transborder dispute resolution, for example, legal experts at the United Nations Commission on International Trade Law (UNCITRAL) set influential standards. Second, interest groups may also gain access to, and influence over, intergovernmental fora. Indeed, the most important intergovernmental institutions for dispute resolution, the 1958 New York Convention, began as a draft proposal from the International Chamber of Commerce, and that body participated actively in the negotiation process. In sum, the constellation of power and interests affecting intergovernmental organizations can be quite complex, requiring attention to the (domestically determined) preferences of states, the power between them, and the role of IGOs or transnational actors in influencing intergovernmental policy outcomes.

IGOs have the ability to exercise authority, but this authority is on average more variable than that of domestic courts. First, IGO authority over private commercial disputes is
always moderated by states. In theory, it would be possible to create a public international tribunal to which individuals or firms could bring commercial disputes, and which might have authority over them. In practice, this has never occurred. Instead, IGOs have set rules, such as the New York Convention, for how states and private tribunals should govern transborder domestic disputes.

The targets of IGO authority are therefore typically states themselves. If backed by the powerful states in a system, IGOs can impose coercive penalties to ensure compliance (as with the treaty ports). Compliance may also be achieved via the legitimate authority of an IGO, such as its technical expertise, but this is then contingent on state consent, and thus on the preferences of the dominant groups within a state.

Though the strength of their authority is therefore circumscribed, the scope of IGO authority may be quite broad, as the New York Convention, with 142 signatories, indicates. Because IGOs are variable in scope, their ultimate authority therefore depends on the constellation of power and interests more than that of state courts.

Finally, in terms of efficiency, IGOs are similar to states in that their designers do not necessarily pay the transaction costs required to use them. If IGOs were to administer courts for dispute resolution, we would therefore expect them to have largely comparable

Note, however, that an intergovernmental organization also has elements of fixed-scope institutions. On the one hand, intergovernmental clubs emulate the logic of private organizations by picking and choosing the favourable constellations of power and interests. On the other hand, the “building blocks” of such institutions—states—are fixed institutions. There are only 190-odd possible partners to choose from, and they come with certain interest and powers. If we consider the most important states to the global economy, the number of possible partners is perhaps only a few dozen. Building a particular institution out of private actors, in contrast, may offer significantly more flexibility because the possible number of constellations is much greater.
levels of cost, speed, expertise, etc. In practice, however, such courts are not ever observed; IGOs take no role in the adjudication of commercial disputes. Instead, IGOs are used to establish a) how states resolve disputes in their courts, or b) how states treat private arbitral awards. The relevant efficiency consideration is, then, simply the transactions costs attendant to negotiating an intergovernmental agreement. These range considerably. For the treaty port system, for example, the biased policy outcome could only be obtain via the costly use of military force. Both the Geneva treaties and the New York Convention required long rounds of multilateral negotiations (see chapter four). In contrast, many of the bilateral treaties recognizing and enforcing arbitral awards on a reciprocal basis have been negotiated very quickly, with the language relevant to arbitration included as boilerplate (see chapter five).

The payoff for an intergovernmental organization, then, is entirely a function of interstate politics.

1. Policy outcomes reflect the preferences of the dominant groups within the dominant states, as well as those of transnational lobbyists and IGOs with agency
2. Authority can be high, but is contingent on scope, which is determined by the number of states that a) share a set preferences for a given policy, or b) can be compelled to join by more powerful actors sharing a set of preferences
3. Efficiency relates to transaction costs of negotiating and establishing an intergovernmental agreement

**4.3.3 Private institutions**

Let us now consider private institutions. Of the three alternatives, these are the most versatile, with their policy, authority, and efficiency depending entirely on the choices of the parties themselves and the legal experts they employ to resolve disputes (as
Explaining institutional variation

Institutional variation

arbitrators, for example). In theory, parties could re-negotiate the terms of the dispute resolution institution every time they make a deal, generating as many dispute settlement institutions as there are transactions. As Coase (1960) famously argued, in a world without transaction costs, this proliferation of contracts would optimize efficiency. Because transaction costs do, in fact, exist, the argument provides a justification for the state as an efficient alternative to endless private-to-private contracting. However, the proliferation of private dispute settlement mechanisms suggests that Coase may have carried the implications of what he called “social cost” too far. Firms may not want to re-create institutions for each transaction, but they do seem, following the rationalist logic, to give themselves an array of alternatives beyond the state to choose between.

This flexibility implies that the attributes of private institutions will be strongly conditioned by the balance of power between firms. Note that a wide array of private institutions are possible. A private ordering may be elaborate and formal, like an arbitration court. But it may also be something as simple as a customary rule used by a certain group of traders. The precise degree of institutionalization chosen will, in the rationalist logic, correspond to firms’ preferred mix of policy outcome, authority, and efficiency.

First, regarding policy outcomes, I have argued above that relative market power will generate different preferences over dispute resolution policy outcomes. When power is even and/or uncertainty is high, neutral dispute resolution institutions will be demanded; when power is imbalanced and firms are fairly certain it will remain that way, they
demand biased policy outcomes. For private institutions, we should not expect biased institutions to be particularly elaborate. Consider a monopolistic market in which a single seller sets the terms of exchange. Disputes, or at least significant ones, are unlikely to arise in such a setting, because the market power of the monopolist allows it to coerce other firms. There is thus little need for institutionalized procedures for adjudication and enforcement. In contrast, neutral dispute resolution requires more institutionalization. Precise rules must be laid out to govern the contract and applied competently to the facts of a dispute. For this reason it is not surprising that private arbitration tribunals tend toward neutrality. Firms seeking biased dispute resolution through private institutions need not develop them so elaborately.

The authority of a private institution is similarly contingent on market dynamics. Indeed, much of the historical institutionalist literature regarding private dispute resolution, discussed above has focused on the authoritativeness of private institutions). When non-compliance with a private decision is likely to result in decreased trading opportunities in the future, private institutions can be quite coercive. But when this is not the case, it is unlikely they will have much effect. For example, in a relatively small market in which all traders know the reputations of potential buyers or sellers, and in which true competition exists, a finding of malfeasance is likely to be quite damaging. Similarly, in a monopolistic or oligopolistic market, the stronger firm will be able to elicit compliance from weaker firms. From these ideas, which derive from the basic findings of cooperation theory (Axelrod 1985), we can discern a list of (additive) conditions under which purely private enforcement is likely to be authoritative:
1. When one party possesses decisive market power over another, e.g. is a monopolist
2. When there are relatively few actors in a market
3. When exchange between actors extends into the future
4. When compliance is readily observable to a counterparty, and to other potential counterparties

The transactions costs of a private institution, unlike its alternatives, are born directly by their users and creators, operating under a market logic. Private arbitral tribunals charge companies for their services. They compete with each other, and with public courts, across all dimensions of efficiency: monetary cost, speed, expertise, and secrecy. Unlike public courts, private institutions can be adjust each of these factors to meet market demand.

The payoff of a private institution is, therefore, largely a function of transnational politics, though market competition determines its transaction costs.

1. Policy outcomes reflect the preferences of the dominant actor in the market
2. Authority is determined by the nature of relations between firms
3. Costs are determined by the degree of market competition between dispute resolution service providers

**4.3.4 Hybrid Institutions**

Hybrid institutions will, of course, combine elements of those institutions described above. As discussed in Chapter one, dispute resolution entrails two central tasks: adjudication and enforcement. The former relates to the process of claim-making, evaluation, and adjudication; the latter describes what happens once a decision has been
made. Hybrid institutions can be understood as those in which a public institution handles one of these aspects while a private institution governs the other.

Take the current regime for TCA as an example. Policy outcomes are determined by private arbitration tribunals, a function of transnational politics. But the judgments of these private bodies are enforceable in domestic courts, putting the full authority of the state behind them. The scope of this authority is, in turn, determined by firm-firm relations, since adherence to private arbitration is voluntary, and by international politics, since enforcement is only possible if the home country is a member of the New York Convention or other treaties that give foreign arbitral decisions the force of law.

Contingent on state delegation to private arbitration, then, the judgments may avail themselves of coercive authority. Transaction costs, in turn, combine the logic of market discipline (for adjudication) and domestic politics (in the home state of the losing firm).

The payoff for a hybrid institution is thus quite complex. The strategy allows actors to “mix and match” the institutional characteristics that other institutional forms.

4.4 Three-level games: connecting supply and demand through institutional arbitrage

Having defined the conditions under which certain combinations of institutional attributes are demanded and supplied, we must now specify the process through which one institution emerges over other possibilities. Continuing with the supply and demand metaphor, I argue that this occurs as if through a process of firm arbitrage over institutions in three spheres of political contestation, the domestic, the inter-state, and the transnational. Following Putnam, I term this framework “three-level games.”
Actors operate simultaneously across the domestic, international, and transnational political arenas. Each of these loci presents them with a different array of power and interests. Institution-building is a possible strategy within each of these interactions (either through the government or governments, or privately), but the resulting institutions will differ. As described above, these differences are due to the different functional characteristics and different constellations of power and interest that attend to each domain of politics. Actors select between the available institutional alternatives to meet their preferences.

This idea grows directly out of trends in IR that emphasize the role of transnational actors, domestic politics, and private governance. These trends have progressively relaxed two canonical principles of modern IR theory: that the state is a unitary actor, as well as the principal one in international affairs. Sophisticated IR theorists have always known this view of the state to be highly stylized. Indeed, they defended this conception not because it was precisely accurate, but because it allowed scholars to formulate parsimonious theories. As IR theory developed, however, new empirical puzzles required more expansive views of world politics. Theories of domestic politics have alerted scholars to the importance of domestic interest groups (Putnam, Milner, Moravcsik), while other scholars highlighted the role of transnational actors in global politics (Keck and Sikkink, Risse). It is often forgotten that the basic contours of these ideas were already in place in the 1970s (Nye and Keohane 1971; Mansbach, Ferguson et al. 1976), as noted above, but had been sidelined during by the debate between neorealism and
neoliberal institutionalism. However, it is only more recently that scholars have also begun to examine the ways in which private actors can create their own transnational institutions. The theory developed here is a logical continuation of these trends (or, alternatively, a further attempt to fill out the broad contours of the 1970s literature), arguing that institutions located in each sphere of political contestation may be substitutable (see figure six). To the extent they are, market actors are engaged in what I term three-level games.
The following decision tree (figure seven) presents, in stylized form, how we can think about the process of institutional arbitrage.

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12 This graph is a reinterpretation of Figure Two in Nye and Keohane (1971, p. 334), modified to emphasize the role of transnational institutionalizations, i.e., private governance.
The model works as follows. First we consider the deal struck by two firms, which determines the kind of dispute resolution they seek. As discussed above, this choice will be a function of their relative bargaining power. When power is equal or information is relatively scarce, a neutral institution will be sought. When power is unequal, and thought to stay that way, the stronger firm will desire an institution biased toward its interests, and the weaker one will have no choice but to accept if it wants to do business. The other institutional dimensions (e.g. authority, and cost) depend on whether or not there is an institution that meets the policy requirement. Contingent on there being such an
institution, actors will also desire an authoritative institution so that they can implement their goals. Those with lower transaction costs will be preferred, ceteris paribus.

Next, we consider supply, looking at which actor(s) dominate each locus of political contestation. For each, we consider what dispute resolution institution they demand (if any), as per the demand conditions. For domestic courts, we consider whether the dominant domestic actors favor neutral policy outcomes, or are disposed toward one actor or another, or toward third parties. We ask the same question of IGOs, but consider the wider forces of interstate politics. And with regard to private institutions, we are curious if market conditions imply demand for biased or neutral institutions.

Once the relative policy outcomes have been described, we consider the authority of the institutional alternatives. Do the institutions that provide the desired policy outcome either command their obedience of the parties to a contract, or have the coercive means to do so? Unless both firms have significant assets in the same jurisdiction, domestic courts are unlikely to meet this criterion. For IGOs, the answer is determined by assessing the scope of an intergovernmental agreement, or, if considering a hypothetical possibility, whether the interests and power relations between the states in which the firms’ assets are located would favor joining a certain institution or not. For private institutions, the question is whether both firms agree to participate, which again depends on the balance of market power between them.
Finally, we consider the relative efficiency of the remaining institutional alternatives, looking either at the responsiveness of state(s) to firms (for domestic courts and IGOs) or market competition between private providers.

In sum, the rationalist model proposes two sets of conditions, one for demand, the other for supply. These lead to falsifiable hypotheses.

**R1: Firms demand neutral institutions if their market power is roughly equal; otherwise the strong firm demands biased institutions and the weak has no choice but to agree.** If a dispute resolution institution with the desired degree of neutrality is possible, firms also demand that it be authoritative and efficient.

A number of observable implications follow. First, we should see certain conditions in place before we would expect the rationalist theory to explain firm demand. Firms will have salient preferences over dispute settlement to the extent they engage in relatively high-value transactions whose value is realized on an ongoing basis. That is, the rationalist theory presumes that firms will be concerned with the cost of potential non-compliance with a contract in the future. Therefore, we should observe relatively large and established firms, operating in industries in which transactions are relatively valuable and which occur over time, to be more likely to express demand as per R1.

Second, we should observe firms with certain market positions express demand for certain baskets of institutional feature. Firms in markets with large numbers of buyers and sellers, in which no one firm or group of firms controls a decisive share, and with significant firm entry and exit will demand relatively neutral institutions. Monopolists
and oligopolists should not demand such institutions (such as independent national courts and professional private arbitration bodies), and instead rely on less institutionalized forms of private dispute resolution. Similarly, firms in markets with large numbers of buyers and sellers and significant entry and exit will not be able to create authoritative private institutions, and so should demand public enforcement for institutions that offer their preferred policy outcome. Finally, if institutional alternatives are approximately equal in terms of neutrality and authority, firms will demand the relatively efficient institution (in terms of speed, cost, expertise, and the maintenance of commercial relations).

Third, a number of process-level implications follow. We should observe firms describing their preferences over institutional alternative in terms compatible with the dimensions of neutrality, authority, and efficiency, and to rank institutions consistent with the posited hierarchy amongst these attributes. Firms should also follow through on their statements, actually selecting the institutions that best meet their preferences (as defined by R1), though on this point we should expect their choices to be conditioned on what institutions are actually, as opposed to hypothetically, available. Similarly, we should observe firms to mobilize to create (maintain) an institution only if it is preferable, in terms of R1, to the status quo (new proposal).

R2: Institutions with the policy outcomes, authority, and scope demanded (per R1) by the dominant interest group in a locus of political contestation, if any, emerge in

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13 Note that the model predicts outcomes as if firms and policymakers behaved in this fashion. We should not therefore expect market actors to literally describe institutions and their preferences in the language posited here. Rather, the hypothesis would be supported if firms’ own descriptions of their preferences suggest preference orderings that substantively match those of R1.
that locus. However, the extent to which the resulting institution meets the dominant actor’s desiderata is constrained by the inherent attributes of domestic, intergovernmental, and private institutions.

Again, a number of observable outcomes and processes are implied by this hypothesis. First, if an actor’s preferred institutional outcome can be achieved in the locus in which it is also the dominant actor, the institutional outcome will match its preferences exactly. In other words, we should expect institutions to deviate from actor’s preferences only to the extent that actor is not politically dominant, or the particular institution pertaining to the locus in which the actor is dominant cannot, because of its inherent qualities, meet that actor’s preferences.

Second, shifts in the constellation of power and interests at a certain locus of political contestation (e.g. a change in government, a rebalancing of the interstate balance of power, a shift in market power) will lead to changes in dispute settlement mechanisms if the newly dominant group’s preferences differ from those of the old group. Conversely, dispute settlement institutions will remain unchanged as long as the dominant groups remain unchanged, and their preferences (determined by the market conditions under which they operate) do not shift. In other words, dispute settlement institutions should change given:

1. Domestic institutions
   a. A shift in the preferences of the domestically dominant groups
   b. A shift in the domestic balance of power, but only if the new group occupies a different market position
2. Intergovernmental organizations
   a. A shift in the preferences of the dominant groups within the dominant states
   b. A shift in the international balance of power, but only if the newly empowered states are dominated by groups with distinct interests
3. Transnational institutions
   a. A shift in the relative bargaining power of commercial actors
   b. A shift in the market conditions that affect the authority of private institutions

Similarly, on a process level, we should not observe actors mobilizing to create new institutions, or defend established ones, unless the status quo fails to meet actors’ preferences, or a new proposal threatens them.

Third, we should observe hybrid institutions when no one locus can successfully fulfill an actor’s preferences. As discussed above, hybrid institutions allow actors to combine one arrangement for adjudication with another for enforcement. This allows actors to combine the policy outcome of one institution with the authority of another while achieving a level of efficiency characteristic of both institutions. We should only observe this strategy when one institution is clearly superior in terms of adjudication and another in terms of enforcement.

5. An Ideational Theory

I now turn to theories that emphasize the role of norms, behaviors, and practices, linked together in fields or communities of actors, in determining institutional outcomes. As noted above, a number of distinct theoretical approaches focus on these kinds of variables and mechanisms, and the theory I present below draws from several of them. I do not seek merely to “operationalize” one existing theory by deriving testable social scientific hypotheses from it. Rather, my goal is to develop a new theory that incorporates the key
insights from several distinct approaches, including ideational IR, socio-legal scholarship, and critical theory.\textsuperscript{14}

Below I explain the key concepts on which the theory builds. First, I note how actors are linked together in “organizational fields” and transnational epistemic communities. In the case of transborder dispute resolution, the legal community provides a common social space in which norms can disperse. Within it, more specific groups, especially national and transnational networks of commercial arbitrators, act as norm entrepreneurs. These epistemic communities can be thought of as “normative interest groups” within the larger organizational field of law, in that they push both firms and states to use and allow private dispute resolution. Certain international organizations, such as the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT), act as hubs of authority within these networks, as do private organizations like the International Chamber of Commerce or various lawyers’ associations.

Second, I elaborate the mechanisms through which these fields and networks are constructed, and through which they inculcate actors into certain norms and practices. In the context of transborder dispute resolution, the dominant mechanism is a logic of legal appropriateness. The practice of law forces actors to logically deduce a “correct” principle from a body of text and practice, and so we should expect logics of

\textsuperscript{14} It would therefore be incorrect to criticize the theory for mistranslating the arguments of existing work into testable hypotheses, as this is not its aim. Though the theory draws directly on existing ideas, it combines them in a novel way, and should be judged by how well it explains variation in transborder institutions for commercial dispute resolution, not by its fidelity to its intellectual origins.
appropriateness to be particularly prominent. That said, the process of settling on a controlling norm is often contested. A certain legal idea or practice, such as TCA, begins with a small group of advocates, who then seek to spread it throughout the field. A principle wins out over others when the normative interest group behind it is able to overcome competitors. I specify a number of ideational “power resources” that can make them more or less successful.

Third, I argue that legal experts exercise influence over other professional fields, especially business and government, through claims to the legitimacy and efficiency of legal expertise. Actors defer to legal experts because they recognize them as legitimate authorities and possessors of technical knowledge. Such deference is neither complete nor automatic, and so we need to understand the conditions under which lawyers are able to influence other actors. I argue that uncertainty over the outcomes of alternative institutions plays a large role.

With these concepts in place, I then outline how this theory explains the conditions under which actors will demand one or another dispute resolution institution, and the conditions under which private actors and the state will supply certain institutions.

5.1 Legal fields and networks

The sociological concept of an organizational field is “a recognized area of institutional life,” a cluster of organizations and actors characterized by 1) a heightened degree of interaction between organizations in the field, 2) the “emergence of sharply defined inter-
organizational structures of domination and patterns of coalition,” and 3) “the development of a mutual awareness among participants in a set of organizations that they are involved in a common enterprise” (Dimaggio and Powell 1992, p. 65). The concept is sufficiently flexible to apply to many domains of organizational activity, including art museums, industry groups, and community colleges. For present purposes, we focus on the organizational fields surrounding the practice of law, which can be thought of as a series of nested and partially overlapping spheres. At the broadest level, the entire practice of law can be considered an organizational field. Lawyers and legal organizations like firms, courts, and law schools experience a heightened degree of interaction. They are connected through inter-organizational structures—the norms and procedures of law, principally, but also economic relations—that link them together. And they are mutually aware of themselves as a group (Tolbert 1988; Suchman 1996).

We can also differentiate narrower fields that overlap or are contained within the full legal field. Because national governments are key sources, interpreters (via courts), and enforcers of law, and because legal practitioners are professionalized along national lines, state boundaries are an important source of differentiation. For example, an American legal field can be distinguished from a Chinese legal field: training and accreditation are different, different court systems are employed, black letter laws differ, and informal and private institutions like bar associations and, indeed, private arbitral tribunals differ. Different nations or groups of nations also vary in terms of what legal scholars call “legal culture,” an amorphous category that refers to the full scope of practices and behaviors that operate within legal fields (Sarat and Kearns 1998; Nelken 2004). National legal
fields are also influenced by distinct legal traditions, which refer to the baskets of norms
national legal fields inherited from their predecessors. Many different overlapping
typologies of legal traditions are possible, but the divide between common and civil law
systems is perhaps the most salient (Trakman 2007). Scholars also refer to the colonial
debates of legal traditions, in which distinctly British, French, or German (for example)
legal norms can be identified across the former colonies of different imperial powers.

There is also, however, an organizational field of private international law, of which
transborder commercial arbitration is an important component, that overlaps with
national organizational fields. This field includes the lawyers who represent firms in
transborder commercial disputes, the arbitrators who judge them, and the private arbitral
institutions that often manage these cases. It also includes associations of arbitrators, the
schools that train them, and the international institutions that create hard or soft
international law in this area, such as the United Nations Commission on International
Trade Law (UNCITRAL) or the International Institute for the Unification of Private Law
(UNIDROIT). This field comes with its own elements of legal culture, which overlaps
with the national legal cultures of the various participants (Trakman 2007).

At a greater level of specificity lies a distinct concept, the epistemic community, which is
likely more familiar to scholars of international relations. In Haas’s classic definition,
“An epistemic community is a network of professionals with expertise and competence in
a particular domain and an authoritative claim to policy-relevant knowledge within that
domain or issue-area” (Haas 1992, p. 3). Epistemic communities are therefore more
specific than organizational fields, in that they include only like-minded experts who share common values or skills, for example, nuclear arms experts or climatologists. They are also often dedicated to pursuing a certain policy outcome.

Such networks have come to permeate nearly every field of law. Within legal fields, bar associations and other professional groups bring together lawyers around common interests. For example, the American Bar Association has some 22 “sections” covering all fields of law. Within the international law section, there are 64 committees on various subjects, one of which covers international arbitration. There are also numerous other legal associations within legal fields, such as the American Society of International Law. Even more pertinent to the present study, however, are the numerous networks that link lawyers together across legal fields. These include groups like the International Bar Association, the Inter-American Bar Association, the International Law Association, the Union Internationale des Avocats—all of which have played a role in promoting arbitration—and scores of others. Even judges have linked together across borders in order to share norms and interpretations to common problems (Slaughter 2004). This has also occurred in the context of the enforcement of arbitral awards and the interpretation of the New York Convention. At a conference celebrating the 40th anniversary of the treaty at UN headquarters, a panel of judges from Thailand, the United States, Canada, Argentina, and Egypt was asked to discuss the role of foreign interpretations in guiding their own jurisprudence. Each stated that foreign judgments were important reference points for their own understanding of how the Convention should apply (1999).
In the realm of transborder commercial disputes, the legal experts who perform TCA can be seen as a transnational epistemic community. The lawyers that teach and practice arbitration (either as arbitrators or advocates for parties) are a highly specialized and organized sub-community of lawyers. Arbitration requires a unique set of skills and expertise that other lawyers, even those in commercial practice, may not acquire. There are also strong social linkages between arbitration lawyers, with many of the most elite groups acting as a kind of club. Arbitrators tend to attend conferences with other members of this club, serve on arbitral panels with members of this club, and recommend that their clients select members of the club as arbitrators. These lawyers are often strong advocates of arbitration over litigation, seeing it as a superior form of dispute resolution. For Cutler (2003), this group constitutes a “meroctocracy,” seeking to impose private law on global commerce. It is certainly a group of like-minded individuals powerfully invested in private dispute resolution.

5.2 How fields influence actors’ behavior (and thus institutional outcomes)

According to DiMaggio and Powell, “once disparate organizations in the same line of business are structured into an actual field…powerful forces emerge that lead them to become more similar to one another” (p. 65). A practice may be adopted by an organization initially because it serves some functional need for that organization. But “as an innovation spreads, a threshold is reached beyond which adoption provides legitimacy rather than improves performance.” DiMaggio and Powell term this process isomorphism, “a process that forces one unit in a population to resemble other units that face the same set of environmental conditions” (66).
DiMaggio and Powell identify three mechanisms through which isomorphism occurs. First, coercive isomorphism involves force or other forms of pressure. For example, a new governmental regulation may force all actors in an industry to alter their behavior in some way. Second, mimetic isomorphism is a process through which organizations model themselves on salient examples, and is primarily, in the sociological literature, a response to uncertainty. “When organizational technologies are poorly understood, when goals are ambiguous, or when the environment creates symbolic uncertainty, organizations may model themselves on other organizations” (p. 69).

The third mechanism of isomorphism, normative pressure, is perhaps the most relevant to the present study. For DiMaggio and Powell, it is principally a process of professionalization, which they define as “the collective struggle of members of an occupation to define the conditions and methods of their work…and to establish a cognitive base and legitimation for their occupational autonomy” (70). Professions have many tools for creating normative isomorphism. Certain training procedures, often in universities, ensure that a common frame of knowledge defined by members of the profession is passed on to new entrants. These entrants are also filtered (both by themselves and professional gatekeepers) to fit existing patterns. Once admitted to the profession, professional associations generate and enforce norms.

The field of law in general fits this framework of normative professionalization well, as does the sub-field of arbitration. To be selected as an arbitrator a lawyer must build
experience with arbitral institutions and, typically, within the arbitration practice of a law firm. Moreover, arbitration institutions are themselves shaped by the normative principles of the field. Arbitral institutions are diverse, but, as the sociological theories predict, also exhibit striking degrees of isomorphism.

Crucially, “each of the institutional isomorphic processes can be expected to proceed in the absence of evidence that it increases internal organizational efficiency” (DiMaggio and Powell, p. 153). This is the key point of difference with rationalist theories. Instead of changing to do what they do as well as possible, actors instead seek to fit into their field. Once common norms are established, the primary goal is to conform to them so as to earn prestige and legitimacy from the rest of the field. Status competition, not efficiency, is the primary driver of actors’ behavior. In this case status and legitimacy derive from adherence to legal principles.

5.3 How fields are constructed

Once a field is in place, then, it exerts influence over actors’ behavior and, thus, over institutional outcomes. A theory of institutional variation therefore requires us to understand how fields are constructed and why they evolve or change. We also need to understand how certain norms and principles come to be embedded in organizational fields. On these points the sociological literature is, in my reading, weaker. Powell and DiMaggio suggest that a practice or organizational form might begin as a response to a functional need, but then evolve, via a process of isomorphism, into an element of an organizational field. We need to be specific, though, about how this process works. The
sociological literature posits a number of drivers, several of them non-ideational. For example, state regulation may force organizations engaged in a similar task to comply with certain standards. Market competition between organizations may wean out certain organizational forms. These mechanisms are accounted for within the rationalist framework outlined above.

Here I focus on an additional, purely ideational mechanism: legal contestation. Law is distinct from other policy areas in that it is, by nature, a system of normative principles. While there are many sources of law (governments, international institutions, common law, customary law, etc.), legal experts are tasked with interpreting these ideas and finding the “correct” solution for a particular case or class of cases. To what extent private disputes can and should be heard in private tribunals, and to what extent the decisions of such tribunals are authoritative, are crucial questions that lawyers have sought to answer within the terms of law. We thus need to understand the conditions that make it more likely for some legal principles to trump others.

I suggest an analogy from the politics of interest groups. Within a (proto) legal field, different ideas abound as to what the authoritative principle ought to be. Individuals and groups within the field subscribe to different principles, and compete with each other to promulgate their view within the field(s) to which they belong.\(^\text{15}\) We should expect the most powerful group to succeed.

\(^{15}\) Sikkink has termed this process “agentic constructivism.”
Unlike in a rationalist framework, however, power is understood in terms of legal resources. These can include several ideational conditions.

First, and most basically, legal arguments benefit from a coherent rationale. Indeed, coherence and rationality is intrinsic to the idea of law, and what separates legal institutions from, say, the arbitrary rule of the powerful. This is not to say that law is necessarily equitable or just, but simply that it presumes a certain degree of regularity and internal consistency. As one legal practitioner engaged in international commerce put it, referencing the eminent legal scholar Ronald Dworkin:

> In *Law’s Empire*, Dworkin gives a description of our legal practices that I considered particularly illuminating. We lawyers are “legal integrators.” As ants are programmed to collect and transport leaves, we constantly look back to previous legal materials in order to structure solutions to legal questions…Incoherence is our declared enemy (Montt 2012, p. 9)

Legal processes force actors to go through a process of reason-giving and argumentation. Transparently arbitrary arguments fail to withstand scrutiny in such a context. We should therefore expect ad hoc rationales to spread through legal fields less effectively than logically coherent principles. In terms of dispute resolution, this means that norms like “favor whichever party you prefer” will not diffuse through organizational fields, and, when confronted by more logical norms, will likely be rejected by legal practitioners in favor of more coherent and rational arguments.

Second, legal norms are strengthened by appeals to higher authorities. Legal advocates buttress their claims by referencing legally and normatively controlling authorities. These can include court decisions, black letter laws, and the opinions of experts that command
respect. Within a given system of law, certain authorities are definitively controlling (such as a legislative statute, or, in common law systems, established precedents). But authorities might also exercise purely hortatory influence, like the decisions of foreign courts or legal experts, or established international practice. Because law represents a hierarchy of norms, we can expect principles that are able to draw on these various authorities to spread further than those that cannot. We should therefore expect legal principles to follow a kind of cascade, in which each new authoritative endorsement of a principle increases the likelihood of additional authoritative backing.

Third, in line with the logic of isomorphism, legal claims are often justified through analogy to successful models. Slaughter demonstrates how networks of judges, by meeting to discuss and compare shared experiences, have allowed legal principles to spread across legal fields (Slaughter 2004). Similar transfusion can occur through all types of transnational legal associations. We should therefore expect principles embodied in developed and prestigious legal fields to dominate those in less sophisticated or prestigious legal fields.

Finally, it is important to note that this view of legal contestation relies significantly on the agency of legal experts. Norms do not diffuse automatically—they are articulated and advocated by individuals (Sikkink 2011). In this case, we would expect commercial lawyers, judges, arbitrators, and the scholars who study them to be the key actors involved in legal contestation.
5.4 Deference to legal authority from other sectors

The final step is to understand the conditions under which legal experts’ views influence firms and states. Scott and Blackman (1990) argue, “…the professions rule by controlling belief systems. Their primary weapons are ideas. They exercise control by defining reality—by devising ontological frameworks, proposing distinctions, creating typifications, and fabricating principles or guidelines for action” (p. 290). Perhaps no profession has been as successful at claiming autonomy by virtue of expertise as the legal profession. Both firms and policymakers delegate significant autonomy to lawyers to decide what is and is not allowable. For the rationalist, such delegation, even though it may result in slack, is an efficient use of technical expertise. A strong version of the ideational argument, in turn, would posit that firms and policymakers defer to lawyers because they seem them as legitimate authorities, no matter what the material consequences of such deference. Here I employ a weaker version of this claim, arguing that firms and policymakers are especially likely to delegate to legal experts when they do not know how alternative institutional arrangements are likely to bear on their interests. Because uncertainty is high in the realm of transborder dispute resolution, this more moderate ideational argument is justified.

To summarize the ideational argument:

- Transborder dispute resolution takes place in a series of overlapping and nested legal fields
- Epistemic communities act as “legal interest groups” within these fields, advocating for their preferred norms.
- Once a norm is entrenched in an organizational field, the field exerts isomorphic pressures on other actors in the field, and in linked fields.
• Other areas of society (e.g. firms and governments) defer to legal authority, especially when they do not understand how different institutional arrangements will satisfy their needs.

As with the rationalist model, the ideational theory identifies a set of conditions for demand and for supply.

**I1: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Firms defer to the dominant norms in the legal field to which they belong when selecting between institutional alternatives.**

**I2: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Policymakers defer to the dominant norms in the legal field to which they belong when selecting between institutional alternatives.**

Again, a few prerequisites must be in place before we would expect these hypotheses to obtain. First, and most basically, a legal field must exist in which firms and policymakers may become enmeshed. This may seem obvious, but many human societies, including many in which trade flourished, did not have courts, judges, law schools, lawyers, or bodies of rules and norms for them to interpret and apply. A minimal legal system is thus a necessary condition for I1 and I2. Second, market relations must be legalized to some degree. In order for the ideational mechanism to apply, firms must at least potentially have need of legal expertise to manage commercial relations, and policymakers must seek to regulate the market through the tools of law. Again, this is not given, as legal systems may exist that touch only tangentially on commercial relations. Indeed, this was the case for much of Chinese history, when private merchant guilds performed the vast majority of commercial dispute resolution. Public law intervened in the market only occasionally (Ma 2004; Hamilton 2006).
If these conditions are in place, I1 and I2 may apply. Both hypotheses require us to identify which legal norms can be said to dominate a particular legal field. This concept is fairly vague, but several indicators can be used to assess dominance. First, the statements and behavior of commercial legal practitioners are the most direct measure of what norms govern commercial law within a particular field. Do they recommend a certain approach to dispute resolution, and believe such an approach to be appropriate? Second, we can look to the authoritative decisions of key jurists, both in public courts and private arbitral tribunals. Because the rulings of these bodies are authoritative, they in many ways determine which norms are dominant within the legal field for which they have responsibility. Third, we can assess dominance in the writings of legal scholars and in the curricula of educational institutions. Legal contestation occurs in the academy as well as the courts, and, though teaching, the ideas of legal scholars directly shape the field of practitioners. A qualitative assessment of the dominance of a particular legal norm can be compiled from these sources.

Assuming I1 and I2 apply, what observable implications follow? Several pertain to the emergence of norms in legal fields, common to both hypotheses. First, if two competing norms exist in a legal field, we can expect the norm that has the most legal resources (a coherent rationale, the support of higher authorities and successful models) to eventually dominate the field. At an observational level, this can be difficult to measure, as the legal resources that drive change are also indicators of that change. Still, we should not expect to see conflicting norms persisting within the same legal field for an extended period of
time. Rather, we should witness new norms enter a field, and, within a relatively short period of time, either be eliminated or come to dominate that field.

Second, we should expect a legal field to embrace the norm of arbitration to the extent linkages exist between that field and the pro-arbitration epistemic community. Such linkages may take several forms. Members of the arbitration community may occupy positions of authority within a legal field (e.g. as scholars, judges, practitioners, etc.). Members of a legal field may join institutions that serve as hub for the pro-arbitration community, such as the ICC, UNCITRAL, UNIDROIT, or others. Members of a legal field may also work or study in countries where the local field is more supportive of arbitration, inculcating the visitor with those norms. Finally, the globalization of law firms (particularly the large Anglo-American practices) creates bridges across distinct legal fields, with potentially powerfully isomorphic effects. When these types of linkages are observed, we should expect a legal field to increase its embrace of arbitration.

Third, the logic of isomorphism implies several observable patterns of variation. Dispute settlement institutions—public and private—within the same legal field should be similar to each other. So institutions in, say, Canada and UK should be more similar to each other than to institutions in France, even though all countries are wealthy market democracies with globalized economies and strong legal systems. Similarly, firms within the same legal field should make similar choices regarding dispute resolution. Firm preferences should vary across legal field, not market conditions. Finally, national policies should follow the contours of legal fields, with policymakers in countries with
linked legal systems (e.g. all common law or civil law countries) exhibiting commonalities.

Fourth, the norms dominant in the legal field should correspond to the preferences and behavior of firms and policymakers within that field. If the dominant legal norms favor private dispute resolution, firms should embrace private institutions and policymakers should delegate authority to them. If the dominant legal norms favor public institutions, the reverse should instead apply.

Fifth, firms and policymakers should evince a fairly limited understanding of the material implications of institutional alternatives. Instead or arbitraging across alternatives to best meet their preferences, firms and policymakers should rely heavily on legal expertise to provide those answers for them. We should therefore observe policymakers and firms requesting advice from legal practitioners when deciding what institutions to employ, and following that advice. After a change in legal norms, it should be lawyers who initiate proposals to create new, norm-consistent institutions.

6. Summary of hypotheses and observable implications

Tables five, six, and seven summarize the rationalist and ideational hypotheses and their observable implications. These concepts guide the five empirical chapters that follow, and are stated in terms that are sufficiently general to apply to the diverse contexts those chapters address. For this reason, at the start of each chapter, a tailored set of observable
implications is presented. This approach has the virtue of testing the hypotheses more against a wider range of empirical material.
### Table 5: Hypotheses

<table>
<thead>
<tr>
<th>Theory</th>
<th>Demand</th>
<th>Supply</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rationalist mechanism</strong>&lt;br&gt;Institutions vary by&lt;br&gt;1. Policy&lt;br&gt;2. Authority&lt;br&gt;3. Efficiency&lt;br&gt;Firms arbitrage across institutions in “three-level” games</td>
<td>R1: Firms demand neutral institutions if their market power is roughly equal; otherwise the strong firm demands biased institutions and the weak has no choice but to agree. If a dispute resolution institution with the desired degree of neutrality is available, firms also demand that it be authoritative and efficient.</td>
<td>R2: Institutions with the policy outcomes, authority, and scope demanded (per R1) by the dominant interest group in a locus of political contestation, if any, emerge in that locus. However, the extent to which the resulting institution meets the dominant actor’s desiderata is constrained by the inherent attributes of domestic, intergovernmental, or private institutions.</td>
</tr>
<tr>
<td><strong>Ideational mechanism</strong>&lt;br&gt;Institutions vary by how closely they match norms of legal appropriateness as determined by:&lt;br&gt;1. Scope of legal fields&lt;br&gt;2. Outcomes of legal contestation</td>
<td>I1: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Firms defer to the dominant norms in the legal field to which they belong when selecting between institutional alternatives</td>
<td>I2: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Policymakers create or maintain institutions consistent with the dominant norms in the legal field to which they belong</td>
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</table>
### Table 6: Observable implications of the rationalist mechanism

<table>
<thead>
<tr>
<th>Rationalist</th>
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<tbody>
<tr>
<td><strong>Prerequisites</strong></td>
<td></td>
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</tbody>
</table>
| 1. Firms will have preferences over dispute settlement institutions to the extent they engage in a) high-value transactions and b) transactions whose value is realized on an ongoing basis. Therefore large, established firms are more likely to express demand per R1.  
2. Because the benefit to any individual firm of the preferred dispute resolution institutions is relatively low, preferences are unlikely to lead to advocacy without collective business associations. |  |
| **Demand** |  |
| 1. Policy  
   a. Firms in markets with large numbers of buyers and sellers and significant entry and exit will demand relatively neutral institutions such as independent national courts and professional private arbitration bodies.  
   b. Monopolists and oligopolists should not demand highly institutionalized private institutions. |  |
| 2. Authority  
   a. Firms in markets with large numbers of buyers and sellers and significant entry and exit will have less private enforcement power, so should demand public enforcement if they prefer arbitration in terms of neutrality and efficiency. |  |
| 3. Efficiency  
   a. If alternatives are approximately equal in terms of neutrality and authority, firms will demand the relatively efficient one. |  |
| 4. Firms will describe their preferences over institutional alternatives with respect to neutrality, authority, and efficiency, and will rank institutions with respect to these attributes. |  |
| 5. Given a set of institutional alternatives, firms will select the institution that best meets their preferences as defined by R1. |  |
| 6. Firms will only mobilize to create (maintain) an institution that is preferable, as per R1, to the status quo (new proposal). |  |
| **Supply** |  |
| 1. If a firms preferred institutional outcome can be achieved in the locus in which it is the dominant actor, the institutional outcome will match its preferences exactly. |  |
| 2. If an actors’ preferred institution already exists, and is not in danger of being replaced, we should not observe the actor to mobilize around dispute resolution. |  |
| 3. If an actor’s preferred institution cannot be achieved in any one locus of political contestation, it will seek hybrid institutions. |  |
| 4. Shifts in the constellation of power and interests at a certain locus of political contestation (e.g. a change in government, a rebalancing of the interstate balance of power, a shift in market power) will lead to changes in dispute settlement mechanisms if the newly dominant group’s preferences differ from those of the old group. Conversely, dispute settlement institutions will remain unchanged as long as the dominant groups remain unchanged, and their preferences (determined by the market conditions under which they operate) do not shift. |  |
### Table 7: Observable implications of the ideational mechanism

<table>
<thead>
<tr>
<th></th>
<th>Ideational</th>
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</thead>
<tbody>
<tr>
<td><strong>Prerequisites</strong></td>
<td>1. Existence of legal field (lawyers, firms, courts, judges, schools, etc.)</td>
</tr>
<tr>
<td></td>
<td>2. Firms employ legal experts to decide on dispute resolution strategy</td>
</tr>
<tr>
<td></td>
<td>3. Policymakers rely on legal experts to determine dispute resolution strategy</td>
</tr>
<tr>
<td><strong>Attributes of legal contestation</strong></td>
<td>1. If competing norms exist in a legal field, the norm that has the greatest legal resources (can cite successful models, has the support of black letter law, has the support of authoritative observers, taught in law schools) will dominate</td>
</tr>
<tr>
<td></td>
<td>2. A legal field will embrace the norm of arbitration the more linkages exist between it and the pro-arbitration epistemic community</td>
</tr>
<tr>
<td></td>
<td>a. Members of the epistemic community occupy positions of authority within the legal field</td>
</tr>
<tr>
<td></td>
<td>b. Members of the legal field join public and private hubs of the pro-arbitration network (e.g. the ICC, UNCITRAL, etc.)</td>
</tr>
<tr>
<td></td>
<td>c. Members of the legal field work/study in countries where the legal field is more supportive of arbitration</td>
</tr>
<tr>
<td><strong>Demand</strong></td>
<td>1. Firms’ preferences match the norm dominant in their legal field</td>
</tr>
<tr>
<td></td>
<td>2. Firms have limited understanding of material implications of institutional alternatives</td>
</tr>
<tr>
<td></td>
<td>3. Firms describe behavior in terms of legal appropriateness</td>
</tr>
<tr>
<td><strong>Supply</strong></td>
<td>1. Policymakers’ preferences adhere to norm dominant in legal field</td>
</tr>
<tr>
<td></td>
<td>2. Policymakers have limited understanding of material implications of institutional alternatives</td>
</tr>
<tr>
<td></td>
<td>3. Policymakers describe behavior in terms of legal appropriateness</td>
</tr>
</tbody>
</table>
1. Introduction

Why do firms choose one dispute resolution institution over alternatives? The goal of this chapter is to explore the demand hypotheses using the broadest contemporary data available. While subsequent chapters will explore the determinants of firms’ preferences in specific times and places, this chapter employs recent global data to provide a general account of current international practice.

As noted in the introduction, the literature on arbitration generally assumes that firms prefer private tribunals to litigation. This is also the conventional wisdom amongst the legal practitioners interviewed for this study. Such accounts typically emphasize the perceived functional advantages of arbitration, as well as its neutrality. To quote one of the main legal treatises on the subject:

There are a number of reasons why arbitration is the preferred means of resolving international commercial disputes…businesses perceive international arbitration as providing a neutral, speedy and expert dispute resolution process, largely subject to the parties' control, in a single, centralized forum, with internationally-enforceable dispute resolution agreements and decisions. While far from perfect, international arbitration is, rightly, regarded as generally suffering fewer ills than litigation of international disputes in national courts… (Born 2009, p. 70).

Measuring this preference empirically has proven far more difficult. Researchers have yet to devise an effective way to sample the global universe of transborder contracts or
disputes, as these are not centrally collected and are typically kept secret. Instead, researchers have relied on non-random samples of contracts, on the published caseloads of those institutions (public and private) that make such information available, and on surveys of firms and legal practitioners (see Chapter One).

Arguably the richest source of data regarding firms’ preferences over transborder dispute resolution institutions is a series of surveys conducted by researchers at the School of International Arbitration, Queen Mary, London. Researchers asked firms detailed questions regarding their views on dispute resolution, and managed to obtain a fairly broad global sample (the data are discussed in detail below). Because the authors were exploring relatively sensitive topics, the breadth of data obtained was likely attributable in part to the stature of the surveys’ conductors in the arbitration community.\(^1\) The directors of these surveys have generously made much of their data available to the author, so the present chapter is able to extend their (largely descriptive) findings via the tools of causal inference.

Nonetheless, like previous studies, the present chapter is constrained by data limitations. For the reasons discussed, researchers are unlikely to obtain fully satisfactory global-level data on firm preferences regarding dispute resolution in the near future. The present study employs two strategies around this constraint. First, subsequent chapters explore narrower versions of the question, testing the determinants of firms’ preferences in specific countries and discrete time periods. Second, the present chapter seeks to maximize the inferences possible with the available global data by employing a social

\(^1\) Though, as discussed below, this advantage also introduces likely biases into the data.
scientific framework. Existing studies, conducted mainly in the legal literature, have missed opportunities to learn from the available data because they have been aimed mostly at description. The present chapter seeks to aggregate the (admittedly meager) data available and squeeze additional insights from them through the tools of causal inference.

The next section considers the nature of the dependent variable. Two kinds of observations provide information about firms’ views on dispute resolution, their stated preferences (in surveys and interviews) and their realized preferences (as written in contracts or manifested in disputes).² It is important to understand how each source of information should be interpreted. Section three then reviews the hypotheses and observable implications applicable to firms’ demand, and describes the key independent variables. Section four describes the Queen Mary survey data and tests it against the relevant hypotheses.

2. The dependent variable: stated and realized preferences

This chapter seeks to explain firm demand for different types of institutions. Unfortunately, firms’ true preferences are not directly observable (Frieden 1999). Instead, the researcher must infer them from two proxies: realized preferences (the actual choices firms make between existing institutional alternatives) and stated preferences (the way firms describe their preferences).

² See Chapter Two.
Stated preferences best measure underlying preferences when firms do not calibrate their answers for strategic gain. Below I present data from global surveys of dispute settlement carried out by the Queen Mary School of International Arbitration. The surveys were conducted anonymously, making it unlikely that firms would have reason to intentionally misrepresent their views. Still, care must be paid to interpret the results as actors’ subjective impressions of themselves. For example, an actor might believe he is rational and strategic, consistent with R1, but not appreciate how norms of legal appropriateness have affected how he calculates costs and benefits (I1). It is therefore important to consider the likely biases (e.g. self-aggrandizement) that certain questions may elicit in respondents. The risks of inaccurate self-perception can be further mitigated by considering a range of data sources from the secondary literature, as well as in the author’s own research interviews.

Additional inferential leverage can be gained by looking at realized preferences, or the dispute resolution institutions that firms actually choose in contracts. But this requires another analytic step. Realized preferences reflect not only underlying preferences, but also firms’ strategies (Frieden 1999), which in turn are shaped by the preferences of the other party to a contract and the range of institutional options available. Two implications follow. First, realized preferences can only tell us, at best, how a firm prefers one existing institution relative to the alternatives. We cannot use them to infer firms’ ideal dispute resolution scenarios. Second, because the choice of a dispute resolution institution is negotiated between the parties to a contract, realized preferences are a joint outcome. Each party brings its own underlying preference to the negotiation, whose result, the

---

3 Of course, the normal caveats associated with survey data apply, and are discussed in more detail below.
realized preference, will only accurately reflect underlying preferences when the two parties agree. Per R1, this will only occur when the market power of the two firms is expected to be equal, which would generate demand for neutral, authoritative, and efficient institutions. Per I1, firms will have similar preferences when they are embedded in legal fields sharing similar norms. When neither of these conditions is in place, we should interpret realized preferences as reflecting power-based negotiation between firms.

Further complicating the matter, much of our data regarding realized preferences comes not from observations of contracts, but from observations of disputes. This introduces an additional distance between underlying preferences and the data available, requiring further nuance in our interpretation. Cases in which disputes are unlikely will be observed less frequently, so we need to consider how the factors that discourage disputes from arising interact with the hypothesized determinants of preferences. Under R1, we should not expect to see many disputes in markets in which one of the parties possesses decisive market power over another, because such parties would have fewer incentives to resolve disputes in the relatively neutral forum of institutionalized private tribunals or public courts (at least in countries with independent judiciaries). Therefore, data obtained from observing disputes will be biased toward relatively neutral institutions.

In sum, though we deal with one dependent variable in this chapter (firm preferences), it is measured in two ways. First, certain stated preferences are used to attempt to capture firms’ preferences directly. Second, by adding the analytic step of contract negotiation,
we can use realized preferences to as a secondary dependent variable (figure eight). Measuring the dependent variable differently increases opportunities for causal inference and renders findings more robust.

**Figure 8: Underlying and realized preferences**

Before proceeding, it is perhaps useful to consider whether firms actually possess preferences over dispute resolution, as hypothesized. The 2010 Queen Mary survey found that 68 percent of firms had an official dispute resolution policy to guide the choices made in their contracts. This suggests that, for large corporations, at least, dispute resolution is sufficiently important for a company to develop a set of internal policies to guide its negotiators.

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4 Existing literature that has attempted to describe firms’ preferences has missed this crucial analytical distinction. By assuming that realized preferences equate to underlying preferences, researchers have concluded that firms want arbitration because they choose it. As the above discussion argues, however, choosing arbitration only tells us that arbitration was the joint preference of two firms.
3. Hypotheses in context: empirical expectations under contemporary conditions

The hypotheses explored in this study consider overall variation, over time as well as between different actors, in the institutions that provide the rule of law for transborder contracts. Outcomes depend on the ongoing interaction between supply and demand. This chapter looks at only at the current outcome of that process, focusing on the preferences of global firms today. The empirical material is broad but shallow, reflecting only the present state of demand given the current array of institutional options, a snapshot that has emerged from a long process of institutional development. We therefore need to consider the general hypotheses in the context of the present world economy, which is relatively, liberal, dynamic, and legalized, and in which the practice of arbitration has diffused widely. Indeed, the Queen Mary surveys, along with other sources, provide some direct measures of the independent variables.

First consider the rationalist explanation:

R1: Firms demand neutral institutions if their market power is roughly equal; otherwise the strong firm demands biased institutions and the weak firm has no choice but to agree. If a dispute resolution institution with the desired degree of neutrality is available, firms also demand that it be authoritative and efficient.

3.1 Policy

The nature of the contemporary world economy leads us to expect little variation in observed firm preferences over policy. A firm’s market position is posited as the chief driver of demand over the policy outcomes of alternative dispute resolution institutions.
Choosing a rule of law

In most cases, of course, market position varies by transaction (since it depends on the relative bargaining power of the two sides to a deal), and we lack systematic data on preferences at the transaction level. Instead, the surveys describe general firm-level preferences. Unfortunately, even these data do not allow us to measure firms’ average market position sufficiently well to make strong inferences. For the sake of anonymity firms in the Queen Mary data have only been identified by industry 5 and by size, based on their total annual turnover (less than $500 million, between $500 million and $5 billion, over $5 billion). These crude measures cannot be used to proxy for firms’ general market position relative to trade partners.

Fortunately, this difficulty can be overcome with a few plausible assumptions. Few firms operating in the global economy today can be expected, on average, to occupy consistently dominant positions vis-à-vis their trading partners. There are many ways to measure market concentration, but cross-national surveys show it to be quite low on average (Pryor 1972; Mitton 2008), and, for those countries for which historical data are available, to be low compared to earlier periods (though an increase has been registered since 1980 in places like the United States) (Pryor 2001). Moreover, monopolists are, by definition, few in number. We would therefore not expect large-N, global measures of firm preferences to reveal much demand for biased institutions. Indeed, as is seen below, “neutrality” is one of the key characteristics firms say they demand, with 80 percent of firms saying neutrality was “highly relevant” or “significant” reason for choosing TCA. At the same time, the large number of highly professional arbitral tribunals and public

5 Firms self-identified with a set of 10 given industry categories: industrial manufacturing, financial services and banking, energy, engineering and constructions, transportation and automotive, retail and consumer, media and entertainment, insurance, telecommunications, and other
courts that exist across a range of countries means that there is a large supply of neutral institutions for companies to choose from. Given this abundance of institutions with the appropriate policy outcome, firms are likely to express their preferences on other dimensions.

3.2 Authority

The data analyzed in this chapter reflect a quite unique set of institutional arrangements regarding authority. The broad diffusion of public delegation to private tribunals has given private arbitration a level of authority similar to that of public courts. With nearly all major trading nations belonging to the New York Convention, private arbitral awards are on average enforceable, \textit{de jure}, in the public courts of the nations in which the firms we observe operate. While \textit{de facto} enforcement certainly varies by country, this is true for court decisions as well. Therefore we do not expect firms to perceive a significant difference in the level of authority between public courts and private arbitration, though the New York Convention and similar instruments that have globalized the scope of this authority for arbitration alone. This situation likely raises the value of arbitration considerably, as it removes one of the chief concerns surrounding private institutions.

The Queen Mary surveys provide support for this expectation. First, voluntary compliance with arbitral awards is broadly considered to be the norm (figure nine). Indeed, less than ten percent of firms surveyed said they had ended up in litigation following an arbitral process (figure ten).

\footnote{For example, most US and European lawyers seem fairly satisfied with the competence of courts within these countries (Sandrock 2009).}
Choosing a rule of law

Figure 9: Voluntary enforcement

How many arbitral awards have been carried out voluntarily by the opposing party?

- More than 75%: 84%
- 51-75%: 3%
- 25-50%: 3%
- Less than 25%: 2%
- None: 8%

Figure 10: Outcomes of arbitration

Has your organization experienced the following outcomes?

- arbitrals award and voluntary compliance
- settlement w/out arbitral award
- arbitral award and then enforcement
- settlement with arbitral award by consent
- arbitral award followed by litigation
- settlement followed by litigation

Percentage

0 10 20 30 40 50 60
Indeed, in the 2008 survey 80 percent of respondents believe that enforceability of arbitration agreements was “highly relevant” or “significant” reason to choose arbitration (Mistelis and Baltag 2008). Moreover, only in 19 percent of cases in which public courts became involved did firms report encountering difficulties with enforcement, and in 70 percent of these cases the enforcement problems related to the defendant (e.g. lack of funds), not the arbitral or legal proceedings. A full 44 percent of firms reported that they received, on average, 100 percent of the value of the arbitral award when they sought to enforce it in courts, and a further 40 percent said they received 76-99 percent of the award on average (Mistelis and Baltag 2008). Still, in some countries, problems did exist: firms cited China, India, and Russia as the jurisdictions most hostile to enforcement (Mistelis and Baltag 2008).

3.3 Efficiency

The discussion above suggests there is not much variation on two of the key rationalist independent variables identified in R1 (explaining how that situation arose is a major task of the subsequent, more historical chapters). In terms of policy, the general expectation is for neutral dispute resolution institutions, of which there is an ample supply of both public and private entities. Regarding authority, international law currently grants private arbitration similar authority to public courts, but broadens their reach beyond the domestic realm. R1, then, would expect most variance in firm preferences to occur on the efficiency dimension, with firms expressing support for the institution that is relatively economical, speedy, and technically proficient, and that minimizes the impact of dispute resolution on business relationships.
We should therefore see stated and realized preferences favor the relatively efficient institution, and to observe firms describe their preferences chiefly in those terms (as, indeed, the legal literature does). This expectation is reflected in the Queen Mary surveys. In general, firms consider the functional attributes of arbitration to be important (figure 11). Asked to rank the institution’s top advantages, they score enforceability (which we may interpret as authority) highest, followed by the efficiency criteria (flexibility and privacy) and neutrality last (selection of the arbitrators). Similarly, with regard to disadvantages, two-thirds of the firms surveyed cited cost and time as their chief sources of discontent regarding dispute resolution, implying that they indeed evaluate institutions in these terms.

Figure 11: Desiderata for arbitration
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How do firms rank institutional alternatives along these dimensions? Public courts around the world vary widely in terms of efficiency. Table eight presents information on key variables from the World Bank’s Doing Business reports for the G20 countries (which account for approximately 80 percent of world trade), averaging data collected between 2004 and 2012. Efficiency is not necessarily correlated with neutrality. China and Russia, for example, score higher than the UK, Japan, Canada, and Italy, although foreign businesses report high levels of bias in both those countries (see below). Unfortunately we lack similarly broad measures for arbitration, although the surveys provide some important comparative evidence.

Table 8: Efficiency of contract enforcement in G-20 countries, average scores 2004-2012 (source: World Bank)

<table>
<thead>
<tr>
<th>Country</th>
<th>Contract enfrcmnt. rank</th>
<th>Days required</th>
<th>Cost (% of claim)</th>
<th>Procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Korea</td>
<td>3</td>
<td>230</td>
<td>10</td>
<td>35</td>
</tr>
<tr>
<td>France</td>
<td>6</td>
<td>331</td>
<td>17</td>
<td>29</td>
</tr>
<tr>
<td>USA</td>
<td>7</td>
<td>300</td>
<td>14</td>
<td>32</td>
</tr>
<tr>
<td>Germany</td>
<td>8</td>
<td>396</td>
<td>14</td>
<td>30</td>
</tr>
<tr>
<td>Russia</td>
<td>16</td>
<td>281</td>
<td>13</td>
<td>37</td>
</tr>
<tr>
<td>Australia</td>
<td>17</td>
<td>395</td>
<td>21</td>
<td>28</td>
</tr>
<tr>
<td>China</td>
<td>17</td>
<td>406</td>
<td>11</td>
<td>35</td>
</tr>
<tr>
<td>UK</td>
<td>22</td>
<td>402</td>
<td>23</td>
<td>30</td>
</tr>
<tr>
<td>Japan</td>
<td>33</td>
<td>360</td>
<td>32</td>
<td>30</td>
</tr>
<tr>
<td>Argentina</td>
<td>46</td>
<td>590</td>
<td>17</td>
<td>36</td>
</tr>
<tr>
<td>Turkey</td>
<td>51</td>
<td>420</td>
<td>27</td>
<td>37</td>
</tr>
<tr>
<td>Canada</td>
<td>59</td>
<td>570</td>
<td>22</td>
<td>36</td>
</tr>
<tr>
<td>Mexico</td>
<td>81</td>
<td>415</td>
<td>32</td>
<td>38</td>
</tr>
<tr>
<td>South Africa</td>
<td>83</td>
<td>600</td>
<td>33</td>
<td>30</td>
</tr>
<tr>
<td>Brazil</td>
<td>118</td>
<td>735</td>
<td>17</td>
<td>45</td>
</tr>
<tr>
<td>S. Arabia</td>
<td>138</td>
<td>635</td>
<td>28</td>
<td>43</td>
</tr>
<tr>
<td>Indonesia</td>
<td>155</td>
<td>570</td>
<td>123</td>
<td>40</td>
</tr>
<tr>
<td>Italy</td>
<td>158</td>
<td>1270</td>
<td>30</td>
<td>41</td>
</tr>
<tr>
<td>India</td>
<td>182</td>
<td>1420</td>
<td>40</td>
<td>46</td>
</tr>
</tbody>
</table>

7 Sandrock (2009) provides a more qualitative comparison of court efficiency across major economies.
8 Number of bureaucratic steps required to bring a contract enforcement action through court.
First, firms do not see a large monetary difference between litigation and arbitration (figure 12), with half finding arbitration cheaper than litigation, and the other half finding the opposite. Indeed, this equivalence suggests that private providers of arbitration, as well as the law firms that represent firms in both litigation and arbitration, have extracted as much value from the market as it will bear, by setting the cost of private arbitration at parity with that of public courts.

**Figure 12: Cost of arbitration compared to litigation**

![Cost: arbitration is...](chart)

Second, this parity does not apply to speed, for which firms perceive an advantage in arbitration (figure 13). Because “time is money,” alacrity is an important advantage for arbitration.
Finally, the efficiency of arbitration is also seen with regard to enforcement, with most three-quarters of enforcement actions finishing in less than one year (figure 14).

Figure 14: Time required to enforce arbitral awards

Enforcement: what was the average time to recognize, enforce, and execute arbitral award?

- 2-4 years: 23%
- 1-2 years: 18%
- 6 months - 1 year: 6%
- less than 6 months: 53%
Last, arbitration is thought to render more amicable conclusions to disputes than litigation. Because the procedure is less formalized and less public, arbitration is thought to better preserve business relationships and facilitate negotiated settlements. Again, survey evidence indicates that at least a quarter of arbitration cases involve settlements (Mistelis and Baltag 2008). Firms give various reasons why they seek a settlement, but preserving a business relationship is the one they cite most (27 percent), followed by a desire to avoid high costs (23 percent) and delays (17 percent), or simply because they have a weak case (21 percent) (Mistelis and Baltag 2008). When asked how important confidentiality is, 62 percent said “very important,” 24 percent said “quite important,” and only one percent said it was not important (Mistelis and Martin 2010).

Now consider the ideational alternative:

**I1: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Firms defer to the dominant norms in the legal field to which they belong when selecting between institutional alternatives.**

The progressive legalization of market relations and the diffusion of arbitration across legal fields has again removed some of the variation driving this hypotheses. In almost all major economies today, firms engaging in transborder commerce employ legal expertise. Indeed, law firms themselves are increasingly transnational. To look at just one country, in 1987 just 57 US firms had international offices, with a total of 1,331 lawyers. In 2007 106 firms operated abroad, with some 15,231 lawyers (Jones 2008). These legal practitioners are almost certain to have been exposed to the practice of private arbitration, and in many legal fields this norm can be regarded dominant. Nonetheless, we should also expect cross-country variation in both the strength of the legal field in shaping firms’
choices and in the dominance of arbitration within those fields. Under II, firm’s embrace of arbitration should vary accordingly.

Several observable implications follow, tested below. First, firms within the same legal field should exhibit relatively similar preferences regarding arbitration, all else being equal. Second, we would expect firms to evince limited understanding of the material implications of institutional alternatives, and instead delegate significant decision-making authority over dispute resolution to legal practitioners. Finally, we would expect the individuals making decisions for firms (whether management or the legal experts to whom they have delegated) to describe their preferences with reference to legal appropriateness.

4. Stated preferences

4.1 Data

As discussed above, the Queen Mary surveys, conducted by Mistelis and colleagues, represent the most comprehensive set of firm-level observations available. That said, the total number of firms polled is not particularly large, and represents a 7-10 percent response rate. The 2006 survey received 94 responses (a seven percent response rate), the 2008 survey had 82 replies, and the 2010 version 136. There is also a mismatch in the geographic distribution of the surveys from year to year, as well as the size of the firms (see table nine).
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Table 9: Characteristics of firms included in Queen Mary surveys 2006-2010

<table>
<thead>
<tr>
<th>Year</th>
<th>N</th>
<th>Europe %</th>
<th>North America %</th>
<th>Asia/Pacific %</th>
<th>Other %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>94</td>
<td>50</td>
<td>15</td>
<td>30</td>
<td>5</td>
</tr>
<tr>
<td>2008</td>
<td>82</td>
<td>40</td>
<td>30</td>
<td>15</td>
<td>15</td>
</tr>
<tr>
<td>2010</td>
<td>136</td>
<td>31</td>
<td>12</td>
<td>35</td>
<td>21</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>N</th>
<th>Less than $500mil %</th>
<th>$500mil – $5bil %</th>
<th>More than $5 bil. %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>94</td>
<td>29</td>
<td>36</td>
<td>20</td>
</tr>
<tr>
<td>2008</td>
<td>82</td>
<td>3</td>
<td>29</td>
<td>68</td>
</tr>
<tr>
<td>2010</td>
<td>136</td>
<td>17</td>
<td>29</td>
<td>53</td>
</tr>
</tbody>
</table>

These surveys, then, tell us about the preferences of large corporations with a European skew. We can therefore interpret them as broadly representative of the largest multinationals corporations—the 2008 survey found that 76 percent of respondents had a “global structure”—which are responsible for the lion’s share of global trade. In general, these corporations are pleased with arrangements for dispute settlement. The 2008 survey found that only five percent of corporate counsels were “dissatisfied” with the system, compared to 68 percent who were “fairly satisfied” and 18 percent who were “very satisfied” (Mistelis and Baltag 2008). Why are firms so content?

4.2 Analysis

Both R1 and I1 would predict general support for arbitration in the survey. For R1, the broad enforceability of arbitration, the absence of neutrality concerns, and the relative speed and confidentiality of the proceedings make arbitration, on average, functionally superior. And for I1, because the majority of the firms surveyed are large companies operating internationally, and employ sophisticated legal expertise, we can expect the norm of arbitration to have been suggested to them by legal practitioners, on whom we know they rely. In other words, support for arbitration is over-determined.
Indeed, only 11 percent of the firms surveyed preferred litigation to arbitration for transborder disputes, with nearly three-quarters citing arbitration or a combination of arbitration and mediation as their preferred institution (see figure 15). Moreover, 55 of the 88 firms (63 percent) that answered the question “Does your organization insist on the inclusion of an arbitration clause in its contracts as a matter of practice?” did so affirmatively. And of the 68 percent of firms that have codified dispute resolution policies, 81 percent explicitly state a preference for arbitration over litigation (i.e. 55 percent of the total sample) (Mistelis and Martin 2010).

Figure 15: Firm preferences on dispute resolution (Mistelis and Baltag 2008)
Further observations also support both hypotheses. R1 expects the preference for arbitration to be stronger for firms under certain market conditions. Firms that do more business internationally should have a stronger preference for arbitration, as it provides authority and neutrality in a way that domestic courts cannot. Indeed, of the 30 firms that described their disputes as “predominantly domestic,” only four selected arbitration as their preferred mechanism. Instead, of the 24 firms whose business was “predominantly international,” nearly half the firms (11) selected arbitration as their preferred tool above all others.\(^9\) As expected, neither industry group or firm size was significantly correlated with a preference for or against arbitration, likely because those indicators were measured too coarsely.\(^10\)

I1 also finds strong support. Under this hypothesis, we would expect firms that rely more heavily on legal advice to support arbitration more. Of the 71 firms that relied predominantly on legal counsel, 23 picked arbitration as their preferred dispute resolution mechanism. Of the 20 other firms, which relied predominantly on management to make decisions regarding dispute resolution, only one preferred arbitration on average.\(^11\) In other words, the involvement of lawyers was strongly associated with a preference for arbitration.

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\(^9\) A t-test of the difference between these means (coding a preference for arbitration as one and all other responses as zero) was highly significant (p = 0.007).

\(^10\) No paired t-test between the median preference for arbitration of the nine industry categories or three revenue levels was statistically significant.

\(^11\) A t-test of the difference between these means (coding a preference for arbitration as one and all other responses as zero) was highly significant (p = 0.02).
We therefore find support for both R1 and I1. Estimating a very simple OLS regression model with just these two variables confirms the above findings, with both the international character of an organization’s business and its reliance on legal counsel having statistically significant, substantively similar effects on a stated preference for arbitration.\footnote{Internationality has a coefficient of 0.22 and a p-value of 0.03; reliance on legal counsel has a coefficient of 0.23 and a p-value of 0.04. N=91.}

Fortunately, R1 and I1 carry several other observable implications. The surveys also measure firms’ preferences over the nature of arbitration. That is, given that arbitration is preferred, or has been selected, what factors influence firm choice between the various competitors? To the extent firms attempt to maximize their material interests in institutional choices, they are behaving as R1 predicts. But if their preferences are instead vague, or show the influence of legal norms, I1 would be supported.

First, if firms constantly quibble over the details of dispute resolution in every contract they sign, it would provide evidence against I1. The surveys show that approximately equal numbers of firms use standard arbitration clauses in their contracts (e.g. those provided by arbitral institutions, or used as “boilerplate” in certain industries) as tailor each arbitration clause to each individual contract (31 vs. 27, respectively). This finding also provides some support for both hypotheses.

Second, the survey also asked firms how negotiable the elements of their dispute resolution policies were. No more than 10 percent of firms said they would not negotiate...
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on questions like the law governing the dispute, the selection of arbitration or litigation, the seat of arbitration, the particularly arbitration institution chosen, etc. Instead, the vast majority (three quarters or more) said they were willing to conceded in some circumstances. This flexibility and recognition of the trade-off between dispute resolution preferences and other areas of the contracts also supports R1.

Third, the surveys asked firms to rate the importance of different factors on their selection of the law used to govern a dispute. Of the top five factors, three can be considered rationalist. The neutrality of the legal system was considered the most important factor, selected by 66 percent of firms, followed by the utility of a given set of laws for the type of contract, which was emphasized by 60 percent of firms. Both of these considerations have a direct impact on an institution’s policy outcome, and so would be expected to matter under R1. Some 35 percent of firms also said that the choice of law tended to be imposed by the opposite party, the kind of bargaining dynamic also expected under R1. But at the same time, 58 percent of firms said that “familiarity with and experience of the particular law” was a key factor, and 35 percent said that corporate policies or industry standards guided their choices. There is thus also evidence for ideational factors. When it comes to the actual laws chosen, the results are similarly inconclusive. Almost half the firms (44 percent) said they had an absolute preference for contracts to be governed by the laws of their home jurisdictions, an outcome compatible both with the rationalist and ideational factors. A further 25 percent stated English law as their top choice, with Swiss law at nine percent and New York law at six percent. Each of these legal systems is characterized by neutrality and deference to contracts, each offers
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substantial autonomy to arbitration, and each possesses a sophisticated jurisprudence on technical commercial subjects. The emphasis on these laws means that firms on average are seeking efficient and neutral dispute resolution that privileges arbitration, consistent with both R1 and I1. The surveys show similar results for firm preferences over the arbitral institution and seat of arbitration.

Last, the data also show that firms rely heavily on lawyers to make decisions regarding dispute resolution. An early survey found that 50 percent of firms select arbitrators on the advice of outside council, and 14 percent do so on the advice of the arbitral institution. Only a third select arbitrators themselves (Mistelis 2004). The 2010 survey found a similar result, with only 28 percent of firms saying they gathered their own information about potential arbitrators, and 68 percent relying on external legal advice. Still, firms reported that the “final” decision regarding an arbitral clause was made most frequently by the firm’s general counsel (33 percent), with only 16 percent reporting that non-lawyers (business managers or the board) made the final decision.
4. THE INTERGOVERNMENTAL REGIME

1. Introduction

The overall “regime complex” for transborder commercial dispute resolution includes numerous institutional components, public and private, domestic and international. The intergovernmental elements of this system include a range of formal treaties, multilateral, bilateral, and regional, that govern how states treat awards rendered by foreign private tribunals, as well as non-binding rules created by technocratic intergovernmental bodies that concern the domestic regulation of private arbitration and set standards for private arbitrators themselves. Today the institutional keystone of the entire regime is the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards, through which 146 states (as of January 2012) have committed to enforce arbitral awards rendered by foreign private tribunals. The regime’s antecedents, however, stretch back to the turn of the last century, where the present discussion begins.

This chapter focuses on the global multilateral treaties. First it describes the evolution of the New York Convention and its predecessors, the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention Relating to the Execution of Foreign Arbitral Awards, relying on historical and archival sources, including the treaties’ travaux préparatoires. It evaluates alternative explanations by tracing the evolution of the regime from the germ of the idea to its various realizations in international law. Two discrete cases of treaty formation are considered, the 1920s, when the Geneva treaties on
arbitration were negotiated under the auspices of the League of Nations, and the 1950s, when the New York Convention was negotiated through the United Nations.

The chapter then presents a quantitative analysis of national decisions to ratify the 1958 New York Convention. Employing methods pioneered in literature on the diffusion of WTO membership, BITs, PTAs, and other institutional keystones of global commerce, I perform an event history (survival) analysis on NYC ratifications amongst all countries in the world from the treaty’s creation until the present.

The goal of both sections is to reveal the conditions under which states cooperate to delegate authority to foreign private actors, as discussed in Chapter Two. Is delegation driven by the material interests of globalizing firms, power relations between states, and domestic political dynamics? Or has it resulted mainly from the evolution of legal norms and practices, diffused by networks of technocratic legal experts? Extending the analysis over the entire lifespan of the regime affords the advantage of being able to weigh the role of different factors and hypotheses at different stages in the regime’s evolution. I conclude that the regime’s creation was driven largely by commercial interest groups advocating arbitration within international organizations, while its progressive institutionalization and diffusion was instead driven by transnational legal networks.

The chapter proceeds as follows. Section two reviews the hypotheses developed in chapter two, discussing what observable implications they hold for the two treaty negotiation episodes. Section three, after giving a basic account of the facts of the case,
applies this framework to the Geneva treaties of the 1920s. Section four performs a similar analysis for the New York Convention, and section five contains the quantitative study of its uptake around the world. Section six concludes.

2. Explaining two cases of global treaty-making: the 1920s and 1950s

The qualitative portion of this chapter (sections three and four) analyzes two sets of negotiations.\(^1\) The first, under the auspices of the League of Nations’ Economic Committee, led to the 1924 Protocol on Arbitration Clauses and the 1927 Convention Relating to the Execution of Foreign Arbitral Awards. I treat these treaties as a single negotiation episode and outcome because the 1927 Convention was intended as a supplement to the 1924 Protocol. The second set of negotiations, which took place within the United Nations Economic and Social Committee, led to the 1958 New York Convention. Both episodes led to similar results, treaties that collectively delegate significant judicial authority to private tribunals, although the former achieved minimal diffusion while the later has become nearly universal. No other significant attempts have been made to negotiate global commercial dispute resolution treaties.\(^2\)

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2. That is not to say that these treaties are the only intergovernmental agreements dealing with commercial dispute resolution. A number of bilateral treaties beginning in the late 19\(^{th}\) century include clauses promoting the use of arbitration, though typically these have been too vaguely worded to have much legal effect. See Brachet, P. (1928). *De L'exécution Internationale des Sentences Arbitrales*. Paris, Faculty of Law, University of Paris. There is also a long history of regional agreements promoting arbitration in Latin America, a case discussed in more depth in the chapter on Argentina. Finally, there is a European Convention that closely parallels the New York Convention. Because none of these cases can be considered global multilateral negotiations, they are excluded from the present analysis.
These outcomes, by extending the authority of states to the decisions of arbitrators, made what was largely private regime into a hybrid one. What explains this collective delegation? Recall the hypotheses outlined in Chapter Two, and consider the observable implications for each in the context of multilateral treaty negotiations.

2.1 Rationalist

Under the rationalist explanation, interest groups and the policymakers responsive to them work through various loci of political contestation to create the dispute resolution institutions that best meet interest groups’ demand. Following a logic of three-level games, interest groups may find or create their most preferred dispute resolution institution in the domestic, intergovernmental, or transnational realms, or some combination thereof. Recall from chapter two that a hybrid arrangement in which states agree via treaty to enforce the judgments of private tribunals has the following outcomes for firms:

1. Policy outcomes depend on arbitral tribunals, and so are consistent with the policy outcomes demanded by firms (since firms would not otherwise bring their disputes to a certain tribunal).
2. Authority depends on domestic courts, and if therefore generally high to the extent countries have ratified the relevant treaties
3. Efficiency is determined by a combination of market competition (for adjudication) and state responsiveness to firms (for enforcement)

The rationalist model requires us to show how demand and supply converge to lead to this outcome.

Consider first demand. R1 posits the conditions under which one institutional arrangement is to be preferred to another:
R1: Firms demand neutral institutions if their market power is roughly equal; otherwise the strong firm demands biased institutions and the weak has no choice but to agree. If a dispute resolution institution with the desired degree of neutrality is available, firms also demand that it be authoritative and efficient.

Because the treaties in question are designed to extend the authority of private arbitration by lending it the enforcement powers of the domestic courts of the member states, we would expect firms to support them if:

1. Firms prefer arbitration to litigation in national courts in terms of neutrality and efficiency
2. Market conditions do not permit firms to enforce arbitral awards privately

Several observable implications follow. First, for firms to support pro-arbitration treaties under R2, arbitration must provide the type of policy outcome that they desire. Firms in dynamic, open, and competitive markets will support pro-arbitration treaties only if arbitral institutions are relatively neutral. By the same logic, firms that can consistently expect to be relatively dominant vis-à-vis their trade partners should support pro-arbitration treaties only to the extent arbitration offers biased dispute settlement outcomes. In practice, however, the conditions that lead firms to demand biased dispute resolution—imbalanced market power—also make it more likely they will be able to enforce arbitral awards privately. When a firm can effectively dictate the terms of present and foreseeable deals to its interlocutors, it has less need for the police powers of the state. Therefore, the conditions that would lead firms to demand biased arbitration would not be expected to also lead them to demand state backing for arbitration in the form of a multilateral treaty. The implication, then, is that treaties aimed at increasing arbitration’s
authority will be demanded by firms that operate in dynamic, open markets characterized by uncertainty.

Second, note, however, that imbalanced markets are not the only type of market conditions that facilitate private enforcement. For example, markets with few actors who are engaged in repeated transactions of relatively low value give firms incentives to comply voluntarily with arbitral awards (since the reputational cost of not doing so is higher than the value of continued trading). When these conditions obtain we would not expect firms to bother mobilizing in support of pro-arbitration treaties, as the police powers of the state are not required for effective dispute resolution.

Third, we should not observe support for pro-arbitration treaties unless arbitration is at least as efficient as litigation. Therefore, where domestic courts operate relatively well, we can expect demand for an arbitration-supporting treaty to be muted. Conversely, increasing the authority of arbitration will be particularly useful for firms operating in jurisdictions with inefficient courts.

Fourth, and most basically, firms should demand intergovernmental delegation to private tribunals, as opposed to simply domestic support for arbitration, when their business interests extend to firms whose main assets are located in other sovereign jurisdictions. That is, when they are engaged in international trade. This may seem obvious, but note two subtleties. One, crossborder trade can be conducted by firms that hold significant assets in the same country. For example, multinational companies may have significant
capital in both the country of export and the country of import for a certain good, and so be vulnerable to purely domestic lawsuits from both their suppliers and customers. When the market is structured in this way, there is less need for arbitral awards to be made enforceable abroad under treaty law. Two, when a firm’s trading partner is based in a country that lacks sovereignty over economic relations (e.g. colonies), a treaty mechanism would not be the appropriate tool with which to enhance the authority of arbitration. Though the trade is technically international, its governance is a matter of domestic law (in the case of the extraterritorial arrangements, like those in the Chinese treaty ports), or of imperial law. This latter category may even extend to countries that are functionally sovereign. As we will see below, in the late-19th and early 20th centuries, self-governing British dominions like Canada and Australia relied on London to coordinate international economic policy.

In sum, we should expect demand for an arbitration treaty from firms operating across genuinely sovereign jurisdictions in open and dynamic markets, in which private enforcement is not plausible, when domestic courts are relatively inefficient or biased, and when trading partners hold assets outside of a firm’s home country or its colonial possessions (see table 10).

Given demand for collective delegation to private tribunals, when might a treaty emerge?

R2 gives conditions for institutional supply:

**R2:** Institutions with the policy outcomes, authority, and scope demanded (per R1) by the dominant interest group in a locus of political contestation, if any, emerge in that locus. However, the extent to which the resulting institution meets the dominant actor’s preferences is constrained by the inherent attributes of domestic, intergovernmental, or private institutions.
Intergovernmental agreements reflect the distribution of power and preferences amongst states. Treaties can either codify and “lock in” preferences commonly held across states, or, when there is less harmony of preferences, they can reflect the terms of a (potentially asymmetric) bargain in which one state complies with another’s preferences in response to positive or negative inducements (Keohane and Nye 1977; Keohane 1984). In the first situation, R2 would expect an arbitration treaty to emerge when pro-arbitration interests groups (per R1) are dominant across countries. To the extent such groups are not dominant—i.e., under the second scenario—pro-arbitration treaties will only emerge if the states in which the pro-arbitration groups are dominant enjoy bargaining leverage over the states in which they are not. Note that a single treaty may include both dynamics, with a core group of states with common interests forming the treating and then inducing other states to join them.

Several implications follow from this basic logic of interstate cooperation. First, intergovernmental cooperation should be initiated by countries in which pro-arbitration interest groups are not only dominant, but in which the government is sufficiently concerned with their welfare to invest in international institution building on their behalf. We should therefore expect the states initiating pro-arbitration treaty negotiations to be pro-trade states whose dominant firms meet the criteria for R1 outlined above. For example, a protectionist state, or a mercantilist one, or one whose firms operate principally as monopolies, would not have incentives to collectively delegate to private arbitration.
Second, on a process level, we should expect pro-arbitration interest groups in each country to mobilize and lobby the government to join the treaty. Again, our expectation is that these firms will be engaged in competitive international markets which make them desire neutral dispute resolution and limit their ability to enforce judgments privately. Similarly, we can expect interest groups that would suffer from arbitration to oppose treaties empowering it. Firms that enjoy consistently strong bargaining positions and can rely on the courts of their home states to favor their interests would have little reason to increase the authority of international arbitration. A common example is a firm that enjoys the exclusive rights to exploit a certain natural resource in its home country. Such companies (e.g. national oil companies) often enjoy both bargaining leverage over foreign trade partners and the support of local courts. They therefore benefit from precluding the option of authoritative neutral arbitration. Opposition may also come from other interests vested in the domestic court system, such as judges, lawyers, and politicians embracing nationalist ideologies.

To the extent these conflicting interests exist within a country, we should expect to observe domestic political contestation over pro-arbitration treaties. This means that interests groups should communicate their preferences to policymakers via lobbying and other advocacy activities. Policymakers, in turn, should be aware of interest groups’ preferences when negotiating and ratifying treaties. We also would expect them to justify decisions (at least privately) as serving particular economic interests.
Third, we should expect governments responsive to pro-arbitration interests to use positive and negative inducements to persuade governments that are not as dominated by pro-arbitration interests to join the treaty. Such inducements should be discussed in diplomatic exchanges, and we should not observe recalcitrant countries join the treaty in the absence of coercive pressures (or the threat thereof) or linked concessions on the part of the pro-arbitration country. Moreover, the prevalence of these dynamics should correlate with two characteristics of the recalcitrant state. One, states whose trade is relatively important to pro-arbitration firms are more likely to be targeted via diplomatic pressure. We should expect pro-arbitration states to concentrate their lobbying efforts on the states that matter most to their firms. Two, lobbying should focus on states where the functional gap between international arbitral tribunals and local courts is largest. In other words, countries whose courts are highly biased or inefficient should be targeted more than countries with relatively high-performing courts, ceteris paribus.

2.2 Ideational

The ideational theory offers an alternative view of treaty formation, in which legal norms are the chief explanatory variable.

**I2: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Policymakers create or maintain institutions consistent with the dominant norms in the legal field to which they belong.**

Under I2, pro-arbitration treaties emerge if experts across national legal fields converge on a legal norm of state delegation to private tribunals and were able to impress the need for such a norm on policymakers. Several implications follow.
First, the existence of strong legal fields across countries is a precondition for this hypothesis. Pro-arbitration norms cannot diffuse to countries where no professional legal infrastructure exists to receive them. Nor are firms or policymakers likely to defer to legal expertise when legal institutions lack prestige or influence. While the legal profession seems ubiquitous in many countries today, recall that this is not the case across all countries, and certainly not over the years under analysis. We therefore do not expect to observe countries with underdeveloped legal fields supporting the arbitration treaties.

A second necessary condition for I2 is that the norm of arbitration must be widely embraced within the legal fields of the relevant countries. Legal fields that hold arbitration in low esteem are unlikely to suggest that policymakers enhance the ability of that institution to substitute for their own domestic courts. If a country does so against the views of its own jurists, I2 cannot be said to apply.

Third, following the logic of diffusion through legal networks, the embrace of pro-arbitration norms across legal fields should follow two patterns. One, similar legal fields should adopt similar stances with regard to arbitration in general, and so should evince similar levels of support for the arbitration treaties, regardless of material factors. Two, countries that are more closely linked to the key nodes of the arbitration community (such as UNCITRAL or the ICC) should be more pro-treaty than those that are not. These linkages should also be observable at a process level.
Turning now to the mechanics of I2, we should, fourth, see the idea for a treaty originate amongst legal experts and be justified as bringing coherence to the legal rules surrounding arbitration. While material justifications may also be offered, legal experts should, at least amongst themselves, argue for delegation to arbitration in terms of legal appropriateness. Legal experts may also mobilize to lobby policymakers to negotiate pro-arbitration treaties.

Fifth, policymakers should evince little knowledge of the material trade-offs delegation to arbitration entails, and instead defer to legal experts. We should not expect policymakers to attach significant importance to the issue, and instead ask legal experts to make decisions on their behalf. Nor should we expect to see interest groups educating policymakers on their particular preferences.

Sixth, there should be relatively high consensus on policy choices within legal fields. If I2 is correct, we should not observe the same kind of conflictive interest group politics R2 would predict. Instead, policymakers and firms within a country will defer to established legal opinion. Experts’ suggestions should not be significantly modified through the policy process.

Seventh, conversely, the fault lines across which international treaty negotiations should run principally between legal fields. Geopolitical and economic blocs should not find themselves at loggerheads in negotiations. Instead, legal difference between countries should define the positions countries take vis-à-vis each other.
Eighth, diplomatic pressure surrounding pro-arbitration treaties is likely to be minimal. While states may defer to legal expertise regarding their own behavior, they are unlikely to expend scarce diplomatic capital to ensure that other countries also comply with legal norms regarding commercial dispute resolution. For this reason, we are more likely to observe treaties amongst states that share common preferences (i.e. under conditions of relatively preference harmony), and, indeed, common legal fields, than to see the kind of bargaining that is possible under the rationalist model.

Table 10: Hypotheses, explanators and observable implications for treaty negotiation

<table>
<thead>
<tr>
<th>Hypotheses</th>
<th>Chief independent variables</th>
<th>Observable implications</th>
</tr>
</thead>
<tbody>
<tr>
<td>R1+2</td>
<td>1. Market position of dominant domestic interests groups</td>
<td>1. Pro-treaty interest groups</td>
</tr>
<tr>
<td></td>
<td>2. Policy and efficiency of domestic courts</td>
<td>a. Operate in open, dynamic, uncertain markets</td>
</tr>
<tr>
<td></td>
<td>3. Relative power of states</td>
<td>b. Market structure does not allow private enforcement</td>
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<tr>
<td></td>
<td></td>
<td>c. Arbitration at least as efficient as litigation</td>
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<td></td>
<td></td>
<td>d. Contract with parties across genuinely sovereign boundaries</td>
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<tr>
<td></td>
<td></td>
<td>2. Anti-treaty interest groups</td>
</tr>
<tr>
<td></td>
<td></td>
<td>a. Consistently hold more market power than trade partners</td>
</tr>
<tr>
<td></td>
<td></td>
<td>b. Benefit from biased courts</td>
</tr>
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<td></td>
<td></td>
<td>3. Treaties initiated by strongly pro-trade states whose dominant firms demand arbitration</td>
</tr>
<tr>
<td></td>
<td></td>
<td>4. Pro-arbitration interest groups lobby home gov. for treaty; Resistance from firms benefiting from local protectionism</td>
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<tr>
<td></td>
<td></td>
<td>5. Pro-arbitration states apply diplomatic pressure to recalcitrant states. Such pressure correlates with the level of trade between the states and the quality of domestic courts of recalcitrant state</td>
</tr>
<tr>
<td>I2</td>
<td>1. Strength and scope of legal fields</td>
<td>1. Necessary conditions in relevant states:</td>
</tr>
<tr>
<td></td>
<td>2. Norms dominant within a field</td>
<td>a. Existence of strong legal fields</td>
</tr>
<tr>
<td></td>
<td>3. Policymaker uncertainty over cost/benefit</td>
<td>b. Legal fields embrace arbitration</td>
</tr>
<tr>
<td></td>
<td>4. Prestige of experts amongst relevant policymakers</td>
<td>2. Support for treaties tracks common across legal fields, and follows linkages to arbitration epistemic community</td>
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<tr>
<td></td>
<td></td>
<td>3. Legal experts initiate treaty proposals</td>
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<td></td>
<td></td>
<td>4. Policymakers uncertain regarding material implications of institutional alternatives</td>
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<tr>
<td></td>
<td></td>
<td>5. Within the same legal field, relative absence of dissenting viewpoints and contestation in domestic policy discussion</td>
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<td></td>
<td>6. Adoption of experts’ views with little alteration</td>
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<tr>
<td></td>
<td></td>
<td>7. Intergovernmental lobbying unlikely</td>
</tr>
</tbody>
</table>
3. The Geneva Treaties

Before examining the individual hypotheses, it is useful to describe the sequence of events and key actors surrounding the negotiation of the 1923 Protocol and the 1927 Convention, as well as the content of these agreements (i.e. the target to be explained).

The first calls for global harmonization of dispute resolution policy came at the apogee of Belle Époque globalization, and followed the organization of the international business community as such. In 1905 an International Congress of Chambers of Commerce and Commercial and Industrial Organizations met in Liège, Belgium, to discuss what common interests they might advance. The issue of arbitration was first raised at the second Congress, meeting in Milan in 1906, and was discussed widely at the 1912 Boston Congress (Ridgeway 1938). On the initiative of the Belgian Chamber of Commerce, seconded by its London counterpart, the delegates in Boston resolved:

“The Congress affirms its desire to see convened as soon as possible a number of Official International Conferences, assuring between nations the existence of arbitral jurisdiction in the widest sense of the term and such as may assure an equitable solution of all international controversies, either between private people of different nations or between governments, and agrees to the principle of a combination of nations, when and where possible, to endeavor to prevent the atrocities of war” (Bernheimer 1914).

As this resolution suggests, the idea of arbitration initially stretched beyond the mere technical matter of resolving disputes between companies, and was associated with broader notions, common in the early 20th century, of eliminating conflict through international legalization (Weiss 2009). While the conflation of commercial arbitration
and world peace may seem far-fetched to the present reader, recall that during the 19th century such disputes often spilled into military conflict (c.f. the early economic relations of Argentina and China in chapters Six and Seven).  

More specific proposals on arbitration were considered in 1914 at the sixth International Congress in Paris. In the intervening year the London Chamber of Commerce had sent letters to the delegates requesting that they come prepared to discuss the details of the matter, and the New York Chamber of Commerce’s Charles L. Bernheimer, a strong advocate of arbitration in the US domestic context (see Chapter Five), had responded with a detailed plan (Bernheimer 1914). This document was co-drafted with Julius Henry Cohen, a practicing lawyer and legal scholar in New York, who would later publish a definitive treatise on Anglophone commercial arbitration (Cohen 1918). The plan envisioned a global system of private arbitration in which parties would specify in contracts which chamber of commerce’s arbitral authority would hear their disputes, and under which rules. Crucially, the proposal also envisioned a completely private, reputation-based system of enforcement, in which chambers themselves would pressure losing parties to comply with awards. A monthly bulletin, co-published by all the chambers of commerce, would then “transmit to all other Chambers the firm name of any party refusing to comply with the award, with a statement of the reasons, if any, given by him for such refusal” (Bernheimer 1914, p. 5). These kind of reputation-based systems had long been employed in certain commodity trades like grain (see Chapters Five, Six, and below) and cotton (Collin 1914; Pozzi 1914).

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3 C.f. the importance of this theme in the 19th century Latin American (Chapter Six) and 1920s Chinese contexts (Chapter Seven), as well as in the domestic US debate in the 1920s (below).
An alternative option was noted by European delegates, some of whom (e.g. England, Germany, Italy) operated under legal systems that granted arbitral awards legal force in public courts.\textsuperscript{4} The Italian legal scholar Roberto Pozzi summarized the state of law in an influential note to the Congress, which also put forward resolutions taken by a meeting of Italian chambers of commerce in Milan in advance of the Paris Congress. While praising the good intentions of the New York Chamber, Pozzi nonetheless noted several difficulties with the proposal,\textsuperscript{5} and in particular the proposed system of private enforcement:

“The types of moral sanctions discussed, such as censure, expulsion, and the publication of the names of defaulters in a designated official organ, in reality are not the means to overcome the lacunae in the law. Hence their importance remains merely relative” (Pozzi 1914, p. 14).\textsuperscript{6}

Instead, Pozzi urged the delegates to focus on the differences in laws regulating private arbitration across different countries, declaring these a “grave restriction” on the efficacy of the institution (Pozzi 1914, p. 14). In particular he identified three points of difference across nations: the validity of the arbitration clause (countries following the Napoleonic Code typically did not allow parties to commit themselves to arbitration in advance of a dispute, only after a dispute had arise), the ability of foreigners to serve as arbitrators


\textsuperscript{5} Beyond the concern with enforcement, Pozzi also noted that that one of the chief advantages of arbitration in trade associations was that the arbitrators had intimate knowledge of the industry in question, being men in that line of work themselves. This expertise would disappear under a general system of arbitration. Moreover Pozzi worried that such a general system would risk infringing on the powers of national courts, and so be politically controversial in many jurisdictions.

\textsuperscript{6} Original text: Le sanzioni di carattere morale del genere di quelle di cui si è parlato più sopra, quali la censura, l’esclusione, la pubblicazione del nome degli inadempienti in un apposito organo ufficiale, in realtà non sono che degli espedienti, più o meno efficaci, per sopperire alle lacune del diritto. Per ciò la loro importanza resta pur sempre relativa.
(which only Italy permitted), and, crucially, the recognition of foreign arbitral awards. On this last point, Pozzi noted that several countries possessed bilaterally treaties that mutually recognized arbitral awards rendered in the counterparty,⁷ and he referred to the 1889 Montevideo Treaty in which several Latin American nations had enshrined the same principal multilaterally, as a model. But he also held up for special consideration the Italian Procedural Code of 1865, which recognized the legal force of all foreign arbitral awards that met minimal procedural criteria. Though Pozzi acknowledged a system of universal recognition of foreign judicial decisions was “excessively optimistic,” he suggested that private awards would not evoke the same types of nationalist sentiments that might bar countries from enforcing the decisions of foreign courts. He proposed the gathered delegates might pursue this avenue, stating:

The goal of this path is the recognition on the part of all States of foreign sentences [meaning both court decisions and arbitral awards] with a simple exequatur⁸ of the form, and thus the generalization of the system that has in Italy—over the course of nearly half a century—given excellent results” (Pozzi 1914, p. 16).⁹

A draft resolution along these lines had been prepared by the Italian chambers of commerce at their Milan meeting, which urged the Paris conference to “design a proposal for an International Convention for the unification of legislation relating

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⁷ A compilation from 1928 recorded the following bilateral agreements promoting arbitration, with just three in existence at the time of Pozzi’s comments: France-Switzerland (1869); France-Belgium (1889); Spain-Switzerland (1896); Italy-Austria (1922); Italy-Czechoslovakia (1922); Czechoslovakia-SHS (1923); Turkey-WWI Allies (1923) Italy-Yugoslavia (1924); Italy-Russia (1924); Russia-Norway (1925); Czechoslovakia-Romania (1925); Belgium-Netherlands (1925); Germany-Russia (1925); Switzerland-Czechoslovakia 1926; Austria-Switzerland (1927) (Brachet 1928).
⁸ Under Italian law and French law, this term refers to an order issued by a court allowing a foreign judgment or award to be enforced.
⁹ Text: Meta di questo cammino è il riconoscimento da parte di tutti gli Stati delle sentenze straniere con la semplice delibazione della forma, e cioè la generalizzazione del sistema che ha dato in Italia—per l’esperienza di quasi mezzo secolo—eccellenti risultati.
to arbitration, and that the Permanent Committee [of the Paris Conference] transmit this proposal to the Government of the French Republic, exhorting it to invite the other States to an international diplomatic Conference in order to establish...*an international Convention on arbitral procedures to resolve disputes between citizens of different countries.*”

Similar calls were made from other organizations, for example, the Guild Chamber of Grains, Flours, and Milling of Paris, which also urged unification of legislation holding up the permissive Italian law as a model, but did not call for a treaty (Collin 1914).

Ultimately, a hybrid of the American and European proposals was endorsed at Boston. The delegates at Paris passed a resolution calling for the establishment of an international private arbitration institution, consistent with Bernheimer’s vision, and established a committee to look into the matter. The delegates also called upon the French government, a sponsor of the conference, to call an intergovernmental conference on the settlement of arbitration disputes as Pozzi and the Italian chambers had proposed (Ridgeway 1938, p. 318). The New York delegates, who had concluded their proposal by noting “This is a mere outline or draft presented for the consideration and criticism of commercial bodies throughout the word. Counter-suggestions will be gladly entertained,” seemed very content with this addition. Indeed, Bernheimer later took ownership for the Congress’s embrace of arbitration, describing it to the press as “a triumph for a progressive American

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10 Emphasis in original. Text: “...elaborare un progetto di Convenzione Internazionale per l’unificazione delle legislazioni in materia d’arbitrato; e che in seguito il Comitato Permanente trasmetta tale progetto al Governo della Repubblica francese, officiandolo ad invitare gli altri Stati ad una Conferenza diplomatic internazionale che abbia per compito di stabilire, sulle basi del progetto elaborato dalla Conferenza tecnica, una Convenzione internazionale sulla procedura di arbitrato per regolare I conflitti fra cittadini di diverso paese” (Pozzi, 1914, p. 20).
The intergovernmental regime

idea.”\footnote{Edward Marshall, “American Businessmen Become World Leaders,” \textit{New York Times}, p. SM8.} It is striking, however, that the origins of the contemporary hybrid regime for transnational commercial arbitration lay not in the ideas or policies of large commercial powers like the United States, France, Germany, or, indeed Great Britain, the period’s economic hegemon, but in the policies of countries like Italy and the Latin American republics. This “demand” puzzle is explored below.

It does not appear that the French government ever acted on the proposal to call a conference on the enforcement of arbitral awards. The outbreak of World War I, just over a month after the Paris congress concluded, pushed all such issues off the international agenda for the remainder of the decade.

In 1919 the international congresses of the previous decades were institutionalized into a permanent organization, the International Chamber of Commerce. In 1921 this institution created the world’s first self-consciously international arbitration provider, the International Court of Arbitration, which remains the most prestigious and widely used arbitral facility to this day. In the 1920s, though, its importance was in many ways more symbolic than practical, a fact that is not widely appreciated in the literature on the subject. Between 1921 and 1929, it heard only 326 cases. Of these, only 11 were settled by formal arbitration under the organization’s rules. A further 18 were settled by formal conciliation procedures administered by the Court, but the vast majority were settled either through informal conciliation under the ICC’s auspices (75 cases), or simply rejected by the Court because the parties had not properly specified the arbitral clause in their contract (ICC Bulletin 1929). Moreover, despite its global ambitions, most of the
ICC’s cases came from Western Europe, and especially France, during this period. Of the 337 plaintiffs that used this system between 1921 and 1930, 177 (just over half) were French. The largest non-European source of plaintiffs was the United States, but only 11 American firms submitted cases. Defendants were similarly concentrated geographically, with over 80 percent based in Europe.12

At its first general meeting in this new guise, the 1921 London Congress, the ICC called upon countries that did not recognize the independence and validity of private arbitration to do so, declaring that “uniformity of legislation directed towards the recognition of standard arbitration proceedings is…highly desirable from the point of view of international relations” (ICC 1921, p. 16). Unlike in 1914, however, no call was made for a treaty. Instead, the ICC saw itself playing the role of international coordinator, harmonizing national policies through the efforts of its national committees.13 Indeed, we observe chambers of commerce linked to the ICC (e.g. London and New York; see below) beginning domestic lobbying efforts at this time.

However, the question was also taken up by the newly formed League of Nations, particularly its Economic Committee (EC). This body has not been the subject of significant study by political scientists, but represents a fascinating and early mix of state, intergovernmental, and private authority, in many ways presaging the transgovernmental

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12 Data are compiled from the ICC Bulletins 1921-1930.
13 This role was described by the ICC as follows: “The National Committee [the local branch of the ICC], being a federation of representatives of the principal economic forces of the country, is the natural agency for national action on the part of the International Chamber. Here the function of the International Chamber consists in co-ordinating and welding together the activity of the various National Committees and in arriving by simultaneous national effort at an international result.” ICC (1921). Proceedings of the First Congress (London). Brochure No. 18. Paris. P. 17.
and hybrid networks that currently play a major role in global economic governance.14 An economic committee was not envisioned in the original League Charter, but rather suggested in 1920 by the economic section of the League Secretariat—the international civil servants responsible for advising the League on economic matters (Clavin and Wessels 2005). Member states demurred, reluctant to cede sovereignty over economic affairs, but consented to the creation of a “Joint Provisional Economic and Financial Committee,” which would be comprised of independent experts from various nations and have the power to study issues and propose solutions to the League’s Council or Assembly. In 1923 the provisional committee was made permanent and divided into a financial committee and an economic one (the latter having responsibility for commercial policy, including dispute resolution). Though nominally independent, the experts on the Economic Committee (EC) were often senior civil servants from ministries related to economic affairs. Appointments were made by the League’s Council, and so the EC’s members came most often from those governments, as well as smaller, typically European countries. Interestingly, the United States, despite not being a member of the League, found some representation on the EC through the appointment of “independent” experts such as representatives of the various American chambers of commerce based in European capitals (Clavin and Wessels 2005).

Though the EC lacked authority to create international law, it could advise the Council on economic policy and could propose treaties to the Assembly’s Second Committee. Only this latter group, the sub-section of the Assembly charged with economic affairs, had the authority to place resolutions and treaties before the League’s membership for signature and ratification. In practice, however, the EC’s agenda-setting power was so great that historians believe “the real power lay with the Economic and Financial Committees,” (Calvin and Wessels 2005, p. 480). As we will see below, this general rule was particularly true for dispute resolution; none of the EC’s suggestions relating to arbitration were modified in their passage through the Second Committee and the Assembly. Thus, the principal body formulating global policy on dispute resolution was a mixture of private experts and “domestic” civil servants (i.e. not professional diplomats), though it was nominally subordinate to the intergovernmental apparatus represented by the League’s Council and Assembly.

In 1922 the Economic Committee (EC) took up the question of transborder dispute resolution on the suggestion of its British representative, Sir Hubert Llewelyn Smith (League of Nations Official Journal [hereafter “OJ”] 1922, p. 616, 620). Llewelyn Smith was a career civil servant who had held various positions at the top of the British Board of Trade,¹⁵ and, while sitting on the League’s Economic Committee, also served as Chief Economic Advisor to the British Government (Beveridge and Einaudi 1946). The EC decided to charge a “Committee of Experts on legal and commercial questions” with a remit

¹⁵ Though officially only empowered to advise government, this entity, which had begun as an ad hoc committee in the 17th century, acquired a diverse portfolio as the British economy grew increasingly complex following the Industrial Revolution and the expansion of the Empire.
“to study the effect of agreements between residents of different countries to submit to arbitration disputes arising under commercial contracts; to examine any obstacles to the operation of these agreements arising out of the exercise of jurisdiction by the national Courts in matters within the scope of the agreements, and to consider how far such obstacles can be removed… and, lastly, to consult, when pursuing their work, such organisations and persons as may seem desirable” (LN C.E.I.41 / LN 1927.II.43, p. 30).

The committee of experts recommended a set of changes that should be made to national laws in order to enhance the standing of arbitration,16 and this conclusion was “fully endorsed” by the EC, which also set itself the task of thinking how this goal might best be achieved.17 By the end of the year, the EC decided to begin drafting a protocol on arbitration, convening another committee of jurists to assist them. After a few iterations of the draft passed between the EC, the expert committee, and the League’s Council, a final version was opened for signature at the fourth meeting of the League’s general membership, in 1923. It entered into force in 1924.

The Protocol committed states to recognize the validity of an arbitral clause in a commercial contract (Art. I) and “to ensure the execution” thereof, but only of awards rendered in their own territories (Art. III). This offered substantial authority to arbitration,

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16 The Committee made the following report:
“If two parties of different nationalities agree to refer disputes that may arise between them in a named country, an action brought by either party in any country other than that agreed upon as the place for arbitration ought to be stayed by the Court of the country in which it is brought, provided that: (a) the Court is satisfied that the other party is and has been ready and willing to do all thing necessary to carry out the arbitration agreed upon; and (b) that the same Court is satisfied, either by a certificate of the Court of the country in which it was been agreed to arbitrate or by diplomatic methods, that the law of the latter country recognizes and will make effective the arbitration agreement.” ((LN C.E.I.41 / LN 1927.II.43, p. 30).
17 “The Economic Committee fully endorsed the views of the Committee of Experts and considered that measures should be taken to compel merchants who have adhered to an arbitration clause to respect and comply with it. For this purpose it would be necessary to remove from the laws of the different countries anything that would allow merchants to break their engagements or that would justify them in having done so.” (LN C.E.I.41 / LN 1927.II.43, p. 30).
but also left ambiguous the question of whether arbitral decisions rendered in other
countries would be enforceable in signatories’ courts. This was a key flaw in the eyes of
arbitration advocates, as it would have forced businesses to pursue arbitration in the
country of their counterparty. The issue was raised at ICC meetings in June and
November of 1925, which adopted resolutions calling for an expansion of the scope of
the Protocol. In 1927, the EC tasked a committee of experts to investigate the matter, and
the group returned a draft agreement extending the 1924 Protocol to provide for
enforcement of foreign arbitral awards. The proposal was discussed within the EC, and at
a special International Economic Conference held in Geneva in May 1927. In September
the draft Convention on the Execution of Foreign Arbitral Awards was opened for
signature by the League’s Assembly (LN Doc. A. 11 1927 II).

The Protocol received 26 ratifications before WWII (after which it was largely
considered defunct; see below); the Convention received 19 (table eleven). With some
notable exceptions (the United States, Canada, India, Argentina) the majority of the
world’s trading powers approved the treaties. The pattern of ratification is explored
below. It seems that this system succeeded in increasing the authority of arbitration. At an
ICC conference in 1935, the head of the Court of Arbitration noted that 87 percent of its
awards had been carried out voluntarily and, of the remaining 13 percent that had gone to
court, almost none had not been subsequently enforced.18

18 “As regards the execution of the awards, the speaker pointed out that voluntary compliance was the
general rule. A recent inquiry had shown that 87% of the awards, the subsequent history of which was
known to the ICC, had been carried out without legal procedure.” ICC, World Trade, July-August 1935, p.
25
Let us now examine the hypotheses outlined above. For each I assess whether the general conditions required for them to hold obtain, and if there is evidence that that processes they envision in fact occurred.
3.1 Rationalist

The rationalist logic calls our attention to three crucial explanators: the preferences of economic interest groups, their ability to advance their preferences in domestic politics, and the relative power of those states that, driven by these groups, adopt a pro-arbitration stance. During the 1920s each of these factors favored intergovernmental delegation to arbitration.

First, we must confirm that company demand follows the logic of R1, meaning that arbitration is preferred to litigation in terms of neutrality and efficiency, on average, and that arbitration’s lack of authority caused firms to seek state backing for it. As noted above, we observe wide support for arbitration across the international business community. Recall that the original calls for a global treaty on commercial arbitration come from the 1906 International Congress of Chambers of Commerce and Commercial and Industrial Organizations, not from legal experts or national governments. R1 would also expect these umbrella groups, not individual firms, to be the advocates for dispute resolution institutions, since the economic benefits are relatively diffuse, and so unlikely to figure near the top of any individual firm’s advocacy priorities, especially in advance of a dispute.

Despite the near-unanimous support observed at the business association level, R1 would also expect to find variation in business demand for the treaties based on how useful the enforcement of arbitral awards abroad would be to the interests of any particular firm.
Demand should be strongest for firms that do significant business with firms based in other jurisdictions, particularly those with weak legal institutions, firms that do not occupy systematically privileged positions in global markets (which would lead to demand for biased institutions), and firms that cannot, because of the dynamic market conditions under which they operate, ensure regular compliance with arbitral awards unless assisted by state courts.

Unfortunately we do not have systematic firm-level data for this period to test these implications directly. An indirect inference, however, can be made with regard to the timing of the treaties, which is puzzling. The first calls for a treaty backing arbitration only emerged in the first years of the 20th century, after more than half a century of British-led economic liberalization and globalization, and at least as long after arbitration became commonly used in international exchange. Why this delay? Also in need of explanation is the striking observation that the treaties the business community decided to endorse generalized the policies of countries like Italy and the Latin American republics, not those of Britain or the other core economies.

R1 offers an explanation to both these puzzles based in the shifting market position of firms in the dominant economies. Consider the case of the hegemon. Arbitration was widely practiced in the UK and its colonies, playing a central role in the intra-Empire trade that constituted a major portion of the contemporary global economy (OJ 1922, p. 1412). The various international commodity and trade associations based in London, Liverpool, and Manchester had practiced arbitration since at least the beginning of the
The intergovernmental regime

19th century, and the London Court of Arbitration, a generalist institution, was one of the most active in the world (Cohen 1918; Birdseye 1926; van Hissenhoven 1938; Hooker 1939; Barty-King 1978). Arbitration scholars from the early 20th century often point to the disruption the American Civil War caused in the flow of cotton and other commodities from the United States to Britain as a key impetus for formal arbitration in the commodity trades (Birdseye 1926). These practices received the official sanction of British policy and jurisprudence following the Arbitration Act of 1889, although the standing of foreign awards was left to the discretion of the courts.

Despite this support for arbitration, for many British traders during the earlier phases of 19th century globalization, the enforcement of foreign arbitral awards would not have been a central concern, for three reasons. One was the nature of the British-led commodity trade. Groups like the London Corn Trade Association or the Liverpool Cotton Exchange were the first associations of traders to develop and rely on arbitration in the United Kingdom. But these industries were exactly the kind of markets in which private enforcement of arbitral decisions was highly effective. The total number of firms bringing cotton, wheat, sisal, or other staples to the United Kingdom was typically small. Transactions were relatively small in value, and buying and selling occurred between the same firms on an almost daily basis. The gain that could be had from defecting on a contract was therefore typically far less than what could be gained by maintaining a productive business relationship and sound reputation (van Hissenhoven 1938; Hooker 1939; Barty-King 1978; Bernstein 2001; Lewis 2012).19

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19 See also more detailed accounts of the international grain trade in Chapters Five and Six.
Two, despite their transnational nature, these industries typically involved transactions between parties who all possessed significant assets under the jurisdiction of British courts. The grain trade, discussed in more detail in Chapter Six, provides an example. Most of the companies selling wheat to British mills were not distant farmers on the Russian steppes or Argentine pampas, but rather multinational shipping firms that served as middlemen. These companies owned significant assets in the United Kingdom and its dependencies, and were therefore directly vulnerable to enforcement actions in UK courts. Because most developing countries traded principally commodities with the UK, the structure of the trade allowed the UK to conduct a brisk business with places like Argentina without having to worry that its own companies would find themselves seeking to enforce an arbitral award in Argentine courts.

Three, much of British trade occurred within the Empire, or with countries such as China and the Ottoman Empire, over which Britain exercised extraterritorial jurisdiction. Enforcing arbitral awards in these jurisdictions was thus a matter of domestic or imperial law, not international law understood as the reciprocal concessions of equal sovereigns. Even if there were demand for mutual delegation to private arbitration, then, a treaty would not be the appropriate means to achieve that end. That said, enforcing arbitral awards in these countries did require international coordination because several of the most economically important dominions (e.g. Canada, South Africa, Australia) were self-governing, but this occurred through the system of Imperial Economic Conferences, at which common policies were agreed and later, in theory, implemented by national legislatures. Only in the latter half of the 19th century would trade outside the Empire
The intergovernmental regime became significant as countries like France, the United States, and Germany industrialized and liberalized their foreign trade.

For these reasons, we would only expect British traders to be concerned with an international treaty that enhanced the enforceability of arbitral awards once a) trade was not chiefly in commodities, b) economies outside the Empire became economically significant.

While trade data for this period, even for the UK, are imprecise at best (Imlah 1958), we can infer that open, dynamic markets were much more common at the end of the period of 19th century globalization than at the beginning. First, major trading economies tended to have high tariffs until the second half of the 19th century. This is not the place to review the extensive literature on 19th century liberalization, but note that the cascade of bilateral treaties committing countries to lower tariff levels only occurred in the 1860s and 1870s.

Second, open, dynamic transborder markets required other countries to gain the ability to compete with Great Britain in world markets, not simply to sell it the commodities it required to produce manufactured products. The spread of industrialization from the UK to Western Europe and North America was a gradual process, only reaching a critical

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20 A useful summary of the proliferation of unilateral tariff reductions and bilateral trade treaties (most of which incorporated the most favored nation principle) that followed the UK’s embrace of free trade in the 1850s and the 1860 Cobden-Chevalier treaty can be found in Kindleberger, C. P. (1975). "The Rise of Free Trade in Western Europe, 1820-1875." The Journal of Economic History 35(1): 20-55. An interesting fact, not well known amongst scholars, is that small European states actually practiced free trade before British liberalization, with Tuscany permitted the export of grain from the province of Maremma in 1737 (Kindleberger 1975, p. 23).
mass at the end of the 19th century (Taft Morris and Adelman 1988). Again, a full review of this phenomenon is beyond the scope of the present study, but recall that widespread industrialization of the type Britain had achieved began relatively late in countries like Germany (after unification in 1871), the United States (after the Civil War ended in 1865), and Japan (with the Meiji in 1868). Significant trading economies like France and the Low Countries began industrializing sooner, but never achieved a scale of industrial capacity on par with the United Kingdom. Indeed, by the start of the Great Depression, only 12 countries had achieved the level of industrial output, per capita, that the UK had reached in 1870 (see table 12). These new competitors, though relatively few in number, quickly seized market share. In 1870 the UK’s industrial production accounted for 32 percent of the global total; in 1913 it had fallen to just nine percent (Rostow 1978). A complex two-way trade of manufactured products was only possible once this process had reached a level of maturity.

### Table 12: Years in which countries passed threshold of manufacturing output per capita obtained by Great Britain in 1870. Source: (Bénétrix, O’Rourke et al. 2012)

<table>
<thead>
<tr>
<th>Country</th>
<th>Year reached level of UK in 1870</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>1871</td>
</tr>
<tr>
<td>Germany</td>
<td>1886</td>
</tr>
<tr>
<td>Belgium</td>
<td>1889</td>
</tr>
<tr>
<td>United States</td>
<td>1890</td>
</tr>
<tr>
<td>Norway</td>
<td>1897</td>
</tr>
<tr>
<td>Canada</td>
<td>1902</td>
</tr>
<tr>
<td>Denmark</td>
<td>1903</td>
</tr>
<tr>
<td>Argentina</td>
<td>1905</td>
</tr>
<tr>
<td>Sweden</td>
<td>1916</td>
</tr>
<tr>
<td>France</td>
<td>1922</td>
</tr>
<tr>
<td>Austria</td>
<td>1928</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1929</td>
</tr>
</tbody>
</table>

Third, British trade experienced something of a step-change following the economic troubles of the 1890s (see figures 16 and 17). The ten years before WW1 represented the
fastest peacetime growth in British exports since 1854. Even more important, however, was Britain’s transformation into a major importer of finished goods. The rate of growth in imports of finished goods between 1900 and 1914 was nearly double that of the previous two decades.

Figure 16: British imports of finished goods (source: NBER)
In sum, the diffusion of industrialization and liberalization, both spearheaded by the United Kingdom’s technology, capital, and foreign policy, created a global economy in which UK firms were much more likely to engage in trade with companies in other jurisdictions that occupied comparable positions of market strength. Put differently, British firms in the 1920s were much more likely to occupy market positions similar to those that Italian firms might have occupied in the mid 19th century, of those that Latin American firms occupied vis-à-vis one another.

Let us now turn to the supply-side of the equation. Given demand for arbitration per R1, we should observe, under R2, pro-arbitration lobbying by interest groups at the domestic level. This indeed occurred where national laws were insufficiently deferential, and by the mid 1920s, as the treaties were being negotiated, all major economies came to favor arbitration in their domestic laws. Chapter Five discusses the United States case in depth,
so here simply note that the campaign of the New York Chamber of Commerce and its offspring, the American Arbitration Association, was successful in radically transforming the legal context of arbitration at the federal level and in the economically significant states. The British domestic situation, where the law was also favorable toward arbitration, is also referenced above.\(^{21}\) Let us briefly consider the domestic situations of the other two major European economies at the time, Germany and France.

German mercantile associations had become regular users of arbitration as the country became a commercial power in the latter decades of the 19\(^{th}\) century (Cohn 1941), as the League of Nation’s 1922 expert committee recognized (OJ 1922, p. 1412). Though the German state played a large role in the economy, this private autonomy enjoyed a highly favorable legal environment, perhaps the most deferential in the world.\(^{22}\) Under the 1887 Code of Civil Procedure, arbitrators enjoyed unusual discretion to decide the case as they thought best, with little need to consider how the laws of the land might bear on a question. Awards were final, and judicial review virtually impossible (Cohn 1941, p. 5, 16). German merchants, therefore, had little need to press the state for greater standing for arbitration. Foreign awards were also easily executed in Germany, requiring just a simple executory motion in a German court. Although awards that failed to meet the standards for arbitration established in the German code were not enforceable, this does not seem to have been a major concern for most merchants, as the German code was fairly tolerant of foreign forms of arbitration (Brachet 1928, p. 113). Indeed, the Protocol

\(^{21}\) Indeed, the *Economist* noted that for merchants the “root of the present difficulties” pertaining to dispute resolution was not British law but “the difference between the rules of English law and those of other countries” (*The Economist*, September 15, 1923, p. 397).

\(^{22}\) Several other countries’ laws were heavily influenced by the German model, including Austria, Norway, Poland, Denmark and, less predictably, Scotland and Japan (Cohn 1941, p. 5).
and Convention required little domestic policy change of Germany (Nussbuam 1943, p. 223), which ratified them in 1924 and 1930, respectively.

France, in contrast, stood out as the major economy in which arbitration enjoyed least privilege. As discussed in more detail in Chapter Six (Argentina’s laws being heavily influenced by France’s, by way of Spain), the Napoleonic Code recognized the possibility of arbitration, but neutered the force of an arbitration clause in a commercial contract to bind parties in advance of a dispute. Arbitration was possible ex post facto, but parties could not be forced to accept the procedure in advance. Instead, the mercantile disputes were largely treated in a specialized public court system, which replicated many of arbitration’s functional features. Two institutions performed this task. First, in almost all French cities an official tribunal de commerce judged commercial disputes, often acting more as a tool of mediation and conciliation than adjudication. The judges of these systems were, like in contemporary private arbitral tribunals, themselves merchants elected by their peers. But unlike, for example, the New York Chamber of Commerce system or trade associations, the judges of the tribunaux de commerce received training from the state in how to administer disputes, and were formally designated by the government.  

Second, conventional courts could also refer commercial cases to a special judge (réfééré commercial) who would handle them in a more arbitration-like fashion, with less legal process.

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23 Note the similarities between this system and the institution created by the New York Chamber in the 1870s, which was explicitly modeled on it (Chapter Five).
The existence of relatively efficient public institutions seems to have reduced French enthusiasm for private arbitration. The ICC reported in 1921:

“It is well known that French circles are not on the whole favourable to the adoption of the general arbitration clause in national legislation; the Fédération des Industriels et des Commerçants Français has recently stated once more in a resolution that the jurisdiction of commercial courts, especially in view of the early constitution of the “référé commercial”, is able to place at the disposal of the parties all the advantages of arbitration, and, furthermore, ensuring them guarantees that arbitration is unable to offer them” (ICC 1921).

Importantly, however, these institutions functioned only for domestic disputes. Foreign arbitral awards had no more standing under French law than domestic ones. It is therefore unsurprising the calls for reform came from the growing international sector of the French economy. Indeed, the ICC report cited above noted that French indifference to arbitration applied “except in so far as international commercial relations are concerned” (ICC 1921). In 1902, Louis Louis-Dreyfus, a scion of the multinational grain concern of the same name that was a central player in the contemporary private dispute settlement order in Argentina (see Chapter Six) introduced a bill in the lower house that sought to make arbitral clauses binding on future disputes (London Times, Dec. 10, 1925, p. 15). At the 1914 congress of business associations, the Parisian textile association—dependent on imports of raw materials from abroad—noted that French adversity to arbitration “risked submitting our country to moral and material damages, distancing us from the foreign merchant”24 (Collin, 1914, p. 5 11). It took until 1925, however, for the French Senate to follow up on the initiative of Louis-Dreyfus, when even more bold legislation

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24 Original text: “La situation actuelle risque de porter à notre pays un réel préjudice moral et matériel. Elle tend à éloigner de nous, dans une certaine mesure, le commerçant étranger…”
was introduced by Senator Etienne Clémental. This was itself fascinating, as Clémental, serving in various ministerial capacities, was one of the chief authors of the national economic planning system introduced after WWI, a system that increased the role of the state in the economy. He was also, not coincidentally, the founding president of the ICC.

In all the major economies, then, we observe R2’s prediction of pro-arbitration interests lobbying for their preferred mechanisms at the domestic level. In the two major countries which, by the 1920s, had not given domestic arbitral awards legal standing, these efforts succeeded. Given demand for a treaty under R1, and the dominance of pro-arbitration interests domestically in the major powers of the period, we should also observe, under R2, the dominant interest groups succeed in lobbying their home governments to initiate or support the Geneva treaties. Indeed, as R2 predicts, in 1925 the ICC reported that its national affiliates were actively lobbying the governments of Czechoslovakia, Italy, and Poland, and that the governments of other key states were already moving to ratify the Protocol (Austria, Belgium, Japan, the Netherlands, Norway, Romania, Sweden, and Switzerland) (ICC 1925, p. 9-11). The ICC secretariat itself was also advocating for the treaties within the EC (Magnier 1928).

These efforts were most apparent, however, in the world’s dominant trading state. Recall that it was Llewelyn Smith, the British government’s senior economic adviser, who first formally proposed the idea of a treaty on arbitration to the EC. It is worth detailing the domestic forces that shaped this initiative.
In the decades leading up to the negotiation of the Protocol, British business interests had made known their desire to see enhanced enforcement for arbitral awards abroad, both within the Empire and without. In 1910, various UK-based chambers of commerce recommended to the International Congress of Chambers of Commerce (which met in London in that year) that “power should be obtained by means of an international convention to secure reciprocity between this country and other countries for extending to the British trader the advantage, which foreign traders enjoy in this country, of enforcing their awards abroad” (London *Times*, June 6, 1910). The *Times* opined that this topic “will be the only really important question on the agenda of the International Congress.” It also noted that the UK Board of Trade “has loyally thrown its heart into this work and has received through the Foreign and Colonial Offices replies to its inquires from 47 countries.”

Perhaps as a result of these efforts, a step forward was obtained the following year at the 1911 Imperial Economic Conference, where delegates approved a resolution that read:

“The Imperial Government should consider in concert with the Dominion Governments whether, and to what extent and under what conditions, it is practicable and desirable to make mutual arrangements with a view to the enforcement in one part of the Empire of judgments and orders of the Courts of Justice in another part, including judgments or orders to enforce arbitral awards.”

25 Unfortunately the records of the Board of Trade do not seem to include evidence of these efforts.
26 Cabinet Papers, Imperial Conference 1926.
However, these efforts did not lead to a treaty, with the government instead adopting a more incremental approach. In 1912 the UK Secretary of State for Foreign Affairs found it necessary to respond publically to the Association of Chambers of Commerce (a UK-wide umbrella group), which had called for bilateral conventions with certain states in order to render arbitral awards enforceable. The Foreign Office concluded that, “whilst the establishment within the Empire of an arrangement of the character indicated is likely to prove a useful step towards a wider application of the principle of recognition of judgments and orders of Court, including the question of the appointment of arbitrators, his Majesty’s Government deems it desirable to defer the question of negotiating conventions with foreign countries on the subject until after the completion of such an arrangement with the Governments of the self-governing dominions” (London Times, May 21, 1912). Nothing more seemed to come of this proposal before the outbreak of World War I.

A group of pro-arbitration interests represented by the London Chamber of Commerce, the London Court of Arbitration, the London Corn Trade Association and others tried again in 1918, petitioning the Lord High Chancellor (the cabinet member with primary responsibility for legal affairs) to explore how their arbitral awards might be better enforced abroad. The government duly commissioned a committee of legal experts to report to Parliament on the issue, but its chair, a jurist, offended the commercial bodies

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27 The precise mandate was to “report what steps, if any, are feasible and are to be recommended to facilitate the commencement and conduct of legal proceedings (including arbitrations) between parties in this country and parties abroad, and the enforcement of judgments, decrees, and awards elsewhere than in the country in which they may have been made, and to provide greater uniformity and mutual improvements in the commercial law and practice relating to legal proceedings and arbitrations and the means of enforcing the decision arrived at in the same…”Darby, L. F. C. (1919). Report of the Committee Appointed by the Lord Chancellor to Consider the Conduct of Legal Proceedings between Parties in This
that had originally brought the petition by appointing only lawyers to the committee. They refused to meet with the committee and instead requested a meeting with the Lord High Chancellor himself. It is not clear whether this meeting ever occurred. Unperturbed, the committee produced its report anyway, after consulting the chambers of commerce of Manchester and Liverpool, as well as various arbitration experts and commercial legal practitioners.

The report’s recommendations, issued in 1919 (Darby 1919), were likely not the ones hoped for by the original petitioners. Most focused on how both arbitral awards and court judgments might be better enforced within the Empire, and these concerns were acted upon in the 1920 Administration of Justice Act, which aimed to enhance applicability of both court decisions and arbitral awards across British possessions (although in practice it took several more years to implement). But with respect to the enforcement of arbitral awards in other jurisdictions, the committee concluded “that the time if not ripe for any attempt to give international effect to awards as such.” The justification offered is vague, and seems mostly based in uncertainty; “Much experience of the working of any such system on a smaller scale or between particular countries would be required before a general system could be safely taken in hand.” Though the committee hoped that a reciprocal arrangement with the United States might be attempted—they had been told of the pro-arbitration zeal of the New York Chamber of Commerce—they thought “the preliminary work of preparing an international accord by voluntary effort is far from complete, and … without it any recommendation of specific overtures would be...
premature” (Darby 1919, p. 13). In other words, the incremental approach was maintained: first resolve the issues of enforcement within the Empire, then see what might be done at the global level.

Unfortunately, the archives do not seem to contain records of the discussions within the Board of Trade around Llewelyn Smith’s proposal of a treaty on arbitration to the League’s Economic Committee. However, it is important to note that the Board of Trade was in constant communication with commercial and industrial organizations in the UK, and so could not have missed a resolution of the London Chamber of Commerce in 1923, which called for the issue of the enforcement of arbitral awards to again be placed on the agenda of the Imperial Economic Conference. More relevantly, “The Council also resolved to place before the Board of Trade the desirability of steps being taken to advance the considered judgment of the commercial world that commercial differences should be settled by commercial arbitration” (*Financial Times*, May 14, 1923, p. 3).

Furthermore, the London Chamber claimed to have “intimations received from Sweden, Italy, and Greece of their willingness to approve a convention on the subject,” which highlighted “the expediency of Great Britain and the Overseas Dominions concurring in such a project” (*Financial Times*, May 14, 1923, p. 3). The press did not mention that the New York Chamber of Commerce had also suggested that its London counterpart seek such treaty in a series of letters from Bernheimer (van Sittart Bowater 1922). Finally, the Chamber made the services of the members of its Court of Arbitration available, via the Board of Trade, to the delegates of the Imperial Economic Conference to help answer technical questions relating to arbitration (Eales 1923).
It is clear, however, that the Board of Trade remained interested in a general arbitration treaty despite caution in Parliament. Indeed, a second report on arbitration provided an occasion for the Board of Trade to voice its views on the subject. In 1927 a parliamentary committee was again charged with reviewing the 1889 Arbitration Act and its subsequent interpretation, and recommended an interpretation of the law that granted arbitration strong autonomy, including with reference to the enforceability of foreign awards in British courts (McKinnon 1927). The report does not mention the contemporary negotiations in Geneva, but the compatibility between British law and those negotiations was discussed at a meeting at the Board of Trade on March 24, 1927, at which Llewelyn-Smith made clear his views. While gratified by Parliament’s strong backing for arbitration, which he thought “would make the ground firmer for the purpose of Mr. Claughton Scott’s [the British representative’s] discussions at Geneva,” he thought the report, by trusting in the favorable attitudes with which British judges treated arbitration, missed the key principle of reciprocity that motivated the Board of Trade’s actions in the EC:

“No doubt the Court’s discretion is exercised so judiciously in Great Britain that no grievance arises in practice from its existence. But that is not the question in which the Board of Trade are interested. We want to secure for our own traders the power of getting awards made in their favour enforced in foreign countries in some of which we cannot perhaps trust the Courts to exercise fairly a discretion which can safely be entrusted to a British Court (Llewellyn Smith 1927).

Such a position precisely reflects the rationalist logic for the treaty.
What about the other major economies? Process-level observations for most of the other major economies fall outside the scope of the present study, but inferences can be drawn from the pattern of ratification. Given the broad range of interest groups supporting the calls for a treaty at the prewar congresses and through the ICC, we might expect all significant trading nations to join. Table 13 lists the 39 countries whose external trade accounted for at least half of one percent of global trade in 1927 (the year the Convention was opened for signature).\(^{28}\) Countries that did not ratify either the Protocol or Convention are highlighted in bold, revealing that a large number of trading powers chose not to join the Geneva treaties.

Under R2, however, we would not expect colonial possessions or countries subject to extraterritorial jurisdiction to sign the treaty, as the colonial laws of the dominant country governed dispute resolution. Even if there were demand for delegation to private arbitral bodies, this would be sought via an adjustment in domestic and/or colonial law, not a League treaty. This was also the case for the self-governing Dominions of the British Empire (which, as discussed above, did indeed seek to empower arbitration, and pursued this goal within the Imperial Economic Conferences). As the fifth column of table 13 shows, many countries fell into this category, in which an alternative intergovernmental arrangement existed between non-signatories and their primary trading partners.\(^{29}\) Countries subject to those arrangements would not be expected to join under R2.

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\(^{29}\) The only truly significant exception is Canada, which, despite being part of the British imperial system, conducted most of its trade with the United States. Would it have not benefited from increased delegation to arbitration for trade with its southern neighbor? It may have, but because the treaty only had effect amongst signatories, the United States would have had to ratify the treaty as well for it to be of any value to Canada. Given US intransience on this issue (see below), Canada had little incentive to ratify. Note as well that, starting in the 1930s, the creation of the inter-American system obviated Canada’s need to pursue the
This leaves the United States, Argentina, the USSR, Cuba, Mexico, Hungary, and Chile. With the exception of the US, all of these countries’ exports were dominated by commodities. Unfortunately, precise, comparable measures from this period of the share of commodities in a country’s export basket do not exist (preventing a multivariate regression analysis of ratification). However, looking at the chief commodities for which data is available, we see each of these countries is highly engaged in the commodity trade. The Argentine case is discussed extensively in chapter six. Like Argentina, Hungary and Cuba were major agricultural producers. The former was one of the largest producers of wheat in Europe, while the latter’s economy was dedicated almost entirely to sugar and tobacco production (in 1927 these commodities accounted for 93 percent of Cuba’s exports (Mitchell 2007)). Chile and Mexico, in turn, were principally ore producers, though the former also accounted for much of the world’s sodium nitrate, and the latter was a significant oil producer. The Soviet Union was somewhat more diversified, with significant agricultural, ore, and timber resources, but...
still highly biased toward primary commodities, which made up nearly 90 percent of Soviet exports in the 1920s (Davies, Harrison et al. 1993).

As noted above, the structure of these industries (in which a few established players, typically large multinational firms, interacted repeatedly into the future) tended to make disputes rare and rendered voluntary compliance and reputation-based enforcement effective. Under R1, we would therefore not predict significant demand for countries involved principally in commodities to join the Geneva treaties.

Table 13: Ratification of the Geneva arbitration treaties

<table>
<thead>
<tr>
<th>Country (League of Nations names)</th>
<th>Ratify Convention and/or Protocol?</th>
<th>Trade, 100k USD</th>
<th>Global share</th>
<th>Alternative intergov. arrangement?</th>
<th>Commodities significant in export basket?</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>No</td>
<td>8922</td>
<td>13.7%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Yes</td>
<td>8782</td>
<td>13.5%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes</td>
<td>5824</td>
<td>8.9%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>France</td>
<td>Yes</td>
<td>4241</td>
<td>6.5%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Canada</td>
<td>No</td>
<td>2368</td>
<td>3.6%</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>India</td>
<td>No</td>
<td>2068</td>
<td>3.2%</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Japan</td>
<td>Yes</td>
<td>1901</td>
<td>2.9%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Italy</td>
<td>Yes</td>
<td>1858</td>
<td>2.9%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Argentina</td>
<td>No</td>
<td>1797</td>
<td>2.8%</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Yes</td>
<td>1789</td>
<td>2.7%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Belgium</td>
<td>Yes</td>
<td>1548</td>
<td>2.4%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Australia</td>
<td>No</td>
<td>1479</td>
<td>2.3%</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>China</td>
<td>No</td>
<td>1333</td>
<td>2.0%</td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>British Malaya</td>
<td>No</td>
<td>1161</td>
<td>1.8%</td>
<td>Yes</td>
<td>Yes</td>
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<tr>
<td>Czechoslovakia</td>
<td>Yes</td>
<td>1127</td>
<td>1.7%</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Dutch Indies</td>
<td>No</td>
<td>1024</td>
<td>1.6%</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Switzerland</td>
<td>Yes</td>
<td>870</td>
<td>1.3%</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Spain</td>
<td>Yes</td>
<td>861</td>
<td>1.3%</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Sweden</td>
<td>Yes</td>
<td>858</td>
<td>1.3%</td>
<td>No</td>
<td>No</td>
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<tr>
<td>Brazil</td>
<td>Yes</td>
<td>820</td>
<td>1.3%</td>
<td>No</td>
<td>Yes</td>
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<tr>
<td>Denmark</td>
<td>Yes</td>
<td>811</td>
<td>1.2%</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Union of South Africa</td>
<td>No</td>
<td>796</td>
<td>1.2%</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
The intergovernmental regime

The ratification of the Geneva treaties, then, corresponds almost perfectly with the logic of R2. The one economically significant country that failed to ratify the treaties and whose trade a) stretched beyond commodities and b) fell outside the British Empire or other intergovernmental arrangements was the United States. Given that both US business and legal interest groups were strongly pro-arbitration, and had successfully lobbied for the federal Arbitration Act in 1925, the case presents a potentially important challenge to the logic of R2. There are several general reasons to expect the United States to be the exception that proves the rule, however. First, after declining to join the League of Nations, the United States had no role in negotiating the Geneva treaties, and so would not have had an opportunity to shape them to its preferences. Second, and related, the Republican Party, with its strong isolationist wing, held the White House and both houses of Congress throughout the 1920s. Though strongly pro-business, the Republicans resisted formal engagement with the League’s organs as a matter of policy. Third, over
The intergovernmental regime

the course of the decade the country’s general economic orientation grew increasingly protectionist (Eichengreen 1989; Madsen 2001).

These conditions can help explain why pro-arbitration treaty interest groups might not achieve their desired policy outcome. But the archives suggest a more surprising reason for US non-adherence to the protocol and convention—pro-arbitration interests in the United States did not even attempt a serious campaign for them. Instead, to the extent groups like the New York Chamber of Commerce or the American Bar Association (the groups that led the campaign for the domestic law) advocated around treaties, they pushed for bilateral arrangements in which the United States and a select country would agree to recognize arbitral awards on a reciprocal basis. For example, in 1922 the American Bar Association, at its annual convention, passed a resolution declaring the association’s support for federal arbitration legislation and the guarantee of foreign awards via treaty, proposing drafts of each (see chapter XX). Its model treaty, however, was simply a series of clauses that could be inserted into bilateral commercial treaty.

Two possibilities arise. Either US interest groups truly preferred bilateral treaties to the multilateral versions, or they simply thought that, given the political obstacles to League treaties mentioned above, the cause of arbitration would be best served by advocating bilateral deals. We do not have direct evidence of interest groups’ deliberations on the matter, but, given the extensive nature of the New York Chamber’s archives, this lack of evidence is itself telling. It does not appear that the leading arbitration advocates in the
US business world ever considered pushing the Geneva treaties with the federal government.

Instead, the New York Chamber and other pro-arbitration groups conducted significant advocacy for bilateral treaties, as well as, in the 1930s, the Pan-American system. As early as 1921, as the ICC was first setting up its global arbitration campaign, Bernheimer of the New York Chamber sent a letter to Herbert Hoover (then Secretary of Commerce) advocating the need for bilateral arbitration treaties (Bernheimer 1922). This was followed by a series of meetings and exchange of letters with the State Department’s Trader Adviser’s Office in spring of 1922 (Hornbeck 1922). These efforts received consistently formulaic responses, though an official in charge of Latin American affairs proved more responsive, foreshadowing the active role the State Department would later take in building the inter-American regime. In general, though, the State Department’s response was, in the words of a junior Dutch diplomat who Bernheimer had asked to make requests on his behalf, “not pressing this matter very much just now.” Though it “showed interest … in the idea of general treaties,” it “was not very hopeful” (Gratama 1922).

Frustrated, Bernheimer then asked his friend Miles Dawson, a prominent New York lawyer, to refer him directly to Secretary of State Charles Hughes (Bernheimer 1922).

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32 An official charged with Latin American affairs noted he had read the pamphlets left by Bernheimer and thought it might be useful in forming “a closer bond of interest between North and South America and I believe such work as you are doing will be important in bringing such a condition to a successful and happy consummation.” Anderson, T. (1922). Letter from Tavis Anderson to Charles Bernheimer, July 24, 1922. New York Chamber of Commerce and Industry Records. New York, Columbia University. MS 1440 Box 115.
This led to an interview in which the Secretary seemed generally supportive but non-committal. In Bernheimer’s words, “The understanding which Mr. Hughes brought to the subject made it possible for me to accomplish the following: Secure his permission to say that he is sympathetic to the principle, that he will give the matter his personal attention, and that I may keep in personal touch with him regarding the matter” (Bernheimer 1922). Nothing more seems to have come of these efforts. The first bilateral treaty containing arbitration provisions would not be signed until after WWII (see Chapter Five).

In 1923 the State Department was sent a copy of Geneva Protocol by the Secretary General of the League, though it does not appear it was actively considered until 1925. A memorandum from the Office of the Economic Adviser (to the State Department) noted, “The Protocol appears to fulfill an objective long sought by certain Chambers of Commerce. Commercial arbitration has been the subject of national and state legislation in the United States and some discussion in this Department and in the Department of Commerce.” The records suggest that State sent a copy of the treaty to the Commerce Department for consideration, but the discussion seems to have ended there. The matter next appears in State’s records in 1930, in a memorandum of the Treaty Division, which confirmed that “available records indicated that the Department had not taken a definite position or declared its attitude with respect to this subject,” adding, “the lack of precedent and practice in the past contributed largely to the failure of the Department to take a positive stand” (Division 1930).

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33 During a 1944 query, State asked Commerce if they had any record of these discussions. The representative of the Department of Commerce said that Commerce said that no records had been found, but surmised that the view would have been favorable.
The minimal effort the State Department put into evaluating the treaty is consistent with the lack of interest group pressure on the issue. There are also indications, however, that the general chill regarding US participation in League treaties may have played a role. In 1926, a Columbia law professor contacted the State Department to ask about US adhesion to the Geneva Protocol. He was told that the government’s policy was not clear, but also “that if there were serious objections to the treaties, such as might arise from Illinois, the practical likelihood of adherence by the United States would be very small indeed” (State 1930). This is likely a reference to the general isolationist views associated with Republicans, who were well represented in the Midwest.

The final observable implication of R2 is that, to the extent preferences diverged, powerful states that supported arbitration should have used their leverage over recalcitrant states to push them to also adhere to the treaties. As discussed above, however, the major trading states largely shared a common preference for arbitration, obviating the need for domestic pressure in favor of the treaty. As discussed above, many of the nations we might expect to have been targets of such pressures were exactly the ones form whom the major firms in the dominant countries did not demand arbitration because:

a. They traded principally in commodities, the markets for which were dominated by multinational firms that operated under conditions made private enforcement of arbitral awards common and effective. Moreover, these same multinationals often owned significant assets in the jurisdictions of the dominant countries, and so were vulnerable to domestically enforceable arbitral awards
b. They were colonies, and so subject to the domestic laws of the metropole
c. The dominant countries exercised extraterritorial authority over them
Each of these situations made it unnecessary, the eyes of the dominant firms in the trading powers, for the foreign jurisdictions in which they worked to render arbitral awards enforceable in public courts.

Again, the only significant exception to these arguments is the United States, which we might expect, under R2, to have been the target of European lobbying regarding arbitration. However, we would also expect firms’ demand for such diplomatic pressure to be relatively muted given the basic competency of the US court system and the strong standing arbitration enjoyed within it following the 1925 Arbitration Act and subsequent judicial decisions. As a later observer noted, “The [1931] Gilbert case and subsequent cases which have followed it have probably done more in the United States for the enforcement of arbitration awards rendered by foreign arbitration tribunals than the Geneva Convention of 1927 did for the states which ratified it” (Rosenthal 1946, p. 823).

The most likely country to try to influence the United States on arbitration would have been the United Kingdom, given its firms’ strong demand for arbitration, its leadership in Geneva, and the large trade between the two countries. However, the diplomatic records of the United States and United Kingdom do not seem to contain any evidence that the issue was discussed on a bilateral basis. Likely it never achieved sufficient political salience. During this period European governments, and particularly the British, struggled to engage the United States on pressing questions of global governance, ranging from the security work of the League of Nations to the management of the
financial crises that helped precipitate the Great Depression. It is therefore unlikely that commercial dispute resolution would have found space on the diplomatic agenda.

3.2 Ideational

For I2 to apply, the policymakers initiating and supporting the proposal must be embedded in pro-arbitration legal fields and show evidence of deference to legal expertise. First, we observe that as commercial associations were united in their support for arbitration across the major economies, so too did legal opinion in the core countries favor arbitration as a means to resolve disputes. Consider the expert committee formed by the Economic Committee in 1922 to consider obstacles to arbitration. This group comprised professors of law, judges, and practicing lawyers, none of whom were engaged in the ICC or in mercantile pursuits (OJ 1922 p. 1404). Their unanimous support for arbitration cannot therefore be attributed to direct material interest (recall that arbitration only began to be enormously profitable for legal professionals in the 1970s). Instead, it is evidence of a normative stance in favor of arbitration. While resistance might have been expected from Latin American jurists (see Chapter Six), these were not included in the EC’s discussions.

However, while legal norms may have favored arbitration in general, there was much less consensus on the appropriate legal tool through which to render arbitral awards enforceable abroad. In the legal discourse this concept was often discussed in conjunction

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34 Nor, the report suggests, were they a mere front for the ICC. While supportive of arbitration in general, the report expressed skepticism that the ICC’s recently created International Court of Arbitration would attract much business away from existing chambers of commerce and mercantile associations (OJ 1922 p. 1414).
with the question of how foreign court judgments should be treated, which raised thorny legal issues about which intelligent jurists, even in the same legal field, could and did disagree. In 1925 a quasi-intergovernmental conference of mostly legal professionals was held in the Hague to discuss the matter, but reached no conclusive results (LN Doc A. 11 1927 II). While legal norms had converged on the general desirability of arbitration as a dispute settlement procedure, they had not agreed how best to make foreign arbitral awards enforceable in public courts.

The problem divergent legal norms might create for treaty advocates were apparent in the crucial case of Britain. For I2 to be supported, we would need to find evidence that dominant legal norms supported making arbitral awards enforceable via treaty, and that legal experts pushed these views vis-à-vis policymakers. In fact, the opposite was true. British support for the treaty came *despite* the opposition of the legal establishment.

Conflict between legal and commercial interests appeared in the initial parliamentary inquiry into arbitration in 1919. Recall that it was the internationally oriented commercial groups that had initially petitioned the Lord Chancellor to review arbitration policy, and that these same groups were so offended when the resulting committee represented only lawyers that they refused to engage with it. The committee, for its part, gave little consideration to the question of arbitral awards at all, focusing mostly on the difficulties of enforcing foreign judgments in the UK. In other words, they focused chiefly on questions of interest to lawyers working in UK courts. Their conclusion on arbitration was saved for the report’s final paragraph, in which the committee declared itself “unable
to make any recommendation upon the subject of measures for enforcing awards made in arbitration in this country or vice-versa” (Darby 1919, p. 13). The rationale given was that the difficulties “with regard to the enforcement in one country of judgments pronounced in another apply with greater force to awards” (Darby 1919, p. 13), conflating the two issues as, indeed, the League of Nations expert committee had.

Even after the Protocol was ratified, the UK government’s highest legal experts continued to take a dim view of expanding the enforceability of arbitral awards via treaty. The 1927 parliamentary report considered the enforcement of arbitral awards in the UK a non-issue, writing “an action [in court] on a foreign award is and always has been perfectly feasible…For these reasons we see little or no reason to consider the last part of our terms of reference [regarding the enforcement of foreign arbitral awards]” (McKinnon 1927, p. 13). As noted above, Llewellyn Smith and the Board of Trade in their meeting on the subject regretted that the Committee had missed the opportunity to discuss the reciprocal enforcement desired by the commercial community. At the same meeting, Llewellyn Smith went on to identify the chief source of opposition to such a treaty within the British government: legal norms.

The basis of any protocol or Convention for [enforcement] would probably have to be a clear enumeration of the grounds on which (and only on which) the Court may refuse to make an Award enforceable. This means in plain English a restriction on the discretion of the Court, and that is what British lawyers hate. This is the central difficulty which retards progress, and I am sorry that Mr. Justice McKinnon’s Committee has not faced it, or even recognized its existence” (Llewellyn Smith 1927).
In the end this opposition was not sufficient to prevent the UK from ratifying both the Protocol and the Convention. But the fact that the key policymaker behind the treaty identified the dominant norms in his own legal field as the “central difficulty which retards progress” is strong evidence against I2.

Dominant domestic legal norms also may have created problems for the treaty in the United States. As noted above, the issue was the federal nature of American legal organization; the government of the United States could not commit to enforcing foreign arbitral awards in the courts of the individual states, as these were thought to hold Constitutional authority over such matters. The State Department offered this explanation for its lack of action on the Geneva treaties, though it is unclear how heavily this factor weighed amongst others (State 1930). US non-participation in the treaty, then, is reinforced by this ideational incompatibility.

Given the diversity of legal norms, I2 would expect treaty negotiations to reflect a process of legal contestation, in which competing principles were debated in legal terms amongst experts. Such a process could only occur, however, if policymakers were content to delegate negotiating authority to experts. Indeed, there is abundant evidence at the process level that policymakers gave significant discretion to legal professionals to design the exact nature of the treaty instruments. While policymakers generally saw arbitration as positive, they were also unsure about many of the details relating to the costs and benefits of specific policies. Expert committees were called on at least three
times to supply information: in 1923, 1924, and 1927. Explaining their decision to create a committee of jurists to investigate barriers to arbitration in 1922, the EC stated “The Economic Committee, before making any definite proposals to the Council, found it necessary to appoint a Committee of Experts to advise them on the legal and commercial aspects of the question” (OJ 1922, p. 1404). A separate report elaborated that though the EC “recognises the great practical value of the arbitration clauses,” it also recognized “the difficulties of a juridical nature which are in the way of a general convention on the subject, and it finds it necessary that a deeper study should be made of this question before the Committee can arrive at any definite proposal for an international agreement. It therefore appears necessary to consider very carefully with the aid of expert advice both the legal and commercial aspects of the question, and for this purpose the Economic Committee has decided to appoint a small Sub-Committee of Jurists and Commercial Experts” (OJ 1922, p. 620).

Even policymakers’ initial hesitations over delegating authority to foreign tribunals, by making their awards automatically enforceable in member states, reflected not opposition to the policy, but rather uncertainty over how the law would accommodate such a policy. The EC appears not to have intruded overly into the question of enforcement in the 1923 Protocol because they were anticipating a 1925 Conference on Private International Law at the Hague, which aimed to address the issue of enforcing judicial rulings abroad (OJ 1922, p. 1404).

35 The 1927 expert committee, which drafted the Convention of that year, was not composed only of legal experts. Of the eight members, three were eminent law professors, three were representatives of commercial organizations (the ICC, the American Chamber of Commerce in Paris, and a Viennese financial institution), and two were government officials (LN C.E.I.41 / LN 1927.II.43, p. 32). However, that this array of actors unanimously backed enforcement of foreign arbitral awards, and explicitly noted in their report the harmony of views within the group, suggests a normative consensus (Ibid).
Furthermore, we observe little modification of experts’ proposals by the intergovernmental process, and little contestation of the proposal in multilateral fora. The report of the 1922 committee of jurists was “fully endorsed” by the EC (OJ 1922, p. 1404). This endorsement was then echoed by the Council, which forwarded the experts’ reports to member states with the recommendation that they adopt its stance on arbitration (OJ 1922, p. 835, 1404). Afterward, the EC took up the question of a treaty “with the object of giving effect to the recommendations contained in the report of the Sub-Committee and of meeting the widely expressed desire of the commercial world that arbitration agreements should be ensured effective recognition and protection” (OJ 1922, p. 835). Indeed, the policies codified in the draft treaty were exactly those proposed in the experts’ report. The Assembly’s Second Committee also left the draft text virtually unchanged, franking stating in its report to the Assembly, “This text [the Protocol], prepared by the Economic Committee with the collaboration of a Committee of Jurists, has been subjected to slight changes by the Second Committee which have, however, left the form of the draft intact, such as it was submitted to us by the Council” (L.N.II.1923.6, p. 4-5). Echoing the EC, the Second Committee also urged adoption.

Governments had more opinions to express on the 1927 Convention, suggesting a number of revisions to the committee’s draft (C.516.M.175.1927.II, p. 2-3). The vast majority of these, however, were purely technical in nature (e.g. the UK specifying how the treaty would apply to its colonies). Only two recommendations, by the Netherlands and Sweden, proposed substantive changes, and these both aimed to expand the treaty’s
delegation to arbitration. The Economic Committee declined these amendments, and the two governments ratified the treaty anyway.

However, as this last point suggests, experts’ did not have complete freedom to impose the dispute settlement system they thought best. The EC’s hesitation regarding the Swedish and Dutch proposals stemmed from a concern that making the treaty overly aggressive would lead to political resistance (C.516.M.175.1927.II). This type of restraint was also felt in 1922. At that time, the original expert committee had concluded that to recommend states automatically enforce foreign awards would have been a step too far, arguing “In our opinion the time is not yet come at which this question of the reciprocal enforcement of awards in different countries can be considered with profit” (OJ 1922, p. 1413-1414). Instead, the committee felt that the issue of the enforceability of foreign judicial decisions had to be dealt with first, or at least concurrently. This view was later backed by the EC (OJ 1922, p. 1404). A 1925 Conference in The Hague considered this question directly, but decided that a universal policy regarding the enforceability of foreign judicial decisions (not just related to commercial disputes, but to private law generally) would be too ambitious. The EC was then free to consider the more limited question of the enforceability of foreign arbitral decisions, which they then decided to endorse (A.11.1927.II)

Last, for I2 to hold we would expect to see widespread deference to legal and commercial experts from policymakers, including in other issue areas. Indeed, the policymakers on the EC were in constant contact with legal and commercial experts, and frequently
justified their decisions with appeal to both the legal and mercantile expertise of members of the epistemic community surrounding arbitration. So far did this deference extend, pro-arbitration experts were allowed to play a direct role in policy formation, effectively penetrating the intergovernmental apparatus via the EC.

As an early political science study of what we would now call transnational interest groups noted, the ICC was invariably invited to participate in League conferences (Wilk 1940; Schneider 2000). Members of the League Secretariat’s Economics and Finance Section, in turn, regularly attended the ICC’s congresses. These two groups in fact partially overlapped, with the same individuals holding positions in the ICC and on the Economic Committee. Events like the 1927 International Economic Conference, despite having an intergovernmental air, were initiated and organized by the ICC, and were driven by its agenda (Wilk 1940, p. 233). The Conference’s president made sure to signal this in his introduction to the final report, noting the “collaboration of distinguished experts and of both official and private organizations throughout the world…I would mention in particular the International Chamber of Commerce, whose written and personal contributions—based on previous consultations of national committees in many countries—have throughout been of the greatest assistance” (LN C.E.I 44, p. 5).

Similar examples are plentiful. In reporting the draft Protocol to the League Assembly, the Economic Committee stated that its members “venture to urge the great importance of adopting this protocol without avoidable loss of time in view of the great and growing interest shown in the matter by the commercial community. The favourable reception
accorded to the scheme by the chief business organisations of the world is a striking proof of its practical value” (L.N.II.1923.6 / C.75, M). And the assembly itself, in its resolution opening the Protocol for ratification, adopted the same line of argument by “Recognising the great importance which commercial circles attach to the prompt settlement of this question” (OJ 1924, p. 235). The same argument was used again by the EC to introduce the Convention to the Assembly, and the ICC’s various resolutions in favor of a convention allowing for foreign enforcement of arbitral awards were explicitly cited (LN C.E.I.41 / LN 1927.II.43, p. 32).

As would also be expected, the ICC was successful in obtaining its goals regarding economic statistics, the laws governing bills of exchange, and other policies (Wilk 1940, p. 240-241). But it was unsuccessful in securing other, arguably larger goals, such as a reduction in tariffs. This issue touched directly on the material interests of powerful domestic actors, who, across the major economies, clearly communicated their preferences to policymakers.

4. The New York Convention

The postwar patchwork of the Geneva treaties, the inter-American system, and various bilateral deals had left the enforcement of arbitral awards uncertain across much of the world (Nussbaum 1942). As the Geneva treaties were ratified and their implementation worked out in courts, three weaknesses became particularly apparent (Lorenzen 1935; Nussbaum 1942; Van Den Berg 1981; Born 2009). First, the treaties limited enforcement to awards made in a signatory country (or, in some jurisdictions, under the laws of a
signatory, or by legal persons under the jurisdiction of a signatory). Awards rendered in countries that had not signed (e.g. the United States) thus lacked standing under international law. Second, in many places the Convention was interpreted to mean that an award had to be judged “final” in its place of origin before it could be enforced abroad. By requiring an additional encounter with a court, this “double exequatur” requirement reduced efficiency. Last, many courts believed that the treaty allowed them to review the process through which an award had been granted and reject awards that did not meet some minimum process requirements under national law.

While these issues largely remained off policymakers’ agendas during the interwar period, they continued to be a subject of interest and study for the arbitration community. The International Law Association discussed the issue at conferences in Vienna (1926), Warsaw (1928), New York (1930), and Budapest (1934), focusing on refining procedural rules for private tribunals (UN Doc. E/CONF.26/4, p. 17). Other legal groups were also working on the question at the global level, including the International Association of Legal Sciences, the Society of Comparative Legislation, and the Union Internationale des Avocats.

On the crucial question of enforcement, however, the institutional locus shifted from the League’s Economic Committee to the newly created International Institute for the Unification of Private Law (UNIDROIT), a League-affiliated intergovernmental organization headquartered in Rome. Founded in 1926, UNIDROIT, Like the EC, had (and continues to have) a hybrid governance structure. Though ultimate authority rests

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36 UNIDROIT was “re-founded” in 1940, following the demise of the League, via the UNIDROIT Statute.
with an Assembly made up of one representative of each member state, much of the actual decision-making takes place in the Governing Council, a body of 25 elected private individuals, typically judges, practitioners, academics, and former civil servants. But unlike the EC, which focused on economic policy broadly conceived, UNIDROIT was entirely dedicated to harmonizing the laws governing the rights and duties of private legal persons, including firms, and the relations between them. In other words, it was predominantly a legal, not commercial entity.

This mandate shaped UNIDROIT’s work on arbitration. In the late 1920s the organization commissioned an expert to study the state of arbitration laws around the world, and in 1932 decided “an attempt at unification might well be made” (UNIDROIT 1940, p. 2). Another committee of experts was nominated, which met several times throughout the 1930s. A draft Uniform Law on Arbitration in Respect of International Relations of Private Law was issued in 1940. This extensive document proposed a radically new approach to arbitral enforcement that broke both from the ICC’s vision of a minimalist, contract-based procedure that enjoyed substantial deference from national courts and also from the “sovereignty” position of national review of foreign awards. Instead, UNIDROIT proposed significant judicial oversight of arbitration, for example, by requiring awards to be approved by a public judge before becoming binding on the parties. At the same time, they proposed detailed rules to govern how national courts should render such decisions, and suggested making those public judgments—not the awards themselves—universally enforceable. The result would have been an internationally standardized form of “supervised” arbitration driven by public judges.
under a system of universal jurisdiction. While parties would have retained the ability to amend the arbitral procedures as they wished, judges would have the final say on what was and was not allowed (UNIDROIT 1940).

The difference between this system and the ICC’s goals were made clear in the consultative sessions held between the ICC and UNIDROIT in 1935 and 1936. Representatives of the ICC generally approved of the plan to strengthen arbitration, but feared that the UNIDROIT reforms would reduce the power of businesses to define the terms of dispute resolution in their contracts. Still, UNIDROIT’s draft of the model law remained unchanged throughout this period. Nor did the ICC, when it returned to the issue of dispute resolution after WWII, seem particularly influenced by UNIDROIT’s efforts. In the interwar period, then, we note a divergence of views within the commercial and legal communities.

After the war, international networks of arbitral institutions continued growing. In June 1945 the ICC held a conference that brought together all the major arbitral institutions in the world to consider the postwar international economy. Representatives of the American Arbitration Association, the joint US-Canada arbitral commission, the Inter-American Commercial Arbitration Commission, the London Court of Arbitration, and the Soviet marine and commercial arbitration tribunals met in Paris, along with UNIDROIT and the International Law Association. No such meeting had ever occurred before. Considerable differences in approach to arbitration and the laws governing it were noted,

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37 This is made clear in ICC, *World Trade*, Vol IX, May 1937, p. 5; The representative of the British section was particularly critical. Report of the Berlin Conference, 28th June 1936, p. 38
and the organizations agreed to share information regarding their practices on a regular basis. Nothing more substantial seems to have emerged from the meeting, but it represented a significant step forward for the transnational epistemic community of arbitration providers (World Trade, July 1946, p. 6).

The issue of international enforcement of awards first reappeared on the ICC’s agenda in 1949 at its International Congress in Quebec. Noting that “international uniform legislation aimed at simplifying recourse to arbitration would greatly contribute to a wide-spread use of arbitration procedure,” the ICC declared, “As long as the laws governing arbitration vary form one country to another, there will be uncertainty as to the validity of arbitration clauses and the possibility of enforcing arbitral awards in a foreign country” (ICC 1949, p. 85). The next year the Chairman of the ICC’s arbitral tribunal launched his own study of the state of arbitral award enforcement, concluding that that it was inadequate for the needs of modern commerce (ICC 1953, p. 6). And at the next congress of the Chamber, meeting in Lisbon in 1951, the ICC explicitly called for a new treaty, albeit somewhat cautiously, after a period of further study:

“The ICC welcomes a continuation of studies for the unification of arbitration laws in all countries, on the basis of the draft proposed by the International Institute for the Unification of Private Law [UNIDROIT], but recognizes the complexities and difficulties of the subject. The ICC considers that pending completion of these studies an immediate effort should be made (whether by amendment of the Geneva Convention of 1927 of by a new Convention) to remove the main defect which militates against the effectiveness of international arbitration and to permit the immediate enforcement of international arbitral awards. The ICC calls on
all governments concerned to cooperate towards that end” (ICC 1951, p. 75).38

The ICC formed a large committee to study the subject, composed of a number of prominent legal experts and businessmen (ICC 1953, reprinted as UN Doc. E/C.2/373). In 1953 this committee proposed a draft convention that would have moved significantly beyond the Geneva treaties, giving parties more or less complete freedom to design arbitration as they wished.39 Unlike the Geneva treaties, which empowered “foreign” awards on a reciprocal basis, the ICC’s proposal aimed to create a genuinely international award, which could be rendered under the laws of any country and, per the proposed treaty, enforced in the courts of any signatory regardless of that country’s own regulations pertaining to arbitration. And unlike UNIDROIT’s judge-centric system, the ICC placed ultimate authority on the will of the parties and the contract. This position was self-consciously radical, though the ICC characterized it as representative of emerging, though still controversial legal norms:

“Legal circles have until recently shown a marked opposition to recognizing autonomy of the will as a valid source of private international law which, being ideally the science of conflict of laws, presupposes that all legal relationships are subject to some national law. But at the same time, it would be hard to imagine the sense of frontier and of sovereignty disappearing, economically to start with and later politically, without the simultaneous establishment of international forms of procedure along similar lines. Furthermore, it should be pointed out that at the very moment when a supposedly scientific approach is tending to repudiate autonomy as a source of law, the texts of conventions (and in particular the Rome Institute’s Draft Uniform Law) are emphasizing in many cases

38 The ICC further noted that greater coordination amongst private arbitral tribunals might help to make international arbitration more consistent in the meantime, pending legal convergence (ICC 1951, p. 75).
39 The final report stated, “The ICC is here simultaneously pressing for the full application of the already existing Geneva Convention of 1927 and for the elaboration of a new more effective international instrument based on a draft it has itself already prepared” (ICC 1953, p. 25).
that the provisions set forth will only be valid if the parties have not arranged otherwise, thus confirming the autonomy of the will.” (ICC 1953, p. 8).

The next year the ICC submitted its proposal to the UN’s Economic and Social Council (ECOSOC) as part of the Council’s consultations with non-governmental organizations (UN Doc. E/SR.756, p. 5). The national sections of the ICC also brought the matter to the attention of their home governments (see US and UK documents referenced below). A representative of the ICC addressed ECOSOC directly, calling on the governments to form an expert committee to study the prospect of a new convention (UN Doc. E/SR.761, p. 30). This proposal was unanimously approved (UN Doc. E/SR.763, p. 39), and in March 1955 a committee of eight representatives met to review the ICC’s proposal, as well as the comments that member states had offered on it (E/AC.42/1). They ultimately decided to draft their own convention, and submitted a report recommending that ECOSOC convene a conference to negotiate a treaty along the lines the committee had suggested (UN Doc. E/AC.42.4). The committee’s draft differed substantially from the ICC’s proposal, placing far more emphasis on judicial oversight and national law. In other words, it reflected a more sovereigntist approach, and indeed offered only marginal improvements on the 1927 Convention in terms of enforceability.

ECOSOC accepted the sub-committee’s proposal and set up an international conference to negotiate a final convention. The United Nations Conference on International Commercial Arbitration met in May and June of 1958 (UN Doc. E/CONF.26/SR.2 to UN

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40 The committee included representatives of Australia, Belgium, Ecuador, Egypt, India, Sweden, the USSR, and the United Kingdom. Also represented were the IMF and UNIDROIT, as well as the International Law Association and the ICC.
The intergovernmental regime

Doc. E/CONF.26/SR/24, inclusive). Forty-three nations attended, with the Dutch representative presiding. Also represented were three IGOs (the Hague Conference on Private International Law, UNIDROIT, and the Organization of American States), as well as a number of legal and commercial NGOs, including the ICC (UN Doc. E/CONF.26/8/Rev.1). After several weeks of negotiation, the final text of the New York Convention was adopted 35 to zero, with 4 abstentions (UN Doc. E/CONF.26/SR/24, p. 10).

The outcome represented a compromise between the ICC’s position and the sovereigntist emphasis on judicial control and national law (UNIDROIT’s proposed system of universal jurisdiction was largely ignored). The overall level of delegation to private courts was broadly similar to that of the 1927 Convention, though additional constraints were placed on courts’ ability to review the content of awards, and countries could opt, by forgoing the reciprocity requirement, to enforce awards rendered in the jurisdictions of non-signatories. There were also several largely technical updates to the language of the treaty. Perhaps the most significant change, however, was the removal of the “double exequatur” requirement, meaning that court approval need only be sought in the jurisdiction of enforcement (not where the award was decided).

4.1 Rationalist

Remarkably, the material interests of firms and the states that support them had a largely negative effect in the context of the NYC. That is, actors behaving as the rationalist
mechanisms predict work to constrain and delimit institutional proposals put forward by ideationally motivated actors.

First consider interest group demand for the treaty. The ECOSOC delegates in New York made frequent reference to the “strong demand of commercial interests” for the treaty, and to the extent the ICC represented the will of the world’s largest corporations this was indeed true. Large firms sat on the ICC’s Committee on International Commercial Arbitration, which drafted the initial proposal, including senior executives from Shell, Borax, Unilever, and Dunlop (UN Doc. E/C.2/373). Certainly the ICC did not act contrary to the interests of the majority of its members. It does not necessarily follow that its motivations were driven only by firms’ demands, however.

Indeed, a closer examination reveals a split of opinion within the business community. In the United States, outside the US section of the ICC and the US members of the arbitration community, there was, as with the Geneva treaties, little enthusiasm for the ICC draft (see below). In the United Kingdom commercial opinion ranged from indifferent to hostile. These positions are puzzling, prima facie, because neither British nor American firms were disinterested or opposed to arbitration per se. On the contrary, in the UK commercial organizations communicated to the Board of Trade their strong endorsement of arbitration as a practice, and in the years after WWII American business interests lobbied the government to establish effective arbitration systems vis-à-vis China (see Chapter Five).
R1 offers an explanation for this indifference and opposition to the treaty. US corporate apathy is likely a product of American firms’ unique postwar market position. It is not necessary here to review the well-known story of US economic dominance in the 1950s (Santos 1970; Helleiner 1977; Dymsza 1984), but recall that US firms, flush with war-level productive capacity, suddenly faced a world in which the physical and human capital of their main European competitors had been destroyed. American food, consumer goods, capital equipment, and other products were desperately needed for reconstruction, and were often bought on credit also lent by the United States. Per R1, this market imbalance would make disputes unlikely and create conditions conducive to informal resolution favoring US firms. Possessing this potent alternative to neutral, formalistic arbitration, US businesses would have little need to waste time thinking about the enforcement of US arbitral awards in Europe. Even in those cases in which the American firm could not impose the terms it desired, the relative neutrality and efficiency of European courts and their generally favorable attitude toward foreign awards would further reduce the potential cost of non-compliance to US companies. Indeed, we see US efforts to enhance the standing of arbitral awards focused on Latin America, where US firms had historically faced legal difficulties, and in China, where the extraterritorial treaty port system had finally been destroyed by the war (for more on this see chapters Six and Seven). The United States had also pursued arbitration on a bilateral basis during the postwar period, and, when the NYC was opened for signature, had reciprocal enforcement arrangements with Ireland, Colombia, Denmark, Haiti, Israel, Italy, Korea, Nicaragua, Germany, Greece, and Japan (Sultan 1959), obviating the additional value many US businesses would obtain from a multilateral accord.
R1 also explains the opposition of some British commercial groups to the ICC treaty, which contrasts starkly with the attitudes of UK firms in the 1920s. Though their trade was decimated by the war, the British-based commodity organizations remained the chief institutions through which the trade of raw materials was organized. The standard contracts of these organizations called for disputes to be resolved in England under English law, which meant that, though the will of the parties remained paramount, the English commercial court exercised ultimate supervision over the proceedings.

Moreover, while foreign awards were enforceable in English courts under the 1927 Convention, the ICC proposal threatened to reduce the English court’s supervisory role by making foreign awards automatically enforceable in English courts. This raised for the British businessman the possibility of being subject to an arbitral award rendered abroad, possibly by an inferior arbitral institution.

Such a possibility was now increasingly dangerous, because British companies no longer could rest assured that their market position would allow them to insist on British arbitration. Whereas before British economic supremacy had made the country the natural center of the commodity trade, in the postwar world it seemed unlikely that a significant percentage of the world’s natural resources would actually physically pass under English jurisdiction. They therefore opposed the ICC’s initiative because it was feared it would embolden firms in other countries to insist on arbitration outside of the UK and to render such awards, which could not be assured to meet the standards proscribed by English law, enforceable on British firms in their own courts.
The ICC treaty also raised a more direct threat to the British providers of arbitration services. Effective “international” awards would potentially give foreign firms a viable alternative to the British system, siphoning cases from the London-based tribunals to the ICC or other bodies. While this would have meant less business for entities like the London Court of Arbitration, recall that during this period legal experts were not as lucratively remunerated for their services as today. Instead, the strong push by the British arbitration community against the treaty was likely motivated by a fear of losing the prestige of serving as the central dispute resolution clearinghouse for many industries.

Given the indifference of American firms, and the opposition of an important class of British organizations, who, then, in the international business community supported the ICC’s proposal? The principal advocates of the ICC’s position at the intergovernmental negotiations were small and medium Continental countries, such as France, the Netherlands, Norway, and Switzerland. Unfortunately, a detailed analysis of the formation of these positions has fallen outside the scope of the present study, and is not to my knowledge reported in the secondary literature in French or English. Therefore I cannot, at present, identify process-level information that suggests material incentives led Continental firms to lobby their governments. Based on broad market trends, however, this is certainly plausible. We would expect firms in highly interdependent countries that did not, on average, occupy dominant positions in their industries, to be more likely to embrace the kind of dispute resolution the ICC proposal embodied. Each of these
countries had long established arbitral institutions, and would likely benefit from increasing the legal force of their institutions’ awards abroad.

But while the countries that were the principal advocates for the ICC proposal all fit R1’s criteria in terms of general market position, not all countries experiencing such conditions supported the ICC proposal. Indeed, Italy and Belgium stand out as fierce defenders of the sovereigntist position at the NYC conference (see below). Their opposition is particularly surprising, given that both countries were broadly supportive of the Geneva treaties and long-standing users of arbitration.

It is more likely that most firms, even in France, the Netherlands, and other pro-ICC countries, were largely tepid in their support for the ICC proposal. After all, firms in these countries were essentially in the same position as British firms not involved in the commodity trade or loyal to the London Court (whose preferences we do observe). Such firms, receiving no privileges from the London-based system, would have presumably benefited from enhanced enforcement as much as a Dutch of French firm would. If the British firms unconnected to the British system were pushing for the treaty, we might have reason to expect their Continental counterparts to do so as well. Instead, British industry is at best indifferent or tepid toward the treaty. Under R1, there is no reason to expect similar Continental firms to be any more enthusiastic, much less to mobilize around it.
It seems likely to conclude, then, that the ICC’s claims to speak for the international business community as a whole were significantly exaggerated. At best, some Continental firms supported the type of arbitration the ICC proposed. This absence of rationalist demand for the NYC leads us to expect ideational forces will dominate (explored below).

Given weak interest group demand for the ICC treaty, we should not observe, under R2, economic interest groups beyond the ICC lobbying for the treaty. Indeed, process-level observations from both the US and UK show very weak interest group engagement in favor of the treaty and, in the latter case, significant opposition to it. Consider each in turn.

In the United States only a few arbitration-related groups voiced an opinion on the treaty. The State Department’s official position paper on the New York Convention noted “the absence of any compelling sense of need for a new convention on the part of the business community,” summarizing its engagement with interest groups as follows:

“The U.S. Council of the ICC has been actively pressing for U.S. adherence to the ECOSOC draft convention. A number of other prominent business organizations have advocated U.S. participation in the Conference, but only two of them, the New York Chamber of Commerce and the Commerce and Industry Association of New York, have gone so far as to join the U.S. Council in calling for U.S. adherence to the convention.” (State 1958)

The Department was dismissive even of these modest gestures of support, believing it “unlikely that the communications received from private US organizations represent
spontaneous expressions of interest,” and were instead put forward at the behest of the US Council of the ICC. The paper also looked to the UK for corroboration, stating, “It is also noteworthy, considering the world importance of London as a world arbitration center, that the British Government has stated that it is unaware of any demand for a new convention on the part of the British business community.”

As for the ICC itself, the Department’s position paper contended that

“it is reasonable to expect that [the treaty’s] proponents make out a strong and persuasive case for it. The U.S. Council of the ICC, however, has failed to do so. It has alleged certain advantages that will flow from the convention but has done little to document or support its contentions. The advantages it sees are mainly that the Convention will permit the enforcement of U.S. awards in countries which presently refuse to enforce them and that it will bring to such awards enforcement by summary methods and under a clearly defined procedure. The ICC appears unduly optimistic. It presupposes a widespread acceptance of the convention by underdeveloped countries, especially in Latin America, where U.S. awards are said to meet with the greatest difficulty. Whether such acceptance will materialize is problematical in view of the hostility of many such countries to arbitration except on their own terms and in view of the slight incentive the convention gives them to undertake worthwhile commitments on its subject.”

Instead, the Department thought the ICC’s “interest may be regarded as in the nature of special pleading” (State 1958) given its own arbitration practice. In sum, it is clear that the pro-treaty domestic interest groups failed to dominate US policy on this issue and, given the given the US’s other, more legalistic objections to the treaty (see below), the US position at the New York negotiations was to endorse arbitration as a practice, but to avoid committing itself to the treaty.
In the UK, instead, domestic interest groups actively worked against the treaty, and were successful in persuading the government to challenge the ICC’s ambitions of genuinely international arbitration in the intergovernmental forum. Because this opposition proved decisive in diluting the ICC’s proposal, it merits detailed discussion.

As in the 1920s, the governmental bodies in charge of dispute resolution policy were the Board of Trade, responsible for assessing commercial opinion, and the Lord Chancellor’s Committee on Private Law, a group of respected jurists who served as a quasi-official advisory body to the cabinet minister in charge of legal issues. The Lord Chancellor, himself a lawyer, ultimately dictated policy, but the Board of Trade had significant agenda-setting power, as it was in charge of providing the background research that informed the Committee’s discussions.

The Board of Trade first heard of the ICC’s proposed treaty from the UK’s ECOSOC delegate, in 1953. It then sent a copy of the proposal to a few dozen commercial organizations to solicit their views. The London Chamber of Commerce, the parent organization of the London Court of Arbitration, responded quickly and forcefully, stating

“The shortcomings of the Convention of 1927, as seen by the International Chamber, do not exist in anything like the same degree for English traders who, in their contracts, stipulate that disputes shall be settled by arbitration under the Rules of the London Court of Arbitration or one of the many trade associations which provide similar facilities” (1958)

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The London Chamber also noted

The Chamber is satisfied that the Protocol and the Convention have been of value to British traders especially when it is borne in mind that their very existence must have been instrumental in many instances in influencing the losing party in an arbitration to honour the award because of his knowledge that his country was bound by treaty to enforce the award against him in his own Courts.” (1958)

The commodity associations unanimously agreed with this verdict, many stating that formal enforcement proceedings were rarely required in their industries (as predicted by the nature of the their markets). For example, the Rubber Trade Association told the Board of Trade, “Generally contracts for the purchase or sale of rubber in the London market are made on the terms of the R.T.A. contract and members have experienced little difficulty over the settlement of claims which have been the subject of arbitration on such contracts” (1954). The London Rice Broker’s Association reported, “It is seldom that an award under the Rules of this Association is not accepted by the parties concerned and therefore the question of enforcement is of little interest to us” (Sanderson 1954). And the London Sugar Association claimed, “Disputes between parties using this Association’s contracts are fortunately rare. There have only been 24 cases in the last 30 years and in only one of these cases has the Award not been enforced. This was because the defendant had disappeared and could not be traced abroad” (O'Toole 1954). Indeed, the British Federation of Commodity Associations confirmed the importance of private enforcement based on market conditions, writing:

“Generally speaking, there is no problem in the primary commodity trades over the question of the enforcement of arbitration awards arising from the contracts made under the rules of any of the recognised British commodity trade associations; cases where a foreign party has failed to implement an award given in this country under such contracts are rare. This is largely because commodity contracts tend to subsist between buyers and sellers
known to one another and established in their respective markets.” (Wilson 1955)

The Federation of Commodity Associations also noted that the proposed convention could in fact be damaging to British traders:

“...certain of my members have expressed doubts as to the wisdom of a Convention on the enforcement of awards. Their doubts arise from the apprehension that an arbitration award given in a foreign country against a British party might be an unfair award and yet, under a Convention, be enforceable in British Courts...there is a feeling that the existence of a Convention may encourage foreign traders, who incidentally may represent the State, to insist upon arbitration in their countries in the knowledge that their awards will be enforceable in British Courts. In the commodity trades, we certainly do not wish to encourage foreign arbitrations where, apart from the possibility of unsatisfactory arbitration procedure, there is a lack of expertise.”(Wilson 1955)

More general business associations concurred. The Federation of British Industries stated that increasing the ability of firms to enforce arbitral awards is, in general, desirable, but “At the same time, it is felt that importance should be attached to doing nothing that might undermine the authority of the systems of arbitration operated by the London Chamber of Commerce or the various commodity markets”(Crump 1954).

Other bodies were completely disinterested. The insurance industry bluntly stated that they had no opinion in the matter (Wilmot 1954), while the Liverpool Corn Trade Association thought that “It appears … that the subject is one primarily for International Lawyers and other Legal Experts” (1954). The Ministry of Fuel and Power told the Board of Trade that oil companies had been entirely dismissive of the issue, and that detailed consultations were therefore unnecessary (Gummer 1954).
Taking note of these views, the Lord Chancellor’s Committee decided it was “not convinced by [the ICC’s] argument, which seemed very gravely to exaggerate the importance of legal enforcement of arbitral awards as a factor in the development of international trade” (Speed 1956). While the Committee differed on how much of a threat the ICC proposal actually represented to the British arbitral system, it “agreed, however, in thinking that the draft Convention in the form prepared by the ICC was open to many serious criticisms” (Ibid.).

The UK government then brought this position to the committee of experts appointed by ECOSOC that met in 1955. Though this group had agreed to act as independent experts and not represent national positions, the Lord Chancellor’s Committee’s report of 1956 states that “the United Kingdom member of the ad hoc Committee of legal experts was … instructed to explain the difficulties that the ICC draft presented to the United Kingdom” (Speed 1956). The fact that that representative, Professor B. A. Wortley, also sat on the Lord Chancellor’s Committee reinforced the introduction of a national interests into the ECOSOC experts’ discussion.

In the words of the Lord Chancellor’s Committee, Professor Wortley “was remarkably successful in persuading the ad hoc Committee of Legal Experts to reject most of the features of the ICC draft Convention which we found objectionable” (Speed 1956). Indeed, the so-called “New York Draft” that the expert committee created, and which became the starting point for the negotiation of the actual Convention, was decidedly
soverignist in outlook, granting local courts significant control over the enforcement of arbitral awards. As the Lord Chancellor’s Committee saw things,

“The present [New York] draft does not propose any radical changes in the present arrangements, but it goes as far as I think the United Kingdom should be prepared to go in the present state of commercial and legal opinion. There are serious difficulties, and there would certainly be very strong opposition, to our agreeing to any Convention which weakened the existing power of Courts to refuse to enforce foreign awards; this came out very clearly when we were considering an earlier and more ambitious draft prepared by the International Chamber of Commerce. It suits us to have United Kingdom awards enforced abroad, but the price we have to pay is to enforce foreign awards in the United Kingdom; we cannot afford to pay too high a price, which we should be doing if we weakened the existing safeguards against enforcing improper awards.” (Speed 1956)

Again, the UK Board of Trade solicited feedback on the new draft from a few dozen commercial organizations, and the Lord Chancellor’s Committee found opinion to be “favourable but not enthusiastic, although the New York Draft was regarded as a great improvement over the ICC Draft” (Speed 1956). The Lord Chancellor’s Committee took very seriously the fears voiced by a small minority of commodity traders that standards of arbitration abroad were low, and that

“the tendency on any international convention on the subject would be to encourage nationalistic demands in foreign countries that arbitration between their nationals and British nationals should be conducted in those countries and not in the United Kingdom”(Speed 1956).

42 An example can be found in the Sisal Association’s views: “My Committee is aware that in 1954 the Board of Trade consulted Chambers of Commerce and trade associations and that strong objections was expressed by them to the proposal that international awards should be recognised as valid in every country so long as the procedure applied was in accordance with the rules agreed upon by the parties, i.e., such awards would be independent of the law of the country where the case was heard. With this objection my Committee agrees, and it was, therefore, glad to hear that H.M. Government’s representative, at a meeting last March of an ad hoc Committee of the United Nations Economic and Social Council, was authorised to oppose this proposal and was successful in persuading that Committee to delete it from the proposed Convention.” Smallwood, V. R. B. (1955). Letter from Smallwood (London Sisal Association) to White (UK Board of Trade), December 16, 1955ibid., UK National Archive.
For the Committee, “The fact that disputes are almost automatically referred for settlement by arbitration in the United Kingdom is a most valuable asset to the British trader.” However, the Committee also found the fear that a new treaty, at least in its revised form, would disrupt this advantage to be “ill-founded.” The Committee therefore recommended the UK participate in the NYC drafting conference, and work to ensure that the final result was more or less in line with existing policy.\footnote{A separate report by the Committee reached a similar conclusion: “The ascendancy we have long enjoyed in the field of international commercial arbitration is now being challenged. Some foreign countries particularly, in Eastern Europe and the Far East, resent the assumption that arbitration should as a matter of course be conducted in the United Kingdom. We are not likely to arrest this tendency by ignoring it, still less by giving the impression that we are unwilling to co-operate in improving the existing arrangements for purely selfish reasons. Speed, R. W. A. (1956). Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Report by the Lord Chancellor’s Committee on Private International Law.\cite{Speed1956}. There was a concurrent discussion relating to arbitration within Europe under the auspices of the UN Economic Commission for Europe, which generated a similar response. At a confidential meeting between the Board of Trade, the London Chamber of Commerce, and the British Federation of Commodity Associations, the latter groups expressed displeasure with any new institutional arrangement that would shift arbitrations from their traditional home in London to Geneva. June 4, 1957 BT 11/5439.}}

A final observable implication for R2 regards diplomatic pressure. If France, Switzerland, the Netherlands, and the other strongly pro-treaty countries had serious economic interests at stake, we might have expected them to lobby less enthusiastic countries to support the ICC’s position at the negotiations, or to ratify the resulting Convention once it was signed. Again, the US and UK would be likely targets for such pressure, given the importance of these economies to the Continental firms’ trade. However, no evidence of diplomatic discussion on these matters can be found in the US or British archives.

In sum, the material interests of British companies seem to have had a decisive impact in limiting the ambitions of the New York Convention. In other countries, the absence of
strong interest group pressure either for or against created space for ideational factors to drive government policy. We turn to these next.

4.2 Ideational

Under I2, we should observe support for arbitration in the legal fields of the pro-treaty states, negotiations that reflect competing legal views between states, and significant deference from policymakers to legal experts. All of these conditions indeed find substantial support.

First, I2 would expect legal groups to initiate treaty proposals. As in the 1920s, there was a clear group of arbitration experts seeking to influence policy. But whereas before commercial interests dominated, in the 1950s the arbitration advocates had a decidedly legalistic orientation. Indeed, this group had expanded significantly over the intervening decades, stretching beyond the ICC and the EC to include private legal organizations like the International Law Association, the International Association of Legal Sciences, the Society of Comparative Legislation, Union Internationale des Avocats, and the inter-American organizations, amongst others. UNIDROIT, the Organization of American States, and the Council of Europe were also proposing or had enacted international law regarding arbitration. While business groups had clearly dominated the push for arbitration in the 1920s, legal groups had become increasingly active since.

Indeed, the legalization of the arbitration movement can be seen in the ICC itself. This is a crucial point, since the ICC remained the chief force behind the call for the new treaty.
Though intended as a business court, the ICC’s Court of International Arbitration had become dominated by lawyers. The Chair of the ICC’s Commission on International Commercial Arbitration was an eminent British solicitor, Sir Edwin S. Herbert, and it was on his initiative that the ICC studied the issue following the 1949 Quebec conference (ICC 1953). His report appeared in the June 1950 issue of *World Trade*. The document is remarkably legalistic and normative, making a passionate case for the autonomy of the contract, which constituted, in the author’s view, nothing less than “the foundation of our civilization” (Herbert 1950). The importance of arbitration for commercial outcomes is simply assumed.

In sum, legal organizations played a much larger role in discussing dispute resolution, proposing policies, and advocating for certain alternatives than they had before. Though the key organization remained a business group, the ICC, it was the individuals already involved in arbitration within that organization, mostly lawyers, who directed the treaty campaign. Commercial interests did not oppose this initiative—general statements in support were made at the ICC conferences, as noted above—but businessmen seemed content to let the existing arbitration experts take forward the policies they thought best. In this regard, it is also perhaps telling that the ICC chose to approach ECOSOC directly,⁴⁴ and not to carry the campaign forward through a sympathetic national government as arbitration advocates had done in the 1920s. This strategy suggests that

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⁴⁴ In presenting the Council with his proposal, the representative of the ICC stated, “It was obvious that under Article 62 of the Charter, the Economic and Social Council was the only organ before which the matter could properly be placed, and it was therefore to the Council that the ICC was submitting its proposal” (UN Doc. E/SR.763, p. 8).
the ICC conceived of the issue as a matter for technocratic international governance, not a matter of national interest.

Second, I2 would expect countries with pro-arbitration legal fields to be the strongest voices for arbitration within the treaty negotiations. We would not expect to observe contestation along geopolitical lines, or other cleavages in world politics. Indeed, virtually all countries expressed strong support for arbitration in general terms. The US representative to ECOSOC, despite holding instructions not to sign the treaty, declared his delegation “in complete sympathy with the ICC’s objectives,” and noted that the United States had included arbitration-enhancing provisions in several of its bilateral commercial treaties (UN Doc. E/SR.756, p. 8). The French delegate stated, “It was obviously logical and in fact essential” that arbitral awards be enforced abroad (UN Doc. E/SR.761, p. 31), and the United Kingdom “recognized the importance of the principle of arbitration” (UN Doc. E/SR.761, p. 32). During the conference, smaller wealthy trading states like the Netherlands, Belgium, Switzerland, and Israel were particularly vocal supporters of arbitration.

The socialist countries were equally supportive. While perhaps surprising, prima facie, this support reflected long-standing Soviet reliance on arbitration to handle international trade both within Comintern and without (see Chapter Seven for a more detailed explanation of socialist arbitration). The Soviet representative noted his nation’s extensive reliance on the practice in his opening remarks (UN Doc. E/CONF.26/SR.5). Czechoslovakia bragged that its “Chamber of Commerce had an arbitral tribunal, an
established institution possessing great experience, which was playing an increasingly important part in the nation’s commercial life” UN Doc. E/CONF.26/SR.4, p. 5-6). And Poland spoke directly to the relation between geopolitics and arbitration, arguing,

“the present division of the world into two great economic and social systems made it particularly important conclude an international convention on arbitration. Trade between countries belong to those two systems had increased rapidly during the past few years, and a concomitant increase was to be expected in the number of disputes” (E/CONF.26/SR.4, p. 6).

Indeed, East-West trade was almost entirely reliant on private arbitration, since neither side could feel confident in the other’s courts (Holtzmann 1979).

More surprising was the strong rhetorical support for arbitration found in the Third World. The Indian delegate “welcomed the ICC draft convention as a promising means of settlings [trade] disputes” (UN Doc. E/SR.761, p. 31). Ecuador echoed the ICC, arguing that “arbitration provided modern international trade with the flexibility and rapidity it needed” (UN Doc E/CONF.26/SR.2, p. 9). The Turkish representative implored countries not to seek to adapt the convention to their national laws, but rather to update national laws to conform to the new pro-arbitration rules (UN Doc. E/CONF.26/SR.4, p. 8). The Argentine delegate stated that his “Government attached particular importance to arbitration as a means of settling international commercial disputes,” declaring the Geneva treaties “no longer adequate” (UN Doc. E/CONF.26/SR.5). And both Costa Rica and the Republic of China (Taiwan) “stressed the importance of international commercial arbitration to the under-developed countries” (UN Doc. E/SR.1059, p. 74). This level of support is surprising for I2, because the domestic legal system of these countries were
generally less supportive of arbitration than those of the First and Second worlds (Domke 1965). In some cases this support was likely cheap rhetoric, as the countries most vocally supportive of arbitration did not actually ratify the treaty for decades (e.g. Turkey, Costa Rica, Argentina).

But, third, despite this general endorsement of arbitration, we again observe uncertainty amongst policymakers over the specific means through which to support it. This is evidenced primarily in their continued reliance on expert committees. Even arbitration advocates recommended proceeding cautiously. When the ICC submitted its draft convention to ECOSOC in 1954, it did so only as “a basis for further consideration in the drafting of a final convention” (UN Doc. E/SR/761, p. 30), calling on the Council to form a committee to study the topic. The ICC sought to frame the issue as a purely technical one, asking the member states to move ahead on the basis that “the principles and objectives of arbitration were so generally recognized and accepted that all governments could support the proposal for such a study,” even if there remained “differences of opinion about some of the technical provisions” (UN Doc. E/SR.761, p. 30).

Governments seemed largely to accept this statement (as the approving comments regarding arbitration cited above suggest), though some (e.g. Cuba, Venezuela, Egypt) were careful to note that the opinions of national governments ought to be consulted by the experts. However, this point underscored the lack of knowledge on the topic amongst policymakers, since it prompted the UK delegate to note frankly that “the problem of the enforcement of international arbitral awards was very complex and governments would have to conduct lengthy consultations, on the issue in general and on the ICC draft
convention, with legal experts and trade organizations before they could express any
definite opinion” (UN Doc. E/SR.761, p. 32). Little controversy arose at the meeting
where ECOSOC unanimously adopted the ICC recommendation and form a study
committee. Perhaps the delegates were persuaded by the Belgian delegate’s argument that
“The fact that the item had been sponsored by an organization with the prestige of the
ICC was a sufficient guarantee of the importance of the question” (UN Doc. E/SR.761, p.
30).

The expert committee did not meet until the following year, and declared its non-political
nature at the outset. Though made up of eight national representatives (from Australia,
Belgium, Ecuador, Egypt, India, Sweden, the USSR, and the UK), the committee saw
itself as essentially technocratic, introducing its report with the following disclaimer:

“In view of the technical nature of the subject matter, the members of the
Committee while being aware that they had been appointed as
Government representatives, considered themselves as acting essentially
as technical experts with the understanding that the views expressed by
them in the course of the Committee’s deliberation would not necessarily
constitute the positions of their respective Governments.” (UN Doc.
E/AC.42/4, p. 4).  

These non-representative representatives were joined by individuals from the
International Monetary Fund (who left after one meeting), UNIDROIT, the ICC, and the
International Law Association. After a few weeks of deliberations, the Committee
resolved to call for a conference aimed at drafting a new convention on international
arbitration, and proposed a draft text on which the discussions might build.

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45 C.f. the internal British documents, referenced above, which give the lie to this claim, at least in the case
of the UK.
But despite this technical orientation, the Committee’s draft convention differed significantly from the ICC proposal and UNIDROIT’s model law. It afforded more leeway to national arbitration procedures, and enhanced the role of courts by requiring an award to be effective in the country where it was issued before it could be enforced abroad. The final outcome, the New York Convention, also differs from the ICC’s draft, and the treaty’s travaux preparatoires show extensive debates over nearly every word. Is this not, then, evidence of intergovernmental bargaining more in line with R2?

An examination of the content of these deliberations suggests otherwise. The convention certainly featured debate, but the terms of the debate were, as the statements quoted above suggest, predominantly legalistic in nature. At no point was the general utility of private arbitration as a policy matter, in dispute. Rather, controversy arose over how best to achieve this goal in a world of varied legal systems. Delegates worried that if the convention departed too radically from the accepted legal norms of their home states, national courts would reject it. The conference, in other words, more closely resembled a legal seminar than, say, a trade round negotiation.

Indeed, even the British government (the state arguably most motivated by material interests) saw the other delegations acting principally in terms of law. A 1956 UK Cabinet report on the preparations for the New York conference noted that few of the common law countries were eager to negotiate a new convention, and complained:

“Not only is the legal background against which other Governments have made their comments different from that of the United Kingdom, their general approach to the subject appears to be “juristic” rather than practical; they seem concerned to find solutions to difficulties of legal principle rather
than to difficulties which businessmen meet in practice. In fact, in the
discussions that have so far taken place on this topic, very little factual
evidence of difficulties caused by the existing Convention has emerged.
There is a substantial body of opinion in favour of convening a Conference,
(only one Government, Lebanon, expressly opposed the suggestion), and it
appears that the practical, and indeed somewhat sceptical approach of Her
Majesty’s Government to the proposal for preparing a new Convention will
not command much sympathy from other Governments.” (Trade 1956)

The central legal controversy revolved around the extent to which arbitration could be
bound to certain procedures by national laws, and how much of a role public courts
would play in ensuring the quality of arbitral proceedings (Haight 1958; Van Den Berg
1981). Recall that the ICC advocated arbitration constrained only by the will of the
parties, enforceable globally with a single, pro-forma visit to court in the country where
the award would have effect. The ad hoc committee draft, in turn, gave a role to national
laws in deciding what arbitration must look like, and would have required, potentially,
public courts to approve both when an award was rendered and when it was enforced.

Italy was a strong advocate of the latter, sovereigntist position, stating

“At the present time, there was no possibility of securing acceptance of a
solution founded solely on the principle of contractual autonomy, in which
the law would be relegated to a secondary position…courts could hardly
be expected to have confidence in an award which had not been made
within the framework of a legal system…absolute liberalism was a thing
of the past…if the Convention was [sic] to be ratified by a greater number
of States than the 1927 Geneva Convention, it would be necessary to
eschew unduly revolutionary solutions whose acceptance would be
7).

France represented the opposite opinion, arguing that “international arbitration could not
be truly effective unless there was a greater emphasis on the principle of freedom of
contract” (UN Doc. E/CONF.26/SR.2, p. 3-4). Further, the French delegate disagreed with the Italian delegate’s “anxieties” over the conservative nature of jurists. Other countries split along similar lines, with the Netherlands, Switzerland, Israel, and several others taking the French side, the United States, Belgium, and several Latin American countries siding with the Italians, and many delegations seek to craft a compromise between them. This debate lasted some three days, with the final compromise reducing the grounds on which an arbitral award could be invalidated, but keeping open the prospect of judicial review in both the jurisdiction of origin and that of enforcement, though the latter was not expressly required for the former to proceed.

Strikingly, this debate over autonomy does not seem to have conformed to any differences in policy. Note, for example, that the principal antagonists in the debate all delegated high degrees of autonomy to arbitral awards both foreign and domestic. Rather, the delegates argued in terms of what was the correct legal principle. Sovereigntists were primarily concerned with ensuring that that outcome would be sufficiently compatible with their domestic legal system to allow for ratification. Supporters of a purely contract-based system, in turn, believed, following the ICC, that trade could best be encouraged by removing all possible constraints on the will of the parties. This pattern was repeated in debates over other questions, for example, regarding the conditions under which an arbitral agreement could be considered invalid, or how the convention might apply to federal countries (Haight 1958).
Further evidence for the legalistic nature of the debate can be found in the uncertainty and confusion that sporadically interrupted the proceedings. Delegates often used words in different ways (e.g. “exequatur”), or interpreted the same phrases to have different legal implications. Delegates would occasionally make a proposal only to be told it would in fact have the opposite effect of what they said they intended, prompting the delegate to retract his proposal (Haight 1958). The tone of the proceedings was therefore often more of joint problem-solving than of bargaining.

Finally, it is significant that many of the delegations that participated most vociferously in the discussion were headed by lawyers, not professional diplomats. Several insights into the personal nature of the delegations can be gleaned from the recollections of the German delegate (Glossner 1999). The Dutch Ambassador chaired the meeting, but relied heavily on his countryman, Pieter Sanders, who would go on to be recognized as one of the world’s foremost authorities on arbitration, to guide the discussion and speak for the Netherlands. Italy was represented by Mario Matteucci, former director of UNIDROIT, and the law professor Eugenio Minoli. France, which was arguably the most pro-ICC delegation (its headquarters sat in Paris), was represented by Conseiller d'Etat Georges Holleaux, “a French academic in the best sense of the word, the very picture of the elegant Senior French Legal Officer.” Even more significantly, the French delegation also included Rene Arnaud, who had helped to found the ICC after WWI and concurrently served on the very ICC commission that had submitted the initial proposal. The German delegate himself, meanwhile, was an arbitration expert who would go on to become the president of the ICC’s ICA.
In sum, though the New York Convention was born in a process of contestation, it was legal contestation. The travaux préparatoires read more like the preparatory meeting of an epistemic community than an intergovernmental bargaining process.

5. Adoption of the New York Convention

As may be expected from the lack of enthusiasm amongst key governments, acceptance of the New York Convention was gradual. A decade after it was opened for signature, the NYC had only come into effect in 34 countries. The following decade, 20 more countries joined, with 23 more in the decade after that. During the 1990s a tipping point was reached as 50 countries joined within a 10-year span, and in the last decade 20 more brought the total membership to 146, nearly the same as the WTO (see figure 18).

Figure 18: Participation in New York Convention

![Member states of the New York Convention, 1958-2011](image)
What explains this steady spread of delegation to arbitration over the last 50 years? The question parallels prominent strands of recent IPE literature that attempt to explain the diffusion of liberal economic policies in the postwar period (Simmons and Elkins 2004; Simmons, Elkins et al. 2006; Simmons, Dobbin et al. 2006; Cao 2009) and the intergovernmental organizations that institutionalize them, like the WTO (Davis and Wilf 2011), PTAs (Mansfield, Milner et al. 2007), and BITs (Simmons, Elkins et al. 2006). As Simmons and Elkins note in their seminal article, “one of the most important developments over the past three decades has been the growing willingness of governments to open up the national economy to global market forces” (Simmons and Elkins 2004, p. 171). The phenomenon is complex, as it involves the interaction of domestic and international political dynamics, manifests across multiple policy dimensions, and seems influenced by a host of causal factors. Nonetheless, Simmons and Elkins and the scholars that have followed them have demonstrated that macro-level policy diffusion models can shed light on the mechanisms behind liberalization.

However, as we might expect, different types of liberalization—and different international instruments through which states cooperate to achieve mutual liberalization—seem to be driven by different mechanisms. Simmons and Elkins test a variety of policy dimensions (capital account liberalization, current account openness, and exchange rate unification) against a host of mechanisms, finding that economic competition—especially for FDI—is the strongest force behind policy convergence, affecting liberalization more than, for example, the existence of successful role models or cultural similarities (Simmons and Elkins 2004, p. 182). This pattern also holds for BITs,
the authors find (Simmons, Elkins et al. 2006), and even for private environmental governance mechanisms (Cao and Prakash 2011). Trade institutions, instead, seem driven by other dynamics. Mansfield et al. (2007) show that domestic political institutions condition the ability of states to form PTAs, and Davis and Wilf (2011) show that geopolitics—as opposed to domestic politics or economic interests—drive WTO ascensions.\footnote{Importantly, countries must apply to join the WTO, and may be rejected by existing members. We would therefore expect political interests to play a larger role.}

In this section I apply the insights of this literature to transborder dispute resolution institutions. I test the mechanisms mentioned above—economic competition, cultural or linguistic similarities, domestic political characteristics, and geopolitical alignments or the coercive power of dominant states—to see if the same factors that drive other key international economic institutions also drive ratification of the New York Convention. I also test the hypotheses developed in chapter two and discussed above, some of which can be understood as more specific versions of the mechanisms highlighted in the wider literature. Following Simmons and Elkins, I employ spatial weighting techniques to estimate a country’s similarity to other countries across a number of dimensions.

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>State</th>
<th>Year</th>
<th>State</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
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<td>1959</td>
<td>South Africa</td>
<td>1976</td>
<td>Georgia</td>
<td>1994</td>
</tr>
<tr>
<td>Egypt</td>
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<td>Spain</td>
<td>1977</td>
<td>Mali</td>
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<td>1959</td>
<td>Djibouti</td>
<td>1977</td>
<td>Venezuela</td>
<td>1995</td>
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<td>Kuwait</td>
<td>1978</td>
<td>Bolivia</td>
<td>1995</td>
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<td>Syria</td>
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<td>Colombia</td>
<td>1979</td>
<td>Portugal</td>
<td>1995</td>
</tr>
<tr>
<td>Morocco</td>
<td>1959</td>
<td>San Marino</td>
<td>1979</td>
<td>Lithuania</td>
<td>1995</td>
</tr>
<tr>
<td>India</td>
<td>1960</td>
<td>Jordan</td>
<td>1980</td>
<td>Senegal</td>
<td>1995</td>
</tr>
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<td>Country</td>
<td>Year</td>
<td>Country</td>
<td>Year</td>
<td>Country</td>
<td>Year</td>
</tr>
<tr>
<td>------------------------------</td>
<td>-------</td>
<td>-----------------</td>
<td>-------</td>
<td>-----------------------</td>
<td>------</td>
</tr>
<tr>
<td>Russia (USSR)</td>
<td>1960</td>
<td>Ireland</td>
<td>1981</td>
<td>Mongolia</td>
<td>1995</td>
</tr>
<tr>
<td>Cambodia</td>
<td>1960</td>
<td>Yugoslavia</td>
<td>1982</td>
<td>Mauritius</td>
<td>1996</td>
</tr>
<tr>
<td>Romania</td>
<td>1961</td>
<td>Indonesia</td>
<td>1982</td>
<td>Kazakhstan</td>
<td>1996</td>
</tr>
<tr>
<td>Germany (FDR)</td>
<td>1961</td>
<td>Monaco</td>
<td>1982</td>
<td>Uzbekistan</td>
<td>1996</td>
</tr>
<tr>
<td>Austria</td>
<td>1961</td>
<td>Uruguay</td>
<td>1983</td>
<td>Brunei Darussalam</td>
<td>1996</td>
</tr>
<tr>
<td>Hungary</td>
<td>1962</td>
<td>Panama</td>
<td>1985</td>
<td>Lebanon</td>
<td>1998</td>
</tr>
<tr>
<td>Madagascar</td>
<td>1962</td>
<td>Peru</td>
<td>1988</td>
<td>Oman</td>
<td>1999</td>
</tr>
<tr>
<td>Netherlands</td>
<td>1964</td>
<td>Bahrain</td>
<td>1988</td>
<td>St. Vincent</td>
<td>2000</td>
</tr>
<tr>
<td>Switzerland</td>
<td>1965</td>
<td>Argentina</td>
<td>1989</td>
<td>Honduras</td>
<td>2001</td>
</tr>
<tr>
<td>United Republic of Tanzania</td>
<td>1965</td>
<td>Kenya</td>
<td>1989</td>
<td>Albania</td>
<td>2001</td>
</tr>
<tr>
<td>Niger</td>
<td>1965</td>
<td>Algeria</td>
<td>1989</td>
<td>Brazil</td>
<td>2002</td>
</tr>
<tr>
<td>Trinidad &amp; Tobago</td>
<td>1966</td>
<td>Lesotho</td>
<td>1989</td>
<td>Iran</td>
<td>2002</td>
</tr>
<tr>
<td>Tunisia</td>
<td>1967</td>
<td>Antigua and Barbuda</td>
<td>1989</td>
<td>Zambia</td>
<td>2002</td>
</tr>
<tr>
<td>Italy</td>
<td>1969</td>
<td>Croatia</td>
<td>1991</td>
<td>Iceland</td>
<td>2002</td>
</tr>
<tr>
<td>United States</td>
<td>1970</td>
<td>Côte d' Ivoire</td>
<td>1991</td>
<td>Qatar</td>
<td>2003</td>
</tr>
<tr>
<td>Mexico</td>
<td>1971</td>
<td>Guinea</td>
<td>1991</td>
<td>Pakistan</td>
<td>2005</td>
</tr>
<tr>
<td>Sweden</td>
<td>1972</td>
<td>Turkey</td>
<td>1992</td>
<td>Afghanistan</td>
<td>2005</td>
</tr>
<tr>
<td>South Korea</td>
<td>1973</td>
<td>Uganda</td>
<td>1992</td>
<td>Montenegro</td>
<td>2006</td>
</tr>
<tr>
<td>Cuba</td>
<td>1975</td>
<td>Czech Republic</td>
<td>1993</td>
<td>Bahamas</td>
<td>2007</td>
</tr>
</tbody>
</table>
The intergovernmental regime

<table>
<thead>
<tr>
<th>Country</th>
<th>Join Year</th>
<th>Country</th>
<th>Join Year</th>
<th>Country</th>
<th>Join Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Holy See</td>
<td>1975</td>
<td>Slovakia</td>
<td>1993</td>
<td>Rwanda</td>
<td>2009</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>1975</td>
<td>Estonia</td>
<td>1993</td>
<td>Cook Islands</td>
<td>2009</td>
</tr>
<tr>
<td>Chile</td>
<td>1975</td>
<td>Barbados</td>
<td>1993</td>
<td>Lichtenstein</td>
<td>2011</td>
</tr>
<tr>
<td>German Democratic Republic</td>
<td>1975</td>
<td>Saudi Arabia</td>
<td>1994</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Australia</td>
<td>1975</td>
<td>Zimbabwe</td>
<td>1994</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

5.1 Model

Though the treaty is now nearly universal, the New York Convention only achieved this diffusion over the course of five decades. The key variation in the dependent variable is thus the time it took a country to join, not whether it ever joined. The appropriate regression technique is therefore survival analysis, which allows us to compare the effect of different factors on the “risk” that an event occurs, in this case, the ratification of the New York Convention. Here I employ a Cox proportional hazards model, which makes no assumptions about the baseline hazard model (i.e. it does not assume that ratification follows some innate logic independent of the explanatory variables). Importantly, this type of regression accounts for the dynamic nature of causality, allowing for the possibility that the effect of a causal variable on ratification in 1959 will not be the same in 2008. The basic form of the model can be expressed as:

\[ h(t_i) = h_0(t) \exp(x_i \beta) \]

where \( t_i \) is the duration before ratification for country \( i \), \( x_i \) is a vector of independent variables, and \( \beta \) represents their corresponding coefficients. The left hand side of the equation \( h(t_i) \) is thus the probability that \( i \) will join the NYC if it has not already.
The data form a panel of country years including the 194 independent states identified by the Correlates of War project from 1958 to 2008 (the panel is unbalanced, as some countries enter and exit the international system during this period). The dependent variable is thus the number of years between when a country could potentially adopt the New York Convention (i.e., 1958, or the country’s first year of existence and sovereignty over foreign economic policy) and the date of ratification. Countries that never join are treated as censored in the final year of the panel.

5.2 Hypotheses

First consider some of the existing explanations for the spread of other international economic institutions. Four main theses can be identified.

**Interests of dominant domestic groups**

Studies of trade agreements have emphasized how domestic political conditions affect the likelihood of international cooperation (Milner 1997; Maggi and Rodriguez-Clare 1998; Grossman and Helpman 2002; Mansfield, Milner et al. 2007). These studies confirm the basic intuition that when pro-trade interest groups rise to power, cooperation is more likely. However, they also highlight how domestic political institutions (like regime type or the number of veto players) systematically condition interest group politics. Mansfield et al. (2007), for example, show how the presence of veto players reduces the likelihood that a county will form PTAs.
A similar logic may apply to dispute resolution. The more powerful trade-oriented interest groups are, the higher the likelihood that a country will ratify the NYC. Empirically I represent the power of trade interests by the openness of the economy, meaning the share of exports and imports in a country’s GDP. When this is high, we may expect interest groups to advance pro-trade measures in domestic political arenas, including pressing ratification of the New York Convention. As Mansfield et al. (2007) show in the case of PTAs, such efforts are constrained by the strength of veto players in domestic politics. I therefore test if these domestic constraints also block ratification of the Convention (Henisz 2010). Last, because we would expect this logic to apply more vigorously in countries with political systems open to interest group pressures, I consider regime-type (as measured by the Polity IV data).

**Geopolitics**

Other studies of trade have found that economic institutions depend less on the material interests of firms and the political institutions that channel them, and more on the politics of inter-state relations. Security interests may thus trump simple economic goals (Gowa 2010). With regard to WTO accession, Davis and Wilf (2011) find, surprisingly, that WTO membership is driven more by geopolitical factors (such as alliances and UN voting similarity) than by trade openness.
Could similar dynamics drive NYC membership? As we have seen above, support for the NYC spanned the principal geopolitical divide of the period under study, so we would not expect alliance patterns to be as important as, for example, they are for the WTO. Rather, given that all developed economies supported arbitration, we would expect to see geopolitical pressure being applied, if at all, onto more peripheral members of the global economy. I thus consider (as Davis and Wilf do), if countries that are particularly vulnerable the usual levers of economic pressure are more likely to join the NYC. First I consider whether or not a country is negotiating to join the WTO, as these processes are an important opportunity for established trading powers to condition the terms on which an applicant will participate in global trade. I also consider the same variables Simmons et al. use to measure coercion, including whether they are beneficiaries of IMF credits or concessional lending.

Competitive and cooperative diffusion

The literature on diffusion highlights a range of causal mechanisms, both material and ideational. Regarding the former, we might expect countries that trade more with NYC member states to become more likely to sign the agreement themselves. The mechanism may be purely informational, as firms from member states seek to educate their counterparties about its benefits. Alternatively, if we assume that treaty members’ firms are more likely to prefer arbitration, we might expect them to push their suppliers and

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47 Indeed, a version of the model including alliance similarity with the US and with the Soviet Union yielded no significant results.
48 The model reported does not include the amount of development assistance a country receives as a measure of its vulnerability (as Simmons et al. do), as doing so reduces the number of observations significantly.
customers to follow suit. To test this dynamic, I look at the proportions of a country’s imports that come from NYC members, and the proportion of its exports that go to NYC members. The higher the trade with NYC members, the more likely we should expect ratification to be.

Diffusion may also be competitive. Simmons and Elkins (2004) and Elkins et al. (2008) find that countries that are competitors for the same FDI or foreign markets often adopt similar policies. Here I test that idea by looking at trade connections. Do countries whose competitors—as measured by the similarity of their trade profiles—join the NYC also do so? To determine similarity I generate a spatial lag variable modeled on those used by Simons and Elkins, which has the general form Wy*. W is an N by N by T matrix that measures the “distance” between each country and all the others for each year. This “distance” is measured in exports, so if two countries sell exactly the same value of goods to exactly the same countries in the same year there would be no “distance” between them. I calculate the correlation (Pearson’s) between each country’s trade profile (a vector of their exports to each other country) with every other country’s trade profile in each year. These values, which range from 0 (no correlation) to 1 (perfect correlation), populate W, which represents how much any two countries compete in the same export markets. In turn, y* is an N by T matrix whose elements are 1 if country i is a member of the NYC in year t and 0 otherwise. By summing across years, Wy*, then, provides a
value for each country in each year equal to the number of other countries in the NYC weighted by how closely those countries share country i’s export markets.49

Finally, diffusion may occur through ideational channels. The existing literature on diffusion explores how common language, religion, or other cultural or identity-based variables (Simmons and Elkins 2004), or common membership in intergovernmental organizations (Cao 2009), lead countries toward policy convergence. I therefore test the effect of cumulative NYC ratifications amongst a country’s language peers, as well as common membership in the various intergovernmental organizations relevant to dispute resolution: UNIDROIT and UNCITRAL.

**Ideology**

Several authors have speculated that reliance on private authority represents an ideological shift away from the state and toward market-based governance and private orderings. If this were true, we would expect NYC ratification to be associated with Right-leaning governments and with the privatization of state-owned enterprises. I therefore test the effect of a Right-leaning executive and a Right-leaning legislature on the propensity to join the NYC.50 I also look at the total amount of state-owned companies that are privatized.51

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50 Data are obtained from the World Bank’s Database of Political Indicators.

51 Data are obtained from IMF.
Three-level games

The rationalist model developed in this study would share some observable implications with the domestic politics, geopolitics, and diffusion hypotheses stated above. However, it would only expect interest groups to mobilize to support the New York Convention at home or abroad when they a) desire arbitration over litigation, and b) do not possess effective private enforcement methods. Per R1, these conditions are a function of a firm’s position in the market. Unfortunately, it is difficult to devise a quantitative measure of the average market position of firms in a given country.

However, two types of data allow for at least partial testing of this crucial hypothesis. First, all else equal, we would expect firms to demand arbitration when domestic courts are dysfunctional and biased. Interest group demand should therefore be conditional on the quality of court systems, with ratification increasingly likely is court systems are poor. While time-series data on judicial quality has been a significant empirical problem for IPE scholars (cf. Simmons et al. 2006), a recently created dataset allows us to measure judicial independence for a wide range of countries and years (Linzer and Staton 2012).

Second, while we lack data that measure the portion of a country’s firms that inhabit the kinds of structured markets that facilitate private arbitral settlement,\(^52\) we do know that

\(^{52}\) For example, detailed data on intra-firm trade would be extremely useful, but unfortunately does not exist for many countries or for much of the time period in consideration. See Miroudot, S. (2011). "Intra-Firm Trade: Patterns, Determinants and Policy Implications" OECD Trade Policy Working Papers.
such conditions are more common in commodity trades than in manufacturing. I therefore test the amount of agricultural goods in a country’s exports, as well as its overall trade in manufactures. Unfortunately, standardized data on specific commodities are only available for a relatively small range of countries and years, limiting the range of data available to test this hypothesis.

We would not expect interest groups to lobby for NYC ratification if they were satisfied with the private enforcement mechanisms available to them. Under the logic of R1, this should apply to firms that are certain their market position allows them to extract future concessions from other firms, making law-based dispute resolution unnecessary (e.g. monopolists and oligopolists). R5 is difficult to test at the macro level because firm-level trade data are rare, and do not exist for all the years and countries we would like to include. A rough proxy, however, would be to look at countries whose chief traders are industries known to possess effective private dispute resolution institutions (including for enforcement). As discussed in chapter 9 (on Argentina), the grain industry is one example. The grain trade is dominated by a few major firms engaged in repeated interactions. Firms’ reputations are therefore valuable, and long-standing private dispute settlement institutions provide credible information about those reputations. I therefore consider whether countries that depend heavily on grain exports or imports are less likely to ratify the NYC.\footnote{Data are obtained from the UN Comtrade database, though these are unfortunately rather limited.} However, data limitations reduce the number of observations significantly, and I do not report the results of this test—which were not statistically significant—in table 16.
Transnational Legal Networks

Finally, we would like to test the ideational argument that an epistemic community of experts, advocating a norm of arbitration within their legal fields, has played a strong role in the practice’s diffusion. This is another hypothesis that does not lend itself easily to large-N analysis, since precise proxies for the scope and extent of legal fields and epistemic communities are difficult to imagine. Still, some variables might be considered. First, some of the general ideational diffusion variables discussed above can also be considered proxies for legal fields (common language) and epistemic communities (common international organizations). However, to test the more specific idea that legal commonalities and participation in the arbitration community drive ratification, we must consider several additional and more precise variables. I therefore also consider whether countries are more likely to ratify the NYC once other countries with the same legal origin do so, creating spatial weight variables to measure the extent to which a county’s legal system peers participate in the NYC.\(^{54}\) For the same reason, I include a dummy variable to see if being a federal country has an effect on joining. I also consider whether a country has signed the key intergovernmental treaty on investor-state dispute resolution, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Though the treaty (through which states commit to hear investment disputes in the World Bank’s International Centre for Settlement of Investment Disputes, of ICSID) deals with a separate policy issue (helping states make credible promises to investors, as opposed to the NYC, which helps firms make credible promises to each

\(^{54}\) Spatial weights for variables that are unchanging categories—like language or legal system—are equivalent to the number of other countries sharing the characteristic that have joined the NYC.
other), it employs a similar institutional technology: arbitration. As discussed above, arbitration lawyers often work in both types of cases, and the topics are linked as a subject of legal study.

Control variables and model specification.

In all the models I include two country-specific control variables, the size of the national economy (log GDP) and the level of development (GDP per capita).\(^{55}\) I also employ two of the variables mentioned above (regime type\(^{56}\) and the openness of the economy to trade\(^{57}\)) as controls in models where they are not the chief explanators of interest. For each model I cluster standard errors by country to control for omitted country-specific factors that may drive ratification.

Table 15: Summary statistics (not reported for binary variables)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs.</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min</th>
<th>Max</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDP (log)</td>
<td>7161</td>
<td>22.797</td>
<td>2.373</td>
<td>16.595</td>
<td>30.312</td>
</tr>
<tr>
<td>GDP / capita</td>
<td>7155</td>
<td>5551.974</td>
<td>11913.630</td>
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<td>Regime type</td>
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<td>0.433</td>
<td>7.493</td>
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<td>10.000</td>
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<tr>
<td>Veto players</td>
<td>7633</td>
<td>0.203</td>
<td>0.218</td>
<td>0</td>
<td>0.730</td>
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<td>Openness</td>
<td>6774</td>
<td>74.851</td>
<td>46.905</td>
<td>0.309</td>
<td>445.911</td>
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<td>Judicial independence</td>
<td>7962</td>
<td>0.447</td>
<td>0.307</td>
<td>0.016</td>
<td>0.989</td>
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<td>IMF credit</td>
<td>8417</td>
<td>171m</td>
<td>1060m</td>
<td>0.000</td>
<td>28300m</td>
</tr>
<tr>
<td>IMF lending</td>
<td>8417</td>
<td>1.282m</td>
<td>55m</td>
<td>-1730m</td>
<td>1990m</td>
</tr>
<tr>
<td>% exports to NYC</td>
<td>7591</td>
<td>0.641</td>
<td>0.335</td>
<td>0.000</td>
<td>1.000</td>
</tr>
<tr>
<td>% imports from NYC</td>
<td>7591</td>
<td>0.656</td>
<td>0.322</td>
<td>0.000</td>
<td>1.000</td>
</tr>
<tr>
<td>Exp. competitors</td>
<td>7293</td>
<td>168.671</td>
<td>45.468</td>
<td>10.000</td>
<td>300.440</td>
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<td>Privatization</td>
<td>5486</td>
<td>0.166</td>
<td>0.741</td>
<td>0.000</td>
<td>14.800</td>
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<tr>
<td>Agr. exports (% merch exports)</td>
<td>5140</td>
<td>7.535</td>
<td>12.339</td>
<td>0.000</td>
<td>93.824</td>
</tr>
</tbody>
</table>

\(^{55}\) World Development Indicators.  
\(^{56}\) Polity IV score.  
\(^{57}\) Ratio of trade to GDP, World Development Indicators
The intergovernmental regime

<table>
<thead>
<tr>
<th>Merchandise trade (% GDP)</th>
<th>6790</th>
<th>59.438</th>
<th>47.358</th>
<th>4.532</th>
<th>986.647</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lang. in NYC</td>
<td>8417</td>
<td>4.098</td>
<td>6.251</td>
<td>0.000</td>
<td>22.000</td>
</tr>
<tr>
<td>Legal sys. In NYC</td>
<td>8417</td>
<td>21.688</td>
<td>21.934</td>
<td>0.000</td>
<td>70.000</td>
</tr>
</tbody>
</table>

5.3 Results

The results are given in table 16 (n.b. To facilitate interpretation, hazard rates, not coefficients are reported; values above 1 indicate increased risk of joining the NYC, values below 1 indicate reduced risk, and values equal to one indicate the variable has no effect on joining). I estimate a model for each hypothesis. Data limitations for certain variables mean that some models are estimated on smaller subsets of the data than others.

Table 16: Survival analysis of NYC ratification, 1958-2008, hazard rates and standard errors. Hazard ratios are reported. Values above 1 indicate a greater likelihood of joining the NYC more quickly; values below 1 indicate a delay in NYC adoption. * corresponds to a p-value <.10, ** to <.05, and ***<.01.

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic interests</td>
<td>1.278***</td>
<td>1.288***</td>
<td>1.203***</td>
<td>1.289***</td>
<td>1.314***</td>
</tr>
<tr>
<td>(0.077)</td>
<td>(0.077)</td>
<td>(0.091)</td>
<td>(0.091)</td>
<td>(0.095)</td>
<td>(0.095)</td>
</tr>
<tr>
<td>GDP (log)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>GDP/capita</td>
<td>1.000</td>
<td>1.000</td>
<td>1.000</td>
<td>1.000</td>
<td>1.000</td>
</tr>
<tr>
<td>(0.000)</td>
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<td>(0.000)</td>
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<td>(0.000)</td>
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<td>(0.005)</td>
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None of the models associated with the existing IPE literature present compelling explanations for NYC ratification. Unlike theories of trade liberalization based in domestic politics, regime type, openness, and the presence of veto players have no consistent effect on the proclivity of countries to sign the NYC. R2 assumes that governments learn about, and are motivated to pursue the New York Convention through the lobbying of firms that demand it. But none of features of domestic politics that condition that process seem significant in this case. Though regime type achieves statistical significance in some of the other models, its substantive effect is small, with hazard rates essentially equal to one.
With regard to geopolitics, applying to join the WTO has a strong positive effect on joining the New York Convention, but the other variables do not attain significance. Still, because WTO applicants must make concessions to the established trade powers, this could be interpreted as evidence for geopolitical maneuvering. Note, however, that this effect would also be consistent with a learning mechanism, in which new members learn what policies are effective for trade as part of the accession process. Such an interpretation would better fit the diffusion mechanism.

The diffusion variables, however, perform quite badly; none of them achieve statistical significance. Given the strong findings on the diffusion of BITs in Simmons and Elkins’ work, amongst others’, we might expect these variables to be associated with NYC ratification as well. That they are not is particularly striking given that the diffusion variables are fairly “blunt” measurements that are likely to be correlated with a range of causal processes linked to the general phenomenon of liberalization.\footnote{Because both the independent variables and the dependent variables can be considered part of the liberalization “package,” diffusion studies must be particularly careful to establish the correct direction of causality.} In other words, we would expect them to be prone to type I errors (false positives). The fact that none achieves statistical significance may therefore be considered additionally weighty.

Equally unsupported is the ideological model. Contra scholars who criticize private arbitration as neoliberal ideology, the two do not seem to be at all correlated. None of the ideology variables attain significance.
The three-level games model, which tries to operationalize the rationalist logic developed in this study, does not fare much better. Agricultural exports are weakly associated with delayed ratification, as expected, but merchandise exports are as well, which contradicts the theoretical expectation. More importantly, judicial independence, which is meant to correlate negatively with ratification, in fact supports it, though there is too much uncertainty surrounding the estimate to draw useful conclusions (the p-value is 0.14).

Instead, it is the ideational model that finds strongest support. While UNIDROIT and common language do not seem to have significant effects on joining the New York Convention, UNCITRAL membership, ICSID membership, and the participation of other countries in the same legal system do. Moreover, federalism strongly weights against joining. The strongest effect, though, is judicial independence, which we may treat as a proxy for the strength of law as an organizational field in a given country.

The findings strongly back I2, and suggest that the logic of dispute resolution institutions is fundamentally distinct from those of the other institutional underpinnings of the global economy.

6. Conclusion

The analysis reveals a striking transition from material to ideational factors in accounting for the intergovernmental elements of the regime for transborder dispute resolution. The first calls for a global treaty enhancing the enforceability of arbitration came from the most interdependent elements of the business community in the early 20th century, just as
The intergovernmental regime

the phase of globalization the followed the economic transformations of 19th century globalization reached its apex. More than at any previous point in history, firms were engaged in dynamic and open international markets that could less and less rely on colonial institutions, oligopolies, and private orderings to guarantee the enforceability of their contracts. As new traders became engaged in global markets they turned to arbitration to solve their disputes, and where arbitration had existed before it now needed further authority to serve merchants’ needs. As the rationalist mechanism suggests, these groups brought the case for arbitration to their national governments, which responded by enhancing the standing of arbitration domestically (where it was not already empowered). Moreover, the world’s leading power, Great Britain, proposed a general system of reciprocally enforceable arbitral awards. Significantly, legal norms were not a catalyst for this process but, if anything, an obstacle.

However, though policymakers knew they wanted to enhance the enforceability of arbitration, they largely left to legal experts the task of figuring out how such a goal might best be achieved. Legal experts, in turn, though generally supportive of arbitration, differed over the appropriate place of foreign awards in domestic law. Significantly, British jurists resisted suggestions that international law might constrain the discretion of domestic courts. The resulting Geneva Protocol and Convention represented a compromise, creating a system for recognizing and enforcing arbitral awards amongst signatories, but leaving an important degree of discretion to national jurists.
The pattern of ratification of the treaties in the years before the crisis of the 1930s and 1940s further supports the materialist interpretation. With the exception of the *sui generis* United States, all major trading powers signed the treaty except those whose principal exports and imports were governed by a) the British Empire or b) private institutions in trades, like most commodities, in which private enforcement was possible. At the same time, ratification did not follow connections between legal fields or the arbitration community. Consider that the United Kingdom initiated the treaty negotiations, but the countries closest to it in legal terms—Australia, Canada, New Zealand, and the United States—never joined.

A very different pattern is observed in the second half of the 20\textsuperscript{th} century. While the initial impetus to revisit the international law on arbitration did originate with the ICC, it cannot be said to have represented the same kind of groundswell of support in the business community that the cause of arbitration enjoyed in the 1920s. Instead, it was nurtured by the arbitration epistemic community around the ICC and beyond it, largely legalistic in orientation, that had developed over the interwar period. Indeed, most business groups seemed largely indifferent to the issue, except in the case of those British firms that benefited from dominant role London-based arbitration continued to play in key commodity trades. This group did, as R1 would expect, mobilize to block the ICC’s ambitious proposal for truly international arbitration, and succeeded in convincing the British government to support them. The UK, in turn, managed to propose a sovereignist alternative to the ICC that was much more consistent with the established policy of the Geneva treaties. This constraint proved insurmountable to advocates of the ICC position.
at the subsequent negotiations in New York. However, the content of those discussions, as well as the internal documents of the United States, reveals that within the constraints imposed by material factors, institutional outcomes depended almost entirely on a process of legal contestation.

However, the pattern through which countries acceded to the treaty over the five decades that followed its negotiation reveals a final triumph for the ideational mechanisms. It is truly striking that even so basic and important a material factor like the level of trade a country engages in does not affect the speed with which it ratified the New York Convention. Models relying on this basic logic of material interdependence, as moderated by domestic political institutions, geopolitics, diffusion dynamics, or even the three-level games described in the present study all fall flat. Instead, ratification has clearly followed the contours of legal fields and the pro-arbitration epistemic community. Countries are more likely to ratify if their legal peers have, if they have strong court systems, and if they participate in the key technical organizations surrounding arbitration. They are much less likely to ratify if they possess a federal legal structure.

In sum, the institutional outcome sought by firms for material reasons at the beginning of the 20th century—intergovernmental delegation to private tribunals—has now, at the start of the 21st century, come to govern commercial dispute resolution largely through a process of legal diffusion. How can the institution that was rational for firms in the time of steamships and telegraphs still remain useful in an age of overnight global delivery and
email? And if the institution is consistent with material incentives, then why has it been ideational mechanisms that have spread it through the world?

I will return to these questions in the conclusion, where a broader interpretation of the historical evolution of the regime is presented that draws also on the case study material. For now, consider two general observations.

First, the chief rationalist variable, the relative (expected) average market power of firms, is broadly similar at the start of the 20\textsuperscript{th} century and the start of the 21\textsuperscript{st}. The world economy has certainly changed profoundly since the 1910 and 1920s. But in the postwar period, the largest economic shift—increasingly intensive globalization—has made the world more similar to the interconnected economy of the late 19\textsuperscript{th} and early 20\textsuperscript{th} centuries than not. At that time, firms were beginning to operate in dynamic, open, and competitive international markets. The first multinational corporations, in the modern sense of the word, emerged. Today, those conditions apply more intensely and on a broader scale. It is thus entirely consistent with the rationalist logic outlined in chapter two that institutional outcomes would be the similar.

And yet, second, it is legal processes that seem most directly responsible for the postwar institutionalization and diffusion of the policy outcomes businesses sought in the 1910s-1920s. Why did firms and, even more importantly, industry groups not demonstrate the same kind of activism in the postwar period as they did at the beginning of the 20\textsuperscript{th} century? The legalization of market relations seems to have played a major role.
Commercial law firms, in the modern sense, only emerged toward the end of the 19th century, just as private arbitral institutions were developing. In the postwar era corporate law reached a vastly different level of institutionalization.

These trends, though consistent with conventional wisdom, are difficult, perhaps impossible, to measure precisely at the global level. An additional conclusion of this chapter, then, is the need to look beyond the global level and consider individual national cases, as the following three chapters do. The first task is to test at the national level the basic logic of the rationalist and ideational mechanisms. The intergovernmental cooperation studied here is, after all, only one element of the various institutions that bear on commercial disputes. Treaties must be implemented by legislatures and courts, and this implementation can significantly alter the final policy outcome, the ultimate dependent variable of this study. Second, the national cases allow for more precise investigations of the evolution of dispute settlement institutions that this chapter has highlighted. Within each national case, several historical sub-cases are considered. We can therefore test more rigorously the idea that rationalist forces determine the contours of dispute resolution institutions, but, following a process of legalization and institutionalization, ideational factors account for their diffusion and persistence.
5. The United States

1. Introduction

For most of its history, the American economy has mattered more to the world than the world economy has mattered to the United States. Trade makes up a smaller portion of GDP in the US than it does in the more integrated economies of Western Europe or the export-oriented economies of Asia, but the United States has nonetheless been many countries’ most important trading partner for much of the 20th century and beyond. This asymmetry has traditionally tempered American economic weight with a relative aloofness, 1 which at times, as in the interwar period, has had dire consequences for global economic governance. It took WWII, a postwar boom in interdependence, and a global struggle with the Soviet Union to bring the United States to a more activist stance in global economic affairs, serving as the chief architect of the GATT/WTO, the IMF, the development banks, and the other institutional keystones of the global economy. But even at the height of contemporary globalization the United States remains relatively less dependent on trade than other major economies, and continues to be more influenced than its peers by domestic political elements averse to global policy coordination.

The institutions that govern transborder commercial dispute resolution in the United States reflect the country’s “splendid isolation” more than its status as the global

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1 With the important exception of Latin America, where the United States exerted economic hegemony since the late 19th century.
economic hegemon. While the United States has strongly embraced the global system of transnational commercial arbitration, it has done so chiefly through domestic political and legal mechanisms operating at some distance from international trends. At the same time, American companies, lawyers, and legal practices and norms have exerted a decisive influence on the nature of dispute resolution around the globe. Indeed, the strength of the legal field in the United States, especially in the latter half of the 20th century, has given legal norms and actors influence over policy both within the United States and abroad.

This chapter explains the shifting nature of American dispute resolution institutions from European colonization to the present, with an emphasis on New York in the earlier periods. Until the laws governing commercial arbitration were effectively federalized by the Supreme Court, the United States contained as many sub-cases of dispute resolution arrangements as there were states. The 13 British colonies and the subsequent states possessed distinct legal systems with their own norms and jurisprudences, different kinds of firms with varying market positions, and political systems that were more or less responsive to those firms. A comprehensive treatment of this variation across up to 50 cases is beyond the scope of the present study, which instead focuses on dispute resolution at the federal level and in the jurisdiction that became the country’s premiere economic center. Though New York lagged Boston and Philadelphia during the colonial period, by the mid 19th century it was the country’s largest trading port, with 10 times the exports and imports of Boston, though New Orleans was a close second until the Civil War (Glaeser 2005). Moreover, and not coincidentally, New York was an early center of mass industrialization, and commercial groups in New York, particularly the Chamber of
The United States

Commerce, were the most important interest groups engaged in questions of dispute settlement during the first half of the 20th century, the key period for the development of modern arbitration in the US. Indeed, the roots of modern arbitration in the United States can be traced to figures in the Manhattan garment industry, better known for sweatshops and tenements than innovation in dispute resolution.

Five chronological sub-cases are identified. The political economy of the United States, which has operated as a relatively liberal market democracy under the same constitution since 1789, is more continuous than that of the other national cases considered in this study, and so is less obviously divided. Still, two political inflection points (independence and the New Deal) and three economic ones (the “takeoff” of the mid-19th century, the Great Depression, and postwar globalization) can be identified. Because two of these junctures essentially overlap (the Great Depression and the New Deal), the divisions create five sub-cases. First, both the Dutch and British colonial legacies endowed New York with an arbitration system, which under the latter was based in the Chamber of Commerce. The Chamber’s decisions and other arbitral awards were recognized by the common law but denied automatic enforcement in public courts under longstanding English precedent. Second, following independence this system remained largely unchanged under the 1777 New York Constitution and the 1789 federal Constitution, as well as in the attendant jurisprudence. By the mid-19th century, however, the coming of the industrial revolution to the United States, as well as the railroad, the steamship, and the canal system, had precipitated a very different political economy. 1860 is chosen as a
somewhat arbitrary date to demarcate the beginning of this third sub-case. Fourth, the country’s relation to global trade changed again following the 1929 crash, as did, a few years later, dominant norms regarding the role of the federal government in market relations, with a vast expansion of the government’s regulatory role. Finally, the end of World War II left the United States in a new position as the chief architect of the global economic order, a hegemony reflected in the dominance of its firms and capital around the world.

For concision, a complete analysis is only performed on three of these sub-cases: the colonial period, the “takeoff” period, and the postwar period, with the other two sub-cases serving as shadow cases. The chapter proceeds as follows. Section two recalls the hypotheses and observable implications from Chapter Two, and discusses their application to the United States. Sections three through seven then explore the five sub-cases. Section eight concludes.

2. Explaining transborder dispute resolution in the United States

Recall the key hypotheses from chapter two and consider what implications we might observe in the American context. Table 17 below provides a summary.

2.1 Rationalist

R1: Firms demand neutral institutions if their market power is roughly equal; otherwise the strong firm demands biased institutions and the weak has no choice but to agree. If a dispute resolution

\footnote{It is the year before the Civil War, and the last year of the “takeoff” period identified by Rostow (1843-1860). Rostow, W. W. (1960). The Stages of Economic Growth: A Non-Communist Manifesto. Cambridge, Cambridge University Press.}
A suitable institution with the desired degree of neutrality is available, firms also demand that it be authoritative and efficient.

This hypothesis requires us first to examine the relative market power of US firms and their foreign trading partners in order to determine if they prefer biased or neutral dispute settlement. Only if a balance of power exists should we expect demand for institutionalized arbitration. A balance of power can be assumed, on average, when US trade is characterized by markets with large numbers of buyers and sellers with significant entry and exit. However, in markets dominated by monopolists or oligopolists we should not expect arbitration to be much sought.

Second, we should expect firms to prefer arbitration when it offers more efficient dispute resolution than American courts. We will therefore need to compare arbitration to litigation in terms of cost, time, expertise, and impact on business relations. The courts considered in this chapter (New York State and the federal level) may be considered relatively professional throughout the period under study (at least relative to their contemporaries in other states and countries), so we can be sure that is the institutional characteristics of litigation and arbitration per se that drive variation on the efficiency dimension.

Third, if arbitration is preferred to litigation in terms of neutrality and efficiency, we must consider whether it also possesses the authority needed to enforce decisions. Again, this depends on market conditions. In markets with relatively few buyers and sellers, in which individual transactions are of low value but extend into the future, and in which compliance is easily observed, private enforcement will be possible. When this is true,
firms can be expected to demand arbitration even if the government has not delegated it the additional authority conveyed by enforcing arbitral awards in public courts. For firms operating markets in which those conditions do not obtain, however, demand for arbitration is likely to be contingent on whether or not it enjoys the backing of the state.

**R2**: Institutions with the policy outcomes, authority, and scope demanded (per R1) by the dominant interest group in a locus of political contestation, if any, emerge in that locus. However, the extent to which the resulting institution meets the dominant actor’s desiderata is constrained by the inherent attributes of domestic, intergovernmental, or private institutions.

If demand exists for arbitration per R1, R2 would expect private institutions to emerge to supply it. Moreover, when demand for arbitration coincides with market conditions that do not allow for private enforcement, we would expect arbitration-demanding firms to lobby for public support for arbitration, both domestically and internationally. Several observable implications follow.

First, the emergence of private arbitral institutions should occur only when the competitive market conditions described above obtain in American trade. When markets are heavily imbalanced we would not expect firms to have demand for formalized arbitration institutions, and therefore do not expect to observe any emerge. We should not expect arbitral institutions to emerge until US trade reaches a minimal threshold of scale and complexity.

Second, and related, we would expect the emergence of private institutions to coincide with changes in public courts that made them relatively less efficient. For example, an increase in court fees, a backlog of cases, or increasingly complicated business activities might all contribute to greater demand for arbitration.
Turning now to public delegation, third, we should only see state governments or the federal government delegate authority to private tribunals when the policymakers in power are favorable to the firms that demand arbitration (per R1). This is likely to be especially the case when pro-trade interests dominant the relevant legislatures and executives. We should thus expect changes in the level of state delegation to private authority following either a change in firm preferences or a change in political leadership (to policymakers that favor pro-arbitration firms).

Fifth, we should observe the process through which pro-trade firms educate politicians regarding their preferences and lobby them to enhance the status of arbitration. We should also see economic interests that oppose arbitration (as discussed in Chapter Two), if any, work to block such changes.

Fourth, to the extent firms demand that their trading partners be able to credibly commit to dispute resolution via arbitration, we should expect to see American firms lobby the federal government to push pro-arbitration policies abroad, including via treaty mechanisms. When these firms enjoy influence over top policymakers, we can expect the American government to follow through on their goals. We should not expect the federal government to pursue such policies absent interest group demand.
2.2 Ideational

I1: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Firms defer to the dominant norms in the legal field to which they belong when selecting between institutional alternatives.

I2: Epistemic communities of legal experts pass norms regarding dispute resolution through legal fields in a process of legal contestation. Policymakers defer to the dominant norms in the legal field to which they belong when selecting between institutional alternatives.

Both I1 and I2 rely on the existence of a coherent legal profession. A robust legal field has existed in the United States continuously (indeed, increasingly) since European settlement. Moreover, market relations in the United States have always been at least partially legalized, so the most basic prerequisites for I1 and I2 apply for all sub-cases.

As discussed above, before the federalization of arbitration law in the United States, each state’s legal field could be considered linked but distinct. Each state, as well as the federal government, had different statutes governing arbitration, their judges followed different jurisprudences that relied on different case law, and their lawyers were members of different bars. That said, the legal fields of course overlapped significantly, and possessed various channels for the diffusion of norms and practices, which firms, arbitral institutions, legislatures, and judges all used to borrowed freely from other jurisdictions’ practices and policies.

Both the supply and demand hypotheses require us to ascertain the dominant legal norm in the relevant legal field for each sub-case. A first observable implication, then, is that there must in fact be one norm regarding dispute resolution that clearly supersedes others.
While we may see competing norms overlap in certain sub-cases, one should eventually emerge as dominant. More precisely, we expect to observe various elements of legal authority converge on the norm, including the opinions of respected observers, the jurisprudence employed by the courts, the training lawyers receive, etc. If these sources of authority remain in conflict no norm can said to be dominant, and so I1 and I2 cannot apply.

Second, a pro-arbitration norm is more likely to become dominant in a field the more linkages exist to other fields that employ such a norm. We should therefore observe US states and the federal government embrace arbitration the more they are connected via legal networks including educational linkages, the common law, international private organizations like the ICC, intergovernmental bodies like UNCITRAL, or globalized law firms.

Third, for I1 and I2 to apply we should expect to see significant isomorphism within each legal field. For example, firms within the same legal field (e.g. a state) will exhibit similar preferences over dispute resolution institutions; there will be less variation by type of transaction than by type of legal field. Similarly, policymakers within the same legal field are expected to support similar levels of public delegation.

Turning now to process-level observations, fourth, neither firms nor policymakers should demonstrate precise knowledge of the material implication of alternative dispute
resolution procedures. Rather, they should be seen to defer to legal experts on these questions.

Fifth, both firms and policymakers should describe their behavior in terms of legal appropriateness.

Sixth, proposals to change policies regarding dispute resolution originate in legal circles. It should be lawyers, not commercial interests, who bring these concerns to the attention of policymakers.

<table>
<thead>
<tr>
<th>Hypotheses</th>
<th>Chief independent variables</th>
<th>Observable implications</th>
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<tbody>
<tr>
<td>R1+2</td>
<td>4. Market position of dominant interests groups</td>
<td>6. Demand for arbitration when a. Firms operate in open, dynamic, uncertain markets b. Arbitration more efficient than litigation</td>
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<td>5. Policy and efficiency of courts</td>
<td>7. Demand for public support for arbitration when market structure does not allow private enforcement</td>
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<td></td>
<td>6. Relative power of home state</td>
<td>8. Arbitral institutions emerge when demand conditions arise (in terms of neutrality and efficiency)</td>
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<td>9. Norms dominant within a field</td>
<td>10. Public support for arbitration only when dominant domestic policymakers are responsive to pro-arbitration firms</td>
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<td>10. Policymaker uncertainty over cost/benefit</td>
<td>11. Lobbying process is observable</td>
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<td>11. Prestige of experts amongst relevant policymakers</td>
<td>12. Contingent on demand for arbitration in foreign trade, firms lobby policymakers to push arbitration on home countries of trade partners</td>
</tr>
<tr>
<td>I2</td>
<td>5. Strength and scope of legal fields</td>
<td>8. A legal field exists</td>
</tr>
<tr>
<td></td>
<td>6. Norms dominant within a field</td>
<td>9. Following an observable process of legal contestation, a certain norm for dispute resolution comes to dominate the legal field</td>
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<tr>
<td></td>
<td>7. Policymaker uncertainty over cost/benefit</td>
<td>10. A legal field is more likely to embrace a pro-arbitration legal norm the more linkages it has to legal fields embracing similar norms.</td>
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<tr>
<td></td>
<td>8. Prestige of experts amongst relevant policymakers</td>
<td>11. Firms and policymakers within the same legal field should exhibit the same behavior</td>
</tr>
<tr>
<td></td>
<td>12. Neither firms nor policymakers should demonstrate precise knowledge of the material implications of institutional alternatives.</td>
<td>13. Firms and policymakers should describe their behavior in terms of legal appropriateness</td>
</tr>
<tr>
<td></td>
<td>13. Firms and policymakers should describe their behavior in terms of legal appropriateness</td>
<td>14. Legal experts initiate policy proposals</td>
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3. The Colonial Period

The French, Dutch, Spanish, Swedish, and—most importantly—British colonies that would eventually become the United States were established and maintained in large part to serve the foreign trade goals of the metropole. These included access to the natural resources of the American continent (furs and timber, initially, and then agricultural goods like tobacco), and, once a critical mass of population had been established, a captive market for exports. For the British colonies, following the first Navigation Acts in 1651 mercantilist restrictions prohibited most trade outside British possessions, a policy that would later prove crucial in generating support for American independence amongst mercantile elites. Official policy, therefore, favored a smooth flow of goods between the colonies and Europe, prioritizing benefits for the latter. Dispute resolution institutions, however, did not reflect this imbalance.

Under the Dutch (1624-1664), New Amsterdam was established as the key node in the fur-trading activities of the Dutch West India Company (Bachman 1969; Matson 1994). Almost all the trade entering and exiting the colony took place within this corporation, even after the colony was given a more general, public government after political authorities determined the company was not promoting sufficient colonization. This effectively solved the problem of credible transborder commitments through the hierarchy of the firm. Nonetheless, arbitration was used to for small disputes within the colony, first under a Board of Nine Men, whose members, respected members of the community, rotated through committees of three, and then in a more permanent structure
explicitly under the jurisdiction of the governor. In both cases appeals were permitted to public authorities (Jones 1956).³

The British took control of the city in 1664. As Matson explains, the transformation of the city is largely attributable to its inclusion in the mercantilist policies of the expanding British Empire of the late 17th century (Matson 1994). She quotes Governor Edmund Andros a few decades after the city became New York, who

[M]arveled that, in 1674, he had ‘found the place poore, unsettled & without Trade, except a few small coast-ers,’ but by late 1681 the city had ‘greatly increased in people, trade, build-ings, & other Improvements,’ especially because ‘the Navigacon increased att least tenn tymes,’ bringing in ‘plenty of money ... and all sorts of goods at reasonable rates’ (Matson 1994, p. 389).

Almost all of this trade took place within the Empire, as the Navigation Acts effectively prohibited foreign trade. New York sent grain and other agricultural goods to the West Indies as well as England, and received from the latter various manufactured goods. For this reason the British courts that had jurisdiction over this trade were rarely in the position of adjudicating claims between “locals” and “foreigners”—all were subjects of the King.

At the same time, there is ample evidence that arbitration was used on a relatively informal basis throughout this period, just as it was in Britain. Jones (1956) notes that several arbitration enforcement actions appear in the records of colonial courts (which are highly incomplete), and colonial newspapers frequently ran advertisements for arbitration bond-printing services. Under this technique, also common in England, parties would

³ Interestingly, the system is broadly similar to the arrangements in colonial Buenos Aires. See chapter six.
take out a bond that pledged them to pay the counterparty a set fee should they fail to abide by the ruling of an independent arbitrator. While this method increased the authority of arbitration by specifying precise monetary failures for non-compliance, courts applying common law could not always be relied upon to enforce the bonds (see below). Merchants’ letters from the period also make frequent reference to arbitration (Jones 1956). Anecdotally, shipping seems to have been a common topic of dispute.

It was not until 1768, however, on the eve of the Revolution, that a more institutionalized form of arbitration developed following the organization of the New York Chamber of Commerce. In the late latter half of the 18th century, American colonists were increasingly dissatisfied with the economic consequences of British rule. Merchants, in particular, chafed at the restrictions on trade, and the 1765 Stamp Act had inflamed opposition amongst elites and non-elites alike. On April 5, 1765, 20 New York merchants who had been active in agitating for freer trade and a repeal of the Stamp Act met to form a commercial society, motivated chiefly to secure their interests in the turbulent political climate. The merchants aimed at “promoting and encouraging commerce, supporting industry, adjusting disputes relative to trade and navigation, and procuring such laws and regulations as may be found necessary for the benefit of trade in general” (quoted in Bishop 1918, p. 2; emphasis added). The third of these goals is particularly significant for our purposes. At the group’s second meeting on May 3rd, a committee of seven members, who would change after each meeting, was appointed for “adjusting any differences between parties agreeing to leave such disputes to the Chamber” (Bishop 1918, p. 120). Various means of enforcing the decisions of this body were tried. Initially a record of
disputes and awards was entered into the Chamber’s minutes, but this practice was soon discontinued after parties complained of the publicity. At other times awards were passed along directly to the governmental (British) authorities, who were reported to enforce them under quasi-legal means. At one point it was proposed that binding arbitration would be mandatory on members of the Chamber, at the risk of expulsion, but this was rejected as well (Bishop 1918).

It is unclear how many arbitrations were performed by the Chamber during the short remainder of the colonial period, but the surviving records in the Chamber’s archives suggests that only a few dozen arbitrations were performed between the institution’s founding and independence. Despite its revolutionary orientation, the institution continued functioning throughout the war under British occupation of Manhattan. Indeed, the British military commander in New York wrote to the Chamber of Commerce, “As I was and still am of opinion that Mercantile disputes cannot be adjusted in a more proper or more equitable way than by a reference to respectable Merchants, it gave me great satisfaction when the method was so generally agreed to” (quoted in Cohen 1918, p. vii).

In both the Dutch and English periods, then, New York’s crossborder trade was rendered “internal” by colonial institutions. The Dutch West India Company shipped goods across borders under its own internal hierarchy, effectively removing the possibilities of disputes. British mercantilist policies, in turn, restricted crossborder trade to the Empire, ensuring that commercial disputes were between British subjects. Under the Dutch arbitration seems to have been used chiefly for trade ancillary to the principal export
industry (furs), and so is not discussed. But under British rule, when trade was far more
diverse and competitive, arbitration seems to have been used commonly. How can we
explain this outcome?

3.1 Rationalist

Market conditions in British New York were generally open and competitive. With the
eclipse of the Dutch West India Company, trading in and out of New York became a
more messy business. Fur remained the largest source of income, constituting as much as
25 percent of the city’s exports through the 1720s. However, unlike the Dutch, New York
traders found themselves in competition not only with the French to the north, but also
with the new landowners British rule had established in the northern regions of the
Hudson valley. These farmers sought an additional revenue stream for their agricultural
estates by purchasing pelts from northern trappers (sometimes smuggled from French
possessions) and selling them via agents in New York (Matson 1994). Once the fur trade
declined (following overhunting and a shift in European fashions), agricultural goods,
chiefly wheat and flour, became New York’s main trade. Unlike the great trading
companies that would dominate this business a century later, however, the colonial
agriculture trade was divided between a host of small traders and shippers. Households
would sell whatever they overproduced into a complicated regional system of petty
merchants, who would channels goods down the Hudson and via Long Island Sound to
Manhattan, where a wide range of shippers, perhaps from London or Kingston, but all
British subjects, would buy them and ship them to England or the West Indies (Matson 1994). 4

These competitive conditions would suggest demand for neutral dispute resolution institutions, and there is no indication that public courts were not up to the task. To be sure, merchants from different segments of the Empire were constantly seeking to secure special privileges from the government to get the better of their rivals, even those from neighboring colonies. The merchants of New York, for example, waged bitter lobbying campaigns to ban trade from nearby ports in New Jersey and Connecticut. Despite this competition, however, complaints of local bias in court proceedings do not seem to have been a concern. I find no incidence of such complaints in the records of the Chamber of Commerce, nor in the secondary literature. As all of this trade was happening within the British Empire, amongst subjects of the Crown, there is less of an expectation of local protectionism in courts. We can surmise, therefore, that both ad hoc arbitration and proceedings in courts of law were relatively even-handed toward the various groups of traders.

What about authority? The diversity and competitiveness of colonial trade effectively ruled out private enforcement mechanisms. Note also how the various measures the Chamber of Commerce attempted to impose on its members to strengthen compliance with arbitral rulings failed to take root. At the same time, the low standing of arbitration

4 Matson (1994, p. 400) explains, “In the aggregate, many hundreds of families, tenant or freehold, produced wheat and flour during the 1690s and early 1700s, much of it for people settling in and around New York City. By the end of the seventeenth century, over two dozen merchants were also exporting wheat and flour to southern colonies and the West Indies.”
in the common law deprived private institutions of the support of the state (see below). The usage of arbitration bonds, common during this era, was one possible but incomplete solution. We can therefore conclude that public courts continued to possess a significant advantage over arbitration in terms of authority.

Finally, how did arbitration and litigation compare in terms of efficiency? Systematic comparative data on cost, time, expertise, and other indicators are not available for either arbitration or litigation. Anecdotal evidence, however, suggests that litigation was significantly burdensome. Both arbitral services and public courts operated on a fee-for-service model. To use a public court, a plaintiff had first to pay the judge a fee to serve a summons to the defendant. Litigants then had to reimburse the travel costs of the judges and other court staff, as well as pay them a daily rate. Clerks had to be paid for each page they wrote, and constables for each witness they swore. There was then an additional fee for issuing a decision, and even, in some cases for imprisonment of the defendant (in debt cases). In all cases, the losing party was required to bear the entire expense of the legal proceedings (Priest 1999). An extensive empirical study of debt cases in Massachusetts (where colonial court records were more complete) found that court fees amounted to about a third of the value of the award, on average (Priest 1999, p. 2426).

It is difficult to say with any generality what the cost of arbitration was to the colonial merchant, though we can conclude it was significantly less than court proceedings because many fewer steps were involved. For the Chamber of Commerce arbitration system, disputants need only appear before the committee on its scheduled meeting day.
A decision could be with them that same day. Ad hoc arbitration was likely similar in brevity. Another advantage of arbitration was that it could be conducted remotely. Indeed, from merchants’ records (see Jones 1965) and the archives of the Chamber of Commerce we can infer that many arbitrations took place entirely via an exchange of letters.

In sum, arbitration and public courts in colonial America were likely similar in terms of neutrality, but the former provided more efficient dispute settlement procedures, while the latter benefited from greater authority. A rational merchant, then, seeking a secure contract, would be likely to prefer public courts to private arbitration in cases in which enforcement of contract terms was essential, and the amount in dispute was sufficiently valuable to justify the additional expense. The simultaneous use of arbitration and litigation in colonial America was therefore compatible with the mixed demand expected under R1.

But given the relative efficiency of arbitration and the relative authority of litigation, why did merchants not push for greater enforceability of arbitral awards in public courts? R1 would expect merchants to desire this kind of hybrid system and to lobby for it as, indeed, they did in later periods. I find no indication that such a policy shift was even contemplated among merchants, the Chamber of Commerce, or lawyers at the time. As discussed in Chapter Two, we would not necessarily expect individual merchants to have strong enough preferences over dispute settlement to organize to lobby the government for better services, as this represents a classic Olsonian collective action problem.
Instead, we expect business associations, which are widely invested in the legal environment for commerce generally, to be lead dispute resolution policy. In New York business only became organized in a Chamber of Commerce following the solidarity-building struggle for independence. We can thus perhaps attribute the lack of business activism for hybrid institutional solutions to the lack of organization within the colonial New York business community before 1768. This would still leave the rationalist mechanisms somewhat at a loss to explain the lack of activism after the Chamber’s creation, though the outbreak of war likely pushed dispute resolution down the group’s agenda.

In general, then, colonial merchants’ reliance on both arbitration and litigation reflects the varying types of demand predicted by R1. While merchants did not push for the kind of hybrid system that would have likely maximized their interests, their lack of organization as a group for the majority of this period suggests we might not have expected such activism.

3.2 Ideational

Arbitral practices and institutions in colonial America closely reflected English models, as the ideational mechanism would predict. As noted above, ad hoc arbitration, occasionally backed by bonds, was a common occurrence in both England and its colonies. Interestingly, however, the New York Chamber seems to have been the first chamber of commerce to offer general arbitral services, though the minutes of the foundational meeting demonstrate that the merchants were aware of other kinds of
mercantile associations (e.g. trade associations) providing such services in other cities. However, the New York Chamber seems to be amongst the first to refer to itself as a “chamber of commerce,” and to represent the interests of the general business community as opposed to one element within it.⁵ As more chambers of commerce emerged, many of them chose to offer arbitral services as well.⁶ But the New York Chamber was at the leading edge of this trend. It cannot therefore be attributed to institutional isomorphism within the commercial field. Nor can it be explained by an emergent legal norm, as the chamber of commerce was also largely unattached to legal circles,⁷ and no such pro-arbitration norm can be identified. Therefore, while the general practice of arbitration seems to have been borrowed directly from England, as per I1, I2 cannot account for the emergence of general arbitration under the Chamber of Commerce in 1768.

Public policy on arbitration also matched that of England. New York colonial law, transplanted from England, was well established with regard to arbitration (Stoebuck 1968). The dominant principle, laid down by Lord Coke in *Vynior’s Case* in 1609, held that an arbitration clause might be revoked by either party, as it was unlawful for an individual to give up his right to the courts. The case was brought by Robert Vynior against William Wilde, with whom he had signed a bond requiring the payment of £20 should the latter fail to fulfill a series of obligations, as determined by an arbitrator. The arbitrator had found Wilde in violation of the conditions, but Wilde had declared that he

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⁵ New York’s chamber was founded in 1768, the same year as the Jersey (UK) chamber of commerce began; London did not follow until 1782, and Boston (1785), Philadelphia (1784/1801), and Charleston (1773) all lagged New York (Bennett 2011, p. 15).
⁶ For example, Dublin (1780s), Waterford (1787), London (1782), Glasgow (1783), Jersey (1785), Edinburgh (1792) (Bennett 2011, p. 550).
⁷ All of the founding members of Chamber were businessmen, as were the men elected to the arbitration committee.
revoked the authority of the arbitrator before the award could be issued. The court’s reasoning in the case employed the kind of intellectual jujitsu found in, for example, *Marbury v. Madison*, in which the court upheld the rights of the plaintiff while eviscerating the larger principle to which they appealed. Coke ruled,

> As if I make a Letter of Attorney to make livery, or to sue an Action in my name; or if I assign Auditors to take an account; or if I make one my Factor; or if I submit myself to an Arbitrament; although that these are done by express words irrevocably, yet they may be revoked (Coke 2003).

Wilde was thus well within his rights to revoke the authority he had delegated to the arbitrator. This action, however, invoked the condition under which he would forfeit the bond he had agreed with Vynior, to which Coke held him. Vynior received his £20, but the autonomy of arbitration was undercut. Later rulings would further restrict the ability of courts to impose financial penalties on litigants (they could only award damages for losses suffered) which would undermine the types of bonds that had allowed Vynior to succeed. Therefore, “the result of Coke’s dictum in *Vynior’s Case*, plus the enactment of the statute forbidding fines and penalties, was to leave the injured person practically without remedy” (Cohen 1918, p. 151).

Many observers have noted the material incentives English courts faced in the early 17th century to minimize the ability of parties to escape their jurisdiction (Cohen 1918; Benson 1989). Common law courts and judges relied almost entirely on the fees paid by litigants to operate. They thus competed directly with merchant courts—which had grown significantly following England’s rise as a trading power—ecclesiastical courts, and other dispute settlement tools to attract business. It is difficult to say with certainty how much
this factor motivated the entrenchment of the principle in the common law, but it was certainly compatible with other motivations, like the normative idea that the King’s law should stand above all others. Whatever the collection of motivations, the 1609 principle of revocability was well entrenched in the jurisprudence that governed colonial America.

4. Independence to the Civil War (shadow case)

The most striking feature of post-independence dispute resolution institutions is their similarity with colonial arrangements. Both ad hoc arbitration and the Chamber of Commerce system continued much as before, with merchants bringing claims before panels of their peers under summary procedures. Some procedural changes were made to the Chamber system. It began meeting twice per month in 1822, likely reflecting increased demand for its services, and in 1840 the it created an appeal process. The Chamber was also joined by the New York Stock Exchange, which began offering arbitral services between its members and their investors in 1817, although this was typically domestic in scope.

Public courts were also similar to colonial models, both in terms of their efficiency and the laws they applied to arbitration. In 1797 New York adopted a law that largely re-stated the English Arbitration Act of 1697 maintaining the common law position that made arbitral awards largely unenforceable (Jones 1956).

This continuity in the dependent variable is surprising because independence rendered US trade truly “foreign” for the first time. While merchants from other parts of the
British Empire might have counted on colonial courts to see them as fellow subjects, neither they—nor the French, Dutch, and other merchants who returned to New York harbor following the end of British rule—could not necessarily expect the same from the courts of the United States.

During this period New York began its climb to economic preponderance, though it would not achieve this status until the later half of the century. The completion of the Eire Canal in 1924 connected New York harbor to the grain belts of the Midwest, and the city was quickly overtaking Boston and Philadelphia as the chief port of entry European imports as well as the hub of the banking industry (Glaeser 2005). Fundamentally, however, the New York economy remained focused on the same industries and exports as previously. We would therefore not expect a radical shift in dispute settlement institutions.
Legal norms also remained relatively moribund during this period. In Britain, courts continued to grant arbitration limited status until the landmark *Scott v. Avery* decision in 1855. As the effects of this case were not felt in the United States until a few years later, it is treated in the following sub-case.

5. Takeoff, 1860-1930

It is hardly coincidental that the period of transformative economic growth in the late 19th and early 20th centuries coincided with what has been termed the modernization of American arbitration law and practice. It was also a period of rapid growth for American trade, as American commodities and, later, manufactures, fed into the increasingly
The United States

liberalized and interdependent world economy, and newly rich Americans purchased a range of products from the rest of the world (see figure 20). Although the explosion of the domestic economy that followed westward expansion and the railroad kept the ratio of trade to GDP (openness) low (see figure 21), there were more merchants trading across the US border than ever before.

Figure 20: US trade in goods, 1867-1930 (source: NBER)
These merchants, as well as domestic traders, were able to draw upon a range of new contract enforcement options over the period in question. Important changes occurred in private arbitration institutions, statutory law at the state and federal levels, and in jurisprudence and legal norms. I review these below before turning to the explanatory hypotheses.

At the beginning of this period, trade associations in the United States, like their counterparts in Britain, began using formalized arbitration to settle disputes amongst members of their industries. The New York Stock Exchange had adopted this practice as early as 1817, seemingly the first institutionalized provider of private arbitral services in New York since the Chamber of Commerce began in 1768. In 1861 the Commercial Exchange (later called the Produce Exchange) began providing arbitration in the
agricultural sector, particularly the crucial wheat and flour trade. In 1882 the Mercantile Exchange followed suit, and the Coffee and Sugar Exchange created a tribunal in 1885. Numerous other examples can be found during the period (Carhart 1911; Jones 1956). These organizations functioned exactly as their counterparts in England or Argentina did (see Chapters four and six, respectively), providing private adjudication of disputes that was rendered enforceable by market conditions in which a relatively small number of traders interacted with each on an ongoing basis. Though arbitral awards in New York could be enforced in public courts after 1861 (see below), in practice courts exercised significant control over arbitral authority until 1920. But public support was not needed, as private authority was sufficiently strong. For example, the New York Commercial Exchange even had a general enforcement provision that went beyond voluntary arbitration:

The complaint committee is the grand jury of the exchange and is the key to the enforcement of all its rules. All trade differences not submitted by agreement to some one of the trade committees or to the arbitration committee for settlement may be brought to an issue by a complaint. This results in an inquiry by the complaint committee, whose first aim is to conciliate the disputants. Failing in this, it either dismisses the complaint or refers it to the appropriate trade committee for settlement or to the board of managers for discipline. Disciplinary action against non-members may result in their being denied representation on the floor of the exchange and members prohibited from trading for them. Many agreements to arbitrate are reached and many cases are settled out of court by threatened use of the complaint committee (Carhart 1911, p. 538).

As expulsion from the exchange would effectively terminate a merchant’s career, non-compliance was understandably scarce.
But at the same time as the trade associations were building private dispute settlement systems, the New York Chamber of Commerce, the original arbitration provider, was enhancing its relationship with state authority. In 1861 a bill was passed in Albany reaffirming the Chamber’s charter and its mission to foster industry and commerce in the state. It also created a provision whereby the decisions of the arbitral committee could be “made the basis” of a judgment of a court of record (Bishop 1918, p. 124). However, this somewhat ambiguous clause does not seem to have led to important changes in the jurisprudence of New York courts (see below). In 1865 an amendment was made to the bill that required the Chamber’s Arbitration Committee members to swear a public oath, certifiable by the chair of the committee on behalf of the State, to perform their duty faithfully.8

The largest shift occurred in 1874, however, when the Chamber’s arbitral committee attained a quasi-public status. The committee was renamed the Court of Arbitration, and it was headed by an official Arbitrator paid by the State and appointed by the governor. Under the law, members of the Chamber of Commerce could be summoned before the Court if an action were lodged against them (though they could also opt not to appear), or cases could be submitted voluntarily, as before (Bishop 1918; Jones 1956). One appeal was allowed (Shepard and Fancher 1875).

8 The oath read: “[name], member of the Committee of Arbitration of the Chamber of Commerce of the State of New York, being duly sworn, doth depose and say, that he will faithfully and fairly hear and examine all matters in controversy submitted to the Committee, under the act entitled “An Act to amend an Act entitled ‘An Act to remove doubts concerning the Corporation of the Chamber of Commerce, and to confirm the rights and privileges thereof, passed April 13, 1784, passed April 15, 1861, and an Act amendatory thereof, passed April 22, 1865, and that he will make a just award, according to the best of his understanding.” Chamber (1868). Oath of Arbitration Committee. New York Chamber of Commerce and Industry Records. New York, Columbia University. MS 1440.
In 1875 the official Arbitrator, a former New York Supreme Court judge active in Republican politics, gave a speech on the value of the institution, as he saw it. Efficiency was important. “Nothing to be compared with the costlessness and celerity of its adjudications can be found anywhere else in the United States,” the arbitrator affirmed (Shepard and Fancher 1875, p. 5). Of particular interest, though, is the comparison he drew with the trade associations:

“The facility for such settlements and adjustments, furnished by this court, is far greater than that of the Arbitration Committees of the different boards, associations, or exchanges. In them, a committee of different persons, who have other business to attend to, has to be notified and assembled, often at great inconvenience, and after worrying delays. Here the Arbitrator holds court continually, with no other business to interfere with his duties. The committees are changing and shifting. The Arbitrator is appointed for life. The committees establish no precedents, leave no permanent benefits behind them, often are controlled by business interests of their own which may be affected by their decision, and may vary the principles on which a case is to be decided with every wind of opinion, and every new election of committees” (Shepard and Fancher 1875, p. 6).

This was, in effect, a case for legalistic dispute resolution in a quasi-public business court. The Arbitrator cited favorably a comparable French institution, the Tribunal of Commerce of Paris, which he reported as handling some 70,000 cases in 1869 alone. This expediency was contrasted with the common law courts of England and the United States, where “The forms of antiquity have characterized forensic procedure, and darkened the temples of justice with the mould of the past, like ivy feeding on the dust of an ancient ruin. Legal tribunals have been remarkable for perpetuating the spirit of by-gone times” (Shepard and Fancher 1875, p. 11).
The Court of Arbitration, then, represented a radical departure from existing dispute resolution patterns in New York. Perhaps for that reason, it was largely ignored. We do not know how many cases came before the Court, but it was certainly nowhere on the scale of its Parisian counterpart. In general, the Chamber has been described as relatively moribund during the late 19th century (Jones 1956). Even Bishop, a hagiographer for the Chamber, said the Court “was unpopular because it endeavored to cover and dispose of in court fashion every kind of commercial dispute,” (Bishop 1918, p. 124), a view confirmed by Cohen (1946, p. 153): “Because [the Arbitrator] had a lawyer’s training, he presided over the Court of Arbitration as though it were a court of law. This the businessmen did not like.” The institution increased the process involved in dispute settlement without necessarily enhancing its authority, as the arbitral awards still had to be enforced in public courts “darkened” by “the mould of the past.” Given the lack of demand for its services, it is unsurprising that the legislature cut off funding in 1879. The institution then faded out of existence once the first appointee died in 1900 (Jones 1956).

A decade passed before the Chamber revitalized its role in dispute resolution under the leadership of Charles Bernheimer, who would come to be hailed as the father of modern commercial arbitration in the United States (c.f. his international activities, chapter four). So critical was Bernheimer to the success of arbitration that the New York

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9 Cohen (1946) states that is was the legal lobby, which disliked the competition arbitration provided to the litigation it profited from, that blocked funding in the legislature. Unfortunately I have not been able to corroborate this claim, and it seems strange given that the Court of Arbitration was not attracting much business anyway.

10 As one hagiographic observer of arbitration put it, “… arbitration in the United States has been chiefly evolved through the unremitting effort and example of an old, powerful and respected commercial institution, which has persistently, wisely and in an unselfish and public-spirited manner attempted by itself
Chamber disregarded its usual rule of preventing individuals from serving as chair of the same committee more than twice (Bernheimer was re-elected until he retired). Even more extraordinarily, the Chamber took out a $342,000 life insurance policy on Bernheimer, so that his work on arbitration might continue after his death (New York Times, February 19, 1925).\textsuperscript{11}

Bernheimer was a businessman. His company, Bernheimer & Walter, manufactured cotton products at 51 White Street (in what is now the lower Manhattan neighborhood of Tribeca), and represented the new kind of business the commercial evolution of New York had made possible. In 1910, on Bernheimer’s initiative, the Chamber appointed a special committee, headed by Bernheimer, to consider re-establishing some form of arbitration committee.

Bernheimer’s companion in these efforts, who would work side by side with him throughout the campaign to reform American arbitration, was the lawyer Julius Henry Cohen. The American-born son of Eastern European immigrants, Cohen attended night classes at New York University law school and built a successful practice handling the legal affairs of the city’s garment producers. He was therefore connected to the new class of commercially oriented, predominantly Jewish lawyers that had shocked the Anglo-Saxon legal establishment into virulent displays of anti-Semitism and general nativism.\textsuperscript{12}

\textsuperscript{11} This may have not been as strange as it seems, as Bernheimer was described as a somewhat sickly individual Cohen, J. H. (1946). They Built Better than They Knew. New York, Ayer Publishing.
\textsuperscript{12} The role of Jewish lawyers in the development of commercial arbitration may also reflect the role arbitration played within the Jewish community as whole during this period. Like many immigrant
But Cohen’s status as a first-generation American, as opposed to an immigrant, allowed him to gain a foothold within legal circles; he was elected to various state and national bar association positions in the first decade of the 20th century. Moreover, Cohen’s interests and activities were not limited to commercial matters. He was a prolific writer associated with various reform causes. He played a role in the 1910 “Protocol of Peace,” an agreement between garment workers and employers that followed a spate of labor riots in the city. This private agreement included an Arbitration Committee, headed by the jurist Louis D. Brandeis, to resolve labor disputes, and it is likely through this mechanism that Bernheimer and Cohen came to know each other and to discover their mutual interest in arbitration. Cohen also came to serve as the General Counsel for the Chamber of Commerce. If Bernheimer was the driving force behind the arbitration reform movement, Cohen was its intellectual leader.

In a posthumous tribute to his friend, Cohen said it was Bernheimer who asked him in 1910 to probe the Chamber’s history of arbitration. Apparently the organization had lost knowledge of the role it had played since 1768, as Cohen states, “I went back to the musty old records of the Chamber over a period of one hundred and fifty years and found that during the Revolutionary War, when there were no courts functioning in New York communities, Jews often preferred to resolve disputes in community-based arbitration rather than in the strange courts of the new country. For example, the pan-Jewish organization The Kehillah, (“the Community”), created a Bureau of Industry to conciliate and arbitrate labor disputes between Jewish workers and factory owners. Auerbach, J. S. (1983). Justice without Law? Oxford, Oxford University Press.

City, the Chamber’s system of arbitration by businessmen was actually the only method of administering justice in this City” (Cohen 1946, p. 152). A detailed study of the Court of Arbitration in the 1870s was also carried out, and the lessons of the past were learned. The Committee reported that “dependence on the Legislature for support, in the effort to make the award a binding one, is the rock on which most arbitration plans of this Chamber have come to grief. The enforcement of the award is recognized by your Committee as of great importance, but after consideration it believes that to rest the entire plan upon this phase of it is equivalent to sacrificing the whole to save a part” (quoted in Bishop 1918, p. 124).

Instead, the committee suggested, and the chamber approved, an arbitration committee remarkably similar to the one that had existed before 1874. Parties could include in their contract a clause specifying that disputes would be resolved under the Chamber’s arbitral proceedings. They could then select from a roster of some 200 businessmen to act as arbitrators. The arbitrators volunteered “in a public spirit, working only for the general welfare and harmony of the business world of which they are a component part.” Fees were nominal. As Bernheimer described it to the New York Times, “The Chamber’s plan embraces a public service of practical helpfulness, of unlimited possibilities for good in the world of business. By offering the means for a prompt and satisfactory adjudication of commercial controversies it provides an economical and practical method for the elimination of many tedious delays and vexations incident at trials of law” (New York Times, August 6, 1911, p. 7).

Enforcement of these awards remained problematic, however, with New York courts continuing to adhere to Coke’s 1609 doctrine of revocability. In 1915 a federal district court handed down a decision, United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co. (D. C. 222 Fed. 1006), which put the legal issues in clear perspective. The defendant had signed a contract with the plaintiff calling for arbitration in the event of a dispute, which it later reneged upon. Though the facts of the case were unexceptional, the judge, Charles Hough, took the opportunity to make a case against what he saw as the backwardness of the common law position against enforcing arbitral awards. Referring to the 1855 English case Scott v. Avery (see above), Hough notes the origins of the doctrine of revocability in the need of English courts to take business away from merchant courts, stating “a more unworthy genesis cannot be imagined.” He praises the 1889 English Arbitration Act for correcting this error, and laments that, “Neither the Legislature of New York nor the Congress has seen fit thus to modernize the ideas of the judges of their respective jurisdictions.” Without such laws, Hough felt compelled to uphold existing...
Supreme Court doctrine on the matter: “Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed.”

Bernheimer and Cohen seized on this call immediately, and appealed directly to the New York Constitutional Convention, which was meeting at the time, to include a provision defending the autonomy of arbitration in the most basic law of the state. The chairman of the judiciary committee of the convention demurred, however, in a summary fashion without explanation (Osborn 1915).

The New York Chamber then sought to reverse the revocability doctrine through legal institutions. In 1914 the New York State Bar Association had formed a Committee on the Prevention of Unnecessary Litigation to deal with the problem of crowded courts (see below). Through Cohen’s arguments, the committee included private arbitration as one of its proposed remedies.15

Cohen was initially optimistic that a forward-thinking judge like Hough would move the common law to a more pro-arbitration stance. In 1916, a lawyer representing a New York sugar refiner against a Dutch client appealed to the Chamber to file an amicus brief with the court arguing against the doctrine of revocability. Cohen complied, beginning an investigation of the origins of the principle that delved deep back into English precedent.

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15 The committee’s report read, “Where differences cannot be adjusted between the parties or their attorneys and the intervention of a third party becomes necessary, there are several forms which arbitration may take. The arbitration may be (1) informal, (2) under the Code, (3) under the auspices of a commercial body, or (4) under the auspices of a bar association. The experience of many business men and lawyers testifies to the advantage of these methods of adjusting differences wherever possible. They are inexpensive, speedy and peaceful.” *40 Proceedings of New York State Bar Association* (1917) 390.
An expanded version of his findings was published in 1918 as *Commercial Arbitration and the Law*, a watershed in the legal understanding of the status of private arbitration under common law. Cohen argued that the doctrine was much less well established in English precedent than his contemporaries thought. Even pro-arbitration judges like Hough accepted the conventional wisdom that English doctrine, no matter how unsavory, was well established until Parliament reversed it in 1889. Cohen, in turn, found numerous examples in which English courts had in fact upheld arbitration awards. He also, crucially, argued that English courts had begun reversing the doctrine following the 1855 *Scott v. Avery* case, and that the 1889 Arbitration had largely confirmed the evolution of common law in the latter decades of the 19th century, not provoked it. This “judicial correction of a judicial error,” could also take place in the United States, he argued, and called upon courts to make such a move. Bernheimer purchased “a considerable number” of copies from the publisher to distribute to various jurists and legal experts (Cohen 1946, p. 153).

The court in the sugar case did not accept this argument, nor did others. Instead, it became clear that only way to correct this “judicial error” in a reasonable timeframe was through the legislature. Cohen arranged for Bernheimer to address the New York Bar Association, and in 1919 that body passed a resolution declaring "that the doctrine of revocability of such agreements is a legal anachronism which should be eliminated from the law at the earliest moment." (42 NY State Bar Association Report, 93, 1919).

Interestingly, the lawyers seemed moved by the “rationalist” argument made by the Chamber, not legal principles:
"The demands of international commerce dictate that this nation should not be behind others, either in honesty or in the facilitation of contracts containing agreements for arbitration of disputes. The jealousy of judicial jurisdiction has led to a historical attitude of the Courts toward arbitration agreements, which is unintelligible at present to the business man. The subject has been the basis of a remonstrance from the London Chamber of Commerce to the Chamber of Commerce of the State of New York. In this day, it does not seem that any good public purpose is subserved by treating arbitration clauses as nullities and unenforceable." *43 Proceedings of New York State Bar Association* (1920), p. 282

The Chamber and the Bar Association jointly mobilized to draft a modern arbitration statute (Cohen authored it) and press it upon legislators. Though the lawyers made clear that their preference was for the courts to reverse their interpretation of the common law, they did not think New York could afford to wait, which was the commercial argument:

> While it is desirable that judicial error should be judicially corrected, and that resort to legislation should, as a matter of general policy, not be had in such matters, and while [the members of the Bar Association committee] do not wish to discourage the efforts of the Chamber of Commerce,\(^1\) they are nevertheless of opinion that if the great State of New York is to be the international commercial center it aspires to be, it must speedily set its house in order and not wait for the slow and tedious process of judicial correction of judicial error to be applied in this field. It must promptly simplify its judicial procedure and must make available to business men the easy methods of commercial arbitration. *43 Proceedings of New York State Bar Association* (1920), p. 128

In 1920 the New York legislature passed the New York Arbitration Act, which made a contractual commitment to arbitrate disputes non-revocable under state law. The move seemed popular, as the *New York Times* reported, “So marked has been the increase here in the demand for commercial arbitration, and so much greater is expected to be the call

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\(^1\) This clause might be misread as suggesting the Chamber opposed using litigation to accomplish this goal, but it actually refers to Cohen’s earlier efforts. The Chamber fully supported the New York act, and Cohen himself drafted it.
for it under the provisions of the Walton act, recently passed by the New York State legislature, that the Committee on Arbitration of the Chamber of Commerce of the State of New York has found it advisable to more than double the number of the Chamber’s official arbitrators” (New York Times, May 2, 1920, p. E15).

While other states had enacted laws dealing with arbitration, including a relatively “modern” 1917 law in Illinois (Macneil 1992), New York’s was the first to embody the idea that arbitral awards could be automatically enforced, irrevocably, in public courts. In 1922 the ABA adopted a model law for states based on the New York law, and statutes closely resembling it were soon enacted in New Jersey (1923), Massachusetts (1925), Oregon (1925), Pennsylvania (1927), and California (1927) (Sturges 1930).

But state law only went so far. In 1921 a federal court ruled that the New York law preventing revocation of an arbitration clause was a procedural matter, not a substantive one (Atlantic Fruit Company v. Red Cross Line, SDNY 1921). Federal courts, therefore, were not subject to it (since they were guided by federal laws of procedure, even when deciding cases under the laws of the states). As in the Asphalt case, the judge made clear his displeasure with the common law he felt obliged to apply, writing, “I recognize the growing sentiment in the commercial world…that the law ought not to intervene and render arbitration agreements ineffective,” and cited Cohen’s 1918 treatise to provide support for this claim. The judge also noted “an unfortunate situation is created if arbitration agreements can be repudiated in American courts while American citizens can
insist upon their enforcement in their favor as a bar to litigation abroad.” The need for federal legislation was thus made additionally clear to the reformers (Cohen 1921).

As they had done in New York, Bernheimer and Cohen worked to get the American Bar Association to take a stance in favor of arbitration. In 1920 the ABA directed its Committee on Commerce, Trade, and Commercial Law to consider how to extend the principal of commercial arbitration. In 1921 the Committee presented drafts of a Uniform State Act on Arbitration and comparable federal act relating to interstate and foreign commerce, both of which Cohen was instrumental in drafting, and both of which closely resembled the 1920 New York law. In 1922 the ABA approved resolutions endorsing these positions, although it significantly revised the federal law to include provisions that would not have been necessary in New York (because they were already contained in the existing commercial code) but were lacking at the federal level (Macneil 1992). In the fall of 1922 Bernheimer met with several sympathetic congressmen and senators, and was able to have a draft arbitration law introduced before Congress adjourned for the holidays. A brief hearing was held in January 1923, but the bill was not reported out of committee before the session ended. The bill was reintroduced in the next congress, but another hearing could not be arranged until January 9, 1924, in which a broad range of commercial and legal groups spoke in favor of the bill. Not a single voice was raised in opposition. The House Judiciary Committee reported the bill out of committee a few weeks later (H. R. Rep. No. 96, 68th Cong. 1st Sess, 1924) with a favorable report, and it was placed on the consent calendar (a list of bills that are to be passed without a formal vote (65 CR 1931, 1924). It took the Senate Judiciary Committee until May to report the
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bill out of committee, although it made a few minor amendments to the earlier version. On June 6, 1924 the House passed the bill by consent, with not a single congressman registering opposition (65 CR H11080, 1924). The Senate did not pass its version until the following January, however, approving the bill with minimal discussion (66 CR S2762, 1925). The process was repeated in the House on February 4, 1925 (66 CR H30004), and President Coolidge signed the act on February 12, 1925. It had effect from January 1, 1926.

While the American reform movement was very much in line with international trends, the domestic debates over the legal reforms contained very few references to developments abroad, in the League (see chapter four), or to the interests of foreign merchants trading in the United States. Though the new private institutions and public laws applied to all traders operating in the United States, foreign and domestic, they were conceived of largely in domestic terms. References to foreign merchants’ interests are relatively absent from the Chamber’s propaganda.¹⁷ Given the political salience of isolationism and partisan conflict over free trade at the time, this silence was probably tactically wise. When the Federal Arbitration Act was passed in the House, one of the very few questions was, “In what way does it affect the present understanding of the situation as between nations?” One of the bill’s proponents, Representative Graham (Republican of Illinois, a lawyer by training), responded, erroneously, “It does not affect that at all” (65 CR 1931, 1924). Nor did the United States government show any sign of engaging with the League of Nations negotiations on the subject, even though its

¹⁷ An exception is Cohen’s 1918 Commercial Arbitration and the Law.
domestic policy position was basically compatible with the 1923 Protocol and 1927 Convention (see chapter four).

Nonetheless, Bernheimer, Cohen and other reformers were intimately connected to the European arbitration community. As discussed in chapter four, Bernheimer had participated in the international commercial congresses that precipitated the ICC, including the 1914 Paris conference at which arbitration was one of the chief topics. He had brought a plan for a global arbitration system to that forum and, perhaps crucially, had been told at that meeting how arbitral awards in other countries enjoyed the backing of public courts. We cannot say how important these linkages were in pushing Bernheimer to campaign for greater enforcement of arbitral awards in the United States, but it certainly presented him with a successful model. Throughout the subsequent campaign Bernheimer was in constant communication with a variety of European correspondents, including the newly formed ICC, keeping them up-to-date on developments in the American reform movement.

From the beginning, the reformers imagined a state-level, national, and global system of laws designed to ensure the standing of arbitration clauses and awards in public courts. As discussed in Chapter Four, Bernheimer had proposed a global system for private arbitral enforcement at the Paris meeting of chambers of commerce in 1914, and seems to have been positively influenced by the experience of countries that offered court support to arbitral awards (Chapter Four). Importantly, however, the reformers never sought to push the United States to adhere to the Geneva treaties, or to construct other multilateral
fora. It is not clear why, but likely reflects the lack of demand for such a treaty amongst US firms and the isolationist tendencies of the US Congress and, after the defeat of Woodrow Wilson, the US administration. Instead, the reformers sought similar ends through bilateral means. A draft bilateral treaty was promulgated by the ABA along with the model state and national laws in 1922, and Bernheimer actively lobbied the State Department to include the pro-arbitration language in bilateral commercial treaties, though not after his initial efforts failed in 1922-1923 (see Chapter Four for a more extended discussion).

Finally, several transnational agreements were explored during this time, but only one came to fruition. In 1915 the Bolsa de Comercio de Buenos Aires and the US Chamber of Commerce (newly organized) signed an agreement that created a joint commission, made up of businessmen from both sides, under which arbitration might take place. On the American side, the initiative seems to have not come from the New York Chamber, or from US business interests, but rather the US Chamber itself. This was made clear in a series of letters between Bernheimer and various New York companies who, once they learned of the joint commission, irately protested that they were not represented on it, despite being some of the largest traders operating in Argentina (Fahey 1916). Bernheimer then interceded with the US Chamber to make sure the New York firms were included. Nonetheless, the anecdote suggests that the US-Argentina commission did not play a large role in governing the trade between the two countries. The available records have not revealed the caseload, if any, of the commission, but its subsequent disappearance from the discussion of arbitration suggests it was not major.
During the same period, Bernheimer received letters from chambers of commerce in Valparaiso, Havanna, and Sao Paolo to discuss constructing similar arrangements. Though Bernheimer also responded positively, the discussions seemed to flag after just a few exchanges. Instead, a more serious discussion was held between Bernheimer and several British interlocutors regarding a commercial treaty between the United States and Great Britain that would provide for the mutual enforcement of arbitral awards, but the discussion does not seem to have progressed beyond some initial conversations.

These changes in law were accompanied by shifts in both public and elite discussion of the nature of arbitration, and the institutionalization of the arbitration community in the United States. In 1922 the Arbitration Society of America was founded in New York by Judge Grossman, a respected jurist. The Society aimed at nothing short of an alternative court system for all disputes, commercial and otherwise.

“As a first step, this Society is now organizing a People’s Tribunal of Arbitration in New York City which will be a court operating without red tape, without complicated rules of procedure, or any other of the obstacles to quick and conclusive disposition of the issues that will come before it” (AJS 1922).

It also imagined creating a national network of such tribunals, and a national campaign to enact New York-style arbitration laws in other states. The Society estimated (on a rather speculative basis) that such a move would reduce the amount of litigation in public courts by half (AJS 1922).
These grandiose aspirations will likely strike the modern reader as somewhat unrealistic. At the time, however, they were the subject of serious discussions not just amongst the arbitration but with the broader legal and commercial elite. The Society’s founding board included a banker, an architect, the president of the Fifth Avenue Association, a former judge and lawyer, a judge of the New York Supreme Court, the president of National Surety Company, a professor of political science at Columbia, the president of the Metropolitan Trust Company, a former Senator and Supreme Court justice, and the deans of the NYU and Columbia law schools, plus several other business men. As Kellor reported, arbitration became the talk of the town in the 1920s:

It went out to luncheon and to dinner; receptions were held in its honor, and forums were dedicated to its exposition. It became the subject of conference, debate, and instruction. It frequented exclusive clubs and found its way in to homes, churches, schools and theatres. It passed the exclusive portals of law offices, banks, and corporation board rooms. It came out of dry law books, where only the difficulties were recorded, and found a place in general as well as special periodicals, books, and pamphlets. Sometimes arbitration wore evening clothes; at other times it appeared in overalls, or in a professor’s gown; but it aroused curiosity and interest (Kellor 1948, p. 12).

This description is overwrought, but captures the general tenor of the public discussion at the time. On March 19, 1925, a month after the passage of the FAA, an extraordinary conference on arbitration was held by the Astors at their Fifth Avenue mansion. Attendees included a range of luminaries from business and the legal world, as well as Bernheimer and several politicians. Mrs. Astor gave a set of opening remarks, in which she stated,
“Our country has been a pioneer in the arbitration movement where international disputes are involved, and I believe that our experience in this peaceful method of settling business controversies will, in due time, large influence the settlement of the international disputes and promote the peace of the world” (New York Times, March 20, 1925).

Similarly idealistic quotes can be found from prominent business leaders. James Watson, the founder of IBM and a supported of the AAA said in 1938, “The surest road to world peace is a long sound economic line and proper trade relations between nations, with arbitration taking the place of force when disputes arise” (Straus 1965).

Bernheimer, as the original promulgator of arbitration, was not entirely pleased with these developments, believing that expanding arbitration in this way would distract from its core work of efficiently resolving business disputes. In 1925 he founded the Arbitration Foundation to promote this more conservative vision of the institution. He told the press “there is a great need for control, supervision, and direction of the whole arbitration movement” (New York Times, March 24, 1925, p. 25). Clearly such a schism was not beneficial to the arbitration community, and in 1925-1926 they negotiated a compromise in which the two organizations merged to become the American Arbitration Association (AAA), which remains the predominant supplier or private arbitration in the United States today.

AAA arbitration proved popular. The New York Times reported that within just a few months, 233 cases were submitted for settlement. Of these 114 were adjusted without
formal proceedings, while the remainder were disposed of in fewer than 100 hearings. The AAA charged just $10 for a hearing. In 1926, the AAA held an educational conference at which 20 universities, including all the major law schools, pledged to begin teaching arbitration, and in 1927 the organization reported that it boasted 348 state and local affiliates around the country (New York Times, January 2, 1927, p. 8). When Herbert Hoover was elected president in 1928 he was serving as a board member of the AAA.

In sum, this crucial phase in the development of dispute resolution institution in the United States obviously involves a mix of rationalist and ideational mechanisms. Below I argue that the former drove the latter. Unlike the other sub-cases in this chapter, and in the rest of this study, the reforms in arbitration law during the 1910s and 1920s have previously been examined by scholars also seeking to determine why the law changed as it did. Most of this attention came from the courts themselves. As is discussed below, the US Supreme Court, in its 1984 decision fully federalizing arbitration law in the United States, determined that Congress had in fact intended the law to apply as a substantive piece of regulation binding on the states, not merely a procedural tweak to the federal court system (see below). This determination was widely criticized as a poor reading of legislative history (Macneil 1992), or even a deliberately misconstrued rationalization for the court’s preferred outcome, though some have supported the Court’s conclusion (Drahozal 2002). This controversy need not detain the present discussion except inasmuch as it makes causal arguments about the role of the various interest groups in persuading shaping “Congress’s intention,” (a strange concept to a political scientist). A
related argument is made by Benson, a libertarian economist, who places responsibility for the act squarely on the American Bar Association and other lawyerly groups (Benson 1995). He attributes their motivations not to legal appropriateness, however, but to material interests, arguing that the kind of legalized arbitration the Chamber of Commerce promoted, compared to that of the trade associations, was an attempt by lawyers to seize a piece of the commercial dispute market that commodity arbitration had previously excluded them from. These hypotheses are considered below alongside R2 and I2.

5.1 Rationalist

Under the rationalist hypothesis we would, first, expect demand for arbitral institutions to arise as markets become increasingly complex and neutral forms of dispute resolution are preferred. Though cotton exports achieved this scale early in the 19th century, New York did not play a large role in the trade. Instead, the city remained mostly dedicated to the general dry goods trade and the wheat and flour that had dominated trade in the colonial period. But the grain trade did not reach significant scale, consistency, or complexity until the mid 19th century (Fornari 1973). The repeal of the British Corn Laws in 1849 and the subsequent liberalization of European markets for American agricultural products created a vast new source of demand. The opening of the Erie Canal a few decades earlier had linked New York by water to the grain belt that ran from Ohio to the Red River Valley. The result was an explosion of US grain exports (see figure 22), with the New York as the primary hub, later joined by Chicago and San Francisco.

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18 It played a larger role as a transshipment point for cotton following the Civil War.
As the grain trade passing through New York expanded and internationalized, it also became more concentrated in a relatively small number of multinational shippers (c.f. the similar market structure in Argentina, Chapter six). Small shippers simply could not compete:

Success in the foreign grain trade rested to a large extent on the ability to obtain favorable inland and ocean freight rates, and such rates could be achieved only by those who shipped the grain in large lots. As a result, and also because of the large amount of capital required, the export grain trade was handled by a relatively limited number of large concerns (Fornari 1973, p. 143).

Figure 22: US wheat and flour exports to 1930 (war years removed; source: Historical Statistics of the United States)

The conditions were thus perfect, under R1, for firms in New York to seek neutral, efficient, and authoritative dispute resolution institutions in the 1860s-1880s, and this is
precisely when the major commodity organizations formed and began offering arbitral services. Why was this option preferred to courts? As noted above, the neutrality of New York courts does not seem to have been a primary concern during this period. Instead, it seems that demand for arbitration arose chiefly from efficiency concerns.

Consider the trade association arbitration that arose at the beginning of the period. Precise documentation of cost and time is difficult to find, but by all accounts these institutions resolved disputes quickly and cheaply by experienced industry insiders (Carhart 1911; Huebner 1911), as they did in other parts of the world. Public courts, in contrast, could take far longer to resolve a dispute, and at greater expense. Again, precise statistics are difficult to find, but many commentators noted that cases could take years to come to trial (Jones 1927; Cohen 1946; Benson 1995). This argument was used extensively by arbitration advocates in the Congressional hearings and in newspapers,¹⁹ and seemed to pass unchallenged, though we would expect arbitration advocates to emphasize the matter. Benson (1995) quotes a 1979 study that found delays of two years or more in the New York Court of Appeals between 1896 and 1921. One more contemporary commentator reported, “On January 1, 1923, 27,000 untried cases were on the supreme court calendars in New York County. Using every effort, the court can dispose of about 8,000 cases a year. On the other hand, about 13,000 new cases are being added to the calendar each year” (Jones 1927, p. 258).²⁰ It is probably reasonable to concur with

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¹⁹ For example, “Our courts are congested, the calendars crowded, and cases may have to wait years for judicial settlement” (“Arbitration Plan versus Litigation,” The New York Times, August 6, 1911, p. 7). A report in 1925 estimated that the New York state courts contained over 27,000 untried cases, and that “similar congestion prevailed in the Federal courts” (“Leaders of Affairs Boost Arbitration,” The New York Times, March 20, 1925, p. 14).

²⁰ A letter from the City Court to Cohen in 1915, however, paints a different picture. The Secretary of the court reported that “the regular calendar last year disposed of 5800 causes. There were added to the
Cutler that “the shifts in domestic policies concerning arbitration clearly were a response to the tremendous growth in commercial transactions and the unprecedented expansion in commercial litigation” (Cutler, p. 231). On balance, then, it seems reasonable to conclude that for a businessman to go to court during this period was by no means an easy undertaking.

Still, under R1 we might expect firms to nonetheless prefer courts to arbitration if the former could offer superior authority. As described above, however, the trade associations benefited from market conditions that permitted private enforcement. Powerful evidence of this is provided in a survey Jones (1956) conducted of all commercial cases in New York courts between 1800 and 1920. Jones finds 300 cases relating to arbitration during this period, but only 21 relating to sales contracts, and only nine of these to sales of commodities of the type the trade associations engaged in (Jones 1956, p. 212-213). Only one of the cases that ended in court, *Wheat Export Co. v. New Century Co.* (185 App. Div. 723, 173 NY Supp. 679, 1919), seems to have been conducted under the rules of the Produce Exchange. This implies that of all the disputes tried in the arbitration panels of the Commercial Exchange and related entities, only a very tiny fraction could not be resolved without public intervention. In 1923 the President of the US Chamber of Commerce argued that similar conditions applied in organized commodity markets across the country. Because participating in a such market creates an obligation to abide by arbitration, “Failure to abide by an award is consequently rare. If it calendar new issues during that period of 5886 causes. The court is now trying March, 1914 issues on the regular calendar. The commercial calendar, which gives a preference to certain kinds of commercial actions described in Rule II, is up to date; that is, the day a case is noted for trial, the case appears on the calendar, if moved as a commercial cause.” Letter from City Court of the City of New York to Cohen, March 17, 1915. Box 115. Note, however, that this is just one court.
does occur, of if there is refusal to fulfill the obligation to submit to arbitration, it means ejection from the market—i.e., expulsion from the organization which conducts the market” (Barnes 1923, p. 2). Barnes went on to estimate

“that almost two-thirds of the export trade of the United States, expressed in values, are composed of articles which are bought and sold upon definite grades established by business men’s organizations. As arrangements for arbitration have been provided for transactions in almost all commodities for which grades have been established, it is obvious that well over half of the value of our exports is in commodities which in the United States are bought and sold subject to arbitration, and at least the same percentage would apply to our domestic trade” (Barnes 1923, p. 2).

It is unclear what source the U.S. Chamber relied on to make these estimates, or how accurate they are, but the argument suggests that businessmen at the time understood the logic of R1, which predicts a difference in demand for arbitration between commodities and manufactures, to apply. Indeed, Barnes continued that

“there are other fields of commerce, however, and these fields sometimes are not readily susceptible to direct moral sanctions. There are, of course, transactions between members of organized markets and non-members…Transactions in highly fabricated merchandise which has individuality given by the producer and transactions in merchandise which is individual or specialized in other ways are the types. In connection with such transactions the old principle of caveat emptor survives longest” (Barnes 1923, p. 3).

The revamped New York Chamber of Commerce arbitration service arose to serve this new kind of trade. In the late 19th century New York emerged as a manufacturing powerhouse, a transition that followed directly from its dominance of transatlantic trade. Two industries, sugar-refining and garment-making, accounted for the majority of the city’s manufactures in the late 19th and early 20th centuries (later joined by printing). In both industries, shipping technology made New York a key hub between the raw material
providers and the end consumers. Semi-processed sugar was shipped from the West Indies to New York, refined, and then shipped on to other East Coast ports, the Midwest, or Europe. Cloth from England and New England (often made with cotton that had been exported via New York originally) was cut and sewn into garments before being sold to the rest of the country. Because transatlantic shipping was expensive, and because cloth was less bulky than finished clothes and finished sugar less bulky than semi-processed sugar, it made sense to locate the most intensive part of the manufacturing process close to the principal transshipment hub. At the same time, the massive influx of poor immigrants to New York provided a ready stream of cheap labor (Glaeser 2005). These factors, combined with the invention of the sewing machine and the rising consumption of the burgeoning population, led to explosive growth. Before the Civil War the output of New York’s garment industry was $7 million; in 1910 it was $400 million. Over the same period the number of workers increased from 6,000 to 200,000, the vast majority of them young female immigrants, predominantly Eastern European Jews and Italians (Best 1919). In the early 1900s New York City alone produced about half the clothing sold in the country, according to some estimates (Cohen 1916; Best 1919; Soyer 2005).

The garment industry was divided into small producers like Bernheimer & Walters, making clothes for the national market and export. Best (1918, p. 778) explains that the largest producers might have as many as 500 workers, but many were far smaller. The nature of the business was such that, “Little capital is required, and any one may go into the business” (Best 1919, p. 778). Moreover, frequent use of sub-contractors made transactions devilishly complicated. A clothing company might make one contract with a
certain factory, but that factory would then bring different parts of the project to a wide array of smaller, specialized operations. Competition was fierce, market trends shifted, literally, with the whims of fashion, and relative power between firms was highly uncertain. As one historian notes:

By the 1880s and 1890s, contractors kept minuscule shops, often in their own tenement apartments, and hired a handful of workers, including their own relatives and compatriots...The development was cyclical. Small contractors grew into manufacturers, pushing aside older firms and increasing the average size of shops. Later, the new manufacturers would establish ties with a new crop of contractors, and the average shop size dropped again. In any case, small shops remained the norm. In 1913, three-quarters of garment shops in New York had five or fewer workers (Soyer 2005, p. 7).

It is therefore consistent with R2 that the general purpose arbitration facility of the Chamber of Commerce was reestablished a) by individuals connected to the garment industry and b) only after this and other manufacturing trades reached a critical mass.

Figure 23 shows total US exports by type from 1821-1930 (unfortunately, city-level data are unavailable). Commodities (including manufactured foodstuffs) remain significantly more important than manufactures until the first decade of the 20th century.
Figure 23: US exports 1821-1930 (source: Historical Statistics of the United States)

Second, R1 would expect demand for public delegation to private arbitral institution to arise only after non-commodity trades reached a certain critical mass and a general-purpose arbitration system had been established. Lacking the market conditions the commodity traders used to render arbitration authoritative, the general purpose institution, the Chamber, is indeed the one that seeks state backing in 1915 (at the constitutional convention), 1918 (in courts), in 1920 (in the New York legislature), and in 1925 (nationally). Moreover, the fact that New York interest groups led the nation is consistent with the city’s status as the leading manufacturer.

Third, R2 requires that policymakers in charge of the relevant decision-making bodies be responsive to the firms that demand public support for arbitration. And, fourth, it requires
process-level observations of lobbying activities. Both are amply documented in the records of the Chamber and other sources.

Consider first the New York law. It is clear that the idea for reform began with the Chamber of Commerce, as the first proposals for reform legislation originated with them. In 1914, even before the Asphalt case, the Chamber’s Arbitration Committee developed drafts of a uniform model law on arbitration for states to adopt, as well as a draft federal law (Monthly Bulletin Vol.6, May 1914). Cohen was the author. The substantial similarities between these drafts and the subsequent New York and federal laws is strong evidence for the centrality of the Chamber of Commerce in the reform movement during this period.

It is true that the Chamber ended up working closely with the New York State Bar Association to pass the New York law, but the initiative clearly lay with the Chamber. The Chamber’s Arbitration Committee and the Bar’s Committee on the Prevention of Unnecessary Litigation agreed to work together to promulgate rules for avoiding litigation in 1916, which included recourse to arbitration amongst a host of other topics. But just two years later the Bar committee had renamed itself the Committee on Arbitration, and dealt only with that subject. In other words, it had completely adopted the Chamber’s agenda. The Bar committee even went so far as to investigate setting up its own arbitral services, which would allow lawyers to perform the type of dispute resolution businessmen performed with the Chamber.
Bernheimer noted how the Chamber had effectively brought in the lawyers his 1917 report to the Chamber:

“One of the most encouraging features of the past year’s work is the marked recognition, by the legal profession, of the allure of our method for settling controversies. The lawyers have come to appreciate the services of the Chamber even more than the business men have. Indeed, it is a fair statement to make, that most of the cases now brought to the attention of your Committee, come as the result of advice by attorneys for one and sometimes both of the parties. This is especially gratifying, because, when the system was first presented, the Bar appeared more or less unsympathetic. There seemed to be the idea among many lawyers that business men were antagonistic to the profession and to the judicial methods of administering law” (Chamber of Commerce Bulletin, May 1917, p. 11).

The Bar and Chamber submitted their proposed bill in 1918, along with several others desired by the Bar Association, but none were considered, “owing largely to war conditions,” in the Bar Association’s estimation. Proceedings of NY State Bar 42, January 17-18, 1919, Report of Arbitration Committee

In 1920 the bill was resubmitted, securing passage in both houses and signature by the governor in just one month, on April 19, 1920. In both houses not a single vote against the bill was recorded. In a letter to the San Francisco Chamber of Commerce, Bernheimer related how education had won over the one interest group that was initially opposed:

The labor unions of New York State were strongly opposed to the enactment of the arbitration law, but when it was clearly explained to them that the law did not mean compulsory arbitration, but that it merely meant that when once an agreement to arbitrate had been entered into, it was necessary to live up to the terms of such agreement, they withdrew all opposition; in fact they stayed that since they understood the law, they were not only not opposed to it, but were strongly in favor thereof (Bernheimer 1921).
In sum, then, the Chamber’s activism is almost entirely responsible for the passage of the bill. Al Smith, governor of New York when the arbitration act was being pushed, once told Bernheimer, “You’re a persistent cuss, aren’t you?,” which Bernheimer took to be a great compliment (Cohen 1946).

At the federal level, Bernheimer relied on his connections to New York Republicans to get the bill considered. In December 1922 Charles D. Hilles, the Chairman of the Republican National Committee’s Finance Committee, and a former chairman of the Republican Party, wrote letters introducing Bernheimer to Senator Albert Cummins (a Republican from Iowa who chaired the Judiciary Committee), Senator Frank Kellogg (Republican from Minnesota), and Secretary of State Charles Hughes. Hilles, who was from New York, had served on the Chamber of Commerce’s Arbitration Committee for a number of years, and so was clearly sympathetic to Bernheimer’s cause (Hilles 1922).

In December 1922 Bernheimer met with the relevant senators, as well as Ogden L. Mills, who represented the Manhattan congressional district in which Bernheimer’s business was based. The consensus view of these meetings seems to have been that it would be opportune to gather evidence of support from the national business community for the plan. Bernheimer immediately sent out a flurry of letters requesting support from a wide range of national commercial organizations. He also targeted businesses based in the states of key members of the Senate Judiciary Committee. For example a letter to a member of the chamber of commerce of Louisville, Kentucky, read
It occurred to me that you might be interested to know that Senator Ernst of your State has been appointed a member of the Sub-Committee of the Judiciary Committee in the Senate and which now has this bill under consideration...I sincerely hope your Chamber of Commerce will, at an early date, express itself in favour of the proposed measure and that they will then advise Senator Ernst of their decision in the matter (Bernheimer 1923).

Over the next few months Bernheimer maintained a vigorous correspondence with these interest groups, explaining to them the benefits of the federal arbitration bill, as he saw them. Most responses were enthusiastic, some were indifferent, and almost none were opposed.

The Chamber also benefited from the support of the Department of Commerce and its secretary, Herbert Hoover. In 1923 Hoover sent a letter to the key Senators urging them to support the bill, citing the clogging of courts as “a virtual denial of justice” (Hoover 1923). A personal assistant to Hoover, James Stafford, was in regular correspondence with Bernheimer, pledging support and stating, “I aim to keep you up to the minute in the happenings at the Front” (Stafford 1923).

Cohen also traveled to Washington to lobby Congress. A un-dated noted in the Chamber’s archives notes that Cohen was particularly persuasive vis-a-vis Senator Walsh of Montana, a key Democratic opinion leader, who had apparently voiced reservations about the proposed bill. The note records, “Mr. Cohen saw Senator Walsh and believes he dissipated from Senator Walsh’s mind the fears he entertained; Senator Walsh said Mr. Cohen’s explanation cleared up a great many things.”
On January 31, 1923 a hearing was held on the proposed bill before a subcommittee of the Senate Committee on the Judiciary, though only three Senators (Sterling of South Dakota, Ernst of Kentucky, and Walsh of Montana). Bernheimer spoke first, noting his experience with arbitration as a garment merchant, and putting forward a list of 28 commercial organizations that supported the bill. Piatt also spoke in favor. Aside from some technical discussion of the legal questions involved, the hearing focused on a few policy arguments. Senator Walsh wondered whether the law might force consumers into dispute settlement proceedings they did not really choose. He cited, for example, insurance contracts, in which the form of the contract was fixed, and parties could only choose to sign or not. He also mentioned a letter he had received from stevedores in his district worrying that the proposed legislation would make arbitration compulsory in labor disputes. Both Bernheimer and Piatt explained that neither of these effects were intended by the bill, and suggested that clarifying language might be added to remove these doubts.

However, despite these positive steps, the calendar ran out on the reformers before a hearing could be arranged (Sterling 1923). Haste was also deemed unwise. As a well connected New York lawyer advised Bernheimer in February 1923

…I think the better tactics will be not to appear to press matters too hard. As long as some people appear to suspect the bill of attempting to accomplish a lot of things its drafters never had in mind, any appearance of undue haste will tend to intensify their suspicion. It may be that at the next session the best thing to do will be to suggest further and more extended hearings before the Committee at which everybody who has a kick against the bill can be heard, and all difficulties brought into the open (Henderson 1923).
This advice was heeded, and the ABA made some additional refinements to the bill in 1923 to remove any connection to labor issues or other tangential concerns. The bill was resubmitted, and a hearing held on January 9, 1924. This time Bernheimer and Piatt were joined by Cohen, who also entered a lengthy written testimony, as well as 10 representatives of chambers of commerce and trade associations, and the American Farm Bureau. Bernheimer also presented a list of 67 commercial organizations from around the country that had officially endorsed the act. All spoke favorable of the act, stressing its utility for merchants engaged in interstate commerce. At one point a congressman asked the chair of the committee, “Is there anybody who has indicated any opposition in writing, or otherwise?” to which the chairman replied, “No; I knew of no real opposition when the bill was before the Senate subcommittee at the last session” (1924). The passage of the bills without a single dissenting vote, or, indeed, much subsequent discussion, confirms this view.

Within the process-level observations it is important to distinguish the activities of commercial groups and legal groups. Above I have presented evidence that the New York Chamber of Commerce drove the activism of the New York State Bar Association, and not vice-versa. Benson (1995) argues that the New York Arbitration Act and the Federal Arbitration Act were largely the work of lawyers seeking to legalize the arbitration process so as to not be shut out of it. His argument is based on the idea that arbitration does not require state support to be effective—he notes the widespread use of arbitration in the US before the 1920s reforms as proof of this claim—and so he can see no reason
for industry to support laws delegating state authority to private tribunals.\textsuperscript{21} Instead he argues, relying mainly on secondary literature, that the 1920s reforms were a lawyer-driven process, not in the sense of I2, but in the more traditional interest group fashion.

Under my reading, the documentary evidence cannot be reconciled with many of the claims that underpin this position.\textsuperscript{22} Instead, it seems that commercial groups, the Chamber of Commerce above all, initiated and directed the process, though they recruited legal groups as allies and relied on legal expertise to tell them how best to accomplish their policy goals. This division of labor can be observed even at the most micro-level, in the relationship between Bernheimer, the businessman, and Cohen, the lawyer. Cohen wrote, “It was Bernheimer who brought me out to make the speeches in favor of Commercial Arbitration. His own strength showed best in a small room where he spoke in low tones” (Cohen 1946, p. 150). Recall that it was Bernheimer who first asked Cohen to look into the history of arbitration. Moreover, Cohen wrote of his working relationship with Bernheimer, “He always found my writing too legalistic…not until Bernheimer had carefully read every word and clearly understood the meaning of every sentence would he take the material we produced” (Cohen 1946, p. 150).

\textsuperscript{21} Though he suggests that small industry groups were better able to provide private enforcement than general fora like the Chamber of Commerce, he does not consider how the market conditions that allow for such self-organization vary across industries or over time.

\textsuperscript{22} A few historical claims underpinning Benson’s argument, based in secondary sources, cannot be reconciled with the documentary record. For example, he states that the New York Chamber of Commerce is the only industry group to push Congress for the pro-arbitration laws (Benson 1995, p. 494). While the Chamber was certainly the key orchestrator, it received the explicit backing of a wide range of organizations. He also states that the New York Bar Association initiated the lobbying effort in 1920 (Benson 1995, p. 494). In fact, the Chamber had been attempting to reverse revocability since 1915, and that body had been the one to recruit the Bar Association to the cause in the first place (see below). He also states that the ABA “took the lead” on pushing the FAA in Congress (Benson 1995, p. 495). Again, the evidence shows this to be false (see below).
This division of labor was mirrored in the relationship between the New York Chamber and the state and national bar associations. While the New York Chamber worked closely with legal groups to push pro-arbitration legislation, it was the orchestrator of the campaign. Note that it was Cohen’s intervention that made the New York State Bar Association Committee on the Prevention of Unnecessary Legislation adopt a pro-arbitration plank in 1916. Note also that the state bar association only adopted an anti-revocability stance in 1919, after a speech by Bernheimer, and some eight years after the Chamber began advocating such a position. At the national level, the ABA’s draft arbitration laws followed a similar pattern, with Cohen leading the argument for non-revocability on behalf of the businessmen associated with the Chamber.

The agency of the Chamber is also observed at a tactical level. This is made clear by a letter from Bernheimer to William Piatt shortly after the latter became head of the ABA’s Committee on Commerce, Trade, and Commercial Law in 1922. Bernheimer tells the lawyer, “It seems to me the time has now arrived when the question of the introduction of the Federal Arbitration Law should receive consideration,” and outlines his plan to have the bill introduced by Chairmen of the judiciary committees of both houses. He invites Piatt to join him in Washington for “a conference with men of influence” (Bernheimer 1922). Piatt’s reply mentions a few other senators who might be prevailed upon, but also asks for Bernheimer’s support for the ABA’s proposed Sales and Contract Law, which was a special concern of the lawyers (Piatt 1922). While Piatt seems happy enough to support the arbitration bill, it is Bernheimer who is asking him to do so.
Benson also ascribes to lawyers a financial motivation for pushing legalized arbitration. Barred from trade association disputes, they wanted to make sure they could profit from this new form of dispute resolution, he argues. While this motivation may seem reasonable to the modern reader, it is not plausible in the context. Recall from chapter one that arbitration only became a lucrative business in the 1960 and 1970s. Moreover, the arbitrators who rotated through the Chamber of Commerce’s system were a) not lawyers, and b) not paid. Even the new types of proposals that lawyers’ groups like the Arbitration Society were making for more legalized forms of arbitration were clearly not profit-making endeavors. Consider this description of the Society’s planned tribunal:

> Only a small charge will be made for the use of court rooms and equipment and for services in securing arbitrators and conducting the hearings. Every dollar taken in by the Society will be applied to the upkeep of the tribunal and to the extension of the work throughout the country. This fact is guaranteed by the corporate character of the Society. It is a ‘membership corporation,’ and under the law none of the officers, governors and members can profit through its operations. It will be a public institution, designed and operate to confer its benefits upon the public at large” (1922).

Indeed, these institutions foundered precisely because they were not financially sustainable, relying on grants and other sources of financing to survive (Kellor 1948). If material rewards had indeed motivated lawyers to press for arbitration, they did a spectacularly poor job of it. Moreover, as Benson acknowledges, the evidence shows that many lawyers actually opposed the new arbitration laws precisely because they thought it would detract from their business representing clients in litigation, although this was not the dominant view.23

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23 Piatt mentioned that he had heard this objection to the bill at the 1923 hearing. (1923). Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration. Subcommittee of the Committee on the Judiciary, United States Senate. Washington DC.
In sum, the period provides strong evidence for the idea that commercial groups connected to New York’s new role as a manufacturing center drove the changes in state and federal arbitration law, as R1 and R2 would predict.

5.2 Ideational

During this period legal norms with respect to arbitration in New York and at the federal level changed sharply. The old doctrine allowing courts to revoke arbitration clauses was reversed both in legal minds—following a process of legal contestation—and in public policy. Crucially, however, the evidence shows that the former did not drive the latter. Much of the shift in legal thinking occurred after new laws on arbitration were passed, and, as discussed above, it was business interests that initiated the changes. As Macneil (1992) notes, “Prideful academics might like to find, but will not find…forward-thinking professional scholars writing critically of the defects of the common law arbitration system. Although the law reviews chimed in after the reform movement was well underway and its first successes achieved, neither law school faculty nor student editors can be accused of having been in the vanguard” (p. 28). To be sure, legal groups like the ABA played a crucial role in, especially, the passage of the 1925 Federal Arbitration Act. The official blessing of such groups seemed, alongside the material arguments, to persuade lawmakers to shift policy. But, as discussed above, it was the activism of the Chamber of Commerce that mobilized lawyers, and not the other way around.

First, let us consider in detail this shift away from Coke’s revocability principle. For I2 to apply, we must observe a new norm emerge as dominant following a process of legal
contestation. The origins of pro-arbitration norms in the New York legal field in fact predate the business campaign for arbitration in the early 20th century. In England, where the commercial revolution was well under way, the common law position on arbitration began to shift in the mid 19th century. In 1855 the Law lords handed down *Scott v. Avery*, which radically reversed the position on arbitration by shrinking the ground under which an arbitrator’s authority might be revoked. Lord Campbell, who authored the decision, wrote that parties should “select a judge on whom they place confidence as to his legal qualifications, and as to his capacity to decide facts” so that he may “dispose of the matter more satisfactorily than the regular tribunals of the country, more economically, perhaps, and more expeditiously” and that the parties “select him as their judge, and his judgment is final” without appeal. Lord Campbell also noted the illegitimate origins of the revocability principle:

> The doctrine had its origins in the interests of the Judges. There was no disguising the fact that, as formerly, the emoluments of the Judges depended mainly, or almost entirely, on fees, and as they had no fixed salary there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil” (Quoted in Cohen 1918, p. 254).

Several English cases that followed shortly after allowed the court to expand on this concept, so that by 1859 one of the dissenting justices summarized the scope of the changes as follows: “*Scott v. Avery* has overruled all the previous decisions on the subject…Lord Campbell certainly held that an agreement to refer any dispute to arbitration is binding, and that no action can be maintained until after an adjudication by an arbitrator” (Quoted in Cohen 1918, p. 182). By the time Parliament passed the 1889 Arbitration Act, which codified the autonomy of arbitration in black letter law, the
common law courts had already been following this principle, de facto, for some 30 years.

These changes were observed in the US, where they met with some approval amongst “progressive” jurists. In 1872 Judge Allen of the New York Court of Appeals found himself asked to enforce an arbitral award one of the parties had decided to revoke. He cited *Scott v. Avery*, and noted his sympathy with their logic: “it is not easy to assign at this day any good reason why the contract should not stand, and the parties made to abide by it, and the judgment of the tribunal of their choice.” But he felt compelled to deny the award enforcement anyway, stating that the principle “is too well established to now be questioned” (Cohen 1918, p. 230). In other words, though the principle of non-revocability seemed intellectually superior, it was not dominant within the field.

Nonetheless, an increasing list of pro-arbitration statements appeared in the 1910s, shortly after the New York Chamber’s renewed efforts. In 1914 the jurist Elihu Root, whom Bernheimer had personally lobbied, told the American Bar Association,

> “American procedure ought to follow as closely as possible the methods of thought and action of American farmers and business men and workmen. The law is made not for lawyers but for their clients, and it ought to be administered, so far as possible, along the lines of laymen’s understanding and mental processes…It is that sort of thing which merchants seek when they get up committees of arbitration to decide their controversies without the intervention of lawyers” (Cohen 1918, p. 2-3).
In 1915 the American Judicature Society, a progressive reform group founded in 1913, commissioned a study of arbitral practices in Britain (Rosenbaum 1916). The report was strongly supportive of English practice, noting that

New ways of living and transacting business imply new machinery of law. Society is constantly devising new tools to accomplish its work more economically. Commercial disputes, aside from their technical nature, are different in an essential way. In the law the rendering of exact justice in the matter presented is a final aim. But in business the settlement of a given dispute is not the most important thing. The big thing is the relationship between the parties. In its formal tribunals the law must ignore this preservation of relations between parties, however, momentous (Rosenbaum 1916, p. 18-19).

It went on to note that the 1889 Arbitration act rendered an arbitration clause “not a thing to meddle with, for it is easier to enforce than almost any other part of the contract” (Rosenbaum 1916, p. 21).

The most important of these critiques of the revocability principle, however, was Cohen’s 1918 Commercial Arbitration and the Law. This treatise remains perhaps the most extensive investigation of the early common law stance on arbitration, and while Cohen’s pro-arbitration agenda is clear from the beginning, he brings a wide range of evidence to support his claim that the revocability principle represented an error in judicial reasoning. My review of the legal literature suggests that the only work to match Cohen’s in depth, detail, and comprehensiveness was Wesley Sturges’ A Treatise on Commercial Arbitrations and Awards, but this was not published until 1930.
Within legal circles, then, the case had been made against the revocability principle as early as the late 19\textsuperscript{th} century, and acquired a mass of supporters in the 1910s. As noted above, it received the official approval of the New York Bar Association in 1919, and the American Bar Association in 1921-1922, \textit{before} the new laws were passed in those jurisdictions. Can we therefore conclude that the norm was “dominant” in advance of policy changes, as I2 would require?

The evidence does not support that conclusion. Instead, the laws are more properly interpreted as efforts to \textit{enhance} the dominance of the growing pro-arbitration norm, not effects of it. Recall the Cohen, as chief legal strategist for the New York Chamber, sought first a “judicial correction for a judicial error.” He believed that New York and federal courts could reverse Coke’s dictum just as the Law lords had done in \textit{Scott v. Avery}. But the courts refused to take responsibility for this policy shift, even if they strongly supported the underlying logic. Moreover, even the most pro-arbitration courts (e.g. Hough in \textit{Asphalt}) cited the weight of the revocability precedent as the reason for their inaction. In other words, it was precisely because the new norm was not dominant that courts could not act. This reasoning also appeared in the 1921 \textit{Atlantic Fruit} case, even after the New York law had been passed.

There were also many dissenting voices in the legal community that remained critical of arbitration, even after the New York and federal acts were passed. While the New York State Bar Association bought into the Chamber’s agenda, the New York City Bar Association, interestingly, did not. The Committee on the Amendment of the Law of the
Bar Association of the City of New York noted that the proposed law contradicted “the uniform practice, both in England and in this country, for courts of equity to decline to make decrees or orders directing parties to carry out an arbitration agreement.” It continued,

“There is however a growing opinion in some mercantile circles that he obligation to settle controversies by arbitration should be made binding upon the parties who enter into it and that the courts should compel the observance of such agreements. Whether such a procedure would accomplish all that is hoped for it, and whether it would afford a more sure, speedy, and effective method of securing justice than is afforded by trials in court, are question as to which there exists difference of opinion” (New York City Bar Association 1920, p. 236).

The mere existence of critics is not sufficient to establish that the pro-arbitration norm lacked dominance, but these voices were actually able to thwart arbitration in some areas, suggesting they were hardly marginal. This occurred when Bernheimer and Cohen attempted to push their model state law, endorsed by the ABA, on the National Conference of Commissioners on Uniform State Laws, an institution founded in 1892 that provides states with “non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” Bernheimer and Cohen approached the group in 1922, proposing that they adopt a model statute reversing the revocability doctrine. The chair of the relevant committee, Joseph Francis O’Connell, laid out his disagreement:

“Under the New York Act you are called upon to agree in advance through a clause that is in the contract, most often in small type, that all controversies of any nature, kind or description are to be taken out of the courts and are to be submitted to an arbitrator, either named then or to be named later. It is felt by the great majority of committee that this is wrong in principle… particularly in view of the fact that that would be done in
most instances without any realization on the part of contracting parties as to what they were really doing” (Macneil 1992).

O’Connell also noted the particular nature of the economic interests underpinning the Chamber’s efforts

“It does seem that it would be wrong for us to impose upon this Conference the views of New York and New Jersey, that we know are the result of the activities of a small group. I have nothing but he highest respect in the world for Mr. Julius Henry Cohen…but I fear he has addressed [the subject] entire from the angle of his particular type of clients. I think that Mr. Bernheimer…simply reflects the superior intelligence of Mr. Cohen, and that Judge Grossman is representing practically the same element in the business world that Mr. Cohen does. Now then, is that small group, with their desires for expedition, going to prevail against the forty-six states in this Union who feel that hey have got the interests of all their population to safeguard and look after” (Macneil 1992).

Cohen was unable to persuade the Commissioners to put the non-revocability principle into their 1924 model law. Even more importantly, O’Connell brought the struggle back to the American Bar Association itself. In 1925 this group reversed itself, adopting a model state law that did not contain revocability, even as the federal government adopted that principle in the 1925 Federal Arbitration Act. The Commissioners would not change their stance on revocability until 1943, and a new model law was not promulgated embracing the principal until 1955 (Macneil 1992).

An interesting feature of the arguments made in favor of arbitration was their near universal reliance on English examples. An observable implication of I2 is that jurisdictions whose legal fields are closely linked will tend to adopt similar
patterns of dispute resolution. Clearly English norms enjoyed a favorable reception amongst arbitration advocates in the United States. Other countries had developed sophisticated arbitration systems (e.g. Germany, the Netherlands, Italy, Scandinavian countries, see Chapter four), but none of these was held up as a model. Note, however, that English common law on revocability had changed by the 1850s, and was being cited in New York courts as early as 1872. The change in the law, however, would have to wait another 40 years. Clearly, then, normative transmission alone was not sufficient to shift policy.

Finally, let us consider the extent to which policymakers and firms deferred to lawyers. It is widely recognized in the secondary literature that the 1925 Federal Arbitration Act essentially rubber-stamped the 1922 draft ratified by the ABA (Macneil 1992; Drahozal 2002). Indeed, this was the conclusion of the Supreme Court in its review of the legislative history of the FAA. What is less well recognized, however, is that the ABA draft essentially replicates the provisions of the 1920 New York law, adding in the provisions that were not necessary at the state-level because of the existing New York Commercial Code. What is even less well understood, however, is that the 1920 New York law is based closely on the draft law proposed by the New York State Bar Association, and that this, in turn, is essentially the same as the bill originally proposed by the New York Chamber of Commerce in its 1914 Annual Meeting. In other words, the bills enacted in New York and at the federal level may have been drafted by bar associations, but

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these were as much rubber stamps as the final legislative votes. The true originator of the policy was the New York Chamber.

To be precise, Cohen, a lawyer, was the drafter of all these initiatives. Given the technical nature of the subject, it was inevitable that Bernheimer would need to rely on Cohen’s technical expertise. The key question, however, is whether this deference allowed Cohen or lawyers in general to shift policy outcomes away from the goals sought by material interests. It does not appear that such slippage occurred, as both the New York and federal bills rather precisely enact the goals sought by the New York Chamber and its allies. Given what we know of the working relationship between Cohen and Bernheimer, it is reasonable to conclude that the former was enacting the latter’s goals, and not vice-versa (see above).

6. The Depression, the New Deal, and the War (shadow case)

The years between the economic collapse of 1929 and the end of WWII led to few changes in American dispute resolution institutions. The most significant developments were the institutionalization of the arbitration community that had emerged in the reforms of the 1910-1920s, and the construction of linkages between that community and its counterparts abroad, particularly in the Western Hemisphere. The period also witnessed the first ideological criticism of arbitration based not in the common law doctrine of judicial supremacy, but in post-1929 left-leaning ideology that emphasized the role of the state as a check on corporate power. Each development is described in turn.
6.1 The Inter-American System and other transnational linkages
As noted in Chapter four, Latin American states were the first to negotiate a multilateral treaty, the 1889 Treaty of Montevideo, that committed them to mutual enforcement of foreign arbitral awards. This commitment would be reiterated by the 1928 Havana Convention on Private International Law (the “Bustamonte Code”), the 1940 Montevideo International Procedural Law Convention, and the 1975 Panama Convention. The United States only joined the last of these, and only significantly after it had acceded to the New York Convention.

However, multilateral conferences (the various inter-American meetings that would coalesce into the Organization of American States after WWII) served as an important springboard for transnational linkages, with US actors taking a leading role.\textsuperscript{25} In 1923, at the Fifth International Conference of American States, delegates took note of the recent formation of the ICC’s International Court of Arbitration and adopted a resolution calling on chambers of commerce around the region to promulgate arbitration facilities. They also called for an investigation into the possibility of a similarly international court within region (Norberg 1969; Barrera 2007).

These ideas were repeated at Havana Conference of 1928. A resolution was adopted that

\begin{quote}
Recommends that Chambers of Commerce be organized in the commercial centers of the Americas where there exists a movement of trade whose importance justifies the establishment of such associations, and recommends that these Chambers of Commerce create amongst themselves agreements for extrajudicial arbitration of mercantile
\end{quote}

\textsuperscript{25} Indeed, the only transnational institution to emerge between the United States and Latin American actors that did not have a multilateral origin was the 1915 agreement between the US Chamber of Commerce and the Bolsa de Comercio of Buenos Aires.
disputes…and also recommends that the Inter-American High Commission study the concept of obligatory arbitration as a means to resolve the disputes that occur between merchants domiciled in different countries (Barrera 2007).26

In 1931, at the Fourth Pan-American Commercial Conference (a spin-off of the main conference series) delegates yet again called for a study of commercial arbitration in the region, including an exploration of regional arbitral machinery. This time action was taken, with the AAA taking the leading role.


26 Original text: “recomendar que se organicen Cámaras de Comercio, en los centros comerciales del continente americano en donde exista un movimiento de exportación e importación cuya importancia justifique el establecimiento de tales asociaciones y que estas Cámaras de Comercio celebren entre sí convenios para el arbitraje extrajudicial de los controversias mercantiles (…) y también recomendar a la Alta Comisión Inter-Americana (…) el estudio del principio del arbitraje obligatorio como medio de resolver las diferencias que se suceden entre comerciantes domiciliados en diferentes países…
This group was then validated at the 1933 Montevideo Conference, which adopted a resolution stating

with a view to establishing even closer relations among the commercial associations of the Americas entirely independent of official control, an inter-American commercial agency [shall] be appointed in order to represent the commercial interests of all the Republics, and to assume, as one of its most important functions, the responsibility of establishing an inter-American system of arbitration (Norberg 1969).

In practice, however, the AAA and the Council on Inter-American Relations (a US-based public affairs group, since dissolved) were tasked with implementing this idea (Domke 1949). No new organization was created. Instead, the AAA-designed Inter-American Commercial Arbitration Commission (IACAC) became the officially recognized arbitration body. The first “official meeting” of the IACAC was held in New York on September 27, 1934, and included representatives from Ecuador, Mexico, Bolivia, Guatemala, and Nicaragua (New York Times, September 28, 1934, p. 17). Spruille Braden, a US businessman and diplomat, served as its chair.

The Inter-American system, however, never really received the level of usage its founders envisaged. By 1970 the institution had only handled some 2,600 cases, or an average of 76 per year (Norberg 1969). This would lead the organization to significant soul-searching in the mid 20th century. In 1965 the head of the AAA gave a lecture titled “Inter-American Commercial Arbitration: Unicorn or Beast of Burden?,” noting that inter-American arbitration had grown far less than trade. This forced the organization to consider whether the mere “trickle” of inter-American arbitration cases meant there was
in fact little demand for such dispute resolution institutions, making them more of a fanciful legal construct than a commercial workhorse (Straus 1965). Some contemporary observers attributed the lack of cases to ignorance amongst businessmen, and thus suggested “greater emphasis on education and publicity among business and professional groups as to the nature and potential advantages of arbitral legislation and regional facilities” (Goldman 1965). Straus, in contrast, cited a contemporary survey by Harvard Business School that found that two-thirds of businessmen in the manufacturing industry were familiar with arbitration, while 100 percent of traders and bankers were. The survey also found that 50 percent of respondents believed arbitration was generally better than litigation, while 82 percent said it was always better for certain issues (e.g. licensing agreements, investment contracts, etc.). Straus therefore concluded that inadequate national laws, not lack of demand, were the chief barriers to using arbitration. Despite reforms, the same conclusion was reached by the Director-General of IACAC twenty years later (Norberg 1984). Nattier (1985), in contrast, speculates that arbitration experts and legal elites may be unaware of the true needs and preferences of potential users.

During this period the AAA also formed transnational partnerships with the Manchester Chamber of Commerce (1931), the ICC (1939), and the Canadian Chamber of Commerce (1943). Only the last of these is particularly significant in terms of the amount of trade actually covered.
6.2 Arbitration Becomes Increasingly Institutionalized and Legalized

With the founding of the AAA in 1926, arbitration acquired permanent institutionalization within US business and legal circles. The organization devoted a significant portion of its budget to education and outreach, funded by a large grant from John D. Rockefeller, seeking to alert the public, business, and lawyers to the benefits of arbitration (Kellor 1948). As noted above, significant efforts were made to recruit the legal profession to the cause, and many law schools began offering courses on the subject. In 1930 Wesley A. Sturges, who would become dean of Yale Law School, published *Commercial Arbitrations and Awards* (Vernon Law Book Company, 1930), a definitive treatise on the subject, decidedly pro-arbitration, that would become the dominant text in the field (Kellor 1948).

Recall that the Association represented a compromise between these two approaches to the subject, combining Bernheimer’s business-focused version with the more legalistic approach of the Arbitration Society. The former sought simply to resolve business disputes quickly and efficiently; the latter aimed to create a parallel legal system. Over the next decades, however, the legal elements came to dominate. This is clear in the rhetoric of the AAA, but is born out most strongly in the nature of its arbitrators. According to Auberbach,

“Lawyers participated as counsel in Association arbitration at a steadily ascending rate (from 36 percent in 1927 to 91 percent twenty years later). The greater the financial amount in dispute, the more likely lawyers were to appear as arbitrators. Consequently, commercial arbitration, historically
an alternative to legal control, quickly and increasingly resembled formal legal dispute settlement.” (Auberbach 1983, p. 111).

As a professor of business law at Harvard noted in a review of Sturges’ treatise, “There is irony in the fate of one who takes precautions to avoid litigation by submitting to arbitration, and who, as a reward for his pains, finds himself eventually in court fighting not on the merits of his case but on the merits of the arbitration.” The result is a “monumental tragicomedy” (quoted in Auberbach 1983, p. 111).

The increasingly legalized nature of AAA arbitration does not seem to have prevented business from relying on it however, as is discussed in the postwar section below.

6.3 The New Deal Critique

But even as the legalization of arbitration brought it further from its origins in the business community, scholars on the left began critiquing it as a way for commercial interests to evade public law. Philip Philipps, a counsel to the National Labor Relations Board (a New Deal federal institution charged with protecting workers’ rights, especially vis-à-vis collective bargaining), penned a harsh attack on arbitration in the Harvard Law Review in 1934:

In business disputes the judiciary ought to be more than a mere automaton, whose sole duty is to furnish the process to enforce the jurisdiction of business tribunals—and to defeat thereby their own jurisdiction—and to enforce without question the awards of business arbitrations and thereby to prevent themselves from determining social and competitive policy by reasoned decisions. Business arbitrations may be essential, but proper balance and strict control by courts is imperative (Philipps 1934, p. 591)
A similar piece appeared at the end of the period in the Yale Law Journal, penned by another government lawyer. Kronstein condemned arbitration practitioners for promoting “a new and separate law of national and international commercial groups, unhampered by legal tradition or restrictions imposed by municipal law” (p. 36) and concluded, somewhat histrionically:

“An instrument of cartels and monopolistic trade associations, modern arbitration appears not only to be incompatible with general concepts of positive law, but even to attack in principle the practical mandates of the Constitution” (Kronstein 1944, p. 68).

These voices were, however, marginal. Beyond these two authors, no outright critiques of arbitration can be found in the contemporary law journals registered with the Hein Online legal library. Mainstream legal opinion was moving decidedly in favor of arbitration, a process that would culminate in the postwar period.

7. Postwar

The postwar period has seen two major developments within American dispute resolution institutions. First, between the late 1960s and mid 1980s the Supreme Court effectively federalized arbitration law, eliminating state-level restrictions on the autonomy of private awards, and establishing a uniform and high level of deference to arbitral authority throughout the country. Second, the United State’s commitment to arbitral independence was internationalized in a series of postwar bilateral treaties, the 1958 New York Convention (ratified 1970), and the 1975 Panama Convention (which contained similar provisions but targeted the Western Hemisphere, and entered into force in 1990), as well
as in the jurisprudence of the Supreme Court. The result is a firm embrace of arbitration in American policy, and a corresponding embrace amongst businesses and law firms. While it is impossible to say what percentage of American firms’ cross border transactions rely on private arbitration, it has clearly increased over the postwar period, and now represents a substantial portion of the United States’ crossborder commerce.

These changes took place under a new moment in the United States’ international political economy characterized by economic and political hegemony and rapid globalization. Immediately following the war, American firms dominated markets around the world as their industrial base and human capital emerged from the conflict not only unscathed, but amped to wartime capacity. But the rapid postwar growth of Europe and Japan soon created a diverse array of competitors, as well as large new markets. This growth, along with technological changes and the diffusion of liberalization under American-led institutions, created an unprecedented level of global economic exchange. By the late 1970s the US economy had reached the level of openness (measured in trade/GDP) achieved in the pre-WW1 era. And as the US-led liberal order became truly global following the collapse of the Soviet Union and deepening interdependence, nearly a quarter of the nation’s GDP was generated by exports and imports by the start of the new millennium.
Figure 25: US postwar trade (source: WTO)

![US trade, 1960-2011](image)

Figure 26: US postwar openness (source: WTO)

![US openness, 1945-2009](image)
The great era of institution building that followed the Second World War affected American disputes resolution policy, but only tangentially. In the wake of WWII the
United States moved to secure alliances with a variety of countries that were thought to be at risk of communism or to face domestic or regional forces inimical to US interests. NATO and the Marshall Plan are, of course, the focal points of this policy, but it also resulted in a range of bilateral commercial treaties with an assortment of medium and small countries (Wilson 1949). These instruments also sought to assert the rights of US investors and merchants in foreign jurisdictions, functioning as precursors to the bilateral investment treaties that would emerge in the 1960s (Walker 1958).27

Between 1946 and 1956, commercial treaties were signed with China, Korea, Japan, Iran, Israel, Ethiopia, Colombia, Haiti, Nicaragua, Uruguay, Denmark, the Federal Republic of Germany, Greece, Ireland, Italy and the Netherlands.28 Of these, only the treaties with Ethiopia and Uruguay did not include provisions for the mutual recognition and enforcement of commercial arbitral awards. The first such treaty, with China in 1946, involved extensive consultations regarding dispute resolution with business and legal groups, and seemed to set a pattern for the others. As a State Department official involved in negotiating the treaties noted, “In effect, the treat[ies] afford a bilateral medium through which the general objectives sought in the Geneva instruments [the 1923

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27 The first “real” BIT, as the term is commonly used, would not arise until the late 1950s.
Protocol and 1927 Convention] are being subscribed to by additional countries” (Walker 1958, p. 64).

In 1958 the United States participated in the conference that would lead to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but with no intention of joining the resulting treaty or contributing much to its development. Because the negotiation process is discussed in Chapter Four, here I focus on its ratification, which—despite the US negotiating position—occurred 12 years later.

While the US Council of the ICC urged passage immediately after signing, and in 1960 the American Bar Association passed a resolution calling for its adoption, the treaty remained moribund until the late 1960s. Then on April 24, 1968 President Johnson transmitted the treaty to the Senate asking for advice and consent. He noted that “there is substantial support for United States accession to this convention among members of the business community concerned with international trade” (Johnson 1968). The Committee on Foreign Relations held a hearing on February 9, 1970 at which only a representative of the State Department testified. The Committee took note of a “number of communications from lawyers and businessmen urging early and favorable action” on the bill, and stated, “so far as is known, there is no opposition to bill” (Fulbright 1970). The Committee on the Judiciary also issued a favorable report on June 11, 1970 (Rogers 1970), and the implementing legislation was passed by both houses of Congress in summary fashion.
Five years later, the United States and its regional neighbors negotiated the Inter-American Convention on International Commercial Arbitration ("Panama Convention") through a specialized conference of the Organization of American States on private international law. The Convention is broadly similar to the New York Convention, but targets the Western Hemisphere (in 1975, the only members of the New York Convention in the Western Hemisphere were the United States, Mexico, and Trinidad and Tobago). Unlike the New York Convention, however, it states that if parties fail to specify the arbitral rules in advance, the rules of the Inter-American Commission on Commercial Arbitration will apply.²⁹ And while it requires mutual enforcement of arbitral awards, it is less precise than the New York Convention about what grounds for denying enforcement are permissible. The United States signed the treaty in 1978, ratified it in 1986, but did not pass implementing legislation until 1990. The implementing legislation creates a hierarchy within US law. If a majority of parties to a dispute are citizens to countries in which the Panama Convention applies (e.g. a dispute between a US firm and a Latin American firm), then US courts will enforce the award as per the Panama Convention. Otherwise, the New York Convention will apply. This means that most inter-American disputes are technically ruled by the Panama Convention, though the practical effects are largely the same (Erickson, Gupta et al. 2005).³⁰

²⁹ IACAC had adopted the UNCITRAL arbitration rules, so effectively the treaty promoted arbitration as defined by that body.
³⁰ The House Judiciary Committee Report accompanying the implementing legislation for the Panama Convention stated that "the New York Convention and the Inter-American [Panama] Convention are intended to achieve the same results, and their key provisions adopt the same standards, phrased in the legal style appropriate for each organization. It is the Committee’s expectation . . . that courts in the United States would achieve a general uniformity of results under the two conventions." H.R. Rep. 101-501, 101st Cong., 2d Sess. 5 (1990), reprinted in 1990 U.S. Code Cong. & Adm. News 675, 678.
In the meantime, significant changes were taking place in position of the Supreme Court vis-a-vis arbitration. At the beginning of the postwar period the Supreme Court was not prepared to grant unlimited autonomy to arbitral institutions. In *Wilco v. Swan* (346 U.S. 427, 1953), the Court was asked to reconcile a conflict between the Federal Arbitration Act of 1925 and the Securities Act of 1933. The former allowed parties to elect arbitration over litigation, but the latter guaranteed customers of financial products the right to hold brokerages accountable in court. The Court argued that the kind of complex legal reasoning required to protect consumers under the Securities Act was inappropriate for arbitrators to perform, given that they were not required to state their reasons or have their decisions reviewed by higher courts. The Court wrote that, “Determination of the quality of a commodity or the amount of money due under a contract is not the type of issue here involved,” suggesting that it viewed arbitration as most appropriate for those types of basic commercial applications.

But starting in 1967, with *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (388 U.S. 395, 1967), the Court began to take a different approach. The case asked the Court to review a decision of a district court to force parties to arbitrate a dispute in which Prima Paint Corp. was accused of defrauding Flood & Conklin Mfg. Co. The original contract had included a very broad arbitration clause, which the district court had interpreted as empowering the arbitrators to decide any pertinent facts, including whether or not fraud had occurred. The Supreme Court agreed, creating the so-called “separability” doctrine, in which the validity of the arbitration clause is the only matter that might prompt judicial interference. All other determinations, including the determination of fraud, were the
responsibility of the arbitrators, a significant step beyond the mere “determination of the quality of a commodity or the amount of money due” envisioned in Wilco. This rule also had the effect of chipping away at state-level restrictions on arbitration, and thus contributed to the federalization of arbitration law.

The Court’s ruling represented a significant embrace of the position outlined by the AAA in the amicus curiae brief it had filed, and in arguments AAA lawyers had made in court (the arbitration in question was to take place under the AAA’s auspices). The reaction by the arbitration community was extremely enthusiastic. The Chairman of the New York Bar Association’s Committee on Arbitration called the decision a “giant step towards making commercial arbitration more useful to American businessmen” (Coulson 1968).

In 1974 the Court took an even larger step and completely reversed its holding in Wilco in Scherk v. Alberto-Culver Co. (417 U.S. 506, 1974). The case involved a contract between an Illinois firm and a German citizen who had agreed to sell it several businesses based in Europe. As in Wilco, the Court was asked to decide whether the Federal Arbitration Act made an agreement to arbitrate truly irrevocable, or if some other situation might nonetheless allow courts to block arbitration. Not only did the court not find any “special” provision, as it had in the Securities Act, that created a public policy interest in preventing arbitration, it identified “crucial differences between the agreement involved in Wilko and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement.”

The principle is similar to the idea of compétence-compétence in international arbitration, in which the arbitrator has authority to determine his own authority. Importantly, however, the Court does not refer to this principle.
Given that confusion over the location and nature of dispute resolution across borders was inevitably complicated, “A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.” Moreover, “A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.” In other words, the Court found a public policy reason to *enhance* the autonomy of arbitration in international cases.

In an extensive footnote, the Court acknowledged the influence of the New York Convention on its reasoning. It declared its conclusion “confirmed by international developments” including the treaty, and noted that “the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.” Importantly, the Court did *not* rule that it was bound to apply the treaty under the supremacy clause of the Constitution, instead it simply noted that the Court’s own fairly radical interpretation was consistent with policy goals ratified by Congress:

Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention...provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.
This nuance is important. Had the Court simply applied the treaty as the controlling law, it would be possible to argue that legal norms had remained subordinate to politically mandated policies. Instead, the Court simply used the NYC as additional evidence to bluster what it saw as the appropriate legal interpretation.

In 1984 the Supreme Court again pushed the doctrine forward in Southland Corp. v. Keating (465 U.S. 1, 1984), ruling that the Federal Arbitration Act, which it had interpreted so broadly, “governs th[e] issue in either state of federal court.” This rule fully federalized arbitration law in the United States, completing what had begun in Prima Paint by eliminating existing state-level restrictions entirely. Chief Justice Burger, writing for the Court, determined that the legislative history of the FAA showed that Congress had in fact intended this outcome all along, a revisionist interpretation loudly criticized as poor history by scholars and some colleagues on the bench. Justice O’Connor, in her dissent, stated, “The Court’s decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.” Though some arbitration advocates have found additional evidence for Burger’s position (Drahozal 2002), this critical view reflects mainstream legal opinion (Macneil 1992). In other words, the Court saw fit to federalize arbitration despite what most lawyers consider somewhat dubious reasoning.
Just the next year the Court again affirmed the special place of international arbitration in US law in Mitsubishi v. Soler Chrysler-Plymouth (473 U.S. 614, 1985), which upheld the right of Mitsubishi to have its dispute heard in arbitration before the Japan Commercial Arbitration Association, despite the claim of the Puerto Rican car dealer Soler that the contract violated its rights under the Sherman Anti-trust Laws. An earlier case (American Safety Equipment v. J.P. Maguire & Co, 391 F.2d 821, 1968) had held that anti-trust issues were too sensitive to be entrusted to arbitration, especially abroad:

"issues of war and peace are too important to be vested in the generals, . . . decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community -- particularly those from a foreign community that has had no experience with or exposure to our law and values."

But now the Court struck down this argument, concluding that

"concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context."

It also noted that, "since this Nation's accession in 1970 to the [New York] Convention…and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act…federal policy applies with special force in the field of international commerce.” Moreover the court seemed of the opinion that that arbitrators would possess the necessary expertise:

International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly. We decline to indulge the presumption that the parties and arbitral body
conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

The conclusion was reinforced by the amicus curiae brief submitted by the ICC that the arbitration panel was composed of “three Japanese lawyers, one a former law school dean, another a former judge, and the third a practicing attorney with American legal training who has written on Japanese antitrust law.”

Moreover, the Court noted that the New York Convention allowed courts to not enforce arbitral awards that violate public policy, but that such considerations could not be allowed to prevent arbitration from going forward in the first place. Since Mitsubishi, US Courts have maintained a high degree of deference to arbitration tribunals, especially in crossborder disputes. In 1990 a district court upheld an ICC award against a US oil company that had failed to fulfill a contract with the Libyan National Oil Corporation because of US sanctions against that country (National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800).

7.1 Use of Arbitration in US transborder commerce

How much do businesses use the strongly pro-arbitration system that has emerged in the United States? For the reasons discussed in chapter one, the question is difficult to answer. Anecdotal evidence suggests that arbitration is widely used today, and its use has increased significantly over the last two decades.
A study conducted just after World War II found widespread evidence of arbitration amongst US business (Mentschikoff 1961). The author found

“In a survey of trade associations in which we received 547 relevant responses, 34 percent…indicated that their members made individual arrangements for arbitration; 29 percent indicated that they used some type of organized machinery, including the American Arbitration Association; and 26 percent reported that their members never arbitrate” (Mentschikoff 1961, p. 849).

The author also had access to the American Arbitration Association’s case record for 1947-1950. During that period, 1883 commercial cases were filed and 1740 cases processed. Of these, 626 were settled before hearing, 82 were settled after the hearing, and 1032 went to an award (Mentschikoff 1961, p. 858). While she does not provide statistics, the author claims that “this number of arbitrations is somewhat greater than the number of cases of a comparable nature filed in the US District Court for the Southern District of New York” (Mentschikoff 1961, p. 858), though note that this does not include comparable cases in state courts.

Another study in the mid 1960s (Lazarus, Bray et al. 1965) estimated that arbitration was growing at a rate of 10 percent per year, with a total of 3858 commercial cases submitted to the AAA between 1961 and 1964 (65 percent in New York). Interestingly, nearly four times as many people (18,000) appeared on the AAA’s roster of official arbitrators in the mid 1960s, an estimated 20 percent of them lawyers (Lazarus et al 1965, p. 68). The study also found little knowledge of arbitration amongst business executives. A sample of 173 corporation presidents revealed that 82 percent had little to no knowledge of
arbitration. Only seven percent reported participating in an arbitration themselves (Lazarus et al. 1965, p. 42).³²

By the mid 1990s, however, these figures had grown significantly. Lipsky and Seeber (1998) surveyed the general counsels of Fortune 1000 companies in the United States at the end of 1995, receiving a remarkable 60 percent response rate.³³ They found that 80 percent of firms had used arbitration at least once in the past three years, 21 percent frequently or very frequently, 33 percent rarely, and 42 percent occasionally. Some 60 percent of firms reported having engaged in arbitration related to sales contracts (see table 19). Firms also cited the usual efficiency reasons for employing arbitration (see table 20).

| Table 18: Types of disputes put to arbitration (source: Lipsky and Seeber 1995, p. 11) |
|------------------------------------|-----------------|
| Employment                        | 85.0            |
| **Commercial/contract**            | **62.2**        |
| Construction                      | 40.1            |
| Personal injury                   | 31.8            |
| Real estate                       | 25.5            |
| Product liability                 | 23.3            |
| Intellectual property             | 21.0            |
| Environmental                     | 20.3            |
| Consumer rights                   | 17.4            |
| Corporate finance                 | 12.3            |
| Financial reorganization          | 8.1             |

| Table 19: Reasons companies arbitrate disputes (source: Lipsky and Seeber 1995, p. 17) |
|---------------------------------------|-----------------|
| Required by contract                 | 91.6            |
| Saves money                          | 68.6            |
| Saves time                           | 68.5            |
| More satisfactory process            | 60.5            |
| Has limited discovery                | 59.3            |
| Uses expertise                       | 49.9            |
| Preserves confidentiality             | 43.2            |

³² Unfortunately, the authors do not provide sufficient information to assess the robustness of these findings. They state that a random sample of 500 business was polled, earning a 35 percent response rate. ³³ The authors demonstrate that the respondents were broadly representative of the Fortune 1000 in terms of firms size and industry.
More recent attempts have been made to judge scope of arbitration by analyzing the contracts firms employ in their international dealings. Random samples of contracts are not possible to obtain, but some useful sources have nonetheless been found. Eisenberg and Miller (2007) look at 2858 contracts American publicly owned companies filed with the U.S. Securities and Exchange Commission (SEC) in 2002, the largest and most general sample of contracts that has been studied in this way. Surprisingly, considering the frequent claims about the dominance of arbitration, they find that only 20.2 percent of international contracts contain arbitration clauses. They conclude, “Little evidence was found to support the proposition that these parties [large, listed firms] routinely regard arbitration clauses as efficient or otherwise desirable contract terms” (Eisenberg and Miller 2007).

Drahozal and Ware (2010), however, challenge these claims. They point out that the contracts studied by Eisenberg and Miller include exactly the types of agreements for which arbitration is most rare—mergers, securities purchases, credit commitments, underwriting agreements, and other “material” issues. Because these issues are often fundamental to the very survival of a company, firms tend to prefer the more elaborate legal procedures and protections offered by public courts, they argue (Drahozal and Ware

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34 As Drahozal notes, there have been numerous studies of on the treatment of arbitration in specific types of contracts (e.g. employment), but not a general sample, and not attuned to international, as opposed to domestic arbitration. Drahozal, C. R. and S. J. Ware (2010). "Why Do Businesses Use (or Not Use) Arbitration Clauses?" Ohio State Journal on Dispute Resolution 25.
Arbitration, instead, is thought to be more regular in more mundane contracts like sale-of-goods agreements, construction, and joint ventures. This example highlights the difficulty of obtaining useful samples from the TCA universe. Eisenberg and Miller’s sample is large, and was quite labor-intensive to gather and analyze. But selection problems make it difficult to draw strong generalizations from the data.

7.2 Rationalist

Can any of these shifts be attributed to economic interests, desirous of better dispute resolution procedures, lobbying policymakers? First let us consider the level of demand for arbitration predicted by R1. As argued in Chapter four, US firms were likely, on average, to occupy a uniquely strong market position in the immediate aftermath of the war. Indeed, even the AAA, noting the ICC resolutions of the early 1950s calling for a possible treaty on the subject, doubted that American commercial interests would be interested (Domke 1952). This advantage quickly eroded, however, with European and then Japanese recovery. R1 would thus expect an increase in demand for arbitration amongst US firms from the mid- to late-1950s. As noted above, surveys of American firms in the 1960s, 1990s, and 2000s indicate significant usage of arbitration.

Would this demand for arbitration lead firms to seek policy change? It is important to note that already in 1945 a number of existing arrangements made US awards effectively enforceable in key trading partners’ jurisdictions. For example, UK courts had long recognized US awards without incident, and the 1943 agreement between the AAA and the Canadian Chamber of Commerce had created contracts that were enforceable in both
jurisdictions. Figure 29 displays the percentage of US trade covered by these types of arrangements for the period in question. In 1948 just 30 percent of US trade was covered, meaning that many US businesses were operating without authoritative arbitral institutions. By 1958, however, just under half of US trade was being conducted without guarantees of arbitral authority, thanks in large part to the bilateral agreements with Germany, Japan, and other trade partners (and the continued growth of trade with the UK, Canada, and other countries with previous arrangements). As argued in Chapter four, this likely contributed to the lack of enthusiasm for the New York Convention on the part of the US business community and the State Department. As the AAA’s lead figure on international arbitration noted, “a move for the United States’ adherence to a multilateral convention is not urgent at all, since recently the modern bilateral commercial treaties of this country have undertaken to facilitate the use of international trade arbitration” (Domke 1952, p. 548).

After the negotiation of the New York Convention, the amount of US trade in which arbitration was not protected dropped further, as many countries agreed to enforce foreign arbitral awards unilaterally. In 1969, the year before the New York Convention was ratified in the US, only a third of US trade had no guarantee of arbitral authority. But because a number of other countries (e.g. France) had declared they would only apply the Convention on a reciprocal basis, US ratification in 1970 still produced a sizeable reduction in this uncertainty, with the percentage dropping to just a quarter of US trade (figure 29). This percentage was brought even lower following the spate of ratification in the 1980s and 1990s, particularly in South America. For this reason, joining the Panama
The United States

Convention in 1990 only enhanced the enforceability of US awards in El Salvador, Honduras, Paraguay, and Venezuela, as the other Latin American countries were either already members of the New York Convention, or had yet to join the Panama Convention themselves. Joining the Panama Convention therefore did not have an appreciable effect on the amount of US trade conducted without arbitral enforcement.

Considered in these aggregate terms, both the series of bilateral treaties and the New York Convention had the practical effect of enhancing the standing of arbitral awards for a large portion of US traders. The same cannot be said for the Panama Convention, and indeed some of the bilateral treaties—e.g. Haiti and Nicaragua—involved almost negligible levels of exchange. As a first approximation, however, we can conclude that the major bilateral mechanisms and the New York Convention are consistent with the interests of US traders.
Figure 29: US trade and arbitral enforcement postwar

**Percentage of US trade with countries in which US arbitral awards not enforceable**

- **US trade and foreign enforcement of US awards, 1948-1971**
  - Mil USD
  - All trade
  - Non-enforceable trade
Second, for R2 to apply we should observe firms lobbying for the bilateral treaties and for ratification of the New York Convention, at least. Some limited lobbying does indeed occur, but not necessarily where and when R1 expects. As early as 1942, the National Foreign Trade Council adopted a resolution recognizing that facilities for arbitration existed at the national level, and in relations with the other American states, but calling for a global system:

The Convention [meeting of the Trade Council] recommends that the National Foreign Trade Council collaborate with the American Arbitration Association, the Inter-American and Canadian-American Commercial Arbitration Commissions, the International Chamber of Commerce, and such other international organizations as those named may invite, for study of the plans and facilities in effect at the beginning of World War II and, as projected, with a view to making recommendations for a complete worldwide system of commercial arbitration, to be instituted as part of the post-war reconstruction.” (State 1944)

It is likely the AAA took the lead in presenting this resolution and in the subsequent follow-up. Mr. Paul F. Fitzmaurice of the AAA contacted the State Department about its plans in this regard on October 23, 1942, because they wanted to “keep in step with Government policy.” The government response was non-committal (Duggan 1942).

Nothing more seems to have come of these plans, but it is important to mention them because it seems to have placed the idea of commercial arbitration into the State Department’s postwar thinking.

A year later, in December 1943, Woodbury Willoughby, the Chief of the Far Eastern Section of the Division of Commercial Policy and Agreements wrote to the National
Foreign Trade Council proposing the development of arbitration machinery vis-à-vis China.

I have been giving some thought to the problems that will face American business in its relations with China when trade channels are reopened. I am told that your Council recently has held meetings at which such problems have been discussed. I am wondering whether in the course of these meetings, or at other times, your organization or any of its members have devoted particular attention to the possibility of developing machinery for arbitration of commercial disputes between Americans and Chinese in China. It occurs to me that this device might if acceptable to Chinese authorities offer a supplementary means of facilitating commercial relations especially in the early post-war years when conditions may be expected to be unsettled" (Willoughby 1943).

This exchange developed into series of communications between the Foreign Trade Council, the AAA, and the State Department. In June 1944 the AAA presented Willoughby with a memorandum proposing the inclusion of arbitration clauses in the commercial treaties the Department was then contemplating (Willoughby 1944). The government’s response was generally enthusiastic:

In view of the withdrawal of extraterritorial rights in China, study is being given in the Department to the possible use of commercial arbitration as a device to facilitate the settlement of disputes in China between American and Chinese business firms after the war. The Department of Commerce is greatly interested in the subject and has recently set up a new section to study Chinese commercial legislation. It is believed that the Chinese will feel generally favorable toward the idea of the use of arbitration in this connection since in the past they have settled most of their commercial disputes by methods similar to the occidental conception of conciliation and arbitration” (State Department 1944, p. 14).

The first of the postwar treaties—the one with China, signed in 1946—includes provisions for the mutual recognition of arbitral awards, though the enforcement
language is not very strong. The inclusion of pro-arbitration language at all, however, seems to clearly have resulted from the interactions between the AAA, some business groups, and Willoughby.

Linked to the treaty negotiations was an effort business groups and the AAA were leading to establish a joint arbitral commission with China along the lines of the Inter-American or US-Canadian agreements. This effort was initiated by business groups and arbitration advocates loosely organized as the Liaison Committee of American Businessmen Interested in the Promotion of Trade and Commerce between China and the United States. In 1945 this group sent the State Department a memo entitled “Memorandum on a Proposed Conference of Chinese and American Business Men Relating to the Creation of a Joint Chinese-American Trade Arbitration Commission.” (Committee 1945) The memo was signed by executives from Bank of America, International Harvester, General Electric, IBM, Chase National Bank, the San Francisco Chamber of Commerce, as well as a few lawyers engaged with the National Foreign Trade Council and the director of international arbitration at the AAA. It noted the group’s desire to create a joint Chinese-American Arbitration Commission modeled along the lines of the Inter-American or Canadian agreements, and requested that the State Department pursue this proposal with the Chinese government.

Despite the low level of trade between China and the United States, the businessmen cited straightforward material reasons for creating such an institution:
“American Business anticipates a marked increase in the volume of trade between the two countries after the cessation of the present hostilities in the Republic of China. We believe that a sound foundation should be laid during the coming months for the restoration and expansion of that trade. Of very real importance to the amicable development of this trade is provision for the friendly adjustment and settlement of commercial controversies” (Liaison Committee 1945, p. 1).

The State Department acted quickly on this request, forwarding the letter to the Embassy in Chongqing, which in turn passed it on to “the relevant authorities” (Gay 1946).

The negotiations did not get very far, however, due to the disorganization of the Chinese government and its preoccupation with the civil war, which re-started in earnest in 1946. In June 1946 the AAA asked the State Department to follow up with the Chinese government, which had been unresponsive. The Consul General in Shanghai met with Li Ming, the chair of the committee the Chinese government had appointed to look into the matter, and reported that Li “had been to Nanking on two different occasions to discuss the subject with the minister of Economic Affairs…the new Minister informed him that he was not familiar with the subject and suggested that Li Ming write him in regard to the subject.” He does not appear to have written back (Robison 1946).

In December 1946 an executive of the Shanghai Power Company (an American-owned firm operating in Shanghai) wrote to a colleague at the American and Foreign Power Co. in New York, a businessman active in the Liaison Council. The representative of the Shanghai company noted that negotiations were taking place with the wrong individuals (he does not elaborate) and suggested that negotiations be re-started on an official track with the Ministry of Economic Affairs. (Hopkins 1946). The State Department duly
facilitated this new approach, but by the end of 1946 the negotiations had yet to begin. A letter from the Ministry of Economic Affairs to the China-America Council of Commerce and Industry reported that the government was organizing a Chinese Arbitration Board, and that once it was ready, an agreement with the AAA could be worked out (Pan 1946). In early 1947 the plan was abandoned; the State Department reported that the AAA and its business partners “felt that political conditions are so unsettled at the present time that it would not be worth while to push the project” (Willoughby 1947). US assistance to the Nationalist government was cut off later that year following a series of disasters, and two years later Mao proclaimed the People’s Republic of China.

In sum, for the China treaty the logic of R2 is well supported. Though US trade with China was small, businessmen anticipated future growth. The end of extraterritorial privileges and the weakness of Chinese legal institutions put any future contracts at risk of non-enforcement. And the geostrategic importance of China ensured that the State Department had an interest in facilitating the trade connections American businesses desired.

Interestingly, the China treaty is the only treaty for which we observe significant interest group mobilization related to arbitration, and China is the only country for which the State Department is called upon to assist in setting up joint arbitral facilities. The records

35 State Department placed enormous geopolitical emphasis on the country, given the ongoing civil war and the emerging prospect of a global struggle against communism. An internal memo stated, “The importance of defining clearing our economic objectives with regard to China is emphasized by certain new conditions which will face the United States at the end of the war.” These included the end of treaty port system, which expired in 1945 State (1945). A Suggested Program: Interdepartmental Committee on Economic Policy toward China. Records of International Conferences, Commissions, and Expositions. Washington DC, US National Archives. RG 43 Box 22 Entry 698.
of the State Department do not contain similar evidence of interest group engagement for any of the other 15 treaties concluded over the next decade, although they involved countries with far more sizeable trade relationships. Despite the absence of documentation, it is likely that the State Department conducted some consultation with relevant business interests in negotiating the treaties. However, it seems clear that business interests did not choose which countries State would approach or push to sign commercial arbitration agreements.

Rather, the pro-arbitration policy was included in what the Department termed the “standard formula” for the commercial agreements it pursued in the first decade after the war. The development of this formula was the responsibility of the Legal Affairs department, which laid out its reasoning in a 1946 memo (State 1946). The memo notes that the agreement with China, the basis of the “standard formula,” “does not establish an unmistakably definitive rule” (State 1946, p. 1) regarding the enforceability of foreign arbitral awards. The memo suggests that having stronger pro-arbitration language would be “pragmatic,” but also notes that to do so would overrule existing “common-law doctrine.” The author then takes an extensive analysis of the enforceability of foreign awards in various US states, and finds that “A review of American cases affords no evidence that even those state courts that are bound by traditional common-law doctrines would be embarrassed at being directed to enforce arbitration awards rendered abroad” (State 1946, p. 8). Satisfied that stronger arbitration provisions in the “standard formula” would not contradict US legal norms, the memo goes on to recommend that the US make explicit commitments to enforce arbitral awards (on a mutual basis) in future treaties.
Beyond the general invocation of the “pragmatism” of the treaty, concrete commercial benefits go unmentioned.

In sum, then, while the logic or R2 applies to the China treaty, the rest of the batch of pro-arbitration bilateral treaties the US developed before the negotiation of the NYC cannot be explained by an interest group mechanism.

What about the New York Convention? Chapter four explains the lack of interest group lobbying around the negotiation of the treaty—the State Department considered the US Council of the ICC to be the only interest group truly invested in the treaty—but perhaps an uptick in lobbying can account for the treaty’s ratification in 1970? This does not seem to have been the case.

Shortly after the treaty’s negotiation, Clifford Hynning, Chairman of ABA Section of International and Comparative Law, sent out a letter soliciting comments on the Convention from prominent businessmen. Unfortunately, we do not know how many letters were sent or how many responses were received, or what balance of opinion they contained, as we only have records of the letters that Hynning thought were sufficiently supportive to include in his lobbying materials. Some responses were indeed quite enthusiastic, including those from the Aluminum Company of America, B.F. Goodrich, Mobil Oil, and the Minnesota Mining and Manufacturing Co (later 3M). Few of the letters, however, go beyond basic platitudes in favor of arbitration. The American &
Foreign Power Company (which had been involved in the Chinese efforts, see above), was particularly revealing:

“Of course, I have no idea how many nations will sign the Convention, or to what precise extent the Convention will change the various degrees of legal recognition given to arbitral awards at the present time. But if the Convention makes it easier for businessmen of different countries to enforce their agreements, and collect their claims, it seems to me obviously of benefit to international trade and investment, and I see no reason why the United States should not take advantage of it” (H.W. Balgooyen of American and Foreign Power Co. December 23, 1958).

In other words, it seemed like a desirable policy, but the company did not seem to know very much about the implications the policy would have for its bottom line. Tellingly, the longest and most detailed letter, from the Minnesota Mining and Manufacturing Co., was written by that company’s general counsel, and focuses mainly on the legal intricacies the New York Convention would require to be implemented in the United States.

Hynning also reached out to George Haight, the head of the US section of the ICC, who promised him, “I am anxious to do all that I can to assist in arousing support for it in this country” (Haight 1959). While this was nominally a business group, Haight himself was a New York lawyer, the general counsel for Royal Dutch Shell’s US affiliate, and had served as an observer for the ICC at the negotiation of the Convention.

Legal groups moved quickly to endorse the treaty. In May 1960 the ABA International Law Section’s Committee on International Unification of Private Law, of which Hynning was chair, made a detailed study of the treaty and recommended accession. In September
1960, the ABA House of Delegates adopted a resolution putting forth this recommendation, along with some draft language for how the treaty might be implemented in the United States. In November Haight announced this endorsement at a press conference.

With such support, he said, proponents of the move were expected to be able to overcome the two objections held by the Department of State; namely, that the participation by the United States in the convention was not really important and that such participation might violate state laws. The latter objection, he explained, was nullified by the ABA’s endorsement on Sept 1. At that time the ABA recommended passage of legislation that would remove conflicts between treaty and domestic law (*New York Times*, November 30, 1960, p. 51).

It seems, however, that only the latter objection had been overcome, as nothing more occurred for some years, though Hynning and Haight pressed the subject in a series of legal articles.\(^{36}\)

Recall that the AAA had been somewhat tepid toward the Convention at the time of its negotiation. While it certainly did not oppose it, it seemed that the organization felt it would be of little practical effect for American businesses. For unknown reasons, this stance changed in 1966, when the organization passed a resolution urging US accession and collected a list names declaring support for it, including 26 business people (a handful from major firms) and 37 lawyers (Straus 1966). The letter noted, “Because the

\[^{36} \text{In 1962 they wrote in the ABA journal “It would be a paradox if the United States, the country with the world’s largest foreign commerce and investments, were to fail to join in a multilateral effort, such as this, to stabilize and encourage further development by assuring American traders and investors that their contracts for the settlement of disputes will be recognized, and that arbitral awards in their favor will be enforced, not only in the United States but in all thither countries adhering to the Convention” Hynning, C. J. and G. W. Haight (1962). “International Commercial Arbitration.” *American Bar Association Journal* 48: 236-239.} \]
The United States has not acceded to the UN New York Convention of 1958, there now exists an unfortunate and unnecessary barrier to the enforcement of properly executed American awards abroad.”

This prompt provoked a favorable response from the State Department, which put the treaty to a new internal group, the Secretary of State’s Advisory Committee on Private International Law. This group included “members designated by the American Bar Association, the American Law Institute, the American Branch of the International Law Association, the Association of American Law Schools, the American Association for the Comparative Study of Law, the American Society of International Law, the National Conference of Commissioners on Uniform State Laws, the Judicial Conference of the United States, the Conference of Chief Justices, and the Department of Justice” (Katzenbach 1968). In other words, the major legal groups in the country. This group approved accession, but suggested some technical reforms to the implementing legislation.

Following State Department approval, Johnson submitted the treaty to the Senate for its advice and consent on April 24, 1968. The accompanying letter summarized the extent of support for the treaty as:

1. The 1960 ABA endorsement
2. 9 letters from companies solicited by Hynning
3. the 1966 letter from Staus including the AAA’s official endorsement, and the list of businessmen and lawyer supporters

The treaty was approved without discussion or dissent (114 Cong. Rec. 29605, 1968).
Before it could take effect, however, implementing legislation was required in both the Senate and the House. The ABA and the Secretary’s Advisory Committee on Private International Law took until the end of 1969 to finalize the legislation, at which point it was submitted to the House and Senate (Fulbright 1970; Rogers 1970) with the explanation that it represented the consensus view amongst lawyers for how to put into effect the treaty approved by Senate in 1968.

A hearing held before the Senate Committee on Foreign Relations on February 9, 1970 demonstrated the absolute lack of knowledge legislators had regarding the treaty, and the low salience of the issue. Richard D. Kearney of the Office of the Legal Advisor, Dept. of State, was the only witness called (Kearney 1970). Kearney himself had served as the US representative to the United Nations International Law Commission. After explaining the treaty, Kearney was asked by the Chairman, senator Fulbright of Arkansas, an unrelated question regarding the International Court of Justice.

Chairman [Fulbright]. Is it contemplated that any of the arbitration awards may be submitted to the World Court?
Kearney. No, Mr. Chairman.
Chairman. The World Court has nothing whatever to do with it?
Kearney. Nothing whatever.

---

37 “The reason, Mr. Chairman, was that the American Bar Association had prepared or suggested some implementing legislation, and we thought that was perfectly adequate. But before we sent it up we had it checked by the Advisory Committee on Private International Law, which has representatives of all the major legal organizations on it, and the judges and practicing lawyers on the committee decided that if we scattered these different sections around through titles 28 and 9 that it would make it more difficult on the practicing lawyer and the judge to handle cases of this characters. So they suggested that we get together a committee of experts in order to review the proposals of the American Bar Association and put them into, in effect, one chapter or consider how best we could do it, and we had several meetings with experts on this” (Kearney 1970, p. 9-10).
Chairman. I thought perhaps the parties who make the agreement could agree to submit it to the World Court believing that they might get a more impartial view there. Are they restricted or prohibited from doing this?

Kearney then explained that the ICJ only heard disputes between states. Once this basic issue had been clarified, Kearney stated,

“The basic reason that we propose this legislation and to become party to the Convention is because the people engaged in foreign trade consider arbitration is a very economical and speedy way of settling commercial disputes and they are the ones who wanted this.”

None of the senators questioned this rationale, with Fulbright simply agreeing, “Correct. It is a more sophisticated way of dealing with these matters” (Fulbright 1970). The remainder of the discussion deteriorated into a tangent on the role of ambassadors at IOs, before turning back to a general discussion of the ICJ.

None of this ignorance, however, prevented the Committee from reporting out the implementing legislation, which it did the following week. The report notes, “so far as is known, there is no opposition to the bill” (Fulbright 1970). On June 11, 1970, the House Committee on the Judiciary issued a similar report, and both bills were approved on July 31, 1970.

In sum, then, we observe almost no business groups advocating arbitration. While some number of business men (35, according to my count of the available documentation) voiced support for the treaty, it was legal groups that asked them for their opinion in the first place. Policymakers, for their part, were content to accept this token gesture of
business support, and clearly evinced little knowledge of the treaty they approved. This offers strong proof against R2 with respect to the New York Convention.

Third, contingent on demand for arbitration in foreign trade, we expect to observe firms lobby policymakers to push arbitration on the home countries of trade partners. Again, there is no evidence that this occurred, except for with China, as discussed above.

7.3 Ideational

The changes in American policy toward dispute resolution in this period are best explained by ideational mechanisms.

First, we must observe a pro-arbitration norm come to dominate the American legal field during this period via a process of legal contestation. Indeed, in legal journals there is a diminishment of critical voices during this period (Jalet 1959). The last full-throated attack of the kind seen in journals in the 1930s and 1940s is another piece by Kronstein, discussed above (Kronstein 1963). Indeed, by the end of the 1950s, an observer was able to write, “The doctrine of judicial jealousy, if in fact it ever had existence except in the constant repetition of the vacuous phrase, met with a strong rebuff in the 1950s when lawyers and scholars alike rose in protest and a plethora of articles appeared in law reviews and other legal publications” (Jalet 1959, p. 526). The doctrine had also been undermined by changes in state laws. In 1925, at the time of the passage of the Federal Arbitration Act, only New York and New Jersey boasted “modern” commercial arbitration laws. By 1965, twenty-one states had such laws, making up the majority of the
nation’s economic heft.\textsuperscript{38} Crucially, these changes in elite attitudes were fairly established before the shift in the Supreme Court’s reasoning between 1967 (\textit{Prima Paint}) and 1985 (\textit{Mitsubishi}), though these cases of course served to further validate the norm and enshrined it in policy.

Second, I would expect linkages between the key actors pushing for policy change in the United States and the transnational epistemic community concerned with arbitration. This was not the case, apparently, for the treaty with China or the bilateral efforts that followed it. Such linkages were closely observed, however, with respect to the New York Convention. The early advocates of accession, Hynning and Haight, were deeply involved in questions of private international law. Hynning of the ABA served as Chair of the Committee on the International Unification of Private Law of the ABA’s Section of International and Comparative Law. Haight was the head of the US section of the ICC, and also chaired ABA’s Committee on British Commonwealth Law as well as the American Society of International Law’s Committee on Legal Aspects of Foreign Investments.

These personal linkages were part of a larger trend in the United States to embrace questions of private law in multilateral fora. As one observer at the time noted, “In 1963, the United States departed from its traditional policy on the unification of private law in general by deciding to participate in the Hague Conference on Private International Law and the Rome Institute for the Unification of Private Law (UNIDROIT)” (McMahon

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1971). The government also negotiated the ICSID treaty during this time. In other words, the United States was becoming increasingly connected to pro-arbitration organizations abroad. McMahon (1971, p. 737) states that the US change of heart on NYC “was, no doubt, also prompted by the change in the basic United States policy toward multilateral agreements on private law matters.”

Third, we would not expect to observe firms or policymakers demonstrating precise knowledge of the material implications of institutional alternatives. As the discussion of business lobbying—or lack thereof—and the congressional hearings demonstrate, neither of these groups could see significant costs or benefits from the institutional alternatives. Instead, both relied entirely on lawyers to select policy.

Fourth, we should observe legal experts, not economic interest groups, initiate policy proposals. This implication is perhaps observed most clearly in the present sub-case. Consider first the bilateral treaties. While it was clearly economic groups who urged the China treaty forward, it was government lawyers who expanded the arbitration provision and applied it to the treaties that followed. The anonymous author of the 1946 memo on the “standard formula,” a lawyer in the State Department’s Legal Affairs Office, seems to have been the most immediate initiator of the series of pro-arbitration treaties that followed the 1946 agreement with the China.

The ratification of the New York Convention, in turn, was clearly driven by legal interest groups. It was Hynning (of the ABA) who first sounded out business interests on the
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matter, and then the legalized AAA that recruited more businessmen in 1967. The only business group involved was the US section of the ICC, and even this group was a) headed by a lawyer and b) took direction from its legal allies. Moreover, the “lobbying” process had a decidedly legal tone. The key decisions were taken not in Congress or even amongst the bureaucracy, but in the Secretary of State’s Advisory Committee on Private International Law, a group representing only legal elites.

Finally, it is likely that the court’s judgment in *Prima Paint* (1967) consolidated support for accession amongst legal elites in the lead-up to ratification. Recall that, traditionally, the State Department had opposed both the Geneva treaties and the New York Convention on the grounds that it could not make multilateral commitments on behalf of the states. *Prima Paint* not only consolidated pro-arbitration norms in official jurisprudence, it also partially federalized arbitration law by narrowing the restrictions states could place on awards. A government lawyer noted: “The principal obstacle to ratification that the delegation to the 1958 Conference saw was the difficulty in fitting it into existing United States law.” There was

“…this fear existing in 1958 that joining the Convention, even with appropriate federal implementing legislation, would be an excessive intrusion into matters of state concern has been largely dissipated by further development of federal arbitration law in the interim. It is now well established by such decisions as those in *Robert Lawrence Co. v. Deonshire Fabrics, Inc.* (1960) in the Second Circuit and the *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* (1967), that the Federal Arbitration Act established as federal substantive law the proposition that agreements to arbitrate within its scope are valid, irrevocable and enforceable” (van R. Springer 1969, p. 327).
8. Conclusion

The evolution of commercial dispute resolution institution in the United States shows both the importance of material incentives for shifting institutional arrangements, and also the ways that institutions, once entrenched in legal fields, can persist and, indeed, develop at some remove from the interest groups whose needs they serve. Table 20 summarizes the findings across sub-cases.

**Table 20: US results**

<table>
<thead>
<tr>
<th>Case</th>
<th>Dependent variable</th>
<th>Demand hypos consistent with outcome?</th>
<th>Supply hypos consistent with outcome?</th>
<th>Mechanism observed?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>R1</td>
<td>I1</td>
<td>R2</td>
<td>I2</td>
</tr>
<tr>
<td>Colonial era</td>
<td>Mix of non-enforced arb. and litigation</td>
<td>Y</td>
<td>Y</td>
<td>Y-Y</td>
</tr>
<tr>
<td>Independence</td>
<td>Mix of non-enforced arb. and litigation</td>
<td>.</td>
<td>.</td>
<td>.</td>
</tr>
<tr>
<td>Takeoff</td>
<td>Privately enforceable arb. and emergence of hybrid system</td>
<td>Y</td>
<td>N</td>
<td>Y-Y</td>
</tr>
<tr>
<td>Depression</td>
<td>Enforceable arb. and hybrid system; growth of transnational linkages</td>
<td>.</td>
<td>.</td>
<td>N-N</td>
</tr>
<tr>
<td>Postwar</td>
<td>Enforceable arb. and hybrid system; international institutionalization</td>
<td>Y</td>
<td>Y</td>
<td>Y-Y</td>
</tr>
</tbody>
</table>

The colonial era represented a relatively static period, with dispute resolution performed by both public and private institutions, depending on the needs of the particular case. Cases for which authority was more important than efficiency went to public courts, while cases in which speed mattered more than enforceability could be handled more effectively by arbitration. Given this situation, we might expect, under R1, merchants to advocate for increased delegation of state authority to private arbitration, as, indeed, they did in later periods. However, this may be explained by the lack of an organized
merchant body for most of the period (until the founding of the New York Chamber of Commerce in 1768), though merchants did successfully lobby the government on other fronts. This explanation is also not particularly satisfying given that this arrangement persisted throughout the post-independence period as well, long after the Chamber of Commerce began operating a general arbitration facility. Nor can the lack of hybridization be explained by I2. Even though dominant legal norms disfavored delegation to private arbitration, and would have resisted an expansion of arbitral authority (as they did in later periods), they were never called upon to do so because the idea was never broached. To be sure, it may be that existing norms and practices were so entrenched amongst the business and legal communities that a hybrid arrangement was simply inconceivable, and it would take far larger shifts in material incentives to bring merchants to new ideas regarding dispute resolution.

Such changes came during the late 19th and early 20th centuries. New York’s rise as the nation’s premiere port and manufacturing center changed the market positions of its primary traders, creating demand for different types of dispute resolution institutions. First, the rise of the grain and other commodity trades in the mid-19th century brought to New York the kind of fully private arbitral systems present in London, Buenos Aires, and other commodity trading centers. This institution combined the efficiency of merchant courts with the authority made possible by the trades’ particular structure, in which a small number of repeat players engaged in repeated, small-value transactions. As long as New York’s trade was dominated by these types of businesses, there was no need to public institutions to become involved in dispute resolution. Indeed, when legally-
oriented individuals, working through the Chamber of Commerce, established a quasi-official Court of Arbitration, it was ignored by the business community.

The rise of the manufacturing trade changed these dynamics. The garment industry, for example, was highly competitive, with many small firms entering and exiting the market. Private enforcement was not possible under such conditions, and the public courts suffered from long delays and backlogs. The conditions were thus ripe, in the rationalist analysis, for a new campaign to build effective, general arbitral institutions, and to seek state support for their decisions. Merchants engaged in the manufacturing, chiefly Charles Bernheimer, worked through a revamped Chamber of Commerce to achieve those goals, and met with considerable success at the state and federal levels. While this campaign ran parallel to contemporary developments in Europe, it was decidedly domestic in scope.

It also clearly followed the rationalist logic, and not the ideational one. It was commercial interests that first proposed the general, hybrid system, and suggested it to legal bodies. Many lawyers quickly adopted the idea, and, indeed, expanded on it, as demonstrated by the private legal system groups like the Arbitration Society would propose. But others remained opposed, even following the statutory changes that enshrined arbitral authority in formal policy. By the end of the period, however, the arbitration norm was well on its way to broad acceptance in the legal community.
Over the next decades, the arbitral institutions and policies built by commercial groups in the 1920s became more institutionalized and more closely connected to legal circles. The AAA, originally conceived as a mix of commercial and legal interests, shifted more toward the latter. By the time “normal” economic conditions returned at the end of WWII, it was mostly lawyers who concerned themselves with arbitration policy, though businesses still made use of the institution, which continued to provide the same functional advantages as before.

The distance between US businesses and arbitration policy is reflected in postwar shifts in the dependent variable. The series of bilateral treaties negotiated after 1945 made arbitration enforceable for large swaths of US trade, but occurred with virtually no interest group lobbying. Indeed, the only time US firms seem to have pushed the government to consider enhancing arbitral institutions was vis-à-vis China, and political developments there soon rendered these actions moot. Instead, the important language supporting arbitration in treaties with, for example, Germany and Japan, came from standard templates developed in the State Department’s Office of the Legal Advisor.

The ideational influence on arbitration policy is also seen in the ambivalence the United States showed to the New York Convention at the time of its negotiation. Though supportive of arbitration in general, the US government thought that it would be unable to commit to a multilateral treaty given the country’s federal nature. It also received no pressure from business groups suggesting a strong material case for US engagement. Indeed, it was only after an evolution in legal norms—exemplified in the 1967 *Prima
Paint case—and an increase in pressure from within the legal community that the United States ratified the treaty.

Subsequent decades reinforced the role of legal actors on arbitration policy. The Supreme Court led the way, building on the jurisprudence it had first laid out in *Prima Paint* to develop a strongly pro-arbitration norm in US policy and to impose it uniformly throughout the country. These changes were compatible with, but not precipitated by, material interests. US firms have made increasing use of this hybrid system, especially following the increasing trade dependence of the US economy. But they have also been content to delegate the institution-building to legal actors.
6. ARGENTINA

1. Introduction

A century before the East Asian economic miracle, a very different type of country was the case *par excellence* of rapid economic development tied to the global economy. At the beginning of the 19th century, Argentina was a backwater province of a dysfunctional empire. By the century’s end, it had become a sovereign state, one of the world’s wealthiest per capita, and a pillar of the British-led global economy. But since the Depression the country has gyred between protectionist, statist policies and laissez faire ones, suffering the excesses of both.

This chapter describes and explains the commercial dispute resolution institutions that undergirded Argentina’s involvement with the global economy. These vary considerably over time, as do the political and economic factors they depend on, making the country a rich laboratory for the study of transborder dispute resolution. Indeed, within-case variation is so substantial that I divide the chapter into six historical periods, each corresponding to a distinct phase in Argentine political economy. In each sub-case I test the relevant “supply” and “demand” hypotheses, asking what institutions merchants and legal professionals demand, why private groups might provide them, and why the state might allow such provision.
The discussion begins in the colonial period, charting the growth of Buenos Aires and its surroundings from a remote trading post to major economic center (sub-case one). Following independence from Spain’s mercantilist policies in 1810 came a forty-year period of war and national consolidation. The state-building project finally began in earnest with the constitution of 1853 (modeling the country on the United States) and unification in the 1860s, backed by a sometimes unstable coalition of nationalist elites and landed interests (sub-case two). The “Oligarchía,” as this coalition was called, guided Argentina through a period of rapid economic growth (1880-1930) under a largely laissez-faire system (sub-case three), but proved unable to survive the transformations this process unleashed. Massive immigration and growth created a new class of rural laborers and, with urbanization, industrial workers, who began demanding the political inclusion the 1853 constitution had promised but never delivered. These pressures were compounded by the global depression, and led to Peronism, Argentina’s populist interpretation of fascism, which dominated politics through the middle of the 20th century, albeit punctuated by conservative military coups (sub-case four). During this period the State—under a variety of governments—took a much larger role in the economy, nationalizing key sectors and developing import-substituting industries financed by agricultural exports. These fluctuations also categorized the postwar period (sub-case five), but by the 1970s the pendulum began to swing back the other way, first under the last military government and then in the newly democratic Argentina of the 1980s and 1990s (sub-case six). The embrace of neoliberalism reached its apex under the Menem government that ran the country in the 1990s, but then diminished following the currency crisis and recession of 2001-2002.
Alongside these changes we can observe a shifting mix of public and private institutions and authority governing Argentina’s commercial disputes, the dependent variable. To summarize, the newly independent state grandfathered in the colonial system, in which a private merchant guild, the Consulado, was delegated by the Crown to resolve commercial disputes. In the mid 19th century this body was gradually absorbed into the public judicial system as part of the state-building process. But as Argentina became the world’s leading exporter (per capita), private authority again became more common. The trend reversed again following the crisis of the 1930s and the Peronist years, during which the export sector was nationalized, only to shift back toward the private end of the continuum in the postwar period and, increasingly, under the neoliberal regime. Today, private dispute resolution institutions provide both adjudication and—via the structure of the primary export industries—enforcement for Argentina’s transborder contracts. At the same time, however, Argentine law remains less arbitration-oriented than might be expected, and domestic firms show relatively little interest in the practice. Complicating the picture, Argentina has had an often tumultuous relationship with foreign creditors and investors. Arbitration procedures have often been called on resolve these sovereign credit and investment disputes, associating the institution with the nation’s most complicated and controversial international economic disputes.

The core finding across the sub-cases confirms the importance of material interests on dispute resolution institutions. Argentina’s trade has historically concentrated in commodities like grain that possess market structures amenable to private enforcement of
Argentina

arbitral awards. Beginning in the late 19th century, such institutions have allowed Argentina to function as a leading grain exporter despite the relative weakness, bias, or inefficiency of its domestic court system.

Given the longstanding existence of an effective private option, Argentine exporters have almost never had an incentive to lobby the state to delegate more authority to private tribunals. Nor have foreign interests or their home states sought to impose such institutions. In other words, because of the effectiveness of private institutions, and given the opportunity for arbitrage between public and private institutions, interest group politics and international bargaining have not shaped policy outcomes. Rather, those changes that have occurred in Argentine policy regarding dispute resolution reflect the efforts of the internationally-linked epistemic community of arbitration experts (I2). Because their influence over policymakers has been only partial, state delegation to arbitration has similarly lagged international norms.

The point, however, is that the existence of private alternatives means that this heterodoxy has not adversely affected Argentina’s ability to serve as one of the world’s most important exporters for more than a century. These findings offer an important explanation for a seeming paradox in contemporary Argentine political economy. Since the 2001 economic crisis, the Argentine government has restricted the property rights of foreign investors (most recently the Spanish company Repsol was deprived of its majority stake in the national oil company YPF), causing a flurry of investment arbitration cases. But at the same time Argentina has continued to grow as an agricultural
exporter. The existence of viable private institutions largely explains this seeming contradiction.

2. Explaining transborder dispute resolution in Argentina

Historical scholarship of commercial dispute resolution in Argentina remains relatively scarce. But though a comprehensive and detailed account has yet to be produced, even a relatively cursory investigation shows that, in the words of the leading scholar on the subject, “The historical evolution of arbitration in Latin America…confirms the influence of exogenous political and socio-economic factors on the shaping of ideas and attitudes affecting the growth of international arbitration in the region” (Naón 2004, p. 128).

Recall the relevant hypotheses from Chapter Two in table 22.

| Table 21: Hypotheses and observable implications |
|-----------------------------|-----------------------------|
| Hypotheses | Chief independent variables | Observable implications |
| **R1+2** | 1. Market position of dominant interests groups  
2. Policy and efficiency of courts  
3. Relative power of home state | 1. Demand for arbitration when  
a. Firms operate in open, dynamic, uncertain markets  
b. Arbitration more efficient than litigation  
2. Demand for public support for arbitration when market structure does not allow private enforcement  
3. Arbitral institutions emerge when demand conditions arise (in terms of neutrality and efficiency)  
4. Public support for arbitration only when dominant domestic policymakers are responsive to pro-arbitration firms  
5. Lobbying process is observable  
6. Contingent on demand for arbitration in foreign trade, firms lobby policymakers to push arbitration on home countries of trade partners |
| **I2** | 1. Strength and scope of legal fields  
2. Norms dominant within a field  
3. Policymaker uncertainty over cost/benefit | 1. A legal field exists  
2. Following an observable process of legal contestation, a certain norm for dispute resolution comes to dominate the legal field  
3. A legal field is more likely to embrace a pro-arbitration legal norm the more linkages it has to legal fields embracing similar norms. |
4. Prestige of experts amongst relevant policymakers
4. Firms and policymakers within the same legal field should exhibit the same behavior
5. Neither firms nor policymakers should demonstrate precise knowledge of the material implications of institutional alternatives.
6. Firms and policymakers should describe their behavior in terms of legal appropriateness
7. Legal experts initiate policy proposals

The six sub-cases have been chosen to follow the most common periodization used in Argentine historiography. Five correspond to distinct epochs in the organization of the Argentine state (colony, state-building period, fragile democracy punctuated by coups, both pre- and post-war, institutionalized democracy), but one, which I have termed the Golden Age, is instead distinguished by the radical change in Argentina’s location in the global economy. Happily, dividing the historical record in this way produces variation in the dependent variable without corresponding precisely to changes in dispute resolution institutions (i.e., without selecting on the dependent variable). Moreover, it seems reasonable to assume that the basic organization of the Argentine state and the agriculture boom of the late 19th century are both exogenous to the institutions for transborder commercial dispute resolution, so we do not need to worry that the division of sub-cases is affected by the dependent variable.

In each sub-case I first present a brief summary of the key explanators and dispute resolution institutions, and then consider the relevant demand and supply hypotheses. While some data limitations make it difficult to give equal consideration to each hypothesis in each case

3. The colonial legacy: A hybrid medieval system
The commercial stagnation of the Spanish Empire endowed Argentina with, literally, medieval institutions for dispute resolution. It is worth reviewing the colonial period in some detail, both because it offers a demonstration of the interaction between public and private power at a time when these concepts were first acquiring their modern connotations, and because its influence is clearly seen in later institutions. It also confirms the central rationalist principle that economic actors arbitrage across institutional forms to select the one that conforms most closely with their needs.

With no significant ore mines or population centers, the grasslands along the River Plate remained economically and politically marginal for the majority of the colonial period. The region’s natural fertility, however, allowed settlements to thrive, and permitted the export of various agricultural products, especially hides (Tjarks 1962). This nascent trade was sharply limited by Spanish commercial policy, however, which banned commerce with other countries and funneled all colonial trade through the official Casa de Contracción (House of Trade) in Seville (and later Cadiz), a crucial source of revenue for the Spanish Crown. Moreover, the growing commercial center at Buenos Aires, despite being a natural Atlantic port, was forced to route all trade overland to Potosí and the capital of the viceroyalty at Lima, a route that more than doubled the distance a good would travel to reach Spain (Socolow 1978; Zamora-Pierce 1991; Kraselsky 2007).

Despite this mercantilist regime, the dispute resolution institutions governing colonial trade blended public and private authority. From the medieval period until the 19th century, all Spanish commerce relied on a system of consulados, or merchant guilds, to
resolve disputes (Becú 1966; Zamora-Pierce 1991; Woodward 2007). Each trading city
had its own consulado, governed by an assembly of the local merchants who elected
officers from amongst themselves. As we have seen in the introduction, this system
predated the Spanish empire by approximately five centuries (Díaz-Melián de Hanisch
2001).

A primary responsibility of the consulado was to resolve commercial disputes through
their tribunal, in which merchant judges, elected by their peers, applied various laws.
First amongst these were the Ordenanzas de Bilbao, a body of law developed by the
consulado of that city (though building on previous codifications of merchant custom
dating all the way back to the Amalfian Code and, before that, Roman law). In 1511 the
Ordenanzas were adopted, by royal decree, into the law of the realm, remaining in effect
in Spain until the Spanish Commercial Code of 1829, and longer in Spain’s offshoots
(Díaz-Melián de Hanisch 2001). It was only replaced in Argentina with the commercial
code of 1862.

Buenos Aires acquired its consulado in 1794. The royal decree establishing the body
granted jurisdiction over

“traders or merchants, their partners and agents, over their negotiations in
commerce, purchases, sales, exchanges, securities, accounts, the chartering
of ships, factories, and other things that are known, or ought be known, by
the Consulado de Bilbao, according to its ordinances.” (Tjarks 1962, p. 63).1

1 Original text: “…commerciantes o mercaderes, sus compañeros y factores, sobre sus negociaciones de
comercios, compras, ventas, cambios, seguros, cuentas de compañías, fletamentos de naves, factorías y
demás en que conoce, y debe conocer el Consulado de Bilbao, conforme a sus ordenanzas.”
Within this jurisdiction, the Consulado applied a variety of laws, including Spanish laws passed after 1794, the norms contained in the royal decree chartering the Consulado, the Ordenanzas de Bilbao, the Leyes de Indias (Spanish colonial laws), and the Leyes de Castilla (the old laws of Castile). Amongst these, the Ordenanzas de Bilbao were the most applicable, complete, and authoritative, although more recent royal decrees technically took precedence (Becú 1966). During the colonial period, then, private actors resolved disputes in private courts applying laws generated mostly privately, but with the official endorsement of the state.

Like other merchant courts, the Consulado relied on oral and summary procedure, dispensing justice quickly. The Tribunal consisted of three members, a prior and two consules, and met three days per week. Cases were typically resolved in a single day, with minimal fact-finding and testimony, and scarce documentation (an obstacle to historians). The first aim of the Tribunal was to reconcile the parties amiably. If this proved impossible, the court deliberated and rendered a binding judgment. All hearings and decisions were made in secret (Tjarks 1962, pp. 66-68). These procedures contrasted sharply with the public courts of the time. According to one later observer,

“Whoever has known the thick sheaves of administrative and judicial documents of our colonial era, in which the same concepts and arguments are repeated several times, often in vain, will recognize the juridical rejuvenation that the commercial forum brought to the River Plate” (Tjarks 1962, p. 68).²

² Original text: “Quien haya conocido los frondosos legajos administrativos y judiciales de nuestra era colonial, donde se repiten varias veces los mismos conceptos y se promueven los mismos argumentos, por causas tantas veces futiles, reconocerá la trascendencia y la renovación juridical que introduce el fuero comercial en el Río de la Plata.”
While the *Consulado*’s private nature offered these sorts of functional advantages to merchants, it was also clearly a hybrid entity, depending on public authority in at least two ways. First, like modern TCA, it relied on public authorities to enforce the decisions it came to. Those who failed to comply with the *Consulado*’s rulings—by all accounts a rare phenomenon—were compelled to do so by the public courts, which had the power to invoke police authorities (Tjarks 1962, p. 68). Second, some types of cases offered merchants a right of appeal to a specially constituted public court, the *tribunal de alzadas*, formed of top judge of the viceregal court and two of his colleagues. This option was possible for cases in which more than 1000 pesos were in dispute, or when the case involved “the honor, interests or other circumstances” of the merchants, a clause broad enough to give the public authorities ample discretion over their involvement in the merchants’ court, although such intervention seems to have been rare (Tjarks 1962).

It is important to note that *consulados* were not only dispute settlement institutions, possessing a broader bundle of functions that made them somewhat parallel to modern chambers of commerce. They were meant to foment commerce and industry, and to serve as a kind of corporatist mechanism for the Crown to bargain with the commercial sector over, for example, contributions to the war coffers (Kraselsky 2007).³ *Consulados* thus provided a forum for merchants to organize as an interest group and through which to advance their collective interests vis-à-vis the government and other groups, such as landowners.⁴

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³ However, these other traits were typically not acquired until the 18th century (Tjarks 1962, p. 62).
⁴ Interestingly, though, in 1797 *hacendados* (land-owning farmers) were invited to join the Buenos Aires *Consulado*, bringing a strong pro-free trade block into the body Becú, R. Z. (1966). *Historia del Derecho Argentino*. Buenos Aires, Editorial Perrot.
The Crown’s acceptance of private authority over commerce had limits, of course, the most important being the mercantilist policies that restricted trade to a few cities within the Empire. In the New World, consulados were established in Mexico (1594) and Lima (1613), and in Bogotá in the mid 17th century (Becú 1966). The merchants of these cities jealously guarded their trade monopolies from potential competitors. Lima, for example, controlled trade at Buenos Aires from its establishment until the founding of the Buenos Aires consulado in 1794. These restrictions were gradually eroded by domestic political contestation facilitated by international pressures. Bowing to the emerging reality of freer and freer trade passing through Buenos Aires, and conforming with liberalizing European trends, the Bourbon kings implemented a series of commercial and political reforms in the 18th century, seeking both to stimulate South American trade (so as to tax it), and to appease increasingly powerful criollo interests (Kraselsky 2007). In 1776 the Crown carved the Viceroyalty of the River Plate out of Lima’s jurisdiction, bringing parts of what is now Bolivia, Paraguay, Uruguay, and Argentina under the command of Buenos Aires. Of equal significance, in 1778 the Spanish American ports were permitted to trade freely with each other and with ports in Spain (if not with foreign nationals), freeing Buenos Aires from the yoke of Lima (Tjarks 1962; Becú 1966; Kraselsky 2007; Woodward 2007). This process culminated with Buenos Aires received its own consulado in 1794.

It is also important to note, however, that truly private—that is, not hybrid—dispute settlement institutions existed in Buenos Aires before the coming of the consulado. In the
mid 18th century merchants formed juntas de comercio, fully private, informal committees that performed functions similar to the consulado, including dispute resolution (Kraselsky 2007). 5

3.1 Rationalist

What did colonial merchants desire from commercial institutions? The mercantilist policies of the Empire created a distinct split between the peninsular merchants and those who controlled the access points at Lima and the criollos of Buenos Aires. The latter had no choice but to sell their goods to the government-backed Casa de Contracción, creating a de jure power imbalance between the two groups. R1 leads us to expect hierarchical markets of this nature to generate demand for dispute resolution institutions supportive of the more powerful group.

In practice, however, the restrictive Spanish policies led to a healthy contraband trade, granting the criollos an exit option and therefore mitigating the power difference somewhat. Over the course of the 18th century, criollo merchants around the River Plate regularly bypassed the mercantilists in Lima and Seville to trade with other Spanish merchants, as well as Brazilian, Dutch, and English merchant-adventurers (Nelson 1945; Becú 1966; Socolow 1978). This practice commanded a premium, however, as smuggling was inevitably more costly than sanctioned trade.

5 Historical records of these institutions remain, to my knowledge, sparse.
Thus, the Crown’s control over colonial trade was absolute *de jure* and weak *de facto*. Local commercial interests were in direct conflict with the mercantilist aims of the metropole, and possessed an exit option—smuggling—that gave them some bargaining leverage. Importantly, the power imbalance changed over time, as Buenos Aires expanded in population and more and more producers sought to take advantage of the fertile pampas. R1 would therefore predict increasing demand for neutral dispute resolution institutions as the merchants of Buenos Aires rose in stature.

Indeed, the growing commercial weight of Buenos Aires was recognized as early as 1756, when the *consulado* in Lima established a special branch (*diputación*) in the city to solve commercial disputes and, less successfully, combat contraband (Tjarks 1962). Though some local merchants, as subjects of the same viceroyalty, were represented in Lima’s *consulado*, many were at odds with the mercantilist orientation that dominated the institution, and so considered its presence in their city an unwelcome imposition (Socolow 1978; Kraselsky 2007). The creation of informal, fully private *juntas de comercio* suggests that local merchants were indeed discontent.

Ultimately, however, local merchants were not satisfied with their informal *juntas* either, as they consistently petitioned the Crown for a *consulado* of their own. Following the Free Trade Act of 1778, all cities in the Spanish Empire were invited to develop *consulados*, and Buenos Aires immediately appealed to the Crown for a royal charter creating a *consulado* in their city. Note that this behavior is not consistent with a more limited, “functionalist” version of R1 that would attribute merchants’ demand for an
institution simply to whichever institution proved most efficient. With the opening of a branch of the Lima Consulado in their city, merchants had at their disposal a technically proficient and effective dispute resolution tool. Nor is the behavior consistent with only an “interest-based” reading of R1, as merchants possessed a dispute settlement facility responsive to their interests in the private juntas. The demand for a local consulado thus suggests that both functional effectiveness and unbiased policy outcomes were important for merchants, as per R1. Moreover, this demand increases with the city’s economic power vis-a-vis the metropole.

What about supply? In general terms, the extension of the consulado system to Buenos Aires suggests a degree of institutional path dependency. The institutional form that had been used to solve transborder commercial disputes across the Empire for centuries was extended to its latest commercial outgrowth. This isomorphism implies that I2 may have been important. However, the process through which the Consulado came to govern trade out of Buenos Aires shows, instead, that material interests and domestic lobbying were the chief drivers, consistent with R2. As discussed above, there was hardly any legal community or “infrastructure” related to commerce in Buenos Aires. The legal experts and administrators of commercial law were the merchants themselves. No independent legal field therefore existed that might have served as conduits for alternative ideas regarding dispute resolution, and no community of experts existed to whom merchants or the state might defer. In other words, predominant legal norms—the consulado system—may have proscribed the institutional form that was chosen, but the historical record suggests that the motivations and drivers were material.
These motivations can be seen, first, in the supply of private institutions. As noted above, merchants demanded a more locally-oriented dispute resolution institution, as per R1. Per R2, these same merchants were not content to wait for the Crown to bestow a *consulado* on them, and instead developed their own informal mechanism, the *juntas de comercio*. As the arbitrage mechanisms of R2 foresees, private actors will form their own dispute settlement institutions when these are able to provide the policy outcomes and functions demanded better than the alternative (the Lima-based *consulado*).

However, the Buenos Aires merchants were not content with their *juntas*. I have not obtained clear evidence to explain this dissatisfaction, but the push for a locally controlled *consulado* is consistent with the idea that the *juntas* were lacking in some way. Police enforcement is the obvious advantage the hybrid *consulado* system added to a merely private body like the *juntas*, and so we would expect merchants to value the former over the latter. R2 holds that merchants would only stay with the (presumably) functionally inferior *juntas* if they lacked the political clout to secure a *consulado* of their own. Indeed, we observe an embrace of the *consulado* system once a local one is created at Buenos Aires.

The establishment of the *Consulado* at Buenos Aires and the liberalization of colonial trade generally were subjects of political contestation within the Spanish Empire, following the logic of R2. As noted above, the *criollos*—not just in Buenos Aires, but across Spanish America—desired free trade and a dispute settlement system responsive
to their interests. The mercantilists in Spain and their agents at Lima stood to lose significantly from such an arrangement, which would destroy their monopoly. According to R2, we should observe the establishment of a Consulado at Buenos Aires when the latter lose the domestic political struggle.

Ultimately it was external pressure on the Spanish court that led it switch its favor from the mercantilists to the colonials in the latter part of the 18th century. With the rise of the British and Dutch colonial trading systems, Spain was in danger of losing not just its standing within Europe but also its vast overseas Empire. The Court decided it needed the loyalty of the economically dynamic colonial merchants if it was to retain control of its far-flung possessions. Even more importantly, it needed them to contribute to the war coffers in order to modernize the sclerotic armed forces (Kraselsky 2007; Woodward 2007). The Consulado was the perfect instrument to achieve this goal. It gave the merchants what they wanted—their own dispute settlement and governance body—and in return established a direct link between the Crown and the most important new economic forces in the Empire. In the last decades of the 18th century, consulados were formed at Manila, Caracas, Guatemala, Havana, Veracruz, Santiago, Guadalajara, Cartagena, and Buenos Aires (Díaz-Melián de Hanisch 2001).

Finally, I consider the possibility that foreign pressure from powerful states may have played a role. As noted above, competitive pressures from the international system were an important driver of Spain’s halting steps toward economic liberalization, and so served as an enabling condition for the establishment of the Buenos Aires Consulado, albeit one
chiefly moderated by the domestic political struggle between mercantilists and criollos. These abstract pressures became quite precise during the Napoleonic Wars, when Buenos Aires fell briefly under British control. R2 predicts that powerful states will seek to force other states to adopt dispute resolution institutions that favor the interests of the merchants of the powerful state. In this case, we would expect the British to push to open the Buenos Aires Consulado to their merchants, and this is precisely what occurred in the first years of the 19th century.

Spain’s alliance with Napoleon had put the colonies of the River Plate at risk of British attacks. Interestingly, however, the first attempt to take South America originated not in London, but from an enterprising group of British military officers serving in South Africa, friends united by previous campaigns and shared Irish origins. Dismayed by French advances in Europe and perhaps sensing an opportunity for career advancement, these commanders took it upon themselves to cross the South Atlantic and invade the River Plate.

The task proved fairly straightforward; Buenos Aires, a city of 40,000 inhabitants, surrendered to a force of 1,600 British soldiers on June 27, 1806 after minimal fighting. The city’s willingness to accept the invaders was likely a result of growing resentment against Spanish authority, including resentment regarding trade restrictions. The significant contraband trade in British goods suggested that at least some colonial traders would stand to gain from inclusion in Britain’s economic sphere (Nelson 1945).
Indeed, the British quickly took steps to ensure commerce continued to flow. One of the first actions of the opportunistic commanders was to send a letter to the merchants of Liverpool advertising the newly opened commercial possibilities (Ferns 1953). On July 7 the British commander called a meeting of the governing council (junta de gobierno) of the Consulado, which, by an ample majority abjured its oath of loyalty to Spain and made clear its desire to continue operating under British authority. (Tjarks 1962, p. 208). As a contemporary observer noted, there was “a visible overlap between the political interests of one side and the mercantile interests of the other, solidly unifying the English General and the River Plate Consulado” (Tjarks 1962, p. 2008). The British set up their own court of appeals to replace the ejected Spanish authorities, and the Consulado acquired some new duties, including the collection of customs duties. Most importantly, Buenos Aires began operating under a free trade regime hospitable to British merchants (Becú 1966).

British rule did not last long, however. The haphazard nature of the invasion and occupation quickly turned the population against their new masters, especially after the occupiers sent the viceregal treasury—full of the residents’ and merchants’ taxes—to England. Comparisons were made to Elizabethan privateering. An irregular militia—vaguely supported by viceregal forces—drove off the British in August. Two years later, similar criollo militias repelled a much larger (and officially sponsored) invasion force.

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6 This action is particularly opportunistic given that the Consulado had previously aided the government in resisting British advances. The viceroy, having appealed to Spain for additional defenses and received no response, had called upon the Consulado to arm merchant ships for the colony’s defense Tjarks, G. O. E. (1962). El Consulado de Buenos Aires y sus Proyecciones en la História del Río de la Plata Buenos Aires, Universidad de Buenos Aires.

7 Original text: “coincidencia visible entre los intereses politicos de unos y los mercantiles de los otros, que unen solidariamente al general ingles y al Consulado rioplatense.”
In the meantime, Spanish authority was nominally restored. A new viceroy arrived in 1809 and, after a sizeable bribe from the pro-mercantilist merchant faction, attempted to end the burgeoning free trade passing through Buenos Aires (Reber 1979). But the metropole’s prestige had been mortally wounded. The following year, with Spanish power effectively destroyed by Napoleon, the United Provinces of the River Plate declared their independence.

3.2 Ideational

At the most basic level, the extension of the consulado system to Buenos Aires was compatible with dominant legal norms, as it replicated the standard institutional form in a new location. However, the process through which this occurred, as discussed above, is better predicted by the rationalist mechanism. None of the observable implications related to process are observed. Changes were initiated by merchants, not lawyers. No new norm arose via a process of legal contestation. And merchants and policymakers alike explicitly justified their arguments in terms of material benefit, not legal appropriateness.

Second, the ideational explanation cannot account for the strictly private juntas de comercio that pre-date the opening of the Consulado. These did not conform to a pre-existing institutional model, nor did they conform to a contemporary Spanish legal principle. Indeed, they seem to have involved no legal professionals at all.

Third, if merchants were indeed only concerned with having the normatively appropriate institutions, they would have likely accepted the diputación of the Lima consulate, which
represented the dominant organizational form in the field of Spanish colonial commerce. Instead, they rejected it as overly biased, and demanded one—functionally and normatively identical—entirely of their own.

Finally, the timing of these changes suggests that purely ideological shifts in the Spanish court (I2, broadly interpreted), while facilitative, were unlikely to have been the chief driver of this liberalization. It is true that several European countries adopted similar policies in the late 18th century, seeking to stimulate trade within their empires but restrict it without. In Spain, the ascent of the Bourbon family to the throne in 1713 brought a modernizing French influence to public policy, and numerous reforms were implemented to try to resuscitate the Spanish economy. But though free (internal) trade was increasingly practiced by nearly every other European power from the late 1600s (for example, it was a goal of Louis XIV’s finance minister, Colbert, and thus a central element of Bourbon policy), Spain only adopted it at the end of the following century in the aftermath of the punishing Seven Year’s War with Britain. Had only ideological influences dominated Spanish policy, it is likely that free trade within the empire would have been adopted with the first package of reforms following the ascent of the Bourbons in the early 18th century.

4. Independence and State-building: The Assertion of Public Authority

Between independence in 1810 and the constitution of 1853, Argentina suffered political disorder, international war with Spain and neighboring countries, and civil war between partisans of a unified system controlled by Buenos Aires and those supporting a federalist
arrangement. During much of this time Buenos Aires was under the control of the federalist Juan Manuel de Rosas, an autocratic caudillo who clashed openly with Britain and France, leading these nations to blockade the River Plate (the French in 1838-1840, though with tacit British support, and both nations in 1845-1848) (Reber 1979). None of these conditions facilitated trade, but commerce did continue, as did the colonial institutions for dispute resolution: the Consulado and the Ordenanzas de Bilbao. Indeed, these institutions persisted despite numerous attempts by progressive nationalists to codify commercial law and strengthen the public court system. Though modified by various new laws, the Ordenanzas de Bilbao continued to govern commercial matters until the development of a modern commercial code in the 1860s. The Consulado also continued operating, though it became gradually incorporated into the state institutions of Buenos Aires (which was a separate juridical entity from the rest of the country for much of this period). However, because public courts were often unfunded, sidelined, or otherwise weak and marginal in the chaotic decades following independence (Zimmermann 1999), in practice the merchant court operated largely as before, when it operated at all.

Then, in the latter half of the 19th century the state solidified its control over dispute resolution. In 1852 Rosas was ousted by a provincial coalition that soon formed a new, federalist constitution based closely on that of the United States. Buenos Aires waited six more years to join the new Argentine Republic. By the 1860s, though, a new generation

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8 Interestingly, the disintegration of the United Provinces led merchant groups in other parts of Argentina to establish their own consulados. See Gandarillas, I. R. G. (2003). "Los comerciantes de Salta a través del Tribunal Mercantil durante el Siglo XIX." Cuadernos de la Facultad de Humanidades y Ciencias Sociales 21: 75-88.
of progressive nationalists deliberately set about the task of building a nation state. Creating an effective system for commercial governance was an integral part of this project, driven by domestic needs to develop the national economy and bring Argentine laws in line with contemporary trends in Europe and North America. International economic relations also played an important role, however. During this period European and North American governments intervened with impunity in Latin America to promote the economic interests of their citizens. This gunboat diplomacy caused deep resentment amongst Latin Americans, who fought to assert national sovereignty over economic disputes with foreigners. In 1862 the Argentine jurist and diplomat Carlos Calvo called for conflicts between foreigners and citizens to be resolved on equal terms in national courts. The “Calvo Doctrine,” as this principle was subsequently named, found its way into many Latin American contracts and even some national constitutions (though not Argentina’s). Developing a national, public rule of law was thus in part a way to put Latin American interests on a more even playing field vis-à-vis more powerful nations.

Before turning to explanation, consider first the key shifts in dispute resolution institutions during the nation-building process. In 1815 the governing junta made the Consulado an official consultative entity to advise the provisional government on commercial matters, and a new Cámara de Apelaciones was created to serve the role that the tribunal de alzadas had played under the Spanish system. As the British had done during their brief control of the city, the new government replicated previous institutions.
Then in 1821 the progressive reformer Bernadino Rivadavia came to power in Buenos Aires—he would later become the first president of the temporarily unified Argentine republic—and attempted to modernize commercial policy and bring it under state control. He created a quasi-official Junta de Comerciantes y Hacendados (Council of Merchants and [land-owning] Farmers) to represent the interests of these groups and promote the new country’s economic development. He also centralized the payment of public employees’ salaries, bringing, for the first time, the Consulado’s staff onto the public payroll. Most importantly, Rivadavia arranged for the Governing Council of the Consulado, the body of elected merchants who ran the institution, to dissolve itself in December of 1821. This change effectively reduced the institution’s ambit to conflict resolution only, and sought to bring even that function into the general judicial system.

However, this effort to increase state capacity was stillborn, as can be inferred from a representative historical work on the period, “The Apotheosis of Leviathan” (Garavaglia 2003). The weakness of the judicial system (judges were essentially not paid), especially, meant that the merchant court kept operating much as before, with merchant disputes continued to be judged by their peers under the Ordenanzas de Bilbao (Calzada 1944). In 1822 Rivadavia recognized the difficulty of reforming the commercial system, noting that though “the government has always had the strong desire, called for by the present state of commerce, for the compilation and approval of a Code to correct the abuses that keep [commerce] in disorder and discredit,” such an effort would not be possible given other, more pressing obligations, like maintaining national unity (Calzada, 1944, pp. 132-133). Given the lack of a credible public alternative, merchants successfully pressed the
government again to maintain the status quo. On the advice of the Consulado tribunal, Rivadavia issued a decree in April of 1822 reaffirming the Consulado’s jurisdiction over “commercial acts” and clarifying what these covered (Calzada, 1944, p. 134). Merchants were therefore happy to go along with the government’s expansion of jurisdiction, but preferred the functional, albeit imperfect system over the government’s overly ambitious ideas.

More attempts at commercial reform were made over the next decades, but none succeeded. Merchants were often at the forefront of these efforts, but, importantly, dispute resolution was never a primary grievance. In 1824 the Governor of Buenos Aires issued a decree naming a commission to develop a code of commerce, but it never met (Cabral Texo 1920). At the start of the 1930s there was a more grassroots push for commercial reform firmly based in the demands of merchants and a newspaper, El Diario de la Tarde, that shared their interests (Cabral Texo 1920; Anzoátegui 1977). Two factors sparked the campaign. First, a wave of bankruptcies and fraud cases in the late 1820s had focused attention on the inadequacy of the Ordenanzas de Bilbao. As a contemporary writer opined, “The Ordenanza [sic] de Bilbao, our mercantile code, would be sufficient for the times and country in which it was created, but not for the country and circumstances in which we live” (Anzoátegui, 1977, p. 173). Second, the creation of the Spanish Code of Commerce in 1829 provided a concrete model of how existing laws could be improved. The campaign got as far as to have the legislature nominate, again, a committee to draft a code, but it never was able to complete its task (Anzoátegui 1977).

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9 Original text: “La Ordenanza de Bilbao, que es nuestro código mercantil, sería bastante en los tiempos y en el estado del país en que fue dictada; pero no la es para el país y circunstancias en que vivimos.”
These attempts at reform came to an abrupt end in 1835 with the re-election of Juan Manuel de Rosas as governor of Buenos Aires, whose personalist, caudillo government precluded the rule of law. The Consulado tribunal continued operating as before, but it, like all institutions, was subordinate to the personal preferences of Rosas. One observer bleakly summarized the situation:

“During the period of tyranny, judicial activity ceased; to the multiple and contradictory Spanish laws were added the vagaries of the era, undermining all attempts to operate; thus, Law and Justice did not take root, and withered on the vine” (Cabral Texo 1920, pp. 8-9).

In 1852 Rosas was ousted by a provincial coalition that soon formed a new, federalist constitution based closely on that of the United States. Buenos Aires waited six more years to join the new Argentine Republic. Commercial codes were drafted simultaneously in Buenos Aires and the provinces in the 1850s, but only Buenos Aires succeeded in finishing its code. The government was motivated both by immediate practical concerns—another wave of bankruptcies had provided yet another reminder of the weakness of the Ordenanzas de Bilbao (Cabral Texo 1920; Cortabarría 2009)—and the more abstract goal of modernizing the country to keep pace with European trends and foment growth.

The code was put to the Buenos Aires legislature on May 1, 1857, and immediately became the subject of heated debate (Cámara 1991). Members of the merchant community were amongst the Code’s critics, labeling it overly theoretical, and noting that
none of their number has participated in its drafting (Cabral Texo, 1920, p. 56). The press also complained bitterly about the 20,000 pesos that had been paid to the drafters. Strikingly, however, these complaints were much more about style than substance. Anzoátegui (1977) notes, “The Sources of the Code of Commerce did not figure as a topic of discussion in the parliamentary debates nor in the press. In this sense there was not a real ideological agenda, as occurred years later with the Civil Code” (p. 323). Indeed, in 1859 the Code was adopted, *without modification*, as the law of Buenos Aires. In 1862, following unification, it was adopted—again unchanged—as the law of the Argentine Republic. Even Uruguay and Paraguay adopted exactly the same Code as their own in following years.

Regarding dispute resolution, the Code explicitly recognized private arbitration (for example, with respect to disputes between partners within a company (Anaya 1994)), but granted very little authority to the institution. In this the Argentine Code followed almost identically the precedents established in the French and Spanish codes. A distinction between legalistic and “amiable” arbitration was made, the former similar to contemporary arbitration in its procedures, the latter a more informal practice closer to *Consulado*-era procedures. No distinction was made between arbitration between foreign parties and domestic ones.

Most importantly, the statist Napoleonic Code and its offspring in the Spanish-speaking world essentially eliminated the ability of parties to commit to arbitration in advance of a dispute. Instead, arbitration was seen as an *ex post facto* phenomenon, something parties
agreed to after a conflict broke out. Parties were able to put arbitration clauses in contracts in advance of disputes, but to actually force a contract-breaker into arbitration, a second agreement had to be struck after a dispute had arose (a *compromiso*). This provision, which effectively neuters the commitment device contained in the arbitration clause, essentially remains in effect today. The historical record has not, to my knowledge, recorded any political controversies surrounding these elements of the Code during its drafting or approval.

4.1 Rationalist

With the end of colonial trade restrictions, merchants found themselves competing with each other and with the foreign merchants now trading freely at Buenos Aires. Few large transactions could be made in the disjoint and unpredictable economy, with foreign commerce still largely focused on the hide trade. R1 would therefore predict demand for neutral dispute resolution institutions, a outcome already met by the continued operation of the local *Consulado*. No change in the orientation of dispute settlement institutions was therefore needed, and indeed, no demands for more neutral institutions seem to have been made. 10

However, the weakness of state institutions and the frequent disruptions of war meant that the hybrid arrangement of the colonial era—which combined private adjudication

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10 However, such demands were made in the provinces that independence had separated from the capital. For example, in the city of Salta in the north west, the disorganization of the Argentine state following independence meant that local merchants could no longer benefit from the Consulado at Buenos Aires. Instead, they petitioned local leaders to create their own *Tribunal Mercantil*, which came into existence in the 1820s. Gandarillas, I. R. G. (2003). "Los comerciantes de Salta a través del Tribunal Mercantil durante el Siglo XIX." Cuadernos de la Facultad de Humanidades y Ciencias Sociales 21: 75-88.
with public enforcement, when needed—was no longer possible. Public courts were often non-functional, governments changed frequently, and police forces were concerned more with rent-seeking and patronage from the caudillo than in law enforcement. R1 would therefore predict that merchants would desire to increase state capacity for enforcement, or, if the option existed, to develop purely private arrangements with market-based enforcement capacity.

Indeed, merchants lobbied the government for better commercial laws and courts thought the first half of the 19th century. Interestingly, they seemed genuinely agnostic between public and private institutions, advocating for whichever arrangement would prove more function under the given set of political circumstances. For example, a grand scheme for a commercial code along French lines was proposed in the Consulado in 1815, but was rejected as impractical given the disorganization of the state (Calzadas, 1944, p. 85). Later, during the 1820s, at Rivadavia was seeking build such a system, merchants demurred and lobbied the government to maintain the Consulado’s dispute settlement function as it was, because they feared (rightly) that the new public courts Rivadavia envisioned would not actually come to be. The 1930 campaign to replace the Ordenanzas de Bilbao with something more functional tried to take advantage of the relative stability that preceded the Rosas regime, but foundered once he came to power. Merchants once again voiced the need for modern commercial institutions in the state-building era of the 1850s, and supported the government’s efforts to draft a commercial code, although they had little influence over it.
Indeed, this impotence is the defining characteristic of merchant lobbying during this period. With the exception of the 1820s, when they persuaded Rivadavia to keep at least the dispute resolution facilities of the *Consulado*, merchants routinely failed to persuade the government to realize their preferred policies. Until the 1850s, this failure was in large part a result of the basic weakness and disorganization of the state, or the patrimonial nature of the Rosas regime. But even after 1850 policy elites did not seem interested in involving merchants in the policymaking process, despite their grandiose visions of bringing prosperity to the pampas. We can thus conclude that rationalist dynamics did not have a large impact on dispute settlement institutions.

4.2 Ideational

Instead, dispute settlement institutions were heavily influenced by a new norm closely connected to the state-building process. From independence onward, nationalist elites and jurists advocated increasing the role of national laws and state courts in commercial policy. These men, products of the decades-long struggle to create a functional country, were committed to the idea of a strong government (Peña 1973). Their views on commercial governance can be traced back to the 1807 Napoleonic Code, which had had a strong effect on civil law countries in Europe and its offshoots (Cabral Texo 1920; Cámara 1991; Zamora-Pierce 1991; Lerner 2002). National commercial codes proliferated across Europe and Latin American in the mid 19th century, reflecting the ideational consensus on what a modern country should look like (Anzoátegui 1977).  

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11 In the late 19th century Anglo-Saxon states began relying increasingly on formal laws to govern commercial matters. A uniform commercial code was first developed amongst the German states in 1848,
There was also an international element to this position. In the 19th and early 20th centuries, foreign powers regularly intervened in Latin America to protect their commercial interests. This “diplomatic protection” was often rationalized on the grounds that domestic legal institutions were weak and biased against foreigners (Summers 1933). In Argentina, charge was, in the eyes of the nation-builders, a fair charge against Rosas, under whose watch the River Plate had twice been blockaded by European powers. The assertion of competent, governmental control over commercial matters was thus necessary to remove the rationale behind foreign intervention.

This was the thesis of Carlos Calvo, an Argentine jurist and diplomat, and very much a member of the nationalist state-building elite, who set forth the dominant view on the continent in a wide-ranging 1862 treatise on international law (Calvo 1870).12 Though this statement postdates most of the events discussed above, it can be thought of as encapsulating the mindset of the entire generation of nation-builders. While in later decades the Calvo Doctrine became a byword for national protectionism in some circles, the views of its namesake are in fact subtle and quintessentially liberal.13 Calvo waxes rhapsodic about global commerce as the “common heritage of humanity,” and denounces barriers to trade as “contrary to the views of Providence,” “attacking the liberty of nations,” and “senselessly damaging the beneficent expansion of civilization” (Calvo,

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12 Here I rely on the French edition published in Paris in 1870, the original being unavailable to me thus far.
13 Naón (2004) provides an excellent discussion and defense of the subtleties of Calvo’s view.
At the same time, Calvo states very clearly that “contracts ought to be enforced, with regard to both their legal value and the effects stemming from their stipulations, by the law of the place where they are concluded” (Calvo 1870, p. 356). However, his justification is based not in parochialism, but in the “moral imperative of nations living in close relations with one another.” This is only possible if contracts are enforced scrupulously in situ, without the diplomatic interference that characterized European and North American interventions in Latin America. Calvo’s point, then, is that sound economic relations between states must rest on a robust and equitable rule of law, not on ad hoc and unjust diplomatic maneuvers (Naón 2004). Moreover, Calvo by no means excluded arbitration from his conception of the rule of law. Indeed, Calvo is supportive of international arbitration “as a solution to certain differences, applicable indiscriminately to all identical cases” (Calvo 1879, p. 114); i.e., when it is fair. His point was rather that public law, upheld by mutual respect between sovereign states, must lie at the heart of this system.

14 Original text: “L’échange entre un pays et un autre des produits bruts ou manufactures qui constituent le commerce international dérive du droit et forme le patrimoine commun de l’humanité… ‘contrarier les vues de la Providence, s’attaquer à la liberté des nations, élever entre elles des barriers artificielles et nuire arbitrairement à l’expansion bienfaisante de la civilization.’ 426-427

15 Original text: “En droit strict, les contrats doivent ètre régis, quant à la valeur légale de leur form et aux effets découltant de leurs stipulations, par la loi du lieu où ils son conclus. Cette règle, déduite de l’axiome lex loci contractus, est fondée non seulement sur la convenance mutuelle des individus, mais encore sur la nécessité morale pour les nations de vivre en relations intimes les unes avec les autres. L’État qui cesserait d’appliquer cette règle s’isolerait du mouvement général de la civilization et retournerait bientôt par une pente fatale à l’état de barbarie des tribus sauvages. Le principe qui fait régir les contrats par la loi du lieu où ils sont conclus s’applique à toutes les conventions humaines et subordonne naturellement la force obligatoire des engagements souscrits au strict accomplissement des conditions qui seules leur assurent une validité légale. Le règle lex loci contractus ne s’aplique toutefois ni au statut personnel, à la capacité proper des contractants, qui ne saurait varier suivant les lieux, ni aux cas dans lesquels son application entraînerait la violation formelle des lois du pays où le contrat doit se dénouer pour recevoir son exécution. Le devoir réciproque des nations ne va en effet jusqu’à laisser violer leurs lois particulières, jusqu’à prêter leur sanction à des engagements qui sont contraires à l’or de public ou à la morale, et don’t rien ne peut effacer le vice et la nullité radical”.

16 The United States and Europeans powers explicitly rejected the Calvo Doctrine, refusing to accept constraints on what they presented as a legitimate right to defend their own nationals from Latin perfidy. Summers, L. M. (1933). "The Calvo Clause." Virginia Law Review 19(5): 459-484. However, the idea that
Policy elites, then, were strongly influenced by new ideas about how to organize the state, and were committed to creating public commercial institutions regardless of merchants’ opinions. This was evident as early as the 1820s, when Rivadavia attempted to erect a modern state apparatus in Buenos Aires by nationalizing elements of the Consulado, though even he realized that his vision outstripped what was possible in that uncertain period.

The ideological commitment of policy elites was also seen in the drafting of the 1857 code, which clearly followed the logic of I2. The legislature commissioned respected jurists as the code’s authors, who spent five years preparing a draft. They saw their task as devising the most well-researched, modern, and technically proficient code possible.

Sársfield, the principal author, told the Buenos Aires legislature, “in this Code there is not a single idea of my own; each word here has been seen by ten, twenty, or thirty jurists, in all the codes of the world, in all eras” (Cámara 1991, p. 112). Cosmopolitanism was an explicit goal; the authors stated their desire to create a law that “conformed to the greatest number of Nations that traded with Buenos Aires” (Anzoátegui 1977, p. 333).


17 Original text: “en este Código no hay una sola idea mía, cada palabra que está aquí tiene diez, veinte, treinta jurisconsultos y los códigos de todo el mundo, de todas las épocas que se han tenido la vista.”
18 Original text: “…conforme también del mayor número de Naciones que comercian con Buenos Aires.”
That such a legalistic policy would pass without amendment highlights the high level of delegation policymakers granted lawyers. That it would then go on to be adopted as the commercial code of the new Argentine Republic, as well as that of Uruguay and Paraguay is simply unconceivable under the rationalist logic. This is isomorphism writ large. Despite the heated debate, political institutions approved the technocratic, cosmopolitan Code that the nation-building elites—not the merchants—had sought.

In sum, both merchants and policy elites desired neutral, effective dispute resolution institutions. While the former were served by the consulado system, they wanted it to employ more modern laws and to have the backing of a more effective state. The latter, in turn, wanted these things as well, but were committed to the idea that the state must provide them through public institutions. They tasked a team of lawyers to give them the most modern, cosmopolitan code of commerce legal scholarship could produce, and then adopted it over the objections of the lawyers. This is strong evidence for I2.

5. The Golden Age: a Return to Private Authority

As late as the 1870s, Argentina was a net importer of wheat (Scobie 1964, p. ix). But beginning in the late 19th century, national consolidation and technological development allowed Argentina to benefit from the global economy as never before. As can be seen in figure 22, exports quadrupled between the turn of the century and World War I, and then doubled again by the 1920s (Mitchell 2007). Almost all of this growth came from agricultural products such as wheat, corn, linseed, and, with refrigeration, meat, which supplanted pastoral goods like hides and wool as Argentina’s chief exports (Phelps 1938;
Gerchunoff and Llach 2003). Steam power shrank the distance across the Atlantic and, more importantly, created the first cost-effective way for agricultural goods to cross the “sea of grass” between the distant reaches of the *pampas* and the riverine ports.¹⁹ This infrastructure required investment, however, which the European countries, facing diminishing returns on capital domestically—especially Great Britain—were eager to export. Labor also came from countries with excess supply, principally Italy and Spain, adding the final ingredient for the economic miracle on the River Plate.

Figure 22: Argentine trade, 1890-1930 (source: Mitchell 2007)

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¹⁹ Argentina’s railway networked lagged that of North America. The first track was not laid until 1857, but a sizeable network was not acquired until the early 20th century. Large investment in the *pampas* was seen as risky until the 1879 *Conquista del Desierto*, a military campaign that brutally eliminated indigenous groups that had repeatedly clashed with settlers (Scobie 1964). During the 1880s Argentina doubled the amount of railway tracks, fueled by British investors seeking safe investments away from the lingering depression then gripping Europe (US railways experienced a similar boom during this period). The Barring Crisis of 1890 brought an effective halt to this boom, as did the global collapse of grain prices in the 1890s (Harley, C. K. 1978). "Western Settlement and the Price of Wheat, 1872-1913." *The Journal of Economic History* 38(4): 865-878. Construction did not begin again in earnest until the end of the 1890s. Duncan, J. S. (1937). "British Railways in Argentina." *Political Science Quarterly* 52(4): 559-582.
The political conditions for this takeoff were provided by an oligarchy that brought together the interests of urban elites and the traditional land-owners (Scobie 1964; Fodor and O'Connell 1973; Rock 2002; Gerchunoff and Llach 2003). In previous decades these groups had typically found themselves on opposite sides of the unitarian-federalist split, but, following unification, discovered they both a) depended on the agricultural export sector, and b) shared an interest in depriving the laboring classes, many of them immigrants, of political power. Moreover, landowners themselves were exceptionally well organized as an interest group. The particular ecology of the pampas allowed the same piece of land to be planted with wheat in some years, and then seeded with alfalfa and used for grazing in others (Gerchunoff and Llach 2003). This agropecuario (farming-ranching) production system meant agricultural interests were not divided between

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20 This is not to say that a diversity of interests did not exist within the oligarchy, and that conflict never arose. For a thorough discussion see Fodor, J. G. and A. A. O'Connell (1973). "La Argentina y la Economía Atlántica en la Primera Mitad del Siglo XX." Desarrollo Económico 13(49): 3-65.
cultivators and herders, forming instead a single interest group, represented, since 1866, by the powerful Argentine Rural Society.\textsuperscript{21}

Economically liberal and politically conservative, \textit{La Oligarchía} maintained control of all branches of government, despite a growing populist, leftwing movement against it, until the first election under universal male suffrage in 1916. Even then it retained control of Argentine Senate, allowing it to leave its mark on commercial policy until the transformations set off by the Great Depression.\textsuperscript{22} For some 70-odd years, then, the dominant political actors in Argentina were dedicated to the success of agricultural exports, with impressive results (see figure 23).

\textbf{Figure 23: Principal Argentine commodity exports, 1864-1930 (source: Mitchell 2007)}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure23.png}
\caption{Principal Argentine exports, 1864-1931 (mil. gold pesos)}
\end{figure}

\textsuperscript{21} The group, whose motto, “To cultivate the soil is to serve the country” (\textit{Cultivar el suelo es servir a la patria}), nicely captures the fusion of nationalist and agricultural interests that underlie it, still exists today. See [http://www.ruralarg.org.ar/](http://www.ruralarg.org.ar/).

\textsuperscript{22} As in the United States, the Argentine Senate is malapportioned—with two (since the 1990s, three) senators for each province, regardless of population—and is thus historically favorable to agricultural interests.
Though the Argentine economy was highly “globalized” during this period, most trade and investment linked Argentina to a single country—Great Britain (Phelps 1938). After World War I the United States became an important export market as well, but Argentina continued to sell more goods to the UK than any other country through the 1960s. Before 1914 more investment came from the UK than any other sources; after 1914 the US was the single largest investor (Phelps 1938, p. 99). Revealingly, the department store Harrods opened its first and only foreign branch in Buenos Aires in 1914. In other words, the colonization the enterprising invaders had failed to achieve during the Napoleonic Wars was, at least in some ways, obtained a century later by investors and traders.

In addition to depending on only a few countries, Argentina’s exports were dominated by just a handful of firms. Here I focus on the case of grain, although the meat trade followed a similar logic (Gravil and Dos Santos 1971; Gravil 1985). Just four European multinationals bought the lion’s share of Argentina’s grain, given them extraordinary market power. This imbalance was exacerbated by the foreign exporters control over producers and middlemen via credit markets.

Despite the increasing coherence of the Argentine state, the dispute resolution institutions that governed this explosive trade were largely private. The Buenos Aires Stock Exchange (Bolsa de Comercio de Buenos Aires, BCBA), founded in 1854, had adopted many of the “chamber of commerce” functions that the Consulado had previously provided. It likely served as a quasi-formal dispute resolution institution during the latter half of the 19th century, though few details have been recorded in the historical literature.
By 1883, however, the BCBA began to sponsor special arbitral commissions (*comisiones arbitrales*) for the grain trade, whose “principal functions consisted in setting the daily prices in the Cereals Market and solving the commercial disputes that could emerge in the sales of grain for exportation” (Bollo, Camarero et al. 2005, p. 23). In 1902 the BCBA took a further step toward institutionalizing this process by establishing the quasi-autonomous *Comisión Arbitral de Cereales* (Grain Arbitral Commission), a private body composed of grain traders. In 1905 this institution was renamed the *Cámara Gremial de Cereales* (Grain Guild Chamber) and given further autonomy from the BCBA (Colomé and Gumierato 2009). Unlike in modern arbitration, the decisions in individual cases were public and set precedents. This significantly enhanced the enforcement power of the private body by increasing the reputational costs of non-compliance (Colomé and Gumierato 2009).

The Grain Guild Chamber performed a variety of tasks beyond dispute resolution. It developed model contracts, served as an information clearinghouse, and verified the quality of various types of grain, as well as serving as a lobbying vehicle for the industry. In 1910 it was given the right to run a futures market for grain contracts (MATba 2012). Despite the vast volumes of grain being traded, dispute resolution does not appear to have been overly frequent or burdensome. A complete case record is unavailable, but we know that in 1923 there were 57 disputes, 30 of which were resolved.

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23 Original text: “Sus principales funciones consistían en fijar la cotización diaria en el Mercado de cereales y solucionar las disputas comerciales que podían surgir de las ventas de trigo para la exportación.” In Rosario, another important grain port, similar commissions were established in 1889.

24 For example, in 1902 the government proposed having government regulators inspect all outgoing grain shipments to verify quality, which the industry saw as highly intrusive and costly. The Grain Guild Chamber lobbied against the provision and convinced the government to let it—the Chamber—perform this function in its stead (Bollo, Camarero et al. 2005).
via arbitration and 27 via mediated conciliation. In 1928 there were 74 cases with 31 arbitrations (Bollo, Camarero et al. 2005).

It is important to note that Buenos Aires was not the only important port for Argentine grains, and therefore not the only location of private institutions. The city of Rosario, which occupies a key point on the Paraná, a major tributary of the River Plate, was able to bring cargo ships significantly closer to the northwestern pampas, and also to parts of Paraguay and Uruguay. In 1858 a *Casino Mercantil*—a kind of informal “cafe, club, and exchange” (Colomé and Gumierato 2009, p. 59)—was created in the city. In 1884 this was transformed into a Centro Commercial, and, in 1893, a Grain Arbitral Commission was created in the city, a decade before its sister organization in Buenos Aires.

Finally, some Argentine institutions were becoming involved in the global arbitration movement of the early 20th century, although only in a fairly tangential fashion. In 1916 a bilateral agreement was concluded between the US Chamber of Commerce and the BCBA. Two five-member arbitration committee composed of representative from both bodies were created, one sitting in Buenos Aires and one in New York (Naon 2004, p. 111). However, this new entity did not, it seems, receive many requests for arbitration (see Chapter Five). Argentine actors did not, it seems, participate in the pre-WWI business conferences or in the founding of the ICC after the war. Nor were they involved in the discussion of arbitration in the League’s Economic Committee.

5.1 Rationalist
R1 predicts that when one party is commercially dominant over another, merchants will demand correspondingly biased dispute resolution arrangements. If the power between parties equalizes, in turn, more neutral institutions will be demanded. Given that the defining characteristic of Argentina’s exports during this period was the hierarchical nature of the market, R1 leads us to expect dispute resolution institutions favorable to exporters.

Consider grain. Wheat was Argentina’s biggest export for most of the early 20th century, and the UK its biggest buyer. Though Canada, the United States, and Russia were also important sources of grain for Britain, Argentina was an essential component of British food security, and at times the single largest supplier (Scobie 1964; Gravil 1985). Given the importance of this trade to both countries, it is perhaps surprising that neither British nor Argentine firms played a large role in it. Instead, a cartel of European multinationals, many of them predominantly Jewish-owned, dominated the industry, buying wheat from Argentine producers (either directly or via agents), transporting it to Liverpool or London, and selling it to British millers and retailers (see table 24). The “Big Four,” as the top firms were known, dominated the wheat trade from its origins through the mid 20th century.

<table>
<thead>
<tr>
<th>Company</th>
<th>Nationality</th>
<th>Share of Anglo-Argentine wheat trade in 1914 (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bunge and Born</td>
<td>Founded in Antwerp, principals were Germans and German-Belgians, mainly Jewish</td>
<td>23</td>
</tr>
<tr>
<td>Louis Dreyfus and Co.</td>
<td>Owned by French Jews</td>
<td>22</td>
</tr>
<tr>
<td>Huni and Wormser</td>
<td>Swiss and French owners, many principals were Jewish</td>
<td>10.5</td>
</tr>
<tr>
<td>Weil Brothers</td>
<td>German Jewish owners</td>
<td>10</td>
</tr>
<tr>
<td>General Mercantile</td>
<td>Dutch-owned, but registered in London</td>
<td>9.5</td>
</tr>
</tbody>
</table>
In Argentina, these multinationals enjoyed an oligopoly over the small scale producers they bought grain from, but their power over producers was even more profound.

Agricultural land was principally owned by established *criollo* families that lived most of the year in Buenos Aires (Hora 2002). Cultivation was typically delegated to local agents, who would in turn lease small parcels out to tenant farmers (often recent immigrants). These local agents were typically petit bourgeois, often the owners of the local *almacén* (general store) that supplied food, clothing, alcohol, and other consumer goods to tenant farmers at sizeable profit margins.25 Farmers depended on the local *almacén* for basic subsistence, and, cash poor, often had no choice but to promise future harvests to the shopkeeper in order to buy food and clothes throughout the year (with disastrous consequences when crops failed). *Almacénes* often had a quasi-monopoly on consumer goods in a region, giving them additional power over farmers (Scobie 1964; Gravil and Dos Santos 1971; Gaignard 1984; Colomé and Gumierato 2009).

The greatest power of the *almacénes*, however, derived from their control over rural credit markets, and here the multinational grain traders played a decisive role (Lluch 2006; Colomé and Gumierato 2009). Farmers relied on loans to buy the seeds and machinery needed to produce a successful harvest. Their only source of credit, however,

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25 Gravil (1985) calculates the *almacén*’s profit margin on alcohol at 200-400 percent.
was often the same *almacén* on which they relied for basic subsistence. Shopkeepers, in turn, worked as buyers for the multinational grain traders, either directly, or through an *acopiador* (“collector”) who aggregated grain sales for export firms in a certain region (Colomé and Gumierato 2009). Through these agents, exporters provided credit to the same farmers who would produce for them. The grain cartel, then, not only monopolized the market into which producers sold; it also doled out the capital on which farmers and their middle-men depended (Gravil and Dos Santos 1971).

Tulchin and Seibert’s (1978) study of bank transfers between 1910 and 1926 provides some striking details of the power of the grain exporters in the rural credit system. Fully 80 percent of bank transfers in the period were made by just 48 firms. Of these, 35 were grain traders. Just two of these firms, the leading exporters, account for 28 percent of all transactions (measured by monetary value), and another ten firms claim an additional 60 percent. Moreover, of the 21 most active firms in 1910, 16 were foreign-owned (Tulchin and Seibert 1978).

In sum, Argentine producers were almost entirely at the mercy of foreign exporters. R1 would therefore predict biased dispute resolution institutions, or no institutions at all. The development of largely neutral private dispute resolution institutions in Argentina would therefore seem to run counter to this hypothesis. Indeed, the private institutional arrangements governing dispute resolution on both sides of the Atlantic were remarkably similar, despite quite different market structures. In the UK market the grain traders did not form a cartel. Instead, numerous companies imported grain from numerous sources,
competing aggressively on price (van Hissenhoven 1938; Hooker 1939). This market was highly organized via private institutions (Velkar 2010). In each of the major ports—not just in the UK but across Europe—so-called “corn exchanges” or similar institutions (e.g. shipping exchanges) provided the various functions markets require to operate, including standard-setting, information provision, and, crucially, dispute resolution (van Hissenhoven 1938).26 This last function was provided through arbitration by special panels of fellow merchants. In London or Liverpool arbitrations were technically conducted under English law, but this gave heavy deference to the terms of the contract itself. Because almost all grain was traded under standard contracts developed by the corn exchanges, which codified merchant practice, privately developed standards effectively governed the British grain trade.27 Similar institutions had arisen in New York in the 1860s (see Chapter Five).

Can the rationalist mechanism account for the emergence of neutral institutions, which seem, prima facie, to follow a logic of isomorphism? Consider, counterfactually, what might be gained from a more biased private dispute settlement institution. As noted above, the overall caseload of the private entities was quite small, amounting to only few dozen cases per year out of what was likely thousands of transactions. Moreover, the value of each transaction was itself quite small. In other words, no company’s fortunes

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26 The first British corn exchange was established in Liverpool in 1808. The national Corn Trade Association, founded in 1853, served as an umbrella group for these institutions, as well as a potent lobby (Hooker 1939).
depended on the outcome of a single dispute. Far more important for traders was the price of wheat, which fluctuated with demand, harvests, etc., and which the export cartel could influence. It is therefore unlikely that the dominant firms would have bothered to impose biased dispute resolution institutions, as the payoff would have likely been only a small fraction of their annual turnover.

That said, the shifting nature of the private institutions provides evidence that they were responsive to the balance of power between the export cartel and Argentine middlemen who played a larger role in conveying the grain across the pampas to the ports. As the grain trade grew more important in Argentina, the latter group became composed of larger and more established firms (Scobie 1964; Lluch 2006), who were able to negotiate with the exporters on a more evenhanded basis (producers remained excluded). The cartel was by no means broken, but it agreed to participate in increasingly elaborate private institutions that provided rule-based dispute resolution with greater Argentine representation (Gaignard 1984; Bollo, Camarero et al. 2005). When it was founded in 1905, the Grain Guild Chamber was composed of 12 members, including five exporters, two corredores or comisionistas (port-based, speculative traders who bought and sold grain on short-term contracts), four consignatarios (intermediaries who bought grain from producers to sell to exporters), and one miller. In numerical terms, then, the body was roughly balanced between exporters and intermediaries (Bollo, Camarero et al. 2005). 28 This ratio shifted, however, as the Argentine grain industry matured. Changes in

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28 At the same time, a parallel private dispute resolution institution was developing, unconnected to the BCBA and focused more on the domestic market. The Eleventh of September Fruit Market (based at the railway station named for the date in 1852 when Buenos Aires rebelled against the federalist state) was founded in 1898 to provide foodstuffs for the growing metropolis. In 1901 it created an arbitral tribunal,
1908 increased the number of intermediaries relative to exporters, and in 1932 these groups became dominant. This increasing Argentine representation in private institutions reflects the growing size and sophistication of Argentine firms, and, thus, their relative increase in bargaining power vis-à-vis exporters (Bollo, Camarero et al. 2005).

The preference of firms for private institutions is thus consistent with their material interests, given market conditions, as R1 predicts. What about the supply of such institutions? As with the adoption of the consulado system a century before, the timing of the development of private institutions in Argentina provides evidence for R1 over I2, though the form of the institution suggests isomorphism. British and other European corn exchanges and the arbitration procedures surrounding them were created in the mid 19th century, around the same time the BCBA was founded. Yet it took 30 more years for the BCBA to adopt formal arbitration practices, and half a century before it developed private institutions to manage the grain trade. In other words, private institutions only developed in Buenos Aires when the grain trade reached a certain scale around 1900 (see figure 22). R2 holds that private actors create institutions to meet the demand of merchants, and—while that demand may have strongly shaped by ideational forces—it was met with institutional supply only when a sizeable grain trade emerged in Buenos Aires. As during the colonial period, isomorphic influences may have proscribed the form institutions took, but does not predict their emergence.

What about the Argentine state? After having built a modern judicial apparatus and espoused a preference for public courts, why did policy elites tolerate the new private institutions built around their most crucial economic activity? As mentioned above, The *Oligarchia* had different goals than the nation-building elites of the previous generation. Agricultural exports were making them amongst the wealthiest people in the world, and so they had no incentive to quash the private institutions underpinning their income. A better question, perhaps, is why the Argentine state did not do more to facilitate trade. After all, the Napoleonic arbitration laws from the 1862 Commercial Code were highly unfavorable to private arbitration. Enforcement of an arbitral award required a *compromiso*, effectively preventing parties from committing to private arbitration in advance. Given the power of exporters over government policy, why would they not lobby for the removal of this onerous restriction, and thus bring the police powers of the state behind the private dispute system?

The arbitrage logic of rationalist mechanism holds that such behavior is conditional on the private alternatives available to domestic interests groups. When these are attractive in terms of policy outcome, efficiency, and authority, interest groups will not need to lobby the state to create dispute resolution institutions that serve their needs. This seems to have clearly been the case in Argentina at the beginning of the 20th century. As described above, the functional advantages private adjudication offered over state courts in terms of speed, expertise, and cost were significant, as is true in other cases. More uniquely, the hierarchical nature of the Argentine grain market meant that private
enforcement was also highly effective. To cheat the cartel was exceptionally foolhardy for an Argentine producer or middleman, as no viable alternative existed. Moreover, the small, institutionalized community of traders at the port of Buenos Aires made it easy to share information, raising the effectiveness of reputational punishments. Consistent with this explanation, only several dozen disputes arose each year, and half or more were solved via mediation. Open conflict was thus quite rare, as the small number of cases attests. In sum, the existence of a powerful, fully private dispute settlement system obviated the need to reform public policy to better support that system.

R2 also explains why we do not observe interstate efforts to provide dispute resolution institutions. Given the importance of Argentine grain to the British food supply, we might have expected the British government to ensure a steady and predictable trade between the two countries. The dominance of the European cartel did not go unnoticed. In 1913 a British diplomat reported to the Foreign Office that

“The export of cereals from this republic is very largely controlled by four firms, foreign firms, in which the Jewish element predominates. That the procedure of these firms constitutes a Trust and that such a Trust can in certain eventualities prove highly dangerous to the Argentine Republic cannot…be gainsaid…This question merits very careful study at the hands of His Majesty’s Government with relation to the food supply of the United Kingdom.”

Despite this mistrust, tinged with anti-Semitism, Britain did nothing to break the cartel controlling Argentine wheat, likely because it did not fundamentally threaten their interests. In the British market, Argentine wheat competed against North American and

European exports, limiting the cartel’s ability to manipulate prices (Hooker 1939).

Private provision of the rule of law for the trade was thus not incompatible with British interests. Had Argentina threatened to disrupt the status quo by, for example, exercising public control over the grain trade, R2 would expect Britain to resist. But, as during the 1806 invasion, the interests of the Argentine producers, the merchants at Buenos Aires, and the British were aligned—for now.

5.2 Ideational

That multinationals relied on the same kinds of intuitions in the oligopolistic Argentine market as in the relatively open British market would suggest a strong role for isomorphism (I1). It is important to note, however, that grain arbitration was (and, indeed, remains) decidedly non-legalistic. Arbitrators were always participants in the industry, not jurists, and lawyers were not retained to argue on behalf of parties. The most basic prerequisite for the ideational mechanism—legalization of market relations and deference to legal expertise—is thus not observed. Still, in this case we could understand a similar ideational mechanism operating not through the legal field, but rather through the common norms and practices of the business community itself, and the grain trade in particular. As discussed above, the transmittal of institutional forms from Europe to Argentina seems to have followed these lines, though the impetus, timing, and evolution of the institutions all seem to have been guided by material interests. We can thus assign a limited role to (non-legal) isomorphism in determining the precise form of institutional outcomes, though not necessarily their private nature.
Indeed, legal norms in Argentina, including those embraced within the government, were largely opposed to private arbitration during this time. Before democratic elections in 1916, which brought the urban workers’ party to power (though the Senate remained in control of conservatives), the national government was generally sympathetic to the private institutions appearing in the grain trade. For example, the government actively encouraged the development of a private futures exchange (MATba 2012).

But the post-1916 administration was much less favorable, and included figures that strongly preferred state control over private arbitration. The foremost legal intellectual during this era was José Nicolás Matienzo, who began his career as a legal professor and commercial judge. After a period in the Senate, Matienzo became the dean of the University of Buenos Aires Law School, until he was appointed Minister of Labor and, following the first democratic elections, Attorney General under the new regime. He would later go on to be Minister of the Interior and attempt a run for the presidency before returning to the Senate for the remainder of his career. Despite these political engagements, Matienzo was a major contributor to academic legal debates, and in 1919 published a doctrine “asserting the exclusive jurisdiction of national courts and the rejection of arbitration to hear disputes concerning the validity, exercise, and scope of sovereign state rights or the decision of certain matters governed by the Argentine Constitution” (Naon 2004, p. 142). These views were reinforced by the government’s Solicitor General in arguments before the Supreme Court that same year. The Solicitor General noted that national judges were accountable to public opinion and to the democratically elected Congress, and were bound to impartiality. In contrast, “arbitrators
owe their nomination to the immediate interest of the parties…They are born for the
decision they provide and die with it, without the public even being aware…In this way,
except in rare occasions, the arbitrator acts not as a judge but as a defender of the party
that names him…Thus it is not strange that the awards come out, in general, arbitrary, not
just in their origin but in their content.”

Legal norms opposed to private arbitration were thus firmly entrenched in the highest
levels of the Argentine government. Though policymakers did not seek to thwart the
private institutions from operating (which would have likely required legislation passed
by the *Oligarquía*-dominated Senate), Argentine courts would surely have rejected
enforcement actions under the 1862 Code. Only because private tribunals could enforce
their own awards was this potential conflict averted.

Note also that this state-centric legal norm in Argentina was quite distinct from the
rapidly growing call for arbitration spreading through Europe and North America at this
time (with the founding of the ICC ICA in the early 1920s, the widespread legal
movements to support arbitration in the US and France, and the negotiation of the
Geneva treaties). Under the ideational mechanism, this divergence is consistent with
Argentina’s distance from the transnational epistemic community forming in the United
States and Europe, mentioned above.

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de la Corte Suprema de Justicia ” *Revista de Derecho, Universidad de la Norte* 12: 1-19. Original text :
« Los árbitros deben su nombramiento al interés inmediato de las partes en en el asunto que motiva el
nombramiento y no están sujetos al als fiscalizaciones y responsabilidades de los jueces permanentes. Nacen
para la decisión y mueren con ella, sin que el público, casi, ni pueda apreciar su idoneidad por una serie de
sentencias dictadas en caso y circunstancias diversas, como ocurre con aquellos jueces. De ahí que salvo
raras excepciones, el árbitro no obra como juez sino como defensor del litigante que lo nombra…Así, no es
extraño que los laudos resulten, por lo general, arbitrarios, no sólo por su origen, sino por su contenido. «
6. The Depression, State intervention, and Peronism

The 1929 economic crisis and the subsequent collapse of world commodity markets dealt a profound blow to Argentina’s export-based economy. In response the Argentine state broke from its historical laissez faire approach to economic governance, playing a larger and larger role in the market. Though the economic damage was profound, trade recovered relatively quickly after extraordinary concessions were secured from Great Britain in 1933. A few years later, the sharp increase in demand for commodities during and after World War II provided Argentina with massive new markets (see figures 25 and 26).

Figure 25: Mid-century Argentine trade (source: Mitchell 2007)

![Graph showing Argentine trade, 1911-1948 (mil. paper pesos)]

Figure 26: Principal Argentine exports at mid-century (source: Mitchell 2007)
More profound changes occurred in the nation’s domestic politics, however. After only a
decade and a half of democratic rule (1916-1930), Argentina entered a period in which
control of the country alternated between military juntas that took power through coups
d’etát and fragile civilian governments that won power in elections of varying quality.
Economic crises often precipitated these transfers. From the 1930 military coup until the
1940s, the various governments were distinctly conservative, resisting democracy
precisely because it empowered the urban lower classes at the expense of the ruling
oligarchy. The great innovation of Perón, who first entered government as the minister of
labor and social welfare in a 1943 coup and remained the dominant force in politics until
1955 (and again, briefly, in the 1970s), was to flip this arrangement on its head, using the
military and the state to build a power base amongst the *descamisados*, the “shirtless”
urban masses.

Despite this wild fluctuation in governments and the sharp conflict over the distribution
of national wealth, throughout this period the state consistently came to play a larger role
in the Argentine economy. While state intervention was deepest under left-leaning Peronist governments, it was also advanced—indeed, initiated—by conservative leaders, though toward different ends. All governments relied on the success of agricultural exports. For conservatives representing landed interests, the sector’s success was an end in and of itself, and the state intervened to help the sector obtain a good price on world markets, often at the expense of the industrial sector. Leftwing governments also promoted exports, though with the aim of generating revenue to subsidize social programs and import-substituting industries, these also being favored by nationalists and developmentalists of various political affiliations. For all, exports were an essential source of hard currency (of particular value to the military, which purchased much of its equipment abroad). Thus, though Left and Right fought bitterly over who would profit from exports and had different positions regarding imports and foreign investment, each could benefit from the flow of Argentine meat and grain out of the River Plate. The remarkably consistent increase of Argentine exports over this period speaks to this consensus (see figure 27).
The logic for increasing intervention can be seen clearly in the grain market (again, the meat market followed a similar pattern). The crash in commodity prices associated with the Great Depression made the previous laissez faire approach untenable (Marchildon 2010). Instead, more interventionist policies were required to sustain Argentine agriculture, including in the realm of dispute resolution. In the 1930s, conservative governments sought to bolster exports by devaluing the peso by 20 percent and imposing exchange controls (Phelps 1938). In 1932 the government set minimum prices for grains in order to compensate for the drop in global demand. In 1933 it assumed control of all foreign sales with the hope of imposing an export quota to bolster prices (Gravil and Dos Santos 1971). This was achieved via the creation of a grain board to buy grain from producers through 1,046 specially created local commissions. Producers occupied almost half the positions on these commissions, though traders claimed about a quarter of the posts. This was a radical change for an industry that had previously been dominated by
exporters. The commissions paid farmers 80 percent of the value of the harvest upfront, and then sold the grain to the middle men and, occasionally, the export companies (still the same cartel) at international market prices, at which point the other 20 percent could be paid (Gravil and Dos Santos 1971). The Argentine state thus absorbed many of the losses agricultural producers faced in the 1930s. The government also invested some 105 million pesos between 1936 and 1939 in grain elevators and other capital goods to increase the value of Argentine production (van Hissenhoven 1938; Gravil and Dos Santos 1971). These interventionist policies were reinforced during the Peron Era, when the Argentine Institute for the Promotion of Exchange (IAPE) was created. This government body controlled virtually all foreign trade, and aimed chiefly to transfer wealth from the agricultural sector to the industrial sector through export taxes, import barriers, and subsidies to import-substituting industries (Novick 1986; Brambilla, Galiani et al. 2010).

6.1 Rationalist

With the state now essentially running the grain industry, and later, under Peron, the entire external sector, the structure of the Argentine export industry changed from one in which a few multinational exporters dominated smaller and more numerous domestic producers, to one in which a single entity, the state, represented all producers. This represented a massive shift in power within the market, but not, crucially, enough of a shift to give Argentine producers decisive leverage over the multinational export cartel. Argentine grain still competed against Canadian, American, and Australian grain on the world market (Marchildon 2010). Indeed, these countries attempted to organize a cartel at
a special International Wheat Conference in 1933 in order to stabilize the price of wheat and gain some advantage vis-à-vis the shippers. Though an export agreement quota was struck, it quickly fell apart, with Argentina, which experienced a bumper crop in 1933-1934, the first to renege (Marchildon 2010). Nonetheless, the position of Argentine producers was certainly strengthened by the government intervention, at least relative to their previous position. R1 would therefore predict demand for neutral dispute resolution institutions, but one in which Argentine actors are increasingly represented.

This is, indeed, essentially what emerged, although in a different form. The Grain Guild Chamber was brought under state control and a new bureaucratic entity, the National Commission of Grains and Elevators was created to oversee the industry. However the Grain Guild Chamber continued performing its previous functions—including dispute resolution—even under explicit state oversight (Bollo, Camarero et al, p. 61), similar to the “official” arbitration bodies of the Soviet Union. Still, the basic form of the private institutions was maintained, with industry representatives administering summary decisions under market conditions that promoted voluntary compliance. In terms of the institutional variables considered in this study, then—policy, efficiency, and authority—the result for traders was largely the same. While state intervention led to a massive redistribution to producers, this shift did not manifest in dispute resolution institutions. Again, given the large number of low-value transactions in the industry, this seeming contradiction in fact comports with the rationalist logic.
Consider also the international dynamics. Above, we noted that R2 would predict Argentina’s customers—chiefly Great Britain—to object if that state disrupted the trade that was providing British consumers with cheap and reliable wheat. But the collapse of commodity prices and the failure of the export cartel to raise them removed this worry. Instead, the 1930s were characterized by significant wheat overproduction around the world (Marchildon 2010). This meant it was the Argentines who were left scrambling to maintain access to their chief export market in a closing global economy, as Britain gradually restricted trade to an increasingly exclusive economic sphere within its Commonwealth. The result was an extraordinary treaty, the 1933 Roca-Runciman accord, which granted Argentina an annual beef quota in the UK, but at a heavy price; amongst other concessions, Argentina promised not to raise duties on British imports and, extraordinarily, to buy 100 percent of its coal from the UK (Olivari and Velarde 1963; Gravil 1985). As the unequal terms of the treaty imply, Britain’s dominance within the trading relationship increased in the 1930s; it therefore had little to fear from the government’s control of the export sector.

6.2 Ideational

In contrast, the nationalization of the pre-existing private dispute settlement apparatus is not consistent with an ideational explanation of supply (I2). The conservative military government behind the coup represented the same landed oligarchy that had previously been content with the purely private system. While it is true that legal experts, like Matienzo, had advocated increasing state control of dispute resolution, he and his ideas

31 Left-wing groups and nationalists saw the treaty as a humiliation, and it was frequently cited as a case of conservative interests selling out the country to serve foreign masters.
were associated with the government the military had overthrown, and so they were unlikely to have been influenced in this way. Moreover, Matienzo’s recommendation was to use public courts, not to exert de facto authority over nominally independent entities. While this model did in fact exist in the Soviet Union, the conservative government in Argentina that implemented it was vehemently anti-communist, so this is also an unlikely source of normative diffusion. Indeed, there was also no international trend to create the kind of system in Argentina. While both rightwing and leftwing governments around the world during this period favored government intervention in the economy, including via grain boards and export cartels, dispute resolution was not typically included (the private arbitral institutions in Europe and North America remained fully independent during this period). Last, while the grain institutions were brought under public control, the general purpose arbitration institution—the BCBA—was not. This would suggest that the government’s decision to intervene in dispute resolution institutions was motivated by material interests in the crucial export industry; it only bothered to nationalize the ones in which it had a meaningful economic stake.

Under I2, an even greater step toward public control might have been expected under the Peronists, under whom the state came to dominate nearly every area of economic life. It is important to note, however, that greater state control, in this sense, was unlikely to mean the dismantling of the grain industry’s unique institutions and the transfer of dispute resolution responsibilities to public courts. Peronism operated chiefly through ad hoc and extraordinary public institutions (like the Argentine Institute for the Promotion of Exchange), in which the executive’s power could not be checked. The courts, and the
legal system in general, was suspected of disloyalty, or at least unreliability. Following Peron’s ascent to power, four of the five Supreme Court Justices were impeached (Alston and Gallo 2009), reinforcing the dominance of personalist politics over the rule of law. In other words, policymaker deference to legal elites was decidedly low. We would therefore not expect dominant legal norms, pro-state though they were, to have had much effect.

7. Postwar: State Intervention under Partisan Conflict

Argentine politics continued to oscillate between Left and Right throughout the postwar period under a climate of intensifying partisan conflict and violence. The conflict reached its apogee under the brutal conservative junta of 1976-1983 whose self-immolation during the Falkland / Malvinas Islands War paved the way for a return to democratic rule. State control of the economy reached its height during the two Peron eras (1946-1955 and 1973-1976), with the nationalization of most key industries (including, in 1947, the British-owned railways that played a vital role in the export sector) and populist price controls. These policies precipitated economic crises in the early 1950s and the mid 1970s that led to the ouster of Peron and his wife Eva, respectively, at the hands of the military. Nearly a decade of democratic rule under a center-left government followed the first coup (1958-1966), while conservative military governments ruled Argentina from 1966 to 1973 and from 1976 to 1983.

These gyrations were accompanied by a shifting, even schizophrenic, set of state policies regarding private arbitration. In 1956, under the new democratic government, Argentina
finally ratified the 1940 Montevideo Treaty on Civil Procedure, a regional accord that updated the provisions of the 1889 Montevideo Convention allowing for mutual recognition of private arbitration awards in the region. But then following the conservative 1966 coup, the Civil and Commercial Procedural Code, as the nation’s body of civil and commercial law was now called, was substantially altered, changing the legal standing of international arbitration for the first time since 1862. Law number 17.454 prohibited parties from suspending the jurisdiction of national courts by seeking dispute resolution in arbitration or in foreign courts (Piaggi 1983; Caivano 2008). This change represented a sharp break from previous practice, and likely violated treaty obligations. However, the prohibition did not last long. The law was challenged in court in 1973, and then overturned in 1976 under a different conservative military government.

At the same time, private institutions that had been nationalized in the 1930s and 1940s re-emerged in the 1950s and 1960s, and state authorities began to intervene less directly in the work of the Grain Guild Chamber. In the 1950s the grain board was progressively stripped of its functions, liberalizing the market (Bollo, Camarero et al. 2004). In 1956 a series of decrees authorized the reestablishment of free external trade in the grain sector, and allowed the futures market to re-open (MATba 2012). In 1965 the grain-related institutions were unified under the Buenos Aires Grain Exchange. BCBA, the more general arbitral institution, had grown more oriented to industry, and so no longer shared the same stance as the agricultural industry on key issues. Instead, the various grain-oriented institutions reorganized to solidify their own sphere of practice. The Grain Guild Chamber merged with the Grain Exchange, and re-named itself the Arbitration Chamber.
of the Grain Exchange, in existence up to this day (Bollo, Camarero et al. 2005). The
geneneralist private institutions for dispute resolution also reorganized at this time; in 1963
the BCBA’s arbitral tribunal was re-organized as a modern private arbitration body
(Anaya 1994).

In contrast to these fluctuations, the Argentine export sector performed consistently well.
The postwar period was favorable for the grain trade, as peace and a growing world
population drove demand. This allowed for investment in capital goods and new
fertilizers and pesticides, further increasing productivity (Bollo, Camarero et al. 2005).
The Argentine economy also expanded steadily, and, unlike in previous periods, gains
were spread to a sizeable middle class. While the export sector was taxed heavily to
support import-substitution efforts under several governments (Brambilla, Galiani et al.
2010), this only heightened the importance of a vibrant export sector to a range of
policymakers.

7.1 Rationalist

Following WWII, both the favorable international markets and the end of the first
Peronist period created conditions under which the state could de-nationalize the grain
trade. Rising demand for commodities meant that it was unnecessary to enforce export
quotas on producers, or to bargain collectively in order for the sector to succeed.
Moreover, the excesses of state control under Peron were widely recognized, and the
center-left, democratic party was determined to undo them across the economy. Once
liberalized, the nature of the grain trade reverted to form, with a few large multinational
enterprises—many the same as before—dominating the market.\footnote{Unfortunately, precise data on market share from this period are unavailable, but the secondary literature notes the consistency between the postwar grain trade and the pre-Depression era (and, as we will see below, the late 20th century) van Hissenhoven, P. (1938). \textit{Le Mouvement des Grain dans le Monde}. Brussels, CERES, Hooker, A. A. (1939). \textit{The International Grain Trade}. London, Pitman & Sons, Marchildon, G. P. (2010). \textit{The Impact of the Great Depression on the Global Wheat Trade}. \textit{Unpeaceable Exchange: Trade and Conflict in the Global Economy, 1000-2000}. University of Lisbon, Velkar, A. (2010). 'Deep' Integration of the 19th Century Grain Markets: Coordination and Standardisation in a Global Value Chain. Working Paper 145/10, LSE Department of Economic History.} As before, this market structure favored private dispute resolution, and so R1 would predict demand for neutral, private institutions. And as predicted by R2, the private grain institutions reorganized themselves to meet this demand. Because the structure of the grain industry allowed for private enforcement of private decisions, firms were again able to effectively ignore the fluctuating position of state vis-a-vis private arbitration. Public support for enforcement was not needed, and so the changes in policy had little effect on crossborder commerce. This situation created the conditions under which state policy was not driven by interest group politics or international bargaining, but rather the more parochial preferences of the fluctuating governments.

Consider the radical curtailment of arbitration in 1966. The 1966 coup brought to power a military government adhering to an agenda of national economic strengthening. This regime, an exemplar of what has been labeled the “authoritarian bureaucratic state” (O'Donnell 1988), intervened heavily in the economy to support industrialization. The military itself became an important player in the industrial economy, giving bureaucrats direct financial interests in the success of their firms. The series of reforms to the commercial code in 1966—of which the restriction on arbitration was one small part—are generally seen as an attempt by the military to bring a wider swath of the economy under its direct control. Lawyers were generally regarded with mistrust. An Argentine
legal expert who asked not be named described the inclusion of arbitration in this package of reforms as an arbitrary choice consistent with the general ideological orientation of the government, which was opposed to the rule of law generally. Another expert concurred with the idea that the change was predominantly ideologically driven, and ultimately had little economic impact, adding that “no one noticed” the restriction in the legal community for several years after (Le Pera 2011), since so few arbitration cases reached public courts. These views suggest that the lack of state deference to lawyers allowed legally heterodox norms to emerge. More importantly, though, such a choice that was possible because exporters could rely on private alternatives.

The reversal of this policy ten years later also seems rooted more in the narrow interests of the military than in broader trends (Piaggi 1983). In 1973 the state-owned Dirección General de Fabricaciones Militares had been barred by an Argentine court from applying an arbitration agreement in a contract with the United States Export-Import Bank (Piaggi 1983). That is, two public companies (the US Ex-Im Bank and the Argentine military producer) had agreed to private dispute resolution, but the outcome was ruled unenforceable by an Argentine public court, applying the law created by the previous military government. This outcome displeased the Argentine executive (i.e. the military), which likely forced the courts to reconsider through informal means. A different ruling the same year (1973) reversed the decision, in contradiction of the law, and came with a loud protest from the court:

“The unceasing submission of the State to foreign jurisdictions serves to delegitimize the Argentine judiciary, damage the image of the Republic in
the international concert of nations, and affirms the occurrence—repeated without exception—of an assault on one of the elements of sovereignty” (Piaggi 1983, p. 2).33

In 1976, the newly installed military government (which had come to power in coup against Peron’s wife, Evita) reformed the commercial code via Law 17.454 to allow Argentine parties to choose arbitration, including international arbitration, reversing the 1966 ban (Naón 1982; Caivano 2008). However, the scope to do so was fairly circumscribed, and the language of the law almost “grudging,” as one observer has noted (Nattier 1985):

“The jurisdiction conferred on Argentine courts cannot be changed by agreement of parties. Without prejudice to the provisions of international treaties and of Art. 12, paragraph 4, of Law No. 48, an exception to territorial jurisdiction is made for matters that concern only property, jurisdiction over which can be elected by agreement of the parties. If these matters are international in nature the election can extend even to foreign judges or to arbitrators acting outside Argentina, except for cases over which Argentina courts have exclusive jurisdiction or when the election is forbidden by law.” (cited in Nattier 1985).

These fluctuations in the Argentine state’s deference to arbitration suggest that the both the material and ideational forces at work on the government were weak—because the material interests of the dominant economic groups were effectively addressed through the private system. The military was therefore able to ignore the economic effects of its policies.

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33 Original text: “… la incesante sumisión del Estado a jurisdicciones extranjeras contribuye a desprestigiar el Poder Judicial argentino, deteriora la imagen de la República en el concierto internacional de naciones y permite afirmar que se incurre—por la reiteración sin excepciones—un agravio a uno de los atributos de la soberanía.”
7.2 Ideational

The Argentine legal system remained in a state of flux during the postwar period. Peronism had undermined the role of the courts and legal experts in policymaking. This process was partially reversed during the periods of democratic rule that followed WWII, but was disrupted by the military juntas that felt little need to subject their decisions to legal procedures. For this reason it is highly unlikely that legal norms would have come to affect policy, as virtually no deference to legal expertise was shown.

But even more basically, it difficult to identify a dominant norm within the Argentine legal field regarding private dispute resolution. As the court quoted above indicates, some judges took a dim view of such institutions. But other lawyers were far more enthusiastic. Predictably, it was those most linked to the transnational arbitration committee—indeed, only those, as far as I know—that advocated changing legal norms to better support arbitration.

In 1948 the Argentine Chamber of Commerce (CAC) published a pamphlet proposing a grand plan to develop arbitration in the country (1948). This body, founded in 1927, was not widely considered one of the most important economic interest groups in Argentine politics (though, it would later become so), as the role of “general” business organization was still dominated by the Bolsa de Comercio and agricultural interests were represented by the Sociedad Rural. However, the CAC was entity that served as the official section of the ICC in Argentina, and was the designated national host of the Inter-American
Commercial Arbitration Commission as well. It was thus closely linked to contemporary trends to promote arbitration in Europe and the United States.

While nominally a commercial entity, the CAC’s committee on arbitration was dominated by lawyers. Their plan for arbitration was similarly bold, advocating changes both at the national and intergovernmental levels. First, they noted that the laws of European countries and the United States granted authority to arbitral tribunals, and that it was impossible for IACAC to offer effective inter-American arbitration without guarantees that awards would be enforced in Latin American countries.\(^\text{34}\) The pamphlet therefore claimed that a revised law would be presented to Congress at the following session, and that the proposal already enjoyed the support of “all sectors.”\(^\text{35}\) No evidence has been obtained suggesting that the CAC in fact acted on this idea, or that they even discussed the proposal with other commercial groups.

Second, after noting the efforts of UNIDROIT to re-consider the treaties governing commercial arbitration, the committee proposed a far more ambitious international regime than even the ICC had countenanced. Amongst its provisions were

a. Mandatory arbitration in international contracts
b. Requiring arbitrators to be businessmen or former businessmen
c. The minimization of administrative processes

\(^{34}\)“It was been recognized in all times that the inter-American arbitral procedure could not obtain a real efficiency and efficacy without a law that gave strength to the resolution of its awards.” Original text: “Ha sido conciencia en todo momento, que el procedimiento arbitral interamericano no podrá responder a una real eficiencia y efectividad sin una ley que diera fuerza a las resoluciones de los laudos.

\(^{35}\)“For this reason the Inter-American Comission on Arbitration has insisted on the necessity of passing appropriate laws in each country…a bill to this effect will be presented to the Honorable National Congress during the next session, and counts on the support of all sectors.” Original text: Por esa circunstancia la Comisión Interamericana de Arbitraje ha insistido en la necesidad de obtener la sanción de leyes apropiadas y concordantes en cada uno de los países…Dicho proyecto de ley será presentado al Honorable Congreso Nacional para el periodo próximo de sesiones, y cuenta con el apoyo de todos los sectores.
d. Limiting judicial review of arbitral awards to determinations of whether the award had expired or treated an non-arbitrable issue

Needless to say, this plan was far too distant from political reality to have any hope of realization. But it is important in that it shows that contemporary ideas regarding arbitration in other parts of the world were indeed being transmitted to Argentina via epistemic networks.

8. Democracy, the Neoliberal Turn, and Its Limits

Beginning in the late 1970s, Argentina shifted back toward laissez-faire economic policies. This evolution occurred under a conservative military government, the moderate center-left democratic government that replaced it, and the hyper-liberal government that followed. The collapse of this government during the economic crisis of 2001-2002 has subsequently returned Argentina to more interventionist policies. During this period the laws governing commercial dispute resolution changed dramatically, with arbitration receiving increasing—but, ultimately, incomplete—recognition and deference from the Argentine state. This shift can be seen in domestic legislation, international commitments, and the jurisprudence of Argentine courts. This period has been more closely studied in the academic literature, and many commentators attribute the changes in policy to a general a shift in attitudes toward commercial arbitration in the 1980s and

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1. Que el régimen arbitral sea obligatorio
2. Que los Arbitros sean o hayan sido comerciantes
3. Que se prescinda de toda tramitación procesal
4. Que los Tribunales de Justicia no tengan otra intervención que la de hacer cumplir el laudo contra el que no se admitirá recurso alguno, salvo el caso de que se hubiese dictado después del plazo fijado en el compromiso arbitral, o sobre cuestiones no comprometidas.
1990s that formed part of the broader neoliberal turn in the region’s political economy, perhaps linked to the Washington Consensus (Naón 1980; Naón 1990; Le Pera 1997; Naón 2004; Brunet and Lentini 2006; Caivano 2008). Naón, perhaps the most eminent observer of arbitration in Argentina and the region, offers this explanation:

Unlike the early expansion of arbitration in certain regions of Latin America in the 1915-1930 period, this more recent and much more general movement favourable to arbitration was triggered at the governmental level, i.e., from the top to the bottom, rather than from bottom to top, and as part of a more general policy aimed at creating what was supposed to be a general atmosphere favourable to free trade and the attraction of foreign investment. For this reason, this movement was too closely allied to—and dependent on—the political circumstances prompting it and was often launched before the courts, the legal profession, and local business circles before they became familiarized with the role and advantages of international commercial arbitration. This accounts for the fragility of the pro-arbitration movement of the recent decades and the possibility of a relapse into prior history should the political and economic ideas underlying it disappear” (Naon 2004, p. 172-173).

As I show below for the case of Argentina, at least, this perspective is certainly correct in the sense that the norm or arbitration has not become embedded in the practice of firms, and the government’s embrace of it has indeed been fickle. I find little evidence, however, that the shift to arbitration is explained by a general ideological shift amongst policymakers. Nor does this sweeping ideational explanation tell us why the Argentine government embraced arbitration half-heartedly while depending on exports for revenue and hard currency, nor does it account for the fact that, though Argentine law and practice remain significantly less supportive of private arbitration than international norms and regional benchmarks, the country did ratify a number of key arbitration treaties, and adopted a host of broader neoliberal measures over the course of the 1980s and 1990s. In other words, as noted in the introduction, the general ideological explanation raises as many questions as it answers. Instead, I argue that the political
determinants of Argentina’s dispute settlement institutions today closely resemble those of the previous Golden Age, in which the nature of export markets allowed merchants to achieve their goals largely without state intervention. This alternative deprived arbitration the backing of economic interest groups in domestic politics and internationally, leaving the pro-arbitration epistemic community—growing in influence, but never dominant in Argentine politics—only partially successful in securing support for the institution from the Argentine state.

Before turning to explanation, I first lay out the changes in Argentine law since the 1970s. Following the 1976 reversal of the prohibition on arbitration, a second round of reform under the same government in 1981 suggests that support for arbitration extended beyond this one dispute. The CPCC was amended again by Law 22.434 to further strengthen the autonomy of arbitration by, for example, allowing arbitrators to grant interim judgments. Parties were now allowed to forgo national jurisdiction as desired, with three exceptions: legal areas, such as family law, in which arbitration is not allowed; legal areas explicitly covered by treaties; and legal areas under the exclusive jurisdiction of the Argentine state. (Naón 1982; Nattier 1985; Naón 1990; Caivano 2008).

According to Piaggi (1983), these changes were sufficient to make foreign awards enforceable in Argentine courts, even though Argentina had yet to ratify the New York Convention or the Panama Convention (but was a party to the Montevideo Convention). It is unclear, however, that these early reforms had a practical impact. Julio César Rivera served as a commercial judge throughout the 1980s. He stated that arbitration was seldom
used by firms at the time, and cannot remember a single case in which an arbitration award came before the court for enforcement (Rivera 2011). From figure 30 (below) we indeed observe that few arbitrations seem to have been submitted during this time.

The democratic elections of 1983 brought the center-left to power, where it followed centrist economic policies that, by the late 1980s, provoked a series of debt and inflation crises. During this period Argentina ratified key treaties relating to international commercial arbitration, including the 1979 Montevideo Convention (1983) and the New York Convention (1988), making foreign arbitral awards enforceable in the country. This major shift has been subsequently upheld by the Supreme Court of Justice, which began developing a more pro-arbitration jurisprudence. Decisions in 1988 and 1996 reinforced the autonomy of arbitration, and in 1993 the supremacy of the arbitration treaties over national laws was upheld (Caivano 1999; Whittinghill 2003).

The debt crisis, runaway inflation, and other economic difficulties of the 1980s ushered in the Peronists in 1989 under the leadership of Carlos Menem. The Peronist party had become much less dirigiste since mid-century, and under Menem the embrace of business interests reached an extreme. Over the next decade Argentina became a poster-child for neoliberalism as the country liberalized trade and investment laws, ended inflation by pegging the peso to the dollar, and privatized vast swaths of the economy. To carry out this ambitious transformation the government relied on strong-arm, personalist tactics that were seen to undermine democratic norms and—not coincidentally—enriched Menem and his allies. The rule of law was not valued per se. In 1990 Menem appointed
five extra judges to the Supreme Court, guaranteeing himself a majority, with the justification, “Why should I be the only Argentine president not to have my own Supreme Court?” (Helmke 2005). For a decade, the policies led to rapid growth.

During this period numerous attempts were made to match Argentine laws governing arbitration to the norms of the 1985 UNCITRAL Model Law. The justice ministry, working with elite lawyers, proposed legislation along these lines in 1991, 1996, 1999, and 2001, but failed to push the law through Congress on each occasion (Mealy's 2001; Burghetto 2003; Whittinghill 2003; Caivano 2008). Despite these difficulties, it was clear that the legislature was not opposed to arbitration per se in this period, because the 1979 Montevideo Convention was ratified in 1994 and the Panama Convention in 1995. Moreover, the International Convention on the Settlement of Investment Disputes (ICSID), which grants private investors the right to sue states under ICSID arbitration, was signed in 1991 and ratified in 1994. Dozens of BITs were also ratified over this period.

By the late 1990s it was clear that Menem’s policies—chief amongst them, the currency peg to the US dollar—were unsustainable. Investors, spooked by the aftereffects of the 1997 East Asian crisis, began withdrawing money from Argentina in the late 1990s, eventually breaking the currency peg and provoking a sharp devaluation that decimated the savings of many Argentines and provoked a deep recession. After significant political turmoil at the beginning of the new millennium—which did not, as in past episodes, provoke a military coup—the country has returned to a center-left orientation.
under the populist, left-learning elements of the Peronist party. During the first decade of the 21st century, the government has clashed with several important export sectors, seeking to increase their contribution to national coffers.

The 2001 crisis also provoked a series of investment disputes that made arbitration the subject of headlines—almost always negative—in Argentina. After ignoring the investment regime throughout the postwar decades, Argentina had become deeply committed to protecting investors’ rights under Menem, signing 58 BITs between 1990 (its first was with the UK) and 2002 (it has signed none since the 2001-2002 crisis). Under these agreements, nearly 50 ICSID cases have been brought against Argentina since the 2001 crisis, most stemming from the devaluation of the peso and other post-crisis policies.\(^{37}\) Several of these cases were high-profile disputes with companies like Siemens, Telefónica, or EDF, many of which provided public services that had been privatized under Menem. The issue of arbitration—for investment, not commercial deals, although this distinction was lost on everyone who was not an expert—thus gained significant political salience. A search of the archives of La Nación, the country’s highbrow paper of record, reveals almost 1000 mentions of ICSID between 1995 and today, compared to barely 60 in the New York Times over the same period. As I explain below, the developments had a chilling effect on commercial arbitration, although the two are not technically related.

\(^{37}\) To compare to other countries in the region, Chile has been the subject of three ICSID cases, Mexico one, Peru 11, and even Venezuela only 27. Brazil is not a member.
Today, most observers describe the legal framework for arbitration in Argentina as inadequate (e.g. Naón 2004; Caivano 2008), citing the “confusing amalgamation of regulation addressing arbitration” (Whittinghill 2003, p. 796). Two main obstacles can be identified. First, before an arbitration can proceed in Argentina, a compromiso must be agreed between the parties (Fargosi 1989; Naón 1990; Burghetto 2003; Whittinghill 2003). This is essentially a follow-up contract to the original arbitration clause that sets out the terms of reference for the arbitrators. It is a vestige of the 19th century civil law codes—rooted in the Napoleonic Code—governing arbitration, which often treated the practice as ex post facto (Goldman 1965; Caivano 2008). Obviously this provision undermines much of the utility of the original arbitration clause by requiring parties to agree on dispute settlement procedures after a conflict has emerged. In practice, Argentine courts routinely order parties that have signed an arbitration clause to also sign the compromiso, meaning that arbitration cannot be avoided under Argentine law (Caivano 2008). However, its utility is significantly diminished if courts are forced to intervene at an early stage of the dispute, making elements of the disagreement public and increasing time and cost.

Second, Argentine law and jurisprudence has not fully recognized the autonomy of the arbitration clause or the kompetenz-kompetenz of the arbitrators (Burghetto 2003). Some outlaying decisions have suggested that the arbitral clause is not independent of the arbitration agreement, implying that an invalid contract makes arbitration impossible (Naón 1990). Moreover, when courts become involved with enforcing a compromiso

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38 Here I refer only to Argentine national law, not the law of the provinces. However, since all disputes with a foreign entity in Argentina fall under federal jurisdiction, this discussion is adequate for our purposes (Burghetto 2003; Caivano 2008).
provision, they are forced to consider what is and what is not valid material for arbitration, imposing judicial oversight on the competence of the arbitrators (Naón 1990). There is something of a disjuncture, then, between the arbitration-facilitating laws treaty obligations and the behavior of the judiciary (Naón 2004).

8.1 The Extent of Arbitration in Argentina

Arbitration has also not become widespread in practice. This is the consensus view amongst experts interviewed for this study and in the legal literature, but is difficult to establish empirically. One rather limited survey of 60 members of the Brazil-Argentina Chamber of Commerce in the mid 1990s concluded that “arbitration is little known in our region,” with only a third of respondents reporting that they would include an arbitration clause in their contracts (Pucci 1997, p. 256). And only one of the respondents reported using arbitration for a domestic matter (Pucci 1997). As with the other cases, defining the universe of arbitrations is challenging, as Argentine firms may choose to arbitrate at dozens of domestic arbitration institutions, as well as international ones or in ad hoc procedures.

Anecdotal evidence confirms that Argentine arbitral institutions have small caseloads (Cueto Rúa 1994). I have obtained more concrete data on the caseload of the Arbitration Chamber of the Buenos Aires Stock Exchange from 1963-2010 (figure 30), widely regarded as the country’s preeminent general arbitration body. Unfortunately, the data do not allow us to distinguish between domestic and international arbitrations. I have also obtained data on the caseload of the National Civil and Commercial Chamber, the part of
the federal judiciary to which the issues covered under commercial arbitration (but also other types of claims) would come, though for only a few recent years (figure 31). Note this does not include cases resolved at the state level, which possess distinct legal systems. Several observations emerge even from this relatively limited view of the total universe of cases.

First, the overall number of arbitrations is rather low compared to the American or Chinese cases. There are never more than 50 new arbitrations per year at the BCBA, and in many years the number is far lower. It is difficult to identify the appropriate sample of public cases to compare this figure with, but looking only at contract cases in federal courts (for which we have data only on 2002-2009), the ratio of arbitration to litigation ranges between 10-20 percent (figure 32). This figure does not, of course, include arbitrations at other institutions in or out of the country, or ad hoc arbitration, and so in this sense likely underestimates the number of arbitrations considerably. Nor does it include arbitration in the trade associations that govern Argentina’s main exports, discussed below. However, looking only at what are classified as contract cases in the public statistics also likely underestimates the true number of comparable disputes, because other categories such “payment of funds” or “various securities” may also include cases that could have been arbitrated. Moreover, for neither types of cases can we determine the ratio of domestic to international cases.

Second, the data show that arbitration has varied over time, but not in a way that follows changes in policies in the early 1980s or the ratification of the NYC or other treaties. Nor
do the numbers of cases reflect a general “neoliberal turn” (figure 30). While the large surge in the mid-1970s was likely driven by the CPCC reform of 1976 (which re-legalized arbitration). There is a subsequent drop during the Falklands / Malvinas War and transition to democracy. This is strange, given that these events would most likely have provoked significant commercial disruptions, and thus disputes. Most importantly, against those who claim there was a subsequent return to arbitration during the neoliberal period, the data instead show relatively few arbitrations during the late 1980s and 1990s. Indeed, the 1970s levels are only reached following the 2001 crisis.

Figure 30: Caseload of the Bolsa de Comercio
Figure 31: Cases in the National Civil and Commercial Chamber, 2002-2009 (source: Argentine Judiciary website\textsuperscript{39})

\textsuperscript{39} Available at: http://www.pjn.gov.ar/07_estadisticas/
8.2 Rationalist

Consider first the quality of dispute resolution provided by Argentine courts. On the policy outcome dimension, bias and corruption cannot be ruled out. The World Bank’s *World Governance Indicators* ranked the country in the 47\textsuperscript{th} percentile, globally, for the rule of law in 2000, falling to the 33\textsuperscript{rd} percentile at the end of the decade. The longer-term data from PRS in figure 33, while slightly more positive, suggest that Argentine courts are less likely to provide disputants with a fair trial than they may find in other countries.
On the efficiency dimension, Argentine courts are significantly worse. At the start of the reform period, in 1991, Argentine civil courts were only processing 8.5 percent of commercial cases in the same term (Piaggi 1992), anecdotal evidence suggests not much has improved in terms of speed since. Worse, a “justice duty” of three percent of the award is imposed on commercial disputes in Argentine public courts, increasing the cost of litigation and eliminating an important comparative advantage of public courts over arbitration. Given these disadvantages, we would expect, under R1, foreign litigants to seek alternatives to public courts if private options were available and satisfactory.

Indeed, as in previous periods, the market structure of Argentina’s main commercial exports renders these industries ideally suited to private dispute resolution. In this and other ways, Argentina’s external commerce—and the associated institutions for dispute resolution—has, at the end of the century, returned to resemble those of the Golden Age. As at the turn of the last century, the neoliberal period saw a sharp increase in Argentine
exports. Today, however, instead of supplying wheat for the bread that fed workers in Britain, Argentina produces soy products, its largest export, for workers in China, its largest foreign market after neighboring Brazil.\textsuperscript{40}

Like their counterparts at the start of the 20\textsuperscript{th} century, the major Argentine exporters at the start of the 21st operate in structured markets in which only a few multinationals account for the lion’s share of trade. Argentina’s principal exports for 2010 are given in table 28. Agriculture accounts for over half of their value, with soy products alone making up a quarter. Automobiles and their components (12.6 percent) and oil and gas (10.6 percent) are also important.

<table>
<thead>
<tr>
<th>Complex (group of related products)</th>
<th>Millions USD</th>
<th>% total exports</th>
</tr>
</thead>
<tbody>
<tr>
<td>Oilseed complex</td>
<td>18,079</td>
<td>26.5</td>
</tr>
<tr>
<td>Soy</td>
<td>17,317</td>
<td>25.4</td>
</tr>
<tr>
<td>Sunflower</td>
<td>720</td>
<td>1.1</td>
</tr>
<tr>
<td>Linseed and others</td>
<td>42</td>
<td>0.1</td>
</tr>
<tr>
<td>Automobile complex</td>
<td>8,618</td>
<td>12.6</td>
</tr>
<tr>
<td>Petroleum-Petrochemical complex</td>
<td>7,201</td>
<td>10.6</td>
</tr>
<tr>
<td>Petroleum and gas</td>
<td>5,383</td>
<td>7.9</td>
</tr>
<tr>
<td>Petrochemicals</td>
<td>1,818</td>
<td>2.7</td>
</tr>
<tr>
<td>Grain complex</td>
<td>5,415</td>
<td>7.9</td>
</tr>
<tr>
<td>Maize</td>
<td>3,227</td>
<td>4.7</td>
</tr>
<tr>
<td>Wheat</td>
<td>1,358</td>
<td>2.0</td>
</tr>
<tr>
<td>Rice</td>
<td>230</td>
<td>0.3</td>
</tr>
<tr>
<td>Other</td>
<td>600</td>
<td>0.9</td>
</tr>
<tr>
<td>Bovine complex</td>
<td>3,274</td>
<td>4.8</td>
</tr>
<tr>
<td>Meat</td>
<td>1,356</td>
<td>2.0</td>
</tr>
<tr>
<td>Hide</td>
<td>1,036</td>
<td>1.5</td>
</tr>
<tr>
<td>Milk</td>
<td>882</td>
<td>1.3</td>
</tr>
<tr>
<td>Fruit and Vegetable complex</td>
<td>2,259</td>
<td>3.3</td>
</tr>
<tr>
<td>Fruit</td>
<td>1,335</td>
<td>2.0</td>
</tr>
<tr>
<td>Vegetable</td>
<td>924</td>
<td>1.4</td>
</tr>
<tr>
<td>Metals complex</td>
<td>5,851</td>
<td>8.6</td>
</tr>
</tbody>
</table>

40 China has also announced plans that, if fulfilled, would make it Argentina’s largest source of FDI, as Britain was a century ago. To complete the parallel, these plans include US $12 billion for rail improvements to facilitate the flow of agricultural goods across the pampas.
Argentina

<table>
<thead>
<tr>
<th>Industry</th>
<th>Value</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fisheries</td>
<td>1,344</td>
<td>2.0</td>
</tr>
<tr>
<td>Forest products</td>
<td>1,030</td>
<td>1.5</td>
</tr>
<tr>
<td>Remaining exports</td>
<td>12,731</td>
<td>18.7</td>
</tr>
<tr>
<td>Raw commodities</td>
<td>608</td>
<td>0.9</td>
</tr>
<tr>
<td>Agricultural products</td>
<td>5113</td>
<td>9.2</td>
</tr>
<tr>
<td>Industrial products</td>
<td>9,174</td>
<td>13.5</td>
</tr>
<tr>
<td>Energy and combustibles</td>
<td>166</td>
<td>0.2</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>68,134</strong></td>
<td><strong>100</strong></td>
</tr>
</tbody>
</table>

The industries that make up the lion’s share of Argentina’s top exports are dominated by just a few firms. A comprehensive overview of market shares across industries is beyond the scope of this study, but several key data points tell the larger story. A 2002 study of the soy industry found that only four firms accounted for 68 percent of soy oil and soy flour exports; the top eight firms in each industry accounted for over 90 percent (table 29).

**Table 29: Market share of top soy exporters, 2002 (source: Pascuale and Qaugliani, 2005)**

<table>
<thead>
<tr>
<th>Company</th>
<th>Origin</th>
<th>Soy flour exp. (%)</th>
<th>Soy oil exp. (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cargill</td>
<td>US MNC</td>
<td>19.1</td>
<td>22.3</td>
</tr>
<tr>
<td>Bunge Argentina</td>
<td>Dutch MNC</td>
<td>18.7</td>
<td>17.8</td>
</tr>
<tr>
<td>Aceitera General Deheza</td>
<td>Privately owned Argentine company</td>
<td>15.9</td>
<td>12.4</td>
</tr>
<tr>
<td>Dreyfus</td>
<td>French MNC</td>
<td>14.6</td>
<td>15.5</td>
</tr>
<tr>
<td>Top 4 firms</td>
<td></td>
<td>68.4</td>
<td>68.0</td>
</tr>
<tr>
<td>Top 8 firms</td>
<td></td>
<td>91.9</td>
<td>91.4</td>
</tr>
</tbody>
</table>

The automobile trade is similarly structured. In the late 1980s and 1990s Brazil and Argentina (later with other Mercosur partners) conducted joint industrial policy and trade liberalization to stimulate a regional automobile production industry. The governments provided numerous incentives to create a common market for cars and car parts in the region—for example, intra-firm trade of completed vehicles was duty free—seeking to entice manufacturers to build regional production chains (as they had in North America, Europe, and Southeast Asia) (Ciravegna 2003; Humphrey and Memedovic 2003; Brambilla 2005). The result was industry consolidation via FDI, giving MNCs near total
control over the industry, and an explosion of the regional automobile trade. To appreciate the extent of the shift, consider Argentina’s “ratio of ratios” of car exports to Brazil versus total exports to Brazil, compared to the ratio of car exports to the rest of the world versus all exports to the rest of the world (a value of 1 meaning Brazil has the same share of Argentina’s car exports as the rest of the world). This statistic shifted from 0.144 in 1986 to 4.865 in 1991, meaning that Brazil went from vastly under-represented in Argentina’s car exports in just a few years (Miozzo 2000). Today 80 percent of Argentina’s auto-related exports go to MERCOSUR (INDEC 2012), with the bulk going to Brazil.

Again, most of this trade is in the hands of only a few MNCs. One study of Brazil’s car imports from Argentina in the 1990s found that just three MNCs made up most of the market, with Fiat claiming 18.2 percent, Ford 21.1 percent, and Volkswagen 46.0 percent (Brambilla 2005). Toyota has come to play a larger role following investments in the 1990s, but, as the President of the Argentine subsidiary has stated, “exports are targeted toward Toyota car dealers in the other [Mercosur] countries” (IADB 2011). Precise statistics on intra-firm trade are unavailable, but given the regional structure of the production chains and the explicit tariff advantages for intra-firm trade, we can assume that the bulk of Argentina’s car trade with the region is either intra-firm, or between parts suppliers and their parent companies (Miozzo 2000; Ciravegna 2003; Humphrey and Memedovic 2003). Following R1, then, chances for disputes are therefore extremely rare.
Oil, in turn, is a similarly oligopolistic market. Repsol-YPF, the national oil company that was privatized in the early 1990s and re-nationalized in spring 2012, controls 60 percent of the market. The second largest producer is Bridas, a joint venture between a private Argentine producer and the China National Overseas Oil Corporation (one of China’s three major state-owned oil companies). Subsidiaries of other major foreign producers such as ExxonMobil, Petrobras, and Total make up the rest (EIA 2011).

Grain, meat, and other agricultural products follow similar patterns. A study estimated that the average market share of the top four firms across each of Argentina’s agricultural export industries was over 50 percent (Miranda 2010). More generally, only a few firms account for most of the country’s exports: the 12 top exporters (those exporting over US $1 billion) accounted for 42 percent of all exports in 2009 (IERAL 2011). And not only are Argentina’s chief export industries dominated by a few firms, but many of them—not just automobiles—are engaged principally in intra-firm transfers. Precise and systematic data are difficult to obtain, but a study of Argentina in the 1990s estimated that 60 per cent of TNCs’ exports and 80 per cent of their imports were intra-firm transactions (Kosacoff 2000). In sum, just as in the early 20th century, all of these factors facilitate private enforcement of disputes. According to R1, then, we would not expect to see demand for state enforcement of private arbitration, or hybrid institutions. Instead, we would expect demand for private institutions with market-based enforcement capacity.

Indeed, all of Argentina’s primary export industries rely extensively on private dispute settlement. Importantly, the private institutions that serve Argentina’s agricultural
exporters are not the “general purpose” institutions like the ICC or the Argentine BCBA. Rather, industries like soybeans and grain rely on industry-specific arbitration institutions. Such institutions create informal small world effects around dispute settlement, raising the reputational costs of non-compliance and thus likely making private enforcement even stronger (Lewis 2012; Logan 2012).

Consider, for example, the Federation of Oils, Seeds, and Fats Associations (FOSFA), a private institution based in London that represents 950 members in 79 countries engaged in different aspects (production, processing, transport, etc.) of the trade in soybeans, sunflower seeds, peanuts, palm oil, and related commodities. FOSFA’s antecedent organizations stretch back to the beginning of modern commodity arbitration in London in the mid 19th century. According to the organization, 85 percent of the global trade in these commodities occurs under its standardized contracts (several dozen exist, tailored to different products and regions), which call for FOSFA-provided dispute resolution. 41 FOSFA estimates that tens of thousands of transactions per year could end up in its arbitral body. In practice, however, it only hears 100-120 cases per year, suggesting that the number of disputes is quite low (as the market conditions would predict).

In terms of efficiency, FOSFA arbitration compares extremely favorably to litigation in any court in the world. The cost of arbitration is $2-3,000 for a single hearing, and $10,000 for an appeal (for comparison, a single large shipment of soybeans can be worth $25-30 million). Cases can be decided in as little as 2-3 months, and it is rare for them to

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41 Fascinatingly, FOSFA contracts are also used to govern intra-firm trade, e.g. between different national subsidiaries of the big multinationals that govern the trade like Bunge or Cargill.
extend beyond a year. Only members of the industry are used as arbitrators, with virtually no involvement of legal professionals. “I have a strong mandate to keep it commercial,” states the director (Logan 2012). The London office maintains a stuff of only six.

FOSFA arbitration also benefits from a high degree of authority based in the nature of the market, discussed above. Interestingly, FOSFA facilitates this private enforcement by publishing a “posting list” of companies that fail to comply with awards rendered against them. This list is only shared with FOSFA members, but greatly raises the reputational costs of non-compliance by waiving the traditional secrecy requirement that characterizes much arbitration.\(^{42}\)

Finally, on the neutrality dimension, FOSFA prides itself on studiously eliminating potential conflicts of interest amongst its arbitrators, and I could find no evidence of industry participants alleging bias. Importantly, much of this neutrality is embedded in FOSFA’s decision-making practices, and so leaves little scope for human error. FOSFA arbitrators apply a century and half of established FOSFA practice to cases, forming a large and sophisticated “jurisprudence” that contains well-established precedents for the majority of cases. This institutionalization makes FOSFA arbitration predictable and, thus, neutral in terms of outcomes.

The grain trade is similarly organized, though the industry operates on a larger scale. The Grain and Feed Trade Association (GAFTA), also based in London, is the direct

\(^{42}\) One industry participant, who asked not to be identified, stated that approximately 350 companies appeared on the list. The largest country of origin was India, with 45 companies.
descendent of the 19th century corn exchanges discussed above. This organization represents 1370 members in 87 countries, the majority of whom are involved in shipping grain, not producing or processing it. GAFTA estimates that 70 percent of the world trade in grains occurs under its standards contracts, which call for minimalist arbitration similar in nature to FOSFA’s. The only significant differences are that GAFTA does not keep an internal list of non-compliant firms, and does not allow appeal. This is likely explained by the relatively lower value per transaction of grain relative to oilseeds like soybeans. Grain is a “small quantity, high volume” product, according to the organization’s director, and so firms are more interested in speedy resolution than squeezing maximum value from every transaction.

These international grain organizations trace their roots to the 19th century era of globalization, as do their Argentine cognates, the Arbitral Chamber of the Grain Exchange (Buenos Aires), the Bolsa de Comercio de Rosario, and others (discussed above). As the Legal Director of the Grain Exchange, the arbitration expert and scholar Roque Caivano, stated, “commercial arbitration has very little use in Argentina, but the grain industry is a major exception” (Caivano 2011). Caivano notes that the dynamism and pace of the market—which is characterized by fluctuating prices, perishable goods, and a high volume of transactions, each of which is of relatively low value—makes quick and definitive dispute resolution especially important. In the grain trade “Tomorrow is long term,” Caivano notes, adding that “resolution is more important than winning.” In other words, the grain market creates almost perfect conditions for private dispute enforcement; a small number of actors transact on an ongoing basis, individual
transactions are of low value and the value of goods deteriorates quickly (i.e. little can be gained from cheating), and price fluctuations and weather conditions generate uncertainty over future market positions. As expected, few disputes arise. While the Grain Exchange does not keep precise statistics, Caivano puts the average number at 50-60 per year, with a minimum around 20 and a maximum at 100. These cases represent “less than 0.00 percent” of the total volume of grain traded (Caivano 2011). Of the disputes that come before the Arbitral Chamber, approximately 80 percent are resolved through arbitration while 20 percent end up in mediation. Voluntary compliance with arbitral awards is virtually perfect. “Almost none” of the arbitrations Caivano has observed since joining the Grain Exchange in 1983—essentially the entire extent of the neoliberal period—have required court enforcement. Similarly striking statistics are reported in Rosario. Mariela Ingaramo, the Legal Director of the Bolsa de Comercio, estimates that of the 120,000-140,000 contracts signed each year, only 10-20 conflicts make their way to arbitration (Ingaramo 2011). These specialized bodies are consistent with both R2 and I2, as they meet the material needs of exporters while also reflecting long-standing practice.

In sum, then, neutral, authoritative, and efficient private institutions exist to provide the rule of law for the majority of Argentine exports. We would therefore not expect economic interest groups to lobby for state support for arbitration, as such policies would have little practical value. Indeed, as we see below, the existence of effective private alternatives meant that ideational forces were the predominant mechanism influencing the Argentine state’s policy toward arbitration.
8.3 Ideational

To evaluate I1 and I2 we must identify the existence of a legal field in Argentina and its linkages to external influences, assess the degree of acceptance of pro-arbitration norms within that field, and evaluate the level of firm and policymaker deference to legal experts.

First, as noted above, Argentina has historically possessed a strong and sophisticated legal community. Its relative wealth and strong educational institutions—the Law School of the University of Buenos Aires first amongst them—have supported a significant community of legal experts with close linkages to European and North American intellectual circles, including those specialized in private international law (Caldani 2009). With regard to commercial disputes, experts have described the country as a litigious society.

Second, in the 1980s several distinguished figures in Argentine law became involved in the study and promotion of arbitration. They were also connected to the transnational arbitration community in various ways, illustrating the mechanism through which I1 and I2 might operate.

An early arbitration practitioner and advocate was Sergio Le Pera, who began participating in ICC arbitrations as a young lawyer in the 1970s while also working as a law professor at the University of Buenos Aires. This work firmly connected him to
transnational networks of lawyers. After spending periods of time working on arbitration in Paris, London, New York, and Houston, he became, in the mid 1980s, the first Argentine to sit on the ICC’s International Court of Arbitration. He was also a member of UNESCO’s International Association of Legal Science, serving as vice-president between 1996 and 2000, as well as various other international legal organizations, including the American Society of International Law, the Inter-American Bar Association, the British Institute of International and Comparative Law, and the Société de Législation Comparée. These international affiliations were complimented with significant prestige within domestic legal circles. He held various leadership roles at UBA’s Law School, including the Director of the Department of Economic and Company Law (1994-1996) and the Director of the Postgraduate Department. He was also president of the Argentine Association of Comparative Law from 1988-1992.

Capitalizing on these international linkages and his position within the Argentine legal field, Le Pera has long advocated the advantages of arbitration (Le Pera 1997). In the 1970s he organized what was perhaps the first modern workshop to familiarize Argentine lawyers with its advantages, at which three justices of the Supreme Court were present. This advocacy extended to close collaboration with lawmakers. In 1988 he brought the president of the ICC court to Argentina to lobby lawmakers for ratification of the New York Convention, and was one of the principal lobbyists advocating for Argentine adherence to the NYC. He also served as an author of the (failed) arbitration reform bills of 1991 and 2001, amongst several other laws related to company law.
Ana Isabel Piaggi occupied a similar position in both the international and domestic fields. Piaggi was also a professor of commercial law at UBA, and her work is some of the earliest written on arbitration in modern Argentine legal journals (e.g. Piaggi 1983). In 1987, Piaggi became Argentina’s representative to UNCITRAL, a post she held until 1996. She was also a member of UNIDROIT. On the domestic front, she complemented her prestigious professorial post to become a commercial judge in the 1990s, eventually rising to serve as President of the National Chamber for Commercial Appeals, the nation’s highest commercial court. Throughout this time, she authored numerous articles in support of arbitration and advocated reform of Argentine laws (Piaggi 1983; Piaggi 1992). Not coincidentally, Piaggi is married to the lawyer and politician Jorge Reinaldo Vanossi, one of the principal sponsors of attempts to reform Argentine arbitration law (see below).

A final leading figure of the Argentine arbitration world is Horacio Grigera Naón. Another graduate of UBA, Naón is one of the most prolific and cited scholars on arbitration globally. He is also an active practitioner, eligible to arbitrate through several institutions around the world, and has served as senior counsel to the International Finance Corporate (the private sector arm of the World Bank), as well as Secretary General for the ICC’s arbitration court from 1996-2001. While his primary professional activities have taken place outside of Argentina, Naón has written extensively on Latin America and the Argentine case in particular, and his views on arbitration are widely cited there.
Third, the writings of these figures—and, perhaps more importantly, the jurisprudence of the courts—demonstrate the evolving position of arbitration within Argentine legal circles. One of the first works by Naón argued that Argentine law was, in fact, relatively supportive for arbitration, offering a healthy mix of judicial oversight and private autonomy (Naón 1980). His critiques became sharper (Naón 1986; Naón 1989) later in the decade, after the promulgation of UNCITRAL’s model law (and following a period of working at Bridas, the Argentine energy concern, and an SJD at Harvard Law School).

Piaggi, in turn, noted in 1983 that though “We lawyers are frequently skeptical about the advantages of arbitration,” and “In Argentina domestic arbitration is practically non-existent and international arbitration is little used,” fewer and fewer cases in the future would be resolved in public courts, meaning that lawyers’ needed to change their views (Piaggi 1983). And still in the early 1990s she lamented, “The physiological reaction of the lawyer in the Hispanic tradition is to appeal to the judge, but this singular reaction is not rational, nor in all cases the most convenient” (Piaggi 1992).

The 1990s seemed to be a period of change, however. In 1990 Naón was able to write an article entitled “Arbitration in Latin America: Overcoming Traditional Hostility” (Naón 1990), which praised the shift in favor of arbitration across the region, including in Argentina. This normative consensus supportive of arbitration was also seen in the courts. Court decisions are important indicators of elite norms because they call on judges to

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43 Original text: “Los abogados somos, con frecuencia, escépticos sobre las ventajas del arbitraje y sabemos que nuestros clientes resultan a menudo desilusionados, pero la evidencia nos indica que los acuerdos que sujetan los diferendos del comercio internacional, a los tribunales judiciales de un país determinado, son relativamente escasos y llegarán a ser más escasos todavía ». .. En la República Argentina el arbitraje doméstico no tiene prácticamente virtualidad y el internacional es poco usado »

44 Original text: “La reacción fisiológica del abogado de tradición hispánica ante el conflicto es acudir al juez; pero tal reacción unidimensional no es racional, ni en todos los casos la más conveniente”
decide cases in which statutory or treaty law may not be clear. Whether or not a decision within these gray areas supports arbitration thus indicates the normative orientation of elite opinion. In 1978 the Supreme Court affirmed the jurisdiction of public courts over arbitration in cases in which one of the parties was going through a bankruptcy process (a common source of disputes, and therefore an important limitation on arbitration) (Caivano 1999, p. 6-7). In 1988 this decision was reversed, and this switch upheld again in 1996. In 1993 in the case of Fibraca Constructora S.C.A. vs. Comisión Técnica Mixta de Salto Grande the Supreme Court declared arbitral decisions to be irreversible. In a similar case, Color S.S. vs. Max Factor Sucursal Argentina, the Court gave a full-throated endorsement of arbitration as a norm:

Arbitration depends on the voluntary extension or abdication of the jurisdiction that would ordinarily belong to the Judiciary, which is transferred to private judges who take on and decide the quarrels that are brought to their consideration. In this sub-judice, the parties observe and benefit from multiple advantages of this procedure—speed, economy, informality, the technical knowledge of the adjudicators—and the free submission of their controversies to the authority of arbitrators they themselves have selected. (Quoted in Caivano 1999, p. 9)

As Caivano (1999) explains

The Argentine Supreme Court of Justice has decidedly placed itself at the forefront of the transformation of the legal culture surrounding the matter, demonstrating that it understands the role of arbitration as an alternative mechanism for dispute resolution. The vision of the Court openly contradicts the previous judicial rectitude that public courts have traditional demonstrated…” (p. 18). 

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45 Original text: “En el arbitraje importa la prórroga o la sustracción voluntaria de la jurisdicción que ordinariamente tendrían los tribunales del Poder Judicial, que es transferida a jueces particulares que substanciarán y decidirán las contiendas que se sometan a su consideración. En el sub-iudice, los contratantes advirtieron y sacaron provecho de las multiples ventajas que este procedimiento supone—celeridad, economía, informalidad, conocimientos técnicos de los juzgadores—y libre sometimiento de sus controversias a la autoridad de los árbitros que ellos mismos seleccionaron.”

46 Original text: “la Corte Suprema de Justicia argentina se ha colocado decidamente a la cabeza del proceso de transformación de la cultura jurídica en la materia, con lo cual ha dado muestras de comprender la esencia y el rol del arbitraje como mecanismo alterantivo para la solución de los conflictors. La visión de
But this consensus never became entrenched. Differing approaches could be distinguished between the Commercial Court of Appeals (in which Piaggi served) and the Supreme Court (Spinillo and Vogelius 2002). In 2004 the Supreme Court set off what one observer described as a “bomb in arbitration” (Rivera 2011) by agreeing to review an arbitral award in which a large construction company had won a sizeable judgment against a state-owned firm. The construction firm initially sought enforcement in the commercial court, which upheld the award as legitimate. The state-owned enterprise then took the unprecedented step of filing an appeal directly with Supreme Court (which had jurisdiction because the matter was considered a federal issue), which, even more unexpectedly, agreed to review the award as if it were a normal court decision. The final decision significantly undermined the standing of arbitration in Argentine courts, sharply limiting the degree of deference granted. Naon (2004, p. 166) associated these trends with the anti-liberal ideas of the 1930s and 1940s. At odds with much of the Court’s previous jurisprudence on the issue, the decision provoked a significant degree of confusion amongst lower courts (Irriberi 2012), though subsequently the commercial court has upheld the autonomy of arbitration in subsequent decision. Overall, however, one of the leading arbitration journals characterizes the current situation as middling:

In Argentina, we find ourselves in a rather lukewarm middle ground (the lights and shadows of our title). We are far from being in an environment that is completely hostile to arbitration, but we are also far from being the modern arbitration centre that we believe we could be. (Irriberi 2012).

In sum, then, the Argentine legal field remains divided on the utility of arbitration. I1, therefore, would not expect firms to have embraced the practice, and, indeed, they have

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la Corte contradice abiertamente aquella especie de recelo judicial que históricamente han demostrado los tribunales judiciales…
not. Despite the ratification of the relevant treaties, “Acceptance of black letter law has not always been matched by full implementation on the part of judges, not acceptance and usage on the part of lawyers and their clients” (Naon 2004, p. 145; Burnet and Lentini 2006, p. 614). Experts put the level of domestic arbitration significantly below Brazil or Chile, and cite the difference between arbitral institutions and the practice as firms as a “gap between aspiration and reality” (Garro 2011).

Turning to state delegation, why has the legal standing of arbitration in Argentina remained relatively weak? Given our findings regarding R1, the country’s largest exporters have little need to enhance state support for arbitral enforcement. And therefore, following R2, interest group pressure for state delegation to private arbitration will be low. Indeed, we see little evidence for R2. Instead, it is legal elites who have pushed for greater deference to private authority within Argentina, following the logic of I2. Given the contested nature of the arbitration norm within the Argentine legal field, these efforts have achieved only partial success, securing ratification of the NYC, the Panama Convention, and the Mercosur convention but not changing the domestic laws governing arbitration. As I show below, the pro-arbitration community ultimately lacked the clout and prestige to change domestic laws, particularly after the post-crisis explosion of investment arbitration altered the politics of the issue.

Consider first the ratification of the New York Convention in 1989. The conditions for I2 are readily observed. First, Argentine legal elites promoted ratification as a necessary and natural step to bring Argentina into line with international norms. Naón wrote,
The New York Convention achieves a satisfactory balance between the requirements of justice and of judicial integrity and the objectives of speed and effectiveness required by international commercial arbitration. This explains the heightened quantity of ratifications achieved to date in all the political and geographic domains of the world. The insertion of Argentina into the international current in favor of commercial arbitration also requires us to insert into our juridical apparatus specific norms regulating the international commercial arbitration that occur in our borders (Naón 1986, p. 83).

This view was also held by the two individuals that led the push for ratification in Congress, Sergio Le Pera (discussed above) and Jorge Reinaldo Vanossi. Both were legal elites with strong linkages to the international arbitration community, but Vanossi’s role is particularly interesting, as he bridges the divide between legal elites and policymakers. Like most of the other key arbitration advocates, Vanossi was a law professor at UBA, authored numerous articles and books on both constitutional and commercial law, and held memberships and leadership roles in a number of prestigious scholarly associations in Argentina and abroad. He was also intimately linked to the transnational legal communities surrounding arbitration as a member and President of the Inter-American Juridical Committee (the OAS body responsible for advising on international legal questions, a key promoter of the inter-American arbitral regime), and through his wife, Ana Isabel Piaggi, Argentina’s representative to UNCITRAL (discussed above). But Vanossi was also active in political circles through the main center-left party, serving as a member of Congress for three terms in the 1980s and early 1990s, and again from 2003-

Original text: “Como se aprecia, la Convención de New York alcanza un equilibrio satisfactorio entre las necesidades de justicia y seguridad jurídica y los objetivos de celeridad y efectividad del arbitraje comercial internacional, lo que explica la elevada cantidad de ratificaciones alcanzadas hasta la fecha en todas las regiones políticas y geográficas del mundo. La inserción de la Argentina dentro de la corriente internacional que favorece el arbitraje comercial también requiere contemplar la introducción en su ordenamiento jurídico de normas específicas reguladoras de los arbitrajes comerciales internacionales que transcurran dentro de sus fronteras.” 83
2007 representing a small, economically liberal party based in the porteño bourgeoisie. He was also, briefly, Minister of Justice under the transitional Duhalde government that emerged from the 2001-2002 crisis.

As a member of Congress in the late 1980s, Vanossi led the project to ratify the NYC, introducing the relevant legislation (CR 2700-D-85). Though he was of the same party as the President at the time, the initiative came from him, not from any of the executive ministries, which typically originate legislative projects in the Argentine system. Vanossi also claims not to ever have been lobbied by foreign or domestic firms on the issue, which is consistent with the statements of various domestic industry groups and foreign chambers of commerce. Also consistent with I2, Vanossi found little knowledge of the issue amongst his colleagues, and claims that they tended to defer to him on legal questions, given his personal expertise (Vanossi 2011). Indeed, Vanossi recalls little debate over the content of the NYC. Some senators on the Left were initially opposed, assuming it was a neoliberal policy, but Vanossi had only to show them the list of current signatories (which included all the socialist countries) to dispel this belief (Vanossi 2011). Le Pera was also involved in lobbying, inviting the president of the ICC ICA to Argentina in 1988 to meet with legislators. Le Pera views the favorable impression left by the French jurist as an important source of reassurance to legislators (Le Pera 2011). These efforts seem to have swayed the senators needed to approve the law, and the treaty was ratified without dissent or debate, as I2 would expect. Instead, the chief difficulty

49 Inquiries made by the author to the leading foreign chambers of commerce confirmed that none actively lobbied the Argentine government on matters relating to dispute resolution (emails on file with the author).
facing Vanossi and the other advocates of arbitration was getting the treaty onto the congressional agenda in the first place (in other words it was of low political salience).

While a significant step, ratification of the NYC was not sufficient in the eyes’ of arbitration’s advocates to bring Argentina in line with international norms. Following ratification, Naón again spoke for the arbitration advocates in *La Ley* (the most influential legal publication in the country) stating that “Argentina obviously ought to aspire to a growing role in international commerce,” and noting the contribution of the NYC ratification toward this goal, he argued,

This seems to be an opportune moment to seriously consider examining Argentina’s procedural legislation relating to arbitration with the objective of granting to commercial operators modern and appropriate norms to regulate arbitrations that take place in Argentina. The [UNCITRAL] Model Law offers in this sense numerous advantages because it has been drafted by specialists that represent all the regions of the earth and the principal legal systems through the efforts of an organ of the United Nations (Naón 1989, p.1).  

There soon followed numerous attempts to introduce the UNCITRAL Model Law into Argentine law. The first came in 1991, following the election, in 1989, of the center-right Peronist president Carlos Menem, a staunch neoliberal. Menem’s justice ministry formed a committee of experts, chaired by Le Pera, to prepare a draft law on arbitration, which was sent to the Senate for approval. It never came up consideration. At around the same time, in 1991 and 1992, Vanossi submitted the UNCITRAL Model Law in the House.

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50 Original text: “La Argentina obviamente debe aspirar a una creciente inserción en el comercio internacional. La ratificación por parte de la Argentina de importantes tratados internacionales…contribuye a la realización de ese objetivo. … Parece ser éste el momento oportuno para considerar seriamente una puesta al día de la legislación procesal argentina en materia de arbitraje con el objeto de brindar a los operadores comerciales normas modernas y apropiadas para regular los arbitrajes que de desarrollen en la Argentina. La Ley Modelo ofrece en este sentido numerosas ventajas porque ha sido elaborada a través de los trabajos realizados en el seno de un organismo de las Naciones Unidas por especialistas que representan todas las regiones de la tierra y los principales sistemas jurídicos. P. 1
(Cong. Rec. 5404-D-90; 0201-D-92), with similar results. Subsequent attempts were made by the Ministry of Justice, under the same administration, in 1996 (CR 0588-PE-96) and 1999 (CR 0840-PE-99). Neither succeeded in coming up for a vote. It is unlikely that resistance to arbitration per se explains this outcome. During the same period, two treaties relating to arbitration were ratified; the Panama Convention was introduced in 1991 by the Executive (CR 0087-S-91; 0181-PE-91) and approved by the Senate in 1994, and the Mercosur arbitration accord was introduced in 1998 and approved in 1999 (CR 0588-PE-98; 0025-S-99). Indeed, arbitration advocates cite the difficulty of getting the issue onto legislators’ agenda as the chief barrier (Le Pera 1997; Caivano 2011; Naón 2011; Vanossi 2011).

Following the collapse of Menem’s government, Vanossi found himself as Minister of Justice and Human Rights in the multi-party transitional administration that emerged from the crisis. Though he only served six months in this role, he sent legislation adopting the Model Law to Congress during his first month in office under his name and the name of the President, Eduardo Duhalde (CR 1056-PE-01). The accompanying letter stresses that the law was “prepared by specialists and with the assistance of entities with experience and interests in institutional arbitration.” The law was passed by the Senate in 2002 (CR 226-S-02), and reported favorably out of the House Committee of Justice in 2003, but failed to pass the full House before it expired (CR 6215-D-03).

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Ironically, it was the same crisis that had brought Vanossi into the Executive also made it impossible for him to achieve his pet legislative project. As Rivera (2011) stated, “arbitration became a bad word after 2001.” The crisis and the government’s reaction had set off a number of investor-state disputes—24, or half the total number, were filed in the two years following the crisis—which, under the BITs Argentina had signed in the 1990s, were sent to ICSID. Suddenly “international arbitration” was front-page news, reminding the electorate of the numerous humiliations the country had suffered at the hands of foreign investors and international institutions. While nothing in the UNCITRAL model law would have affected these investor-state arbitrations, congressional officials became unwilling to trust the expertise of commercial arbitration’s advocates. The distinction between commercial and investment arbitration was ultimately too technical. As Vanossi himself conceded, “it was ICSID that stopped it” (Vanossi 2011). These sentiments were echoed by several expert observers (Garro 2011; Le Pera 2011; Naón 2011), and reinforced by speakers at a conference Naón convened on the subject.52

Indeed, no moves toward liberalizing Argentine laws regarding arbitration have succeeded post-crisis. Returning to the House, Vanossi reintroduced legislation in 2004 (CR 6215-D-03), 2005 (CR 1065-D-05), and 2007 (CR 0329-D-07). In 2010/11 the bill was again put forward, but Vanossi, now retired, did not appear on it. Instead, another member of his party, also a lawyer specialized in alternative dispute resolution (mediation) sponsored the bill (CR 0014-D-2010; 0009-D-11). No votes came up on any of

these proposals, and it is unlikely that the populist, center-left government currently in power would look favorably upon them.

Fascinatingly, and consistent with R2, interest group politics were conspicuously absent from the above debates. Vanossi lamented that “Big companies didn’t see it as a priority; it was a lawyers’ project, not a business project” (Vanossi 2011). And Caivano (2011), of the Grain Exchange, noted, “The countryside [i.e. agricultural producers] doesn't need the government. They just want to be left alone. And so they didn’t lobby.” Indeed, the only suggestion of interest group politics arose in 2001, and came from within the legal field. According to Mealy’s, the international legal news service, lawyers’ groups insisted on a provision that would prevent non-lawyers from serving as arbitrators. Such a requirement would undermine some of the flexibility of arbitration, and so was resisted by the bill’s authors, but ultimately conceded by them (Burghetto 2003). Still, this was not enough to secure the bill’s passage.

Also missing from the historical record are the observable implications of R2: pressure from foreign companies or their home states to promote dispute resolution institutions that serve their interests. Some scholars have suggested that alternative dispute resolution was an element of the “Washington Consensus” that the IFIs pushed on Latin America during the structural adjustment period (Burnet and Lentini 2006), but I find no evidence that commercial arbitration was part of this agenda with respect to Argentina, at least. First, as the above discussion of domestic politics suggests, the interests of foreign economic actors did not feature in the domestic political debate, except as the abstract
“requirements of global commerce” defined by arbitration advocates. Second, information from various foreign chambers of commerce in Argentina indicates that the foreign business community has not made dispute resolution a chief issue.\textsuperscript{53} Third, while the United States, Germany, Spain, and other countries have interceded with the Argentine government on behalf of creditors and investors, both bilaterally and via the IMF, to my knowledge the issue of \textit{commercial} arbitration or the UNCITRAL model law has not been raised.\textsuperscript{54} Again, this absence is foreseen by the arbitrage mechanism in R2, which, given the effectiveness of private mechanisms, predicts that foreign companies will have little need to ask their home states to exercise diplomatic pressure on Argentina to reform its arbitration laws.

9. Conclusion

The findings from each sub-case are summarized in table 30. Almost all variation in the dependent variable can be explained by the arbitrage of economic interest groups over institutional alternatives in pursuit of their material goals. First, during the colonial period, merchants relied on their own private institutions to solve disputes, the \textit{juntas de comercio}, until they were able to muster sufficient political power to secure a \textit{Consulado} of their own, which offered superior enforcement powers. Though the \textit{Consulado} represented the normatively appropriate institution, the timing and impetus behind its

\textsuperscript{53} Emails on file with the author.
\textsuperscript{54} This has not been the case for investment arbitration. For example, following a dispute involving Siemens, Germany took a more rigid stance within the IMF on negotiations over the Argentine default. Laura Zommer, “Un contrato que puede costar demasiado,” \textit{La Nación}, Buenos Aires, October 13, 2002.
extension to Buenos Aires were driven by merchants’ demands, not deference to legal expertise.

Second, during the first decades of independence, nationalist elites sought to absorb commercial governance into the State, modeling public institutions on “modern” bureaucracies in Europe. Domestic disunity and war delayed this process until the 1850s, at which point the State was finally able to promulgate a commercial code that borrowed heavily from foreign models, with virtually no input from local mercantile interests. This outcome marked the high point of ideational influence over policy, and, not coincidentally, occurred at a time when Argentina was least engaged with the global economy.

Table 30: Argentina Findings

<table>
<thead>
<tr>
<th>Case</th>
<th>Dependent variable</th>
<th>Demand hypos consistent with outcome?</th>
<th>Supply hypos consistent with outcome? Mechanism observed?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Colonial era</td>
<td>From private arb. to state-backed arb.</td>
<td>R1 Y</td>
<td>R2 Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>I1 N</td>
<td>I2 Y-N</td>
</tr>
<tr>
<td>State-building</td>
<td>Absorption of private arb. by state</td>
<td>R1 Y</td>
<td>R2 Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>I1 Y</td>
<td>I2 Y-Y</td>
</tr>
<tr>
<td>Golden age</td>
<td>Emergence of commodity associations</td>
<td>R1 Y</td>
<td>R2 Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>I1 N</td>
<td>I2 N-N</td>
</tr>
<tr>
<td>Depression</td>
<td>Public control of “private” institutions</td>
<td>R1 Y</td>
<td>R2 Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>I1 N</td>
<td>I2 N-N</td>
</tr>
<tr>
<td>Post-war</td>
<td>Private tribunals reassert themselves</td>
<td>R1 Y</td>
<td>R2 Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>I1 N</td>
<td>I2 N-N</td>
</tr>
<tr>
<td>Policy flux</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Democracy</td>
<td>Private tribunals govern trade</td>
<td>R1 Y</td>
<td>R2 Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>I1 Y</td>
<td>I2 N-N</td>
</tr>
<tr>
<td>Partial state support</td>
<td></td>
<td>R1 N</td>
<td>R2 Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td>I1 Y</td>
<td>I2 N-N</td>
</tr>
</tbody>
</table>
Third, once agricultural exports took off in the late 19th century, merchants adopted private institutions to govern the trade that did not rely on the support of the state. Though the institutional forms precisely mimicked models first developed in Europe, these institutions met the needs of merchants in terms of policy, efficiency, and authority far better than public courts might have.

Strikingly, this organizational form was largely preserved in the fourth sub-case, even after the state took control of exports following the collapse of commodity prices during the Depression. State control strengthened the power of producers vis-à-vis exporters, but, given global market conditions, not enough to tip the scales decisively in favor of the former. The neutral, efficient, and authoritative institutions developed in the Golden Age thus continued to be of service to both sides of the market. Importantly, the enhanced role of the state in the economy did not equate to a greater role for public laws and public courts, as the executive saw these institutions as constraints on its own discretion.

Fifth, these institutions gradually decoupled from the state during the postwar period, allowing the export industry to distance itself from the erratic fluctuations in official policy during that period. Had this private alternative not existed, it is difficult to imagine how the powerful agricultural groups, the various regimes’ key source of hard currency, would have tolerated the official restrictions on arbitration passed during this period.

Finally, this distance from state policy proved decisive following the return to democracy in the 1980s. The country’s most powerful economic interest groups never needed to
lobby the government regarding dispute resolution policy, as their needs were fully satisfied by private institutions. Instead, a nascent group of pro-arbitration lawyers closely connected to the international arbitration community attempted to bring Argentina into line with international norms. They were partially successful, securing ratification of the New York Convention and other key treaties, and altering the jurisprudence of Argentine courts. But the pro-arbitration norm remained stillborn in the Argentine legal field. Before the 2001 crisis, the issue lacked sufficient political salience to secure the passage of a modern arbitration law. After the crisis, the rise of investment disputes made the topic politically toxic, even though ICSID arbitration is unrelated to dispute resolution between private commercial entities.

In sum, then, the nature of Argentina’s export markets has had a decisive impact on dispute resolution institutions in that country. Because the various agricultural commodities that have fueled its trade are concentrated industries that allow for effective private enforcement, the country’s most important economic interest groups have never needed to concern themselves with official state policy (the one exception being the colonial era). This has allowed ideational forces to play the lead role in shaping state policy, though policymakers’ deference to legal expertise has always been partial at best. It is for this reason that Argentina has been able to function as one of the world’s most important exporters for over a century despite fluctuating domestic institutions, an imperfect legal system, and frequently interventionist governments.
7. China

1. Introduction

China presents a crucial case for the governance of transborder contracts. After 30 years of growth, much of it trade-driven, China is now the second largest economy in the world, the largest exporter, the second largest importer, and the second largest recipient of foreign direct investment.\(^1\) At the same time, China’s legal system, though improved, remains weak. The World Bank’s World Governance Indicators ranked it 117\(^{th}\) in the world for rule of law in 2009 (Kaufmann, Kraay et al. 2010); Transparency International’s 2010 Corruption Perceptions Index placed it 78\(^{th}\).\(^2\) Nowhere else is the enforcement of contracts so important to the national and global economies while legal institutions remain so wanting.

Some observers have suggested that the Chinese experience counters the theory that the rule of law and strong property rights are necessary for rapid economic growth.\(^3\) In fact, China’s engagement in the global economy, at least, demonstrates that domestic public courts are not the only institutions that can provide these crucial governance tasks. Indeed, throughout Chinese history public courts and magistrates have only rarely played a primary role in the resolution of transborder commercial disputes.

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\(^1\) It was briefly the largest recipient of FDI before the 2008 financial crisis (IMF 2010).


In medieval times commercial disputes were resolved mostly by trade guilds, which were often centered around clan-based or regional bonds (Bernhardt, Huang et al. 1994; Ma 2004; Shi 2005; Hamilton 2006). Mediation and negotiation were preferred to formal legalistic proceedings. From the middle of the 17th century until the middle of the 19th, the Qing Dynasty restricted foreign trade to a guild of elite merchants at Canton (Guangzhou), the Cohong (工行), who negotiated disputes with foreigners themselves.

In the modern era, where the present analysis begins, public courts played the dominant role in transborder commercial disputes in China—but they were not Chinese courts. Following the first Opium War (1839-1842), Great Britain forced the opening of several ports to British goods and established an extraterritorial, public legal system to oversee criminal, civil, and commercial disputes within them. Over the next 101 years 18 other nations followed suit, applying British, French, American, Japanese and other national laws to transborder commercial disputes (Kayaoglu 2007). The treaty port system remained in effect until the Second World War (interestingly, persisting through the development of modern arbitration in the early 20th century).

After the founding of the People’s Republic of China in 1949, the institutions governing trade became fully Chinese, but, perhaps surprisingly, they were not public courts. Instead, the government followed the practice of the Soviet Union and its satellites and created a nominally independent arbitration panel to administer foreign trade disputes. While certainly not independent of the party-state—few institutions in Mao’s China were—the arbitration panel
represented a genuine effort to create a functional, technocratic institution, unlike the courts, which were explicitly political entities.

Today China is a major participant in the private transnational commercial arbitration (TCA) regime. The caseload of its leading arbitral institutions, the China International Economic and Trade Arbitration Commission (CIETAC)—the direct successor of the Soviet-era institutions—and the Beijing Arbitration Commission (BAC) is on par with the leading Western arbitral institutions. The country also boasts over 200 other arbitral institutions, although only a few of these play a substantial role in transborder commerce. Moreover, Chinese courts have come to show high levels of deference to foreign arbitral awards, with the Supreme People’s Court (SPC) exercising direct oversight over the enforcement of arbitral awards. The importance of private arbitration to China may seem strange given the country’s nominally communist, decidedly statist political system. In fact, it is consistent with the adaptive nature of economic governance under Chinese authoritarianism since 1979, which, through a strategy of “feeling for stones to cross the river” (摸着石头过河), has embraced informality, experimentation, and institutional innovation to meet the needs of foreign commerce while maintaining party-state control of key institutions, including the judiciary.  

This chapter seeks to explain the institutions for transborder dispute settlement in three sub-cases: the “century of humiliation” under the treaty port system, the period from the founding of the PRC to the start of economic reform in the late 1970s, and contemporary China’s embrace of

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private arbitration as it became the “factory of the world.” The chapter first reviews the explanatory framework of chapter two and the selection of the sub-cases. Each period is then considered separately, first by summarizing the institutional outcomes and their context, and then by evaluating the rationalist and ideational hypotheses. For the contemporary period, descriptive inference of the scope of litigation versus arbitration is also performed. The final section provides an analytic synthesis.

The core finding is that material mechanisms condition the power of legal norms to drive institutional outcomes. When China’s foreign trade has been sufficiently important, dominant interest groups, foreign and domestic, have worked to ensure that trade is governed by the institutions they desire. When, instead, China’s trade was of relatively little importance to the dominant groups, ideational mechanisms dominated. Moreover, because the material preferences of dominant groups could be satisfied with a range of potential institutions, arbitration advocates have had some leeway to push Chinese policy in the direction they desire, although, given the relative weakness of the Chinese legal community, this influence is fairly marginal.

2. Explaining transborder dispute resolution in China

Recall the hypotheses outlined in Chapter Two (table 31).

<table>
<thead>
<tr>
<th>Table 31: Hypotheses and observable implications</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hypotheses</td>
</tr>
<tr>
<td>------------</td>
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</tbody>
</table>

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This chapter addresses China’s involvement in the global economy from the mid 19th century to the present. Several stark shifts in China’s political economy over this period make the division of the empirical material into three sub-cases fairly straightforward. First, during the treaty port era, which lasted from 1842 until the end of WWII, China lost sovereignty over external trade and the commercial dispute resolution institutions that governed it. This situation persisted even the 1911 revolution brought a republican government to power that sought to modernize state institutions. Indeed, it failure to do so and the weakness of the central government diminished the discontinuity the 1911 revolution might have represented, and so I treat the entire treaty port period as a single episode.
Second, the founding of the People’s Republic pulled the country back to Qing Dynasty levels of autarky, and replaced foreign extraterritorial courts with domestic arbitration bodies modeled exactly on Soviet precedents. The Foreign Trade Arbitration Commission saw little use, however, given the low levels of trade and the reticence of foreign firms to submit to its jurisdiction. Importantly, however, during this period Chinese firms began arbitrating abroad, typically at the insistence of their foreign counterparties.

Finally, the most radical changes have occurred in the reform period, and especially the 1990s. In economic terms, the decision to begin reforms in the late 1970s marks as decisive an inflection point as the founding of the PRC, leading to fundamental alterations in Chinese political economy. Unsurprisingly, dispute resolution institutions shifted radically as well, failing closely into line with international trends.

3. The Century of Humiliation

Between the First Opium War and the end of the Second World War, 19 different countries imposed their domestic laws on China’s principal ports through a series of one-sided treaties. The result was a system of overlapping and hierarchical extraterritorial jurisdictions to govern the country’s foreign trade and the firms and individuals associated with it. Because each of the foreign powers’ legal systems applied extraterritorial law somewhat differently, and because these laws evolved over the lifespan of the system, a full discussion of the nuances of law in the treaty ports is beyond the scope of the present study (Piggott 1907; 1926; Keeton 1928; Millard 1931; Kayaoglu 2007). Instead, for present purposes, several key points should be noted.
First, all civil and criminal disputes, including commercial ones, involving foreigners fell under the jurisdiction of courts in which foreign judges and foreign laws dominated. Some of these functioned just as other domestic courts would. Others acted as more specialized consular courts dealing with a more restricted range of issues. And some disputes involving a Chinese party (or between two Chinese parties resident in a foreign concession) were considered by mixed courts that involved a combination of Chinese and foreign judges and applied the laws of both countries. Even in these cases, however, the foreign parties had more control over outcomes than Chinese jurists. Disputes between two foreigners could often raise complicated legal questions of jurisdiction and conflict of laws, but in no case were the foreign parties likely to end up under Chinese jurisdiction.

Private arbitration was also practiced in the treaty ports, just as it was in the home territories of the foreign powers that ruled them. Under British jurisdictions, “written agreements to submit to arbitration may be upheld by the courts, and in any action, if the parties consent,” or if the matter is referred to arbitration by the court (Keeton 1928, Vol. 2, p. 118). Indeed, official British policy in the 1920s strongly backed private arbitration, with the consular code stating that, “every consular official shall, as far as there is proper opportunity, promote reconciliation and encourage and facilitate the settlement in an amicable way, without recourse to litigation, of matters of difference between British subjects, or between British subjects and foreigners in China” (quoted in Keeton 1928, Vol. 2, p. 118). Note that the policy does not refer to arbitration between British and Chinese nationals.
It is known, however, that such arbitrations did take place, though they were likely infrequent. The records of the ICC record only one case involving a Chinese company (as the defendant) before 1930. There was also a well-known 1937 case in which an arbitral award rendered by the Shanghai Metal Merchants Association was enforced against an American company based in Seattle (1943). However, the fact that the case garnered significant interest suggests this was a rare occurrence.

Second, while the treaty port system came to govern transborder commercial disputes, it cannot be said that it was created chiefly for this purpose. Rather, the original goal was to protect foreign nationals living and working in the ports from what Western powers considered to be the vagaries of Chinese criminal law. A series of incidents involving the rough punishment of foreign sailors provided foreign powers with a justification for exempting their citizens—and, indeed, whole patches of Chinese territory—from Chinese laws, courts, and police (Keeton 1928; Kayaoglu 2007). But once foreign law had been imposed, it extended beyond this original purpose. As the treaty port system expanded and foreign firms became established on Chinese territory, the use of foreign law for commercial dispute resolution became widespread, and eventually became one of the chief justifications for the continuation of the system.

Third, successive Chinese governments, resenting the treaty port system, repeatedly attempted to develop a modern, functional court system, including for commercial governance. These efforts met with little success. Several attempts at legal reform were attempted by progressive

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5 Interestingly, in this case the plaintiff was a German company based in Shanghai. After securing a successful ruling against the American firm in the metal association arbitration, the German firm sued in Seattle court to enforce the ruling. Under Washington law this required the court to determine whether the arbitration was valid under the law of the place it had been issued, which, because Germany had lost it extraterritorial privileges after WWI, was determined to be Chinese law.
government officials in the latter decades of the Qing Dynasty (1923; Chan 1977; Ma 2004). Part of the motivation for modernization of the Chinese legal system were the promises, made by Britain in 1902 and by the United States and Japan in 1903, that they would renounce their extraterritorial rights once China could offer foreign businessmen a modern, effective legal system (Commission on Extraterritoriality 1926, p. 29). While Chinese officials were no doubt aware that power relations, not merely the legal system, would have to change before the “unequal treaties” would be overturned, they also saw the modernization of the state apparatus as the key to national development, and thus the means through which to remove the objectionable treaties.

Toward this end, the Republican government that came to power in 1912 developed, on paper, a large body of law and institutions closely modeled on Continental and Japanese models. Given the subsequent division of the country into territories controlled by rival warlords, along with the fundamental weakness of the central government, these ambitious remained largely unrealized. It is nonetheless useful to review the government’s plans, as they shed light on the goals of different interest groups within China and the status of different legal norms.

Fascinatingly, these plans included extensive development of private arbitration facilities linked to modern chambers of commerce across the country. A Presidential Mandate first set out the plan in September 1912, and on January 28, 1913 the Ministry of Justice and the Ministry of Agriculture and Commerce jointly promulgated more detailed regulations, which were again amended in 1917 and 1924.
The plan called for modern chambers of commerce to be established in all major cities, and stated, “An arbitration court of commerce shall be attached to every Chamber of Commerce that is established” (Commission on Extraterritoriality 1923). These courts would hear any dispute between traders “with the object of effecting a compromise instead of litigation.” Courts would be comprised of one president, nine to 20 arbitrators (elected by the members of the Chamber⁶), six investigators, and two to six registrars, depending on demand, and would be funded by the chamber of commerce to which it was attached. The arbitral courts were tasked to decide cases “in accordance with the commercial usages and general principles of the district in which the cases arises,” (Commission on Extraterritoriality 1923, p. 94), although decisions were not permitted that violated the law. As in contemporary European and American legal systems, arbitration could be selected in advance on the consent of both parties, or public courts could refer cases to arbitration. However, arbitral awards did not benefit from state backing; “The award of the arbitrators shall take effect only when the parties consent to it.”

In effect, then, the 1913 regulations proposed a national, quasi-official version of long-standing Chinese business practice, under which commercial bodies administered private justice and relied on voluntary or market-based enforcement. Crucially, however, the government articulated this institutional form in the language of modern arbitration, suggesting a system of private dispute resolution more ambitious than that of any other country at the time. It is thus perhaps unsurprising that these plans had, to the author’s knowledge, no practical effect.

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⁶ Demonstrating the mixing of modern commercial practices with Chinese traditional decision-making procedures, in the event that two candidates received the same number of votes, the older candidate would prevail. (Commission on Extraterritoriality 1923, p.95).
Following WWI, the Republican government increased pressure on foreign powers to rescind their extraterritorial rights, bolstered by domestic outrage that the Treaty of Versailles awarded Germany concessions in Shandong province to Japan instead of returning them to Chinese sovereignty. At the Washington disarmament conference of 1921, China persuaded the foreign powers to set up a joint commission to review the extraterritoriality policies. The Commission issued its report on September 16, 1926, and found—to few peoples’ surprise—that the Chinese justice system was insufficiently predictable to warrant the abrogation of extraterritorial privileges. Numerous deficiencies in China’s court system were detailed in the report, including the lack of law covering several areas of commerce, the blurring of distinctions between the judiciary and the administrative apparatus of the state at the provincial level, and the small number of courts (only 91 modern courts of first instance in the whole country) and judges (only 1293 officially trained), and the scant resources available to them (Commission on Extraterritoriality 1926).

Significantly, the report does not mention commercial arbitration as playing an important role in commercial dispute resolution in China, nor does it suggest its development as a potential solution to the deficiencies of the court system; it does not mention the practice at all. Nor can I find evidence that contemporary observers, even members of the arbitration community, thought that private institutions might play a greater role in China’s foreign trade, much less substitute for extraterritoriality. This absence is particularly significant because the question of

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7 The following counties were represented: United States, Belgium, Britain, China, France, Denmark, Italy, Japan, the Netherlands, Norway, Portugal, Spain, and Sweden.

8 An analogous blurring of judicial and administrative officials at the provincial level has led foreign firms to complain of the potential for “local protectionism” in the modern era. See below.
extraterritoriality became politically salient precisely at the same moment that commercial arbitration did, in the early to mid 1920s.

The treaty port system would persist for another two decades before reaching an anticlimactic end at the close of WWII, after the economic rationale for its persistence died away. The Depression had diminished China’s trade with the United States and Europe, and Japanese conquest of coastal China in the late 1930s and 1940s eliminated the rest. There were thus no economic interest groups in Western countries to oppose the end of extraterritoriality in the 1940s, and strong geopolitical reasons for doing so. The United States was eager to strengthen the Nationalist government, which it saw as a bulwark against the Soviet Union (American strategists discounted the threat posed by the Chinese Communist Party until the later half of the 1940s), and so readily acceded to China’s demands to end the “century of humiliation” (see Chapter Five). Moreover, such policies were blatanty at odds with the principles of sovereignty and self-determination undergirding the American postwar project.

3.1 Rationalist

R1 predicts demand for dispute resolution institutions to be based in market relations, and these forces were indeed instrumental in structuring the nature of the treaty port system. The Qing Dynasty’s policy of granting a trading monopoly to the Cantonese Cohong put Chinese merchants in a powerful position vis-à-vis the East India Company and other western traders. Only the Cohong could furnish the tea, silks, and other Chinese goods Western consumers

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9 However, American businesses were eager to develop future economic opportunities in China, and so sought new economic institutions—including facilities for private arbitration—to take the place of the treaty port system. See Chapter Five.

10 For a detailed discussion of the documentary evidence from the State Department archives see Kayaogolu 2007.
craved, but, with an official ban on opium, Western firms could offer little of value to the Chinese in exchange, and were forced to pay in silver specie. So great was Western demand for Chinese goods, that this market structure came, by the mid 19th century, to threaten Britain’s ability to maintain the value of its currency, which was priced in gold. By forcing China to open more ports to trade and to buy a larger portion of foreign goods—including opium—Britain was able to stem the hemorrhage of silver and maintain the value of the pound.

The other effect of opening was to radically flip the balance of power between foreign and Chinese merchants. Whereas before the Cohong had enjoyed monopoly privileges, now any number of Chinese merchants could sell goods for export. These conditions would predict demand for biased dispute resolution institutions, which were provided by the extraterritorial courts.

But the oligopolistic position of Western firms soon eroded as more and more countries forced China to open to their trade and national monopolies like the East India Company gave way to a wider range of competitors. The growth of Chinese traders also evened the market, and treaty ports became known as the “Wild East.” Firm entry and exit was high, as was uncertainty over the future.

A report from a British chamber of commerce (Bourne 1898) at the turn of the century is indicative of market conditions in the textile trade—one of China’s most important imports—in Shanghai:
…in the staple of our import [to China] trade, namely grey and white shirtings, there is no direct competition...but there is indirect competition, especially from Japanese figured fabrics, and from Indian, Japanese and Chinese yarn, woven at home...In coarse cotton yarn Lancashire is out of the market, beaten by India, Japan, and China. In drills and sheeting...we have a most redoubtable competitor in the United States. We can only compete with Japan in her specialties by the adoption of far-eastern design and by constant changes of pattern (p. 5).

Given these competitive conditions, under R1 we would thus predict increasing demand for neutral dispute resolution institutions over the lifespan of the treaty port system.

But while demand, dependent on the balance of market power, may have shifted, supply, which depended on the balance of power between China and foreign countries, did not. Repeated Chinese demands to end the extraterritorial system were resisted by the Western nations and Japan, whose governments came under strong pressure from merchant groups to maintain the system biased in their favor. For example, in the 1920s the American chambers of commerce of Tianjian and Shanghai sent letters to the State Department warning of grave consequences for trade should the treaties be abrogated (Fishel 1952, p. 101).

Even after China, in 1930, revoked extraterritorial privileges for foreigners traveling outside the treaty ports, foreigners insisted on maintaining control over trade. In a 1931 speech at the Royal Central Asian Society, Sir Harry Fox, who had served in various official capacities in China for the British government, warned:

It is our traders in China, our great merchant firms, our banks, insurance and shipping companies, indeed all who have invested money in commercial and industrial enterprises in that country, relying on the security afforded by their being under British law, who have the greatest ground for apprehension...because with all respect for the traditionally high standard of Chinese commercial morality
and for the efforts of the Chinese Government to secure that the new commercial
code is administered with justice and impartiality, our experience of the ways in
which the best intentions of those who administer them has been rather an
unfortunate one.” (Fox 1931)

It should be noted that in the United States, especially, these mercantile interests were opposed
by religious groups active in China—including the Foreign Missions Conference of North
America, the International Missionary Council, and the Southern Baptist Convention—who
argued against extraterritoriality on moral grounds. These groups were joined by the American
Federation of Labor and the National Federation of Women’s Clubs, amongst other left-leaning
groups (Fishel 1952).

This defense of existing privileges of course made sense for foreign firms under the arbitrage
logic of the rationalist mechanism. Chinese courts would be biased against them, they feared.
Private arbitral institutions, if they reflected the balance of power in the market, would provide
neutral dispute resolution. But intergovernmental institutions, reflective of China’s weakness vis-
à-vis other nations, would grant them the most favorable policy outcome. The key question, then,
under the rationalist logic, is why Chinese firms did not work to create more favorable
institutional options for themselves, and insist on using them?

By looking at the feasible institutional alternatives in terms of neutrality, efficiency, and
authority we see that Chinese firms’ options were in fact minimal. Given their bargaining
position, the best Chinese firms could hope to extract from foreigners would be an agreement to
hear disputes in a neutral forum, which ruled out the possibility of using Chinese courts (which
were, anyway, highly inefficient and sparse). But how might such a neutral forum be created?
Private arbitration would seem to offer an answer, but was unlikely, given the chaotic nature of the markets, to prove authoritative. Even a hybrid arrangement, being dependent on the enforcement power of Chinese courts, would not solve this problem. In other words, given the weakness of the Chinese state and nature of China’s foreign trade, the Chinese firms stood to gain little from developing alternatives to the treaty port system. In sum, the dynamic nature of trade in the treaty ports may have evened market power between foreign and Chinese firms, but there was no possibility of securing dispute resolution institutions that could offer commensurately neutral outcomes.

3.2 Ideational

Extraterritorial application of domestic law—as opposed to outright colonial rule—was used by the British and other imperial powers in the 19th century in the Ottoman Empire, East Africa, Japan and Korea, and North Africa (Kayaoglu 2007) and was fully compatible with dominant legal norms at the time. Indeed, the practice can be traced to Ancient Greece, Renaissance Venice, Medieval Europe, and a number of other settings. China itself had permitted extraterritorial arrangements in the past vis-à-vis Arab and Russian merchants (Morse 1925; Quigley 1926).

However, over the course of the century, norms in key countries like Britain and the United States increasingly shifted to favor national self-determination and sovereignty for all countries. Quigley, for example, argues, “The extraterritorial rights of the powers in China rest upon no principle of international law, but constitute exceptions to the general principle of sovereign jurisdiction” (Quigley 1925, p. 48). In light of Chinese attempts to build a modern state, he
concludes that “there is good ground for the relinquishment of extraterritorial jurisdiction (Quigley 1925, p. 68), and notes that foreign opposition is likely rooted in “considerations of a non-juridical character,” such as the material advantages provided by protection from the Chinese state.

This was not, of course, a consensus view, as the statements quote above note. The important point, however, is that the legal principles behind extraterritoriality had become contested, and could no longer be considered dominant ideas that policymakers would automatically follow.

Finally, why was private arbitration not considered as a potential solution to the dilemma of Chinese trade during the 1920s, when alternatives to the treaty port system were being sought, and when public discussion of arbitration was at its height? Above I have suggested that, given the weakness of the Chinese court system and market conditions that would not facilitate private enforcement, arbitration was unlikely to be an attractive option from a rationalist standpoint. But this cannot explain the fact that it does not even seem to have been considered by policymakers (I find no discussions to this effect in the US or UK archives, or in the context of the Commission on Extraterritoriality) or even arbitration advocates. To my knowledge, it was only in the 1940s, after the end of extraterritoriality, that commercial arbitration with China was actively considered by foreign businesses and firms (see Chapter Five).

The failure of the Chinese government to propose an arbitral system is perhaps even more puzzling. After all, Chinese actors would have been the primary beneficiaries of such a system.
Extra-judicial dispute settlement was also a well-established Chinese business practice, and had been adopted as official state policy under the Beiyang government.

More detailed empirical work would be required to answer this question than has been possible in the present study. We may speculate, however, that during much of this period arbitration was considered a practice that assumed a certain level of trust between two parties. To arbitrate was to, in part, trust that the other party would act in good faith to execute the decision of the arbitrator. Such trust was likely facilitated by common cultural bonds that 19th century Europeans and Chinese may have found difficult to forge.

4. The Mao Era

International trade was not a priority for the communist government that declared the People’s Republic of China on October 1, 1949. Instead, official rhetoric and policy favored autarky and growth through internal development. Moreover, China’s trade had been decimated by the war with Japan, World War II, and the war between the Communists and the Nationalists, leaving little on which to build. Nonetheless, the new government quickly put into place the basic bureaucratic structures most socialist countries used to govern trade: a Ministry of Trade\textsuperscript{11}, which controlled transactions through the issuance of export licenses; state-owned import-export firms that supplanted, by 1954, the remaining private companies (Li 1963); the China Council for the Promotion of International Trade (CCPIT), a nominally independent body meant to serve

\textsuperscript{11} Which became the Ministry of Foreign Trade in 1952, and is now, after several other iterations and changes in jurisdiction, the Ministry of Commerce.
as a buffer between the Chinese government and foreign firms\textsuperscript{12}; and in 1954, under the CCPIT, the Foreign Trade Arbitration Commission (FTAC).\textsuperscript{13}

All of these institutions—like most of the new Chinese state—were explicitly modeled on Soviet precedents, the FTAC being no exception (McCobb 1972; Chew 1985; Shen and Chiu 2004). The Commission had jurisdiction over all disputes relating to contracts for the sale or purchase of goods, transport, insurance, delivery, or “other matters of business in foreign trade” (McCobb 1972). However, these disputes had to involve a Chinese entity on one side and a foreign entity on the other. The arbitrators were legal experts, all Chinese nationals, amongst whom the parties could select. Evidence on the law that FTAC applied is scarce (Li 1963; McCobb 1972). Chew (1985) notes that most Chinese companies would insist on the application of Chinese law if a law were to be officially chosen in the contract. Foreigners thus often preferred to leave decisions in the hands of the arbitrators, who would be free to apply a wider range of standards.\textsuperscript{14} Awards were final and enforceable in Chinese courts.

Under Chinese law, then, there were essentially only three dispute resolution options for Chinese-foreign contracts in this period: FTAC, a foreign arbitral body, or a foreign court.\textsuperscript{15}

\textsuperscript{12} This body was modeled on the Soviet All-Union Chamber of Commerce. Its nominally non-governmental nature allowed it to deal with countries that did not have diplomatic relations with the PRC. It remains in existence today, though also uses the name China Chamber of International Commerce. McCobb, J. B. (1972). "Foreign Trade Arbitration in the People's Republic of China." \textit{International Law and Politics} \textbf{5}: 205-231.

\textsuperscript{13} For an overview see ibid.

\textsuperscript{14} Chew cites a 1980 Survey by the National Council for United-States China Trade that found that our of 25 contracts between US and Chinese firms, only two included choice of law provisions (Swedish and Swiss) (Chew, 1985, p. 316).

\textsuperscript{15} Domestic courts in this period were difficult to distinguish from other organs of the party-state. Numerous ad-hoc “people’s tribunals” supplemented the official court system, which was itself dedicated to advancing the CCP agenda. The first president of the Supreme People’s Court, Shen Chunju, was quite clear on this point, “[O]ur judicial work must serve political ends actively, and must be brought to bear on current central political tasks and mass movements.” Quoted in Cohen, J. A. (1969). "The Chinese Communist Party and Judicial Independence: 1949-1959." \textit{Harvard Law Review} \textbf{82}(5): 967-1006.
predominant choice, in other words, was not between arbitration and litigation, but between domestic or foreign institutions. Anecdotal evidence suggests Chinese firms almost always preferred the former (see below). But FTAC, unlike its Soviet counterpart, saw little business, suggesting Chinese firms were not typically able to convince foreign companies to agree to such an arrangement. Though trade increased at a fairly rapid rate during the 1950s (until the 1959 Great Leap Forward, see figure 34), from 1954 to 1966 FTAC accepted only 27 cases. About half of these came from the USSR and other COMECON countries, and the remainder from West Germany, Australia, India, and Malaysia. Over the next decade, which coincided with the Cultural Revolution, FTAC issued only 12 arbitral awards (Shen and Chiu, 2004, p. 6). The Soviet FTAC, in contrast, processed hundreds of cases each year.  

However, while FTAC was identical to its Soviet counterpart on paper, it was also influenced by long-standing Chinese preferences regarding dispute resolution. Specifically, informal mediation and negotiation was almost always attempted before an actual arbitration began, with FTAC and CCPIT officials acting to head off disputes before they actually arrived at arbitration. The extremely low case numbers can probably be partially attributed to this practice.

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Note also that the caseload does not reflect the total number of arbitrations in which Chinese and foreign firms were engaging, as arbitration outside of China was also possible. Before the creation of the FTAC, Chinese companies tended to rely on British or Swedish arbitration (Shen and Chiu 2004). Treaties also specified alternative fora. The PRC concluded commercial treaties with the USSR, Japan, Syria, the United Arab Republic, France, Finland, West Germany (McCobb 1972, p. 228) and eventually the United States (Lockett 1982) which provided for arbitration outside of China. The earlier of these treaties (e.g. the Soviet and Japanese ones) required arbitration in either China or the country of the other party. Later treaties, such as the ones with the United States, allowed third states to be selected as arbitration seats. Unfortunately we do not have any record of the number of foreign arbitrations relating to China during this period.
Regardless of where the arbitration took place, enforcement was a major problem. Since Chinese companies almost never held significant assets abroad, foreign firms were required to rely on either their own market power or the Chinese state to enforce arbitral awards. Awards rendered by the Chinese arbitral institutions had the status of binding law, but, as discussed below, were often unenforceable in practice. For foreign awards the situation was worse, as there were no formal enforcement requirements until the Trial Civil Procedure Law of 1982. Though numerous bilateral economic treaties identified arbitration as a means for dispute settlement, none contained specific enforcement provisions (Tao 2008, p. 159).

On the ideational front, during this period China was almost entirely disconnected from the mainstream postwar arbitration epistemic community. I find no evidence of official Chinese participation in any of the principal intergovernmental or transnational fora related to arbitration. Because the PRC was not a member of the United Nations until 1971, it did not take part in the drafting of the New York Convention. It did not join UNCITRAL until 1983, and so was not involved in the drafting the 1976 arbitration rules, and it was not a member of UNIDROIT until 1986. Moreover, at the individual level, it does not appear that any PRC legal expert participated in the main international professional associations until after reform began in 1970s. Given government policy toward foreign bodies and the serious repercussions an individual thought to have “bourgeois” political instincts might face during this period, this non-participation is understandable. Though there were a few ad hoc connections between the official PRC dispute resolution bodies and foreign institutions—for example, the American Arbitration Association led a mission to China in 1975 to learn about dispute resolution in the country (Doty 1982)—these revealed just how few connections existed. At the 1975 meeting between the AAA and
China

FTAC, the Chinese side found it necessary to explain just the basic workings of their institution, about which the American arbitrators had little knowledge (Doty 1982).

That said, during the 1950s it is likely that Chinese experts were connected to Soviet legal experts. I have been unable to find documentary evidence of such linkages, but the large number of Chinese students sent to study in Russia provides at least one channel for such connections to form. Furthermore, as discussed below, the striking isomorphism between Soviet and PRC legal institutions would be consistent with an epistemic connection.

4.1 Rationalist

R1 requires us first to consider the relative market positions of Chinese firms and their trading partners. Even before the revolution, Chinese firms were decidedly non-competitive in international markets. China could not produce technically sophisticated products domestically, and so relied on foreign trade to bring in basic machinery, arms, and other crucial goods. These conditions put Chinese firms in a disadvantageous market position, which was intensified by the 1961 Sino-Soviet split. Deprived of their primary trade partner for technologically advanced goods, Chinese firms increasingly oriented their trade to Japan and the West (Reghizzi 1968).

R1 would therefore expect demand for the institutions preferred by the non-Chinese parties. Consider first the neutrality criterion. Given their dominant market position, foreign firms would be unwilling, according to R1, to accept institutions that were not at least neutral with respect to their interests. Systematic evidence on FTAC bias during this period is rare. Chew (1985) presents a detailed comparison of the fairness of Soviet and Chinese arbitral bodies in the pre-
reform period, and finds significant national bias in the Soviet FTAC. Chew obtains significantly less evidence on the Chinese FTAC, in part because its caseload was much smaller and records were (and remain) unavailable. Interestingly, however, he finds little evidence of national bias in the few cases he has access to, with roughly comparable rates of success for Chinese and foreign claimants.

Nonetheless, most observers of the pre-reform era report strong preferences from foreign firms for foreign arbitral institutions (Reghizzi 1968; McCobb 1972; Lord Ellis and Shea 1980; Lockett 1982). Reghizzi’s study of Sino-Italian trade in 1960s finds that when the Italian company is the buyer of a good, Chinese arbitration may rarely be chosen, but that in practice most disputes are resolved informally. Indeed, he finds not a single example of an Italian firm arbitrating in China in the 1950s and 1960s. Conversely, when Chinese companies are the buyer (i.e., when their market power is lower), Italian firms insisted on third-party arbitral institutions, with Berne the preferred seat. Furthermore, for certain kinds of high-value goods in which intellectual property protection is a concern, Italian firms would never accept Chinese arbitration, with one of the Italian businessmen he interviewed stating, “We would not even think of going to arbitration in China; we are not crazy” (Reghizzi 1968, p. 116). Reghizzi speculates that Italian firms were amongst the first to convince Chinese trade partners to use third-party arbitration, in part because the Italian Communist Party was respected in China. McCobb (1972) and Locket

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17 COMECON claimants succeeded against Soviet defendants about twice as frequently as a Western claimants did (42 percent to 24 percent), while Soviet claimants succeeded in 89 percent of the cases they brought. Chew’s sample is not random, but because it draws on cases the Soviet FTAC chose to publish in English in a publication targeted at foreigners, it is not likely to overestimate national bias. These results help explain why Sweden became such a popular arbitration destination for Soviet-Western trade during the détente period, as Western firms insisted on more neutral fora.
China

(1982) find substantial (anecdotal) evidence of similar preferences in other European and American firms.

Second, beyond the neutrality of FTAC, there was also concern about the technical proficiency of the institution. We lack detailed information about the individuals who served on the Commission, but we know they existed in a context starved of technical expertise, particularly in the legal field. In 1952 an eight month “Judicial Reform Movement” sought to root bourgeois elements (i.e. officials trained under the Nationalists) out of the ministry of justice and court system; 80 percent were dismissed (Cohen 1969). The few remaining legal experts were dismissed in the 1957-1959 Anti-Rightist campaign, in which legal training and experience of any kind were essentially proof of guilt. The Ministry of Justice itself was dismantled in 1959, and not reconstituted until 1979, after reforms began. And the Cultural Revolution, of course, deprived an entire generation of the chance to study the necessary law. FTAC was not shielded from these campaigns. Nan Hanchen, a respected member of the revolutionary old guard who served as the head of the CCPIT (FTAC’s mother organization), was persecuted during the Cultural Revolution and executed on the orders of the Gang of Four in 1967.

Third, as noted above, foreign arbitration had no recourse to the police powers of the state during the Mao era. Chinese arbitral awards, in contrast, were considered binding under Chinese law. However, this discrepancy was much less important in practice, as foreign firms often enjoyed a dominant market position and Chinese courts could rarely be counted on to enforce decisions anyway. Though they could not count on the Chinese state to enforce their interests, foreign companies could limit future dealings with Chinese firms, making private enforcement relatively
efficacious. At the same time, Chinese courts could rarely be counted on to deliver neutral and accurate judgments (Toh 1986).

In sum, there is ample evidence that foreign firms were highly skeptical of FTAC for reasons of both bias and technical proficiency, and could achieve roughly equal levels of authority with either FTAC or foreign arbitrators (see table 32). Given the weak market position of Chinese firms, R1 would therefore lead us to expect little demand for Chinese arbitration, a result confirmed by FTAC’s scant caseload and the statements of contemporary observers.

<p>| Table 32: Institutional alternatives in the Mao era |</p>
<table>
<thead>
<tr>
<th>Institution</th>
<th>Criteria</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chinese arbitration</td>
<td>Biased; high transaction costs; authoritative on paper but not in practice</td>
</tr>
<tr>
<td>Chinese courts</td>
<td>Not permitted</td>
</tr>
<tr>
<td>Foreign arbitration</td>
<td>Neutral; low transaction costs; authoritative via superior foreign market position</td>
</tr>
</tbody>
</table>

Turing to supply, we can conclude that both foreign firms and Chinese traders would have had incentives to improve the authority of arbitral awards in China. R2, however, holds that FTAC and state policy should reflect the preferences of the dominant group, in this case not private firms but Party leaders. As an ineffective institution, FTAC was consistent with the preferences of party leaders who had little interest or use for international trade. More accurately, no interest group with the power to effect domestic change cared sufficiently about improving FTAC to do so. Moreover, because foreign firms preferred an alternative institution (foreign arbitration), and because they held market power over their Chinese counterparts, FTAC was largely reduced to irrelevance.
4.2 Ideational

What about ideational mechanisms? Given the weakness of the legal field in China during this time, and its isolation from the global legal field, we would not expect ideational mechanisms to significantly influence firm behavior or public policy. Even if they did, there was not much scope for choice; Chinese firms turned to FTAC because it was the only option envisioned for them in Chinese law. Their resistance to foreign arbitration cannot have been the product of a legal norm advocated by an indigenous legal community because no such community existed.

Foreign firms, in contrast, would be expected to prefer foreign arbitral institutions under I1, because they were embedded in legal fields that favor institutions like the ICC or other global arbitration bodies. Indeed, I find no evidence of any foreign observer advocating the use of FTAC. For Western firms, then, the observable implication for I1 is the same as for R1, and is confirmed.

However, I1 might expect COMECON companies to behave differently. After all, they were embedded in the same legal field that shaped the Chinese FTAC. If norms of legal appropriateness alone drove their behavior, we would expect firms from the USSR and other socialist countries to agree to FTAC arbitration more than their Western counterparts did. It is therefore surprising that there were so few cases involving Soviet or other COMECON companies (probably around 20 over the entire period, or about the same number as non-socialist countries; see caseload data cited above). Because COMECON trade with China was substantially higher than Western trade for most of this period, socialist firms were, if anything,
underrepresented in Chinese arbitration. This outcome is not necessarily the product of dislike for the Chinese FTAC. It may also have been the case that socialist firms were relatively more able to invoke informal, negotiated solutions through government contacts than Western firms were. Either way, though, little support is found for the ideational mechanism, which would expect Comintern firms to use the FTAC at a higher rate than Western countries.

Policymakers’ behavior, in contrast, shows strong signs of the isomorphism I2 would predict. As discussed above, after 1949 the new Communist government adopted a trade governance structure virtually identical to the Soviet model, including the quasi-official but nominally independent FTAC. Unfortunately, process observations related to this choice are few, as scholars have gleaned little information about this choice from the historical record. It is likely that government officials who had studied or spent time in the USSR were heavily involved in the drafting of the new institutions, as they were in other key areas of the new government. It is also likely that the Soviet Union sent technical advisers to Beijing to assist the PRC in setting up its trade institutions, perhaps in part because the USSR sought to bring China more closely into its trade orbit. According to Tang Houzhi, who worked at FTAC during this time, “China’s initial steps in the arbitration field came from studying the Soviet Union.” However, more historical evidence is required to explain why the PRC copied Soviet institutions so exactly.

18 “Very few sources provide clues on how the interim arbitration rules were drafted and on what sources the rules were modeled. However, it is largely agreed that CIETAC has its roots in a Soviet-style appendage of China’s then wholly State-controlled foreign trade system. Therefore, it is perhaps correct to say that CIETAC’s early practice may be dominated by the prevailing Soviet practice at the time” (Shen and Chiu 2004, p. 6)
19 Original text 中国仲裁事业的起步缘于学习前苏联. http://www.legaldaily.com.cn/zmbm/content/2010-06/10/content_2166651.htm
5. The Reform Period

Following Mao’s death and the rise of Deng Xiaoping to power in 1978, China experienced what is arguably the most radical economic expansion ever recorded, averaging about 10 percent annual growth over the subsequent decades. Never has such a large economy, encompassing so many people, grown so fast for so long. In 1978 China was the world’s ninth largest economy; today it is the second. Some 500 million Chinese have been lifted from poverty (World Bank 2012).

This change was precipitated by an equally radical change in the interests of the dominant domestic group, the Chinese Communist Party. Following three decades of autarky and Stalinist economic policy, Deng moved the country toward a pragmatic and experimental approach to economic development, based on “seeking truth from facts” (实事求是). These changes did not represent an ideological shift toward classic liberal ideas of economic governance, or even a turn to Keynesianism or social democracy (Vogel 2011). As Deng famously proclaimed, “It doesn’t matter if a cat is black or white, as long as it catches mice it’s a good cat.” (不管黑猫白猫, 捉到老鼠就是好猫). The reforms, then, are best interpreted as an attempt to provide the economic resources for the CCP’s goals of national advancement and development and—equally importantly—the party’s legitimacy. The Cultural Revolution and the disorder that followed had smashed Maoist ideology just as surely as they had torn the nation’s “bourgeois” social fabric, and so a new ideology was required to justify CCP rule. Deng’s statement summarizing the alternative—“to get rich is glorious” (致富光荣)—may be apocryphal, but it has come to stand
as a motto for the era because it so compellingly captures the ideas that have been substituted for communist ideals.

China’s early experiments quickly showed top leaders that foreign trade and investment could be a powerful tool toward these ends. The first Special Economic Zone was created in Shenzhen, next to Hong Kong, in 1980. It proved so successful that in 1984 14 more special areas were designated as beachheads for foreign commerce. Chinese leaders recognized from the beginning that foreign corporations, with their capital, technology, and organizational capacity, would be required to transform the country’s economy; the first law enacted after the start of reform was the law permitting joint ventures, in 1979 (Toh 1986).

But China did not immediately embrace the export-oriented production model for which it is known today. China’s entrance into the world economy has been so literally spectacular, popular accounts often overlook the role of domestic economic rationalization. Much of China’s growth, especially in the first decade and a half of reform, was not connected to the external sector, but to domestic policies like the disbanding of agriculture collectives, relaxing price controls, etc. (Lin 2006). Once the basic domestic reforms had born fruit, a new strategy was required to sustain rapid growth. Starting in the late 1980s, and then again after the post-Tiananmen chill, the government turned to export-oriented manufacturing and the accompanying investment in capital to meet this goal. Deng confirmed this strategy on his 1992 “Southern Tour.” Today, not only does the external sector provide crucial contributions to GDP (see figure 35) and employment, it is also the principal source new technology and IP into China, essential for the country’s desire to move up the global value chain.
Therefore, while the original motivations for reform may have had little to do with the concerns of China’s foreign commercial partners, their effect has been to fuse the interests of China’s rulers to those of foreign firms. The growth of the external sector has also created self-reinforcing dynamics as the number of trade-dependent interest groups within China—ranging from vast state-owned corporations, to local governments in export zones, to the disenfranchised and at times volatile ranks of internal migrants working in export factories—has mushroomed. In sum, the CCP’s legitimacy and purpose have become intricately tied to a growth model that would not be possible without the participation of the world’s largest multinational corporations.

As we might expect, these changes have had profound effects on dispute resolution institutions. As market-based economic development became the primary state objective, foreign investment,
trade, and the legal infrastructure to support them became crucial. A slogan from the time declared “a market economy is a rule of law economy” (市场经济就是法治经济) (Shen 1998). As the Ministry of Justice and legal system were reconstituted in 1979, courts in Beijing, Shanghai, and elsewhere created special economic sections to handle commercial disputes (Lord Ellis and Shea 1980; Doty 1982).

**Figure 36: China's rapid trade growth**

![Chinese trade 1980-2009](image)

In 1980 FTAC became the Foreign Economic and Trade Arbitration Council (FETAC), with an expanded jurisdiction over investment, services, and other areas of international commerce. Re-branding occurred again in 1988, when the institution became what it is known as today, the Chinese International Economic and Trade Arbitration Commission (CIETAC). At the same time, the legal infrastructure to support trade became crucial.

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20 Peerenboom 2002, Chap. 3
time, the CCPIT started using the name China Chamber of International Commerce, more closely approximating Western business groups.

The legal status of arbitration was also improved. As noted above, a series of bilateral treaties had affirmed the right of parties to seek arbitration during the pre-reform period. The 1982 Civil Procedure Law gave foreign arbitral awards formal legal standing for the first time, though only foreign courts, not private parties, could request enforcement (Reinstein 2005; Tao 2008). The 1985 Economic Contract Law reaffirmed the right to settle disputes by arbitration in China or elsewhere and for the first time declared the right of parties to choose the law under which disputes would be settled. Perhaps most importantly, however, in 1986 China acceded to the New York Convention, granting foreign awards the formal protection of international law in its courts and allowing private parties to pursue enforcement.

At the same time, a system of domestic arbitration was developing in China. During the Mao era, private enterprise was miniscule and largely informal. Commercial disputes were resolved either through bureaucratic politics between and within state-owned enterprises, or in formal mediation conducted by local economic commissions (Chen and Shiu 2004, p. 11). After 1978 the State Commercial and Industrial Administration Bureau sought to standardize this process (Spanogle and Baranski 1987). The Bureau and its sub-units (pertaining to local governments) took over dispute resolution, moving it to a less “administrative” and more “law-like” footing. The Economic Contract Law (1981) allowed domestic parties to write contracts to select arbitration as a dispute settlement technique, though its legal status (e.g. how final and binding it was) was unclear. Local level economic commissions began providing arbitration services to companies,
though they varied considerably in their procedures and independence. Specialized arbitration commissions were developed in several issue areas (e.g. real estate, consumer protection, product liability, technology contracts, copyright and securities futures), but their status also remained hazy (Chen and Shiu 2004). Parties were not always free to choose their arbitrators or even the arbitral institutions, and the losing party could often appeal to courts if displeased.

After stalling during the conflicts of the late 1980s and subsequent political freeze, liberalization efforts were redoubled following Deng Xiaoping’s 1992 Southern Tour. Dispute settlement was no exception; in 1994 the government passed the watershed Arbitration Law (in effect from 1995), the first effort to put all arbitration—domestic and foreign—on a formal legal footing.

The law contained several major features. First, it brought all kinds of arbitration under a common rubric, a practice common in other countries, though it gave foreign arbitration greater legal autonomy. The Arbitration Law created three classes of commercial arbitration within China: foreign, foreign-related, and domestic. Foreign awards are those rendered outside of China; these are enforced by the courts largely without review. Domestic arbitration is arbitration involving Chinese firms using Chinese arbitration bodies; courts have more leeway to intervene and review these kinds of awards. Foreign-related arbitration is arbitration that takes place in China in which:

1. One party or both parties to the contract are foreign entities;
2. The subject matter of the contract is located in a foreign country; or
3. The act which gives rise to, modifies, or extinguishes the rights and obligations under the contract occurs in a foreign country (Shen and Chiu 2004, p. 30).

Like foreign awards, foreign-related awards enjoy strong deference from the courts. There thus exists an important bifurcation between domestic and foreign and foreign-related arbitration in
Chinese law, with the latter categories receiving far more autonomy than the former (Peerenboom 2000; Reinstein 2005; Zhao and Kloppenberg 2005; Chi 2009). Provisions were made to ensure that Hong Kong, Macau, and Taiwan would received the privileged “foreign” treatment for the purposes of arbitration (Shen and Chiu 2004).

Importantly, however, the Arbitration Law and subsequent refinements have not allowed ad hoc arbitration to occur within China, effectively removing that option for domestic contracts. Ad hoc arbitration that occurs outside of China, however, is enforced in Chinese courts. Nonetheless, by not recognizing ad hoc arbitration within its boundaries, China has created a significant difference between itself and most major economies.

Second, the 1994 law ended CIETAC’s monopoly on arbitration involving foreign companies. Now any arbitral institution in China could hear disputes involving non-Chinese parties. Several arbitral institutions have sought to challenge CIETAC’s monopoly, especially the Beijing Arbitration Commission and the Hong Kong International Arbitration Centre, though CIETAC remains the leading arbitral institution for TCA in China. However, the introduction of domestic competition into the provision of arbitration in China serves as an important constraint on the institution, forcing providers to strive to satisfy their corporate clients by offering fair, quick, and inexpensive services.

Third, the 1994 Arbitration Law officially severed the remaining links between arbitral institutions and the government. The existing local economic commissions that had handled most commercial dispute resolution were converted into formally autonomous entities. Today
there are around 200 such bodies, though they vary widely in caseload and professionalism (Reinstein 2005). The Beijing Arbitration Commission is widely considered the largest and most important after CIETAC regarding foreign trade, although a number of others have substantial numbers of cases (see table 33).

Fourth, the law revised the standards that govern arbitrators and arbitration, bringing Chinese practice more in line with international standards such as the UNICTRAL model law. One important change was to allow foreigners to serve as arbitrators. As of 2010, CIETAC’s panel of arbitrators included 689 Chinese nationals and 275 foreigners (CIETAC, 2010).

The 1994 Arbitration law also greatly strengthened the juridical autonomy of arbitration in China. For arbitration to function effectively, however, this autonomy must be respected by the courts in practice. Throughout the 1990s foreign business interests and scholars raised doubts about how fair and easy such enforcement was (discussed below). Low-level Chinese courts are closely connected to local governments, which are in turn closely linked to local industries, sometimes in a corrupt fashion. Foreigners alleged that these connections allowed Chinese firms to benefit from “local protectionism” in the enforcement of arbitral awards.

In response, the government has taken two steps through the formal interpretations and statements of the Supreme People’s Court, which are binding on lower courts. First, jurisdiction over the enforcement of foreign and foreign-related arbitral awards was taken away from low-

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21 In addition to informal linkages, courts in China have an “adjudication committee” of government officials that allows for political influence on court decisions.
level and rural courts and given exclusively in intermediate-level courts in large cities (Zheng
and Billiet 2009).

Second, and perhaps most important, shortly after the Arbitration Law came into effect in 1995,
the SPC issued a Notice of the Supreme People's Court on Several Issues regarding the Handling
by the People's Courts of Certain Issues Pertaining to Foreign-Related Arbitration and Foreign
Arbitration.22 This notice instructed all courts contemplating the rejection of a foreign or foreign-
related arbitral award to first report their intended decision to the Higher People’s Court for
review. Should the Higher People’s Court concur, the decision to not enforce the award must
then be reported to the SPC itself, which performs a final review. A follow-up notice in 1998
expanded this system to include decisions to cancel an award as well. The result is a striking ad
hoc review system that essentially centralizes the enforcement of foreign and foreign-related (but
not domestic) arbitral awards under the country’s highest judicial authority.23 I am not aware of
any other country that employs such a system.

These changes have occurred within a rapidly evolving legal system. China’s legal institutions
have strengthened, professionalized, and becoming progressively linked to legal communities
around the world. In 1978, at the start of China’s economic reforms, there were only 2000
lawyers in the entire country, many of them trained before 1949 (Peerenboom 2002, p. ix). The
Ministry of Justice, which had been dismantled in 1959, had to be re-created from scratch in

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International.

23 There is, however, one loophole in the system. Because Intermediate Courts (the court of first instance for most
award enforcement actions) do not have to accept all cases submitted to them, they may refuse to even consider an
enforcement request. These decisions need not be reported up the chain of authority. However, to my knowledge
this loophole has not been a significant source of consternation to arbitration advocates. Ibid.
1979. Judges typically lacked formal legal training, and litigation was virtually non-existent (Peerenboom 2002, p. 6). Today China has around 200,000 lawyers (the third most of any country in the world), and a legal system that is increasingly professional (China Daily, December 26, 2011). Courses on arbitration is now regularly offered in major law schools (Chen 2011; Zhao 2011). Even at the beginning of the reform period, the seeds of a pro-arbitration community were forming in China around the Soviet-style institutions. Tang Houzhi, FETAC’s Deputy Secretary-General in 1984, told an American audience that FETAC adheres to three principles: “independence and initiative, equality and mutual benefit, and reference to international practice” (Tang 1984). He also stressed that arbitration need not take place in China (that is, with his own institution), and hinted that China would soon be joining the New York Convention, which it did two years later.

This domestic shift has coincided with an explosion of linkages between the Chinese legal system and the global legal community, including the transnational legal field surrounding arbitration. China joined UNCITRAL in 1983 and UNIDROIT in 1986, the same year it ratified the New York Convention. In 1994 the ICC opened a China division in Beijing. Chinese arbitral institutions increasingly resembled their global counterparts (discussed below), and began including foreign nationals on their rosters of arbitrators.

These changes can be seen clearly in the trajectory of several individuals who have played pivotal roles in the development of Chinese arbitration. Tang Houzhi, mentioned above, is widely regarded as the “father” of modern arbitration in China. Tang graduated in the early 1950s and went to work for the China General Export Import Company (中国进出口总公司),
one of the main trading companies of the new China, and later in the commercial affairs division of the Chinese embassy in Budapest. In 1959 he began working at FTAC, eventually coming to serve as its Vice-Chairman. In this capacity he represented China at UNCITRAL after the country joined in 1983, negotiating the terms of the 1985 Model Law on behalf of China. Subsequently, Tang became a full-fledged member of the epistemic community, joining various arbitral bodies around the world including the Chartered Institute of Arbitrators, the London Court of International Arbitration, the WIPO Supervisory Board of Arbitrators, the International Council for Commercial Arbitration, and the AAA’s Asian Advisory Committee. He also serves as Vice President of the International Federation of Commercial Arbitration Institutions, and as a law professor at Renmin University.

Another key figure is Ren Jianxin. Ren began his career in the central policymaking organs of the early PRC, the CCP Central Commission on Politics and Law and the Legislative Affairs Office of the State Council. He then went on to serve, from 1959-1966 as the Secretary-General of FTAC, before being purged in the Cultural Revolution. He was restored in 1971, when he served as Director of CCPIT’s legal division and as Secretary-General of the Marine Arbitration Commission. As one of the few senior officials with experience in economic law, he was promoted to the SPC in 1983. This promotion translated into a position on the CCP’s Central Committee in 1987 and, in 1988, the Presidency of the SPC, a post he held until 1998. During the 1990s he concurrently held various state and party positions in the politburo, the Central Committee, the CCP Central Commission on Politics and Law, and the National People’s Congress. While not a member of the various global associations that mark the members of the
global arbitration community, Ren’s experience and personal networks with FTAC and CCPIT make him a crucial link between that community and policymakers, as discussed below.

Chinese domestic arbitral institutions have also grown and changed enormously. Today there are 209 arbitral institutions in China, although the majority of these are not particularly active, nor do they conform to international standards. Many were created out of the previous governmental administrative entity that dealt with local disputes—at times just so the officials working in that department would not be unemployed (Chen 2011)—and so lack independence from the local government. CIETAC remains the most important for transborder commercial disputes. Since the late 1980s, the organization has brought its rules progressively closer to the international standard. A senior executive stated, “It would be good if we could be like the ICC” (Wang 2011), noting that the institution consciously studies the rules of arbitration tribunals around the world and attempts to match its processes to theirs. CIETAC’s evolution is broadly recognized by lawyers practicing in China (Cao 2011; Zimmermann 2011).

BAC, which was created following the 1994 Arbitration Law, is now a close competitor to CIETAC in domestic arbitration, if not international (see below). Though it is also an offspring of the pre-existing governmental administrative apparatus, BAC has benefited from the entrepreneurial drive of its founder, Wang Hongsong, who, with the backing of the Beijing municipal government, has attempted to make BAC the country’s preeminent arbitral institution (Chen 2011; Wang 2011). Like CIETAC, BAC has self-consciously modeled itself on international standards.
The Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC) also play important roles in the burgeoning world of Chinese arbitration, though in a different context (see below).

Table 33: Top arbitral institutions in China (foreign and domestic arbitration) 2010. Source: von Wunzscheim 2012.

<table>
<thead>
<tr>
<th>Arbitration Commission</th>
<th>Total value of claims (mil. RMB)</th>
<th>Rank by value</th>
<th>Caseload</th>
<th>Rank by caseload</th>
</tr>
</thead>
<tbody>
<tr>
<td>CIETAC</td>
<td>13,749</td>
<td>1</td>
<td>1352</td>
<td>10</td>
</tr>
<tr>
<td>BAC</td>
<td>9,300</td>
<td>2</td>
<td>1566</td>
<td>7</td>
</tr>
<tr>
<td>Guangzhou</td>
<td>7,050</td>
<td>3</td>
<td>4593</td>
<td>2</td>
</tr>
<tr>
<td>Wuhan</td>
<td>6,069</td>
<td>4</td>
<td>10099</td>
<td>1</td>
</tr>
<tr>
<td>Shanghai</td>
<td>4,542</td>
<td>5</td>
<td>1124</td>
<td>15</td>
</tr>
<tr>
<td>Shenzhen</td>
<td>2,807</td>
<td>6</td>
<td>1384</td>
<td>9</td>
</tr>
<tr>
<td>Chongqing</td>
<td>2,286</td>
<td>7</td>
<td>2686</td>
<td>3</td>
</tr>
<tr>
<td>Qingdao</td>
<td>2,140</td>
<td>8</td>
<td>1315</td>
<td>12</td>
</tr>
<tr>
<td>Wuxi</td>
<td>1,700</td>
<td>9</td>
<td>1558</td>
<td>8</td>
</tr>
<tr>
<td>Xian</td>
<td>1,370</td>
<td>10</td>
<td>1685</td>
<td>5</td>
</tr>
<tr>
<td>Xiamen</td>
<td>1,280</td>
<td>11</td>
<td>.</td>
<td>30</td>
</tr>
<tr>
<td>Jinan</td>
<td>1,200</td>
<td>12</td>
<td>.</td>
<td>25</td>
</tr>
<tr>
<td>Nanjing</td>
<td>1,160</td>
<td>13</td>
<td>.</td>
<td>23</td>
</tr>
<tr>
<td>Zhengzhou</td>
<td>1,046</td>
<td>14</td>
<td>1589</td>
<td>6</td>
</tr>
<tr>
<td>Haikou</td>
<td>930</td>
<td>15</td>
<td>.</td>
<td>63</td>
</tr>
</tbody>
</table>

5.1 Assessing the scope of arbitration in China today

Before turning to explanation, it is useful first to assess how large a role TCA plays in contemporary cross-border disputes involving China. The total universe of cases is impossible to define precisely. Litigation may occur in Chinese courts or foreign courts. Arbitration may occur at any of China’s hundreds of arbitral institutions or anywhere else in the world the parties designate. While ad hoc arbitration is not possible within China, it may be used by Chinese firms

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24 The Hong Kong International Arbitration Centre was founded in 1985, and was intended more as an alternative for local companies to the ICC, which many considered too expensive, than as a bridge between the mainland and the West. Even as late as 1998, the number of mainland cases in the HKIAC was small. Caldwell, P. (2011). Interview with the author. October 19, Hong Kong, founding Council Member, HKIAC.
abroad. We are thus unable to say definitively how many China-related transborder disputes exist and what institutions are used to resolve them.

Nonetheless, the data available do allow us to make descriptive inferences about the relative weight of various institutions. The following analysis draws on a variety of statistical reports from the government and from Chinese arbitral institutions. To my knowledge the existing literature has exploited these sources only partially, perhaps because most are only available in Chinese.

First, there has been a large increase in commercial disputes of all kinds, foreign and domestic, over the reform period (figure 37). Civil cases in general have increased steadily. Of these, commercial disputes have been classified in different ways at different times. Until 2001 “economic disputes” (经济纠纷) were measured; since 2002, this category has disappeared, though “contract disputes” (合同纠纷) are reported. The China Law Yearbook does not provide sufficient detail to determine how much these categories overlap, though we can infer that they are broadly similar. Both trend upward. Also since 2002, the number of court cases relating to arbitration (that is, cases in public courts relating to arbitral decisions) has been reported. This figure, however, includes numerous types of arbitration enforcement (e.g. foreign and domestic commercial arbitration, marine arbitration, labor arbitration, real estate arbitration, etc.), making it less informative for the present purposes (although the fact that the government began collecting these figures just after the SPC required all foreign arbitral cases to be reviewed highlights the importance attached to that decision).
Given the rapid growth of the Chinese economy, we would expect commercial disputes to increase. Less expected, however, is that the ratio of disputes to GDP rose from the mid-1980s, peaked in the mid-1990s and has now fallen back below 1980s levels (figure 38). In other words, GDP is growing more quickly than disputes.
The total number of arbitrations has also risen. In 2010, according to the Legislative Affairs Office of the State Council, there were 78,923 cases accepted at Chinese arbitral institution (both foreign-related and domestic), with combined value of around USD 15.5 billion (von Wunscheim 2012).

What about the relative weight of foreign and domestic disputes in Chinese courts? Fortunately, the government measured how many economic disputes involved foreign parties. Unfortunately, it did so for only eight years between 1987 and 1996. Still, the data are informative. First, they show that international disputes represented only a tiny fraction of all disputes in Chinese courts, typically less than 0.1 percent (figure 39).
Second, these data allow us to compare—for a few years, at least—the total number of foreign commercial cases in PRC courts to the total number of TCA cases in China (figure 40). Except for 1996, CIETAC had a monopoly on TCA in China during the years for which data on international economic disputes is available, and so we can be sure the data capture all TCA cases within China. Perhaps surprisingly the results show that cross-border litigation was more common than arbitration in China; the ratio of arbitration to litigation for all the years for which data are available is approximately two to one. We do not know if this ratio is the same in litigation and arbitration involving Chinese firms outside of China, but anecdotal evidence suggests that PRC firms rarely litigated in foreign countries in these years, whereas foreign arbitration was a long-standing practice. We can thus expect the total ratio of arbitration to litigation to be somewhat higher.

It is important to state that while the types of cases compared in figure 40 are broadly similar—business disputes between Chinese and foreign firms—they differ in one very important way:
litigation need not have a contractual basis; arbitration almost always does. Thus arbitration cases are essentially contract disputes, while economic disputes in courts may include other categories as well (e.g. disputes between companies that did not have a previous contractual relationship). If only similar types of cases were compared, the ratio of arbitration to litigation would likely be closer.

Figure 40: Arbitration and Litigation in China, 1986-1996 (source: China Law Yearbook; CIETAC annual reports). Note: litigation data were not available for 1990 and 1995; arbitration data not available before 1990.

Unfortunately, it becomes more difficult to calculate the ratio of arbitration to litigation for cross-border disputes after 1996, for two reasons. First, CIETAC lost its monopoly on TCA in China, making it more difficult to identify the total number of TCA cases performed by Chinese arbitral institutions. Figure 41 shows the total number of TCA cases handled by CIETAC and the Beijing Arbitration Commission, a key competitor. TCA in China seemed to reach a peak in the mid 1990s, then diminish, and is now growing again. However, it is unclear whether these
changes meant that fewer disputes were occurring (unlikely, given the increasing volume of trade), whether other arbitral institutions in or out of China were being employed (their caseloads were growing at this time), or whether litigation became more popular.

Figure 41: TCA cases at leading Chinese arbitral institutions (source: CIETAC and BAC)

However, Moser (2007) provide figures for the number of arbitral disputes involving PRC firms at several major arbitral institutions (figure 42). His tables are not cited, and it is unclear how the data were generated.
If correct, these figures suggest that the majority of China-related TCA is conducted by Chinese arbitral institutions in China (figure 43). Furthermore, because the arbitral institutions Moser provides data for—the Hong Kong International Arbitration Centre, the International Chamber of Commerce, the London Court of International Arbitration, the Singapore International Arbitration Centre, and the Stockholm Chambers of Commerce—are the most likely hosts for Chinese companies arbitrating abroad, we can infer that the total amount of China-related TCA is around several hundred cases per year. Note that ad hoc arbitration is not counted.
The ratio of arbitration to litigation, then, likely continues to favor the latter. If we assume that foreign disputes continue to make up a small part of litigation (0.1%) in China, then we would estimate about 2200 such cases in 2005, the last year for which the “total” arbitration data are available. Compared to the 583 arbitration cases that year, the ratio of arbitration to litigation seems to have shrunk.

Interestingly, even if the status of TCA is ambiguous, domestic arbitration has grown steadily more popular in China. Figure 44 shows the total caseloads of two of the leading arbitration institutions (in terms of economic value), revealing an explosion of domestic arbitration.
This growth has been relatively faster than litigation vis-à-vis GDP growth (figure 45). Unlike the bell curve seen in figure 38, the flatter distribution in figure 45 suggests that arbitration (domestic and international) is keeping pace with GDP growth and thus capturing a greater share of disputes. (Note that if we look at the data in figure 38 after 1990, the year the data in figure 45 begin, the distribution looks more like a continuous descent than a bell curve, heightening the difference with figure 45).
From this analysis we can infer that TCA is a central component of transborder dispute resolution relating to China, somewhere about the same order of magnitude as litigation. This finding suggests that arbitration is an important element of the contract enforcement regime. At the same time, it weighs against the common claim in the legal literature that TCA is the only or even the dominant institution for cross-border contract enforcement.

The results suggest that important variation exists in the institutions firms choose to resolve their disputes, perhaps related to the nature of the dispute, the actors involved, or other characteristics. The next section attempts to explain this variation.

5.2 Rationalist

The rationalist mechanism requires us to look first at the balance of power between market actors. China’s liberalization and growth have leveled the playing field between Chinese and
foreign firms. Whereas before Chinese companies were desperate to buy foreign products they could not produce from Western, Japanese, or Soviet firms, today there is ample competition in almost every sector for both imported and exported goods. According to UN Comtrade data, in 1985 Chinese exports covered only 285 product categories (SITC 2); in 2011 the figure was 2032 (see figure 46). While some foreign buyers, like Walmart, wield decisive market power over suppliers (if Walmart were a country, it would be China’s sixth largest export market), these are the exceptions that prove the rule. Moreover, there are numerous examples of Chinese companies holding dominant market positions. The massive investment in Chinese factories and the refinement of corporate structures and production techniques has meant that some companies, such as, most famously, the electronics supplier Foxcon (a Taiwanese company that manufactures in China), can make things in China that it would be prohibitively expensive to create elsewhere.
Figure 46: Chinese exports in 2010 by product category (Source: MIT Medialab; UN COMTRADE)

This leveling of the playing field predicts, following R1, demand for neutral dispute resolution institutions. We should observe firms striving to convince their partners to accept their preferred institution, and succeeding where their market power is greater than their counterparty’s. But because neither Chinese nor foreign firms can expect to be dominant in any predictable way, neutral institutions are likely to be the chief outcome of this bargaining.

How do the various institutional alternatives—Chinese courts, Chinese arbitration, and foreign arbitration—compare on the neutrality dimension? Many observers have alleged that Chinese
China
courts are systematically biased toward domestic firms (Harer 1999; Reinstein 2005; Inoue 2006; Kostrzewa 2006). Survey data suggest this belief is not uncommon in the international business community (Mistelis and Baltag 2008). Others have criticized these views as overstated (Peerenboom 2002; Lan 2012). All observers agree that the bias of Chinese courts varies by region and level, with local courts in rural areas more likely to intervene to protect “their” firms than courts in larger cities and at higher levels (Peerenboom and He 2008). There are good reasons for this variation. Local Chinese courts depend closely on local governments for personnel and resources, and governments in turn share considerable interests with local firms. Local governments rely on local firms for tax revenues, often belong to the same social networks, and may even own significant portions of local companies. Straightforward corruption is also stubbornly common (Peerenboom 20001, p. 27-29). In addition to these informal channels, there are institutionalized ways for local officials to influence cases. All courts have a special advisory committee made up of CCP members and government officials, which provides a direct route for political influence. However, these problems are attenuated in larger cities and at higher tier courts. Governments in larger cities are less likely to be connected to any one firm, as are governments at higher levels (e.g. province as opposed to county or municipality level), and so are less likely to intervene in court cases. For these reasons, bias in Chinese courts is generally discussed in the literature as a phenomenon of “local protectionism” (地方保护主义). We can therefore conclude that Chinese courts, while not necessarily biased, are at risk of being so, especially at the local level.

Some have even suggested that foreigners can receive more favorable treatment in some circumstances, because there is more exposure and thus onus on courts to deliver a defensible result. Lan, R. (2012). Are Intellectual Property Litigants Treated Fairer in China's Courts? An Empirical Study of Two Sample Courts. China and Global Governance. Bloomington Indiana, Research Center on Chinese Politics and Business.
What about Chinese arbitral institutions? As noted above, since the late 1980s, CIETAC has taken enormous steps to bring itself in line with international standards, removing much of the suspicion that clouded FTAC’s legacy. A 2001 survey of American companies performed by the American Chamber of Commerce of Beijing found that 75 percent of firms that had experienced arbitration in China rated it as fair or more fair than foreign arbitral institutions (however, revealing the extent to which foreign perceptions update slowly, the figure was only 55 percent for firms that had not experienced arbitration in China) (Tan 2003). A former CIETAC employee, now a partner at a top foreign law firm in Beijing, reports that CIETAC would often receive informal communications from government officials (typically from municipal or provincial governments, or from the ministries charged with a certain sphere of economic activity) attempting to influence the outcome of a particular case. Such communications were typically ignored, the former employee contends. Since CIETAC became independent in the mid 1990s, it is difficult to see what any one official in a ministry or regional government might be able to offer in terms of sanctions or enticements to affect a case beyond “routine” corruption. Examples are not unknown. One lawyer reports of a case in which one of the arbitrators communicated the outcome to a party before the official result was announced, allowing the party, which was going to lose the case, to withdraw from arbitration (it had been the claimant) in advance of the ruling. It does not seem that such incidents are common, however. Indeed, the largest scandal to affect CIETAC recently was the dismissal of two top officials for assigning themselves the most lucrative arbitrations, not something that affected the institution’s neutrality vis-a-vis the parties (Zimmermann 2011).
The lack of bias in Chinese arbitration post-reform makes sense. CIETAC no longer has a monopoly on non-court dispute resolution. Instead, its competes heavily with BAC and foreign institutions, and bias would be bad for business. We can therefore conclude that over the reform period, Chinese arbitral institutions have become sufficiently neutral to assuage the concerns of foreign firms.

It is also worth considering whether foreign arbitral institutions may be biased against Chinese companies. While none of the legal practitioners interviewed suggested that blatant bias was a large factor, several noted structural characteristics of foreign legal institutions that made it less likely for Chinese companies to succeed. Language was a primary concern (Chen 2011). Chen Fuyong of BAC also noted that foreign arbitrators may be unfamiliar with common Chinese business practices (such as guankao hanging arrangements, in which private companies form loose affiliations with state-owned enterprises to gain access to markets they otherwise could not).

Turning to efficiency, we observe broadly comparable functionality across foreign and domestic arbitral institutions, as well as Chinese courts. Each entails different trade-offs, and so no institutions is definitively superior from an efficiency perspective. Litigation in Chinese courts is typically fast and cheap compared to that in other countries, and even compared to some arbitrations. The World Bank finds that China’s overall “ease of contract enforcement” ranking is 17th in the world, ahead of the UK (22nd), Japan (39th), and Canada (59th), for example. The survey found that, on average, cases in courts took 406 days to resolve, involved an average of 35 procedures, and, significantly, cost only 11 percent of the value of the judgment, the second lowest amongst the G-20 countries (See Table 8, Chapter Three, for a comparison).
On the other hand, outside of major cities expertise remains weak (Lan 2012) (Reinstein 2005; Peerenboom and He 2008). While there has been considerable improvement in Chinese courts, especially regarding commercial matters, and especially in larger cities, basic judicial competence remains a concern (Peerenboom and He 2008). Given these weaknesses, it is plausible that a firm, Chinese or foreign, would prefer a technically sophisticated arbitral proceeding to a potentially deficient court hearing.

Chinese arbitral institutions represent a less extreme version of a similar trade off. On the one hand, CIETAC’s fees are often considerably less than flagship institutions like the ICC (Fei 2011; Wang 2011).

Finally, consider the authority dimension. Dynamic markets for Chinese exports and imports make private enforcement difficult. Rarely will firms wield sufficient market power to make the threat of not doing business in the future a credible deterrent to cheating. R1 therefore predicts demand for institutions that can offer authoritative enforcement of awards—e.g., those that can call on the police powers of the Chinese state.

The key question, thus, is which are more enforceable in China: arbitral awards or court decisions? Both depend on the Chinese judiciary, which, as described above, may not be fully neutral. However, the autonomy of arbitration and the special procedures the government has designed around it make it much more difficult for bias to enter arbitration enforcement decisions than contract litigation done directly in Chinese courts. First, it is more difficult for
judges to twist the law to reject an arbitral award than it is for them tip the scales in a case they are hearing directly. Arbitral awards must be enforced unless some general, and, typically, fairly clear conditions apply. Spurious legal reasoning is easily exposed in such cases, with potential reputational costs for judges. Substantive cases are much less standardized, and so harder to evaluate. For this reason, we should expect enforcement cases to exhibit less bias than substantive cases, on average.

Second, enforcement rates for arbitral awards in Chinese courts are, if by no means perfect, at least decent. We lack the systematic data needed to answer this question fully. While official statistics report the number of arbitration-related cases that end up in Chinese courts (see above), we do not know their outcomes, nor do we know which are foreign or foreign-related and which are domestic. However, three independent studies are worth noting. In 1997, in response to foreign criticism, CIETAC published a study of the enforcement of its awards in Chinese courts. It found that CIETAC’s own awards were enforced in 71 percent of cases, while foreign institutions’ awards succeeded 77 percent of the time. However, these numbers were obtained from a survey sent to courts, so we can expect the relatively pro-arbitration courts to have been more likely to report figures, and cannot rule out the possibility that courts would wish to make themselves seem more pro-arbitration than they actually are.

Peerenboom (2001) conducted a large and detailed (72 cases) empirical study of arbitral award enforcement in Chinese courts in the 1990s based on interviews. As one of the foremost foreign experts on Chinese law, Peerenboom had unique access to the law firms and courts involved in these cases, and so was able to obtain information outside of the public realm. But this strategy
likely also created systematic biases in his sample, as it relied on personal networks of elite lawyers. He finds that foreign awards were enforced (meaning the aggrieved party received some money) in 52 percent of cases, while CIETAC arbitrations were enforced in 47 percent of cases. More important for present purposes, however, is the evidence that Peerenboom’s survey presents on the incidence of local protectionism. Of the 42 cases he is able to measure for local protectionism, 24, or 57 percent, show evidence of it. However, the cases in which protectionism is a factor are not significantly more likely to go unenforced; 54 percent of such cases were enforced, as opposed to 61 percent of cases where protectionism was not present (Peerenboom 2001, p. 27). From these results Peerenboom argues that the fear of local protectionism, though not unfounded, has been overstated. The largest cause of non-enforcement is not bias but insolvency, he argues.26

Finally, von Wunscheim (2012) and her partners at a boutique legal consultancy focused on China have conducted what I believe to be the largest study of arbitral award enforcement, covering some 101 cases (foreign, foreign-related, and domestic) issued between 1995 and 2001. Information about these cases was obtained largely via public reports and personal interviews or work experience, like the Peerenboom study, and therefore likely exhibits similar biases. Von Wunscheim reports enforcement rates of 57 percent for foreign-related awards (n=21), and 60.7 percent for foreign awards (n=56), falling between Peerenboom and CIETAC.27

26 Reinstein (2005), however, criticizes this conclusion, noting that insolvency may be engineered by firms (by transferring assets to separate companies) as a way to escape an arbitral award. Courts may play a role in this charade by delaying enforcement or refusing requests from the plaintiff to freeze the defendant’s assets. While Reinstein (and, for that matter, Peerenboom) identifies a few cases in which this seems to have occurred, it is difficult to conclude, as she suggests, that local protectionism is behind many insolvency-related enforcement problems.

27 Interestingly, she finds a higher rate of enforcement (66 percent) for domestic awards, but the small sample size (n = 12) prevents generalization.
Von Wunscheim also provides information on the reasons courts provide for rejecting enforcement (figure 47). Of the 101 decisions in her sample, the common, process-related are cited most frequently, with only two decisions to not enforce an award due to public policy concerns.

Figure 47: Reasons for non-enforcement of arbitral awards in von Wunscheim (2012) study (n=101) N.b. “none” means the award was enforced.

Informal rules also supplement the official enforcement system, for both good and ill. According to lawyers familiar with numerous cases, Intermediate Courts have occasionally failed to report a non-enforcement action to the SPC. At the same time, CIETAC—which reputation depends largely on the enforceability of its awards—monitors the enforcement actions of its more
important cases. Should problems arise, it informally requests the intervention of the SPC, which can issue directive to lower courts. The best inference, then, is that arbitral awards are largely enforceable in Chinese courts, and on average more authoritative than court decisions.

Table 34: Institutional alternatives in the reform period

<table>
<thead>
<tr>
<th>Institution</th>
<th>Mao era</th>
<th>Reform era</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chinese arbitration</td>
<td>Biased; high transaction costs; authoritative</td>
<td>Neutral; low transaction costs; authoritative</td>
</tr>
<tr>
<td>Chinese courts</td>
<td>NA</td>
<td>Diminishing bias and transaction costs; authoritative</td>
</tr>
<tr>
<td>Foreign arbitration</td>
<td>Neutral; low transaction costs; not authoritative (except for foreign market power)</td>
<td>Neutral; low transaction costs; authoritative</td>
</tr>
</tbody>
</table>

The above discussion of institutional alternatives (summarized in table 34), suggests a broad convergence between the alternative dispute settlement mechanisms in China. Over the period, Chinese arbitration has increasingly approximated Western arbitration in terms of neutrality and efficiency. Chinese law has evolved to make both of these options, if not quite as authoritative as they might be in other jurisdictions, commensurably authoritative compared to each other. On all these dimensions both types of arbitration surpass courts.

Several observable implications follow from R1. First, as Chinese arbitral institutions have improved, foreign firms should be increasingly likely to utilize them as opposed to foreign arbitral institutions. As described above, arbitral institutions in China have undergone a process of professionalization similar to Chinese courts, and so should be increasingly attractive fora for
dispute resolution. Indeed, it appears that Chinese arbitral institutions now capture the lion’s share of China-related arbitration, in the vicinity of 80 percent. Unfortunately, we lack directly comparable data from earlier periods. However, given the miniscule caseload of FTAC during the pre-reform period, it is likely that foreign arbitral institutions handled the majority of cases. The increasing usage of Chinese institutions is thus consistent with the functionalist version of R1.

At the same time, convergence has not been total. Legal practitioners continue to identify a preference amongst Chinese firms for Chinese arbitration and foreign firms for foreign arbitration (Caldwell 2011; Cao 2011; Fei 2011), although most would agree that this preference has shrunk since the 1990s (as the caseload data suggest). Various reasons are cited for this “home court” preference, such as language and the familiarity of arbitrators with idiosyncratic business practices, as noted above (Wang 2011). Legal practitioners also note that these preferences are in part the product of bounded rationality. As a lawyer advising firms on dispute settlement options notes, “Everyone wants a mechanism that they are familiar with, and that is familiar with them” (Tai 2011). The Secretary-General of the HKIAC agreed, noting that sometimes preferences are largely “psychological” (Bao 2011). A senior CIETAC official also complained that many foreign companies who have not experienced a CIETAC arbitration are prejudiced against it (Wang 2011).

Given these preferences, and the open market conditions, R1 would also expect institutions to rise in importance that are seen as acceptable to both foreign and Chinese parties. The strong growth of Hong Kong and Singapore as regional arbitration centers in this period therefore offers
additional support for R1. Both offer important cultural similarities to the Chinese mainland, yet both are governed by legal systems strongly influenced by the legacy of British colonialism. Indeed, a number of legal practitioners report that the Singapore and Hong Kong arbitration institutions are chosen as a “compromise” between Western and Chinese companies (Caldwell 2011). “Parties look for a third jurisdiction, somewhere neutral, which provides both sides with comfort,” states the Secretary-General of HKIAC.

A third observable implication of R1 is that we should observe companies actively bargaining over the choice of dispute resolution institution. Legal practitioners confirm that this is indeed the primary mechanism through which institutions are chosen (Tai 2011; Zhao 2011; Zimmermann 2011), though the level of importance companies attach to it seems to vary.

In sum, R1 would therefore predict a gradual shift over the reform period from the rejection of Chinese courts and arbitral institutions, to increasing usage as these converged toward international standards. Indeed, this is what we seem to observe in practice.

I now turn to the question of why the PRC has embraced arbitration as a major way to provide transborder contract enforcement. As discussed above, the very political survival of the CCP has become linked to a vibrant foreign trade, and this dependence has allowed pro-trade interests to penetrate the party-state. Foreign trade, in turn, depends on effective transborder contract enforcement, which private arbitration, backed by the policy power of the state, can provide. Above we have seen how foreign firms and their domestic partners demand exactly such an arrangement. The logic of R2—which suggests that the dispute resolution institution that meets
the needs of the dominant domestic group will emerge—thus seems generally vindicated by progressive strengthening of arbitration’s autonomy and enforceability throughout the reform period.

Several more specific observations can also be made in support of R2. First, the policies adopted to make arbitral awards more enforceable—especially the SPC’s oversight mechanism—support R2 in that they follow the perennial cleavage in Chinese domestic politics between central and local authorities. As Peerenboom has noted, the rule of law provides aggregate benefits for society but also creates winners and losers (Peerenboom 2002, Chap. 10). In the context of Chinese firms, a level legal playing field can harm the interests of well-connected companies (especially state-owned ones) that benefit from clientalistic relationships with the government. As discussed above, such cases are most predominant in more rural localities where connections between governments and prominent businesses are closer. Winners from the rule of law, on the other hand, include smaller, private firms, MNCs, and foreign investors. Such actors are less able to take advantage of networks of relationships in order to defend their interests, and so depend more on legal institutions. Because these kinds of firms are key drivers of economic modernization and growth, the central government is highly responsive to their needs. The centralized review mechanism can be interpreted along these lines, as can the related move in which the SPC put all civil and commercial cases involving foreign elements are under that jurisdiction of specific Intermediate People’s Courts (second-tier) in capital cities and special economic zones (Reinstein 2005), moving such cases away from the local courts and thus lessening the danger of local protectionism.
Second, the lower level of deference public courts show to domestic arbitration compared to foreign is consistent with the rationalist mechanism, but not the ideational one. Given that the government’s primary objective is to create a policy environment in which foreign trade and investment can flourish, there is little need to meet the demands of purely domestic firms that lack an “exit option.” Moreover, I find very little evidence that domestic firms have articulated demands for more robust arbitration options. Indeed, as discussed in the context of demand, above, purely domestic firms are much more likely to not even know that arbitration might be an option. Instead, observers angry about the “discriminatory” system imposed on Chinese firms seem mostly limited to legal experts (Chi 2009).

Third, Chinese officials explicitly justify the reform of arbitral institutions and their status under Chinese law in terms of stimulating foreign commerce. In 1987, Ren Jianxin, Vice-President of the Supreme People’s Court, published a rare article in a Western business law trade publication touting the effectiveness of dispute resolution in China and of arbitration in particular (Ren 1987). He noted that after China acceded to the New York Convention he had written an article to express the Supreme People’s Court’s commitment to enforce foreign arbitral awards, adding, “This way we shall be able to contribute fully to the further development of economic cooperation, trade, scientific and technical exchange among the states that are Parties to the Convention, and to peace and development of the world” (Ren 1987, p. 398). Official rhetoric thus embraced arbitration as a useful tool for the expansion of foreign trade throughout the reform period.
In sum, the basic conditions established by R1—chiefly, the material interests of the central government leadership—comport with institutional outcomes. But process observations, in contrast, are far weaker, with the main lobbying mechanisms missing.

First, it does not seem that foreign firms or pro-trade Chinese firms actively lobbied the government to ensure the autonomy of arbitration, nor does the government seem to have consulted such interest groups in the lead up to the 1994 Arbitration Law. None of the foreign chambers of commerce in Beijing with whom I communicated (US, EU, German, Japanese) report any involvement in the early 1990s, nor have any taken steps to push for greater autonomy for arbitration since that time. The chambers, which represent the views of the foreign business community, stressed that other rule of law issues—for example, enforcement of IPR—dominate their interactions with the government. A similar attitude applies to Chinese firms. Referring to ongoing efforts to reform the Civil Procedure Law, which affects a variety of commercial governance issues including arbitration, Chen (2012) noted that “there are so many problems with the law” (he cites the ability of courts to refuse to consider cases without sufficient reasons as one) arbitration is not a priority for companies or even law firms.

Second, no lobbying seems to have occurred at the intergovernmental level either. Tao, who was close to the drafters of the 1994 law, confirms that the foreign ministry was not involved. I also find no evidence of concerns over arbitration being raised in the diplomatic record of US-China relations since the initial commercial treaty. In other words, companies do not seem to have relied on diplomacy as an alternative path to influence over Chinese policy.
So how, then, did China’s pro-arbitration stance actually come to be? As I show below, ideational mechanism played a strong role in driving outcomes. I turn to these below.

5.3 Ideational

First consider the role of ideational forces on firms’ preferences. We can expect the large multinationals operating in China, and the global law firms that advise them, to have a longstanding habit of using arbitration. Because this outcome is consistent with their rationalist interests under R1, there is not much to explain. However, we might expect the views of legal experts to be particularly important for multinationals trading with Chinese entities, particularly at the start of the reform period, because of the high levels of uncertainty surrounding Chinese law.

More interesting is the case of Chinese firms, which have experienced a steeper learning curve regarding international business practices over the reform period. Many new Chinese companies, or companies new to international commerce, seem to have initially agreed to dispute resolution clauses they did not actually understand, especially in the early 1990s. Cao (2011) tells of a story from this period in which CIETAC called the CEO of a major company to tell him that a foreign company had brought an arbitration (仲裁 zhòng cài) action against his firm. He responded, “what the hell does this have to do with planting vegetables?” (种菜 zhòng cài is a quasi-homonym in Chinese). According to Tao (2011), “Originally firms would not care about dispute resolution clauses. But once they get involved in a case, they would realize their mistake.” Most experts agreed that Chinese lawyers and firms initially learned of arbitration by stumbling into it in this way, and several experts emphasized that the general level of knowledge regarding the
practice amongst lawyers and business remains below that of other countries with a longer history of the practice.

We lack survey data to corroborate these impressions, but the strong consensus view amongst legal practitioners is that knowledge of arbitration, though low to begin with, has grown enormously. Today large companies with high-value global transactions employ very savvy in-house counsels, as well as the large array of global law firms that have opened offices in Beijing, Shanghai, and a smattering of provincial cities. In 2012 209 foreign law firms were licensed to operate in China (see figure 48). In other words, while small and less advanced Chinese companies continue to lag, the most important commercial entities employ the same law firms and types of lawyers that the multinationals do.

**Figure 48: Foreign law firms in China 2012. Source: (2012)**
The basic conditions for I1—a strengthening domestic legal field linked to global networks that increasingly favors arbitration, uncertainty about optimal dispute resolution procedures—have thus appeared during the reform period. Both Chinese and Western firms were uncertain of how to best resolve disputes, and employed legal experts—sometimes even the same ones—to help them decide. Because these legal experts were disposed to arbitration, the increase of arbitration cases is also consistent with I1.

Because this result is also consistent with the rationalist mechanism, it is important to consider further observable implications. First, on a process level, we see both foreign law firms and foreign and domestic arbitral institutions actively seeking to educate Chinese companies about arbitration. CIETAC has a marketing department to advertise its services, and one director of the organization stated, “Here everyone does marketing” (Wang 2011). CIETAC also conducts regular seminars for in-house counsels, and makes visits to Chinese law firms and companies, as does BAC. BAC also runs a training program for its clients in conjunction with Tsinghua
China

University (Chen 2011). HKIAC and SIAC do similar activities (Bao 2011). Though these entities are, in a sense, competitors, they often cooperate on their outreach programs. As Wang Jie of CIETAC noted, “The market is a big cake. We want to make the whole cake bigger” (2011). Foreign law firms also invest in educational outreach programs to teach clients and potential clients about the dispute resolution options available to them (Fei 2011; Tai 2011; Tao 2011).

It may be possible to gain additional explanatory leverage from the difference in rules governing domestic and foreign arbitration. Because domestic arbitration lacks the legal advantages that foreign arbitration enjoys vis-à-vis litigation (e.g. courts may review the content of domestic arbitral awards), it is more similar to litigation in terms of neutrality, authority, and efficiency. We can thus expect the choice to be driven more strongly by ideational mechanisms. Indeed, the ratio of arbitration involving foreigners to litigation involving foreigners is around two orders of magnitude larger than the ratio of domestic arbitration to domestic litigation (see above). In other words, Chinese firms are much less likely to use arbitration with each than with a foreign company. The total number of arbitration in 2010 was around 70,000 (this includes labor arbitration, marine arbitration, etc., so the number of commercial cases is actually lower), while public courts saw nearly three million “contract disputes” in 2009. Though domestic arbitration has mushroomed in recent years, it remains insignificant compared to litigation, while for foreign cases both institutions play a sizeable role. This difference indicates just how far arbitration remains from being a mainstream practice for most Chinese companies.
Turning now to the supply question, we see that the chief actors involved in reforming Chinese arbitration laws are indeed the pro-arbitration epistemic community. The motivations of this group somewhat overlap with those favored by the rationalist theory. Figures like Ren Jianxin, for example, are steeped in the norm of arbitration, but, as senior government officials and economic liberals, are also motivated by the desire to increase China’s ability to transact with the world. These perspectives are, of course, eminently compatible. Indeed, it is this compatibility, I argue, that has shaped the nature of dispute resolution institutions in China. Legal experts were permitted to import global norms of arbitration because these also served the interests of China’s leaders.

Several process observations highlight the importance of legal experts in shaping outcomes within the constraints imposed by economic interest. First, arbitration experts have been deeply involved in every policy shift and contemplated policy shift on dispute resolution, both as lobbyists exercising their own political agency and as experts called upon by the government. Several observers suggested that the initial impulse for a more pro-arbitration law in the early 1990s originated in CIETAC itself (Wang 2011, Chen 2011, Fei 2011), and it is widely agreed that the institution and the CCPIT in general were closely involved in drafting the legislation. Tao, at the time one of the few arbitration lawyers working for a foreign firm, actively consulted with a chief member of the legislative committee that drafted the law, He Shan, with whom he had shared a bunk-bed at law school. In other words, the views of the pro-arbitration community were fully considered in the drafting of the law, and likely account for the impetus behind it. As one expert stated, it is the arbitration community that drives government policy, not vice-versa (Wang 2011).
The active lobbying and close involvement of the arbitration community provides the mechanism missing from the rationalist account. But the discrepancy between the resulting law and international norms (e.g., regarding the different treatment of foreign and domestic cases, and the ban on ad hoc arbitration domestically) highlights the corresponding limits of a purely ideational explanation. When asked to identify the reasons or concerns that prevented policymakers from implementing a more permissive arbitration law (in 1994 or subsequently), individuals with knowledge of the discussions report that the basic bureaucratic concerns of government officials—not protest from potential distributional losers—were the primary barriers. According to Tao (2011), the decisions were primarily “technical” in nature, and policymakers displayed the cautious incrementalism that characterizes economic governance for much of the reform period. Another observer, who asked not to be identified, was less sanguine, attributing policymaker’s resistance to an “outdated mindset” and stating it is the nature of the government to want to control things. For the purposes of our analysis, however, the implication is essentially the same—policymakers only deferred so much to legal expertise.

For example, Tao (2011) states that the government resisted allowing ad hoc arbitration because it was simply unsure where such a practice might lead, and that decentralized decision-making procedures were too far from policymaker’s mindsets. Another concern was the quality of arbitration that a more autonomous system would provide. While the government seemed pleased with the quality of arbitration in, for example, CIETAC, it could not be so confident that justice would be rendered by a small tribunal in a remote province. A similar concern seems to have motivated the SPC’s centralized reporting system. Such oversight was proposed by
CIETAC (Tao 2011), but strongly endorsed by Ren Jainxin. Indeed, the SPC president had proposed such a system two years before the Arbitration Law was drafted (Tao 2008, p. 173). CIETAC’s reasons for desiring the centralized enforcement of foreign awards is obvious, and was likely shared in least in part by Ren (who had, after all, served as head of CIETAC’s predecessor institution). The top judge likely was also motivated by a desire to demonstrate that China’s judicial system, of which he was the head, was up to international standards. Several experts emphasize the importance of the system for ensuring the “reputation” (Cao 2011) or “standing” (Wang 2011) of the legal system in the eyes of the world.

In sum, while the arbitration community seems to have been a driving force behind the delegation to arbitration, it enjoyed only partial deference from policymakers, who, following their basic conservative instincts, could not be persuaded to delegate any more authority to arbitration than was minimally necessary to ensure the key material goal of facilitating trade could be obtained. The resulting system of course represented a significant step forward for arbitration’s advocates, but also confirmed the importance the constraints that material forces place on ideational mechanisms.

6. Conclusion

The Chinese experience of commercial dispute resolution shows the importance of power and interests in shaping institutional outcomes. This is demonstrated perhaps most vividly in the first sub-case, in which foreign interests relied on the superior military power of their home states to
maintain the treaty port system that served their interests. Importantly, this system persisted even after the balance of power between foreign and Chinese firms had evened, and after norms had begun to shift against the colonialist arrangements. The implication—that material interests tied to state power trumps the other mechanisms considered here—is an important finding. It suggests that the institutions that govern commercial dispute resolution would look quite different in a world in which major economies differed sharply in national power.

The second sub-case confirms how ideational mechanisms can be decisive when trade in general, and dispute resolution in particular, is not salient amongst the key political actors. The PRC’s adoption of the Soviet arbitration institutions did not meet the needs of its foreign trade, but this was of little import to the country’s leadership.

Only in the reform period would the country’s leaders become concerned with such matters. The CCP’s embrace of export-oriented development made it essential for China to offer foreign firms the commercial dispute resolution institutions they desired. Given that Chinese courts remained vulnerable to bias, private arbitration was the natural choice. Indeed, this choice was likely better for China’s leaders than a purely public option, as it allowed them to achieve the desired economic end without enhancing the independence of the judiciary—which might have had broader repercussions adverse to CCP interests.

As before, however, the precise form the institution took was largely shaped by ideational factors. It was the arbitration community that initiated and sculpted the policy changes that would grant private tribunals governing foreign trade such an extraordinary degree of state
support, and it was the same legal experts who led China’s arbitral institutions into broad conformity with international norms.

Table 35: China findings

<table>
<thead>
<tr>
<th>Case</th>
<th>Dependent variable</th>
<th>Demand hypos consistent with outcome?</th>
<th>Supply hypos consistent with outcome? Mechanism observed?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Treaty ports</td>
<td>Foreign law imposed via one-sided intergovernmental agreement</td>
<td>Y</td>
<td>Y-Y</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Y-N</td>
</tr>
<tr>
<td>Mao era</td>
<td>State arbitration</td>
<td>N</td>
<td>Y-N</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Y-Y</td>
</tr>
<tr>
<td>Reform</td>
<td>State-backed private arbitration, institutionalized internationally</td>
<td>Y</td>
<td>Y-N</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Y-Y</td>
</tr>
</tbody>
</table>

These findings shed light on an important dilemma at the heart of China’s recent history. As noted above, the country would seem, prima facie, to belie the conventional wisdom that sound legal systems are necessary for lasting economic prosperity. Given that much of China’s growth is linked to foreign trade, for which the credibility of contracts is even more tenuous, the paradox would seem especially puzzling. Reliance on private arbitration explains how this contradiction is solved, at least for a large portion of the country’s foreign trade.
1. Cross-case findings

The five empirical chapters have explored the supply and demand hypotheses across a wide range of data, beginning at what is, in an analytic sense, the end. The survey data in Chapter Three reflect the contemporary preferences and behavior of large multinationals—that is, demand—which are contingent on the existent institutional alternatives. The results conform to the expectations of both the rationalist and ideational mechanisms. Firms seem to evaluate institutions in terms of neutrality, authority, and efficiency, and, as R1 would predict, given average market conditions, opt for neutral, authoritative, and efficient institutions. They are also more likely to select arbitration when they follow legal counsel, and report extensive delegation to lawyers for drafting dispute resolution provisions. These results show that the contemporary regime for TCA is indeed compatible with firm preferences, or, in other words, that institutional supply matches merchants’ demand. Were this not the case—e.g. if firms operating under dynamic market conditions had preferred biased institutions, or not been concerned with efficiency, or if firms following legal expertise had not conformed to dominant norms—it would not have made much sense to continue exploring the hypotheses.

Having confirmed that firms’ demand, measured as a global snapshot, conformed to theoretical expectations, the study turned to the question of how these institutions arose in the first place—supply. Chapter Four began that analysis by looking at the
intergovernmental regime through which states commit to recognize and enforce private arbitral awards, demonstrating a striking evolution. At the beginning of the period of globalization that followed the Industrial Revolution, arbitration was confined to the trade in commodities, such as cotton, grain, or sugar. These markets were dominated by a small number of multinational firms that tended to engage in low-value transactions on an ongoing basis, facilitating private enforcement. The resulting arbitral institutions, operated entirely by merchants, perfectly met firms’ demand for neutral, efficient, and authoritative dispute resolution. For the second half of the 19th century, these transnational institutions were the primary tools to provide the rule of law for commercial exchange across borders. State intervention was not needed to make the commodity arbitrations function—much less intergovernmental agreement—and so public institutions played little role.

But as new industries developed and spread around the world, very different market conditions came to apply to large swaths of global exchange. Industries like the textile trade could not rely on the same small-world effects to guarantee the enforcement of their contracts. Though they still hoped to take advantage of arbitration’s neutrality and efficiency—creating general arbitral institutions like the London Court of Arbitration, the Arbitration Committee of the New York Chamber of Commerce, and eventually the ICA—they could not count on the authority of such institutions. Thus originated the impetus for the hybrid system that has now become nearly universal, in which public courts enforce the decisions of private arbitral bodies.
Importantly, this movement originated amongst commercial interests, and responded to their needs, though lawyers quickly became involved. The campaigns to delegate state authority to private tribunals were led by commercial groups, and followed a familiar logic of interest group politics, as the rationalist mechanisms would suggest, both at the domestic level and, as the chapter documents, in the League of Nations’ Economic Committee. By the start of the Depression these campaigns had profoundly transformed the rules governing dispute resolution across the major economies, putting in place the basic policies that, in modified form, remain in effect to this day.

But perhaps the most surprising finding of Chapter Four is the contrast between the treaty negotiations of the 1920s and those of the 1950s. Whereas the former corresponded to the rationalist logic, ideational mechanisms drove the latter. Though a successor to the Geneva treaties was originally proposed by the ICC, it was the legally oriented elements of this organization—which had developed in the intervening decades—that shaped it. In contrast to the 1920s, there were no business campaigns to my knowledge in favor of the treaty. Indeed, business groups in the UK opposed the treaty, and those in the United States were at best ambivalent. Still, the negotiations that took place in the spring and summer of 1958 brought a wide range of countries together to devise an instrument that would allow for the mutual enforcement and recognition of arbitral awards. After a set of negotiations that read more like a legal seminar than an exercise in interstate bargaining, they created the New York Convention.

The treaty’s subsequent diffusion to every economically significant state, which has made
it the keystone of regime complex for commercial dispute resolution, followed the same ideational logic. The survival analysis in Chapter Four shows that ratification was accelerated by linkages to legal fields that had adopted pro-arbitration norms as well as connections to the transnational epistemic community of arbitration advocates. Basic rationalist drivers—e.g. dependence on trade, the level of trade with pro-arbitration countries, trade competition with countries embracing arbitration—were not associated with increased likelihood to ratify. This last finding represents an important difference with the existing literature on other forms of global economic governance, such as the WTO, PTAs, and BITs.

Chapters Five through Seven then turned to the particular cases of the United States, Argentina, and China, analyzing some 14 sub-cases across these countries. Table 35 summarizes the findings across the case studies, albeit somewhat crudely, by indicating a) whether observed demand was compatible with the R1 and I1, b) whether institutional outcomes were consistent with the predictions of R2 and I2, and c) whether the process-level mechanisms of the ideational and rationalist hypotheses can be observed.

The rationalist mechanism finds decisive support. In no sub-case was firm demand inconsistent with the predictions of R1, given market conditions. In several cases, however, firms’ preferences cut against the dominant norms in their legal fields, and in other cases the basic prerequisites for I2 were simply not present. For example, private arbitration was accepted by lawyers during the “takeoff” period in the United States, but longstanding legal principles held it to be subject to judicial oversight and control. Thus
firms’ campaign in the 1920s to increase state delegation to arbitration (an indication of their demand for it) ran against legal norms. It would take some decades before the institutional arrangement firms proposed became a dominant norm within US law. Similar divergence is seen in colonial Buenos Aires, when merchants organized their own juntas de comercio to administer disputes in the absence of an official consulado. Nor can the reliance on private institutions that emerged in the grain trade at the turn of the century be said to have been driven by deference to legal expertise. Argentine legal norms became relatively more pro-arbitration following the return to democracy, but this shift lagged commercial practice by some 80 years. Finally, in China, the usage of foreign arbitral institutions during the Mao era disregarded dominant legal principles, which saw FTAC as the appropriate forum for transborder commercial disputes.

A similar finding emerges with regard to supply. Certainly, in several of the cases governments adopted a policy that was not consistent with preferences of merchants engaged in foreign trade (e.g. State-building Argentina, Maoist China), but this is not surprising as those governments were responsive to other interests. Indeed, the only cases in which a government adopted a policy that was not consistent with the preferences of economic groups to which it was responsive occurred in Argentina in the latter half of the 20th century. But here the logic of three-level games applied, as private institutions were adequately meeting the needs of Argentine exporters during this time. That government was thus “free” to implement policies that did not conform to economic preferences.

In contrast, in several cases governments adopted policies that went against legal norms:
e.g. the enhancement of arbitral authority in the United States in the 1920s, and several of the policy fluctuations in Argentina from 1930 onward. However, the provision of private arbitral institutions, as opposed to state policy, has sometimes more closely matched ideational, not rationalist needs (not presented on table 36). These included the New York Court of Arbitration in the 1870s, the Inter-American Commercial Arbitration Commission, and even the ICC ICA, at least during the 1920s. In each of these cases firms shied away from using the tribunals that, in the eyes of the lawyers advocating them, were meant to usher in a bright new age of efficient dispute resolution.

In terms of outcomes, then, we find widespread support for the rationalist hypothesis. But if we look more in depth at the processes and mechanisms of institutional supply, we see that the ideational hypothesis has in fact been quite important. In eight\(^1\) of the 12 analyzed sub-cases, institutional outcomes were compatible with both R2 and I2. In two of these cases (colonial US and postwar Argentina), both rationalist and ideational mechanisms were observed. But in the remaining six, process-level observations removed the problem of equifinality. In two of these cases (colonial Argentina and treaty port China), rationalist mechanisms clearly dominated. But in the remaining four (postwar US, Argentine state-building, Mao China, and China under reform), a third of the total, ideational mechanisms were most important. Significantly, ideational mechanisms were the primary drivers of institutional supply in all the postwar cases, which is consistent with the findings of the intergovernmental chapter. This suggests a larger, evolutionary pattern across cases, to which we turn below.

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\(^1\) US: Colonial and postwar; Argentina: Colonial, state-building, and postwar; China: all.
### Table 36: Cross-case findings

<table>
<thead>
<tr>
<th>Case</th>
<th>Dependent variable</th>
<th>Demand hypos consistent with outcome?</th>
<th>Supply hypos consistent with outcome?</th>
<th>Mechanism observed?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>R1</td>
<td>I1</td>
<td>R2</td>
</tr>
<tr>
<td>Colonial era</td>
<td>Mix of non-enforced arb. and litigation</td>
<td>Y</td>
<td>Y</td>
<td>Y-Y</td>
</tr>
<tr>
<td>Independence</td>
<td>Mix of non-enforced arb. and litigation</td>
<td>.</td>
<td>.</td>
<td>.</td>
</tr>
<tr>
<td>Takeoff</td>
<td>Privately enforceable arb. and emergence of hybrid system</td>
<td>Y</td>
<td>N</td>
<td>Y-Y</td>
</tr>
<tr>
<td>Depression</td>
<td>Enforceable arb. and hybrid system; growth of transnational linkages</td>
<td>.</td>
<td>.</td>
<td>.</td>
</tr>
<tr>
<td>Postwar</td>
<td>Enforceable arb. and hybrid system; international institutionalization</td>
<td>Y</td>
<td>Y</td>
<td>Y-N</td>
</tr>
<tr>
<td>Colonial era</td>
<td>From private arb. to state-backed arb.</td>
<td>Y</td>
<td>N</td>
<td>Y-Y</td>
</tr>
<tr>
<td>State-building</td>
<td>Absorption of private arb. by state</td>
<td>Y</td>
<td>Y</td>
<td>Y-N</td>
</tr>
<tr>
<td>Golden age</td>
<td>Emergence of commodity associations</td>
<td>Y</td>
<td>N</td>
<td>Y-Y</td>
</tr>
<tr>
<td>Depression</td>
<td>Public control of “private” institutions</td>
<td>Y</td>
<td>N</td>
<td>Y-Y</td>
</tr>
<tr>
<td>Post-war</td>
<td>Private tribunals reassert themselves</td>
<td>Y</td>
<td>N</td>
<td>Y-Y</td>
</tr>
<tr>
<td></td>
<td>Policy flux</td>
<td>N</td>
<td>N</td>
<td>N-N</td>
</tr>
<tr>
<td>Democracy</td>
<td>Private tribunals govern trade</td>
<td>Y</td>
<td>N</td>
<td>Y-Y</td>
</tr>
<tr>
<td></td>
<td>Partial state support</td>
<td>N</td>
<td>Y</td>
<td>N-N</td>
</tr>
<tr>
<td>Treaty ports</td>
<td>Foreign law imposed via one-sided intergovernmental agreement</td>
<td>Y</td>
<td>Y</td>
<td>Y-Y</td>
</tr>
<tr>
<td>Mao era</td>
<td>State arbitration</td>
<td>N</td>
<td>N</td>
<td>Y-N</td>
</tr>
<tr>
<td>Reform</td>
<td>State-backed private arbitration, institutionalized internationally</td>
<td>Y</td>
<td>Y</td>
<td>Y-N</td>
</tr>
</tbody>
</table>

**2. Synthesizing the mechanisms: an evolutionary interpretation**

The ideational and rationalist mechanisms tested in this study are internally consistent, causal explanations for variation in transborder commercial dispute institutions. That is,
they specify the conditions under which, and processes through which, a certain institutional outcome will emerge. I have tested them against data as alternative hypotheses, evaluating whether the conditions and the causal processes each envisions in fact obtain. The results show broadest support for the rationalist mechanism.

However, this “horse race” approach may leave some questions unanswered. First and most basically, there is the common social science problem of equifinality, through which a single institutional outcome may be the product of multiple causal mechanisms. As noted above, in several of the cases we observe both the conditions specified by the rationalist and ideational mechanisms apply simultaneously. Combining process observations with state observations reduces this problem significantly, as only two cases remain characterized by equifinality. But it also muddies somewhat the results, as the process-level observations show relatively more support for the ideational mechanism. How should we interpret this divergence?

Second, while alternative hypothesis testing is appropriate for determining the dominant logic in a particular case, and, given sufficient cases or generalizability, for a phenomenon as a whole, the project also seeks an understanding of the evolution of the regime for transborder commercial dispute resolution. Though it manifests in numerous cases, the transborder dispute resolution regime is also global and transhistorical. The alternative hypothesis testing performed above has assumed, implicitly, that the 14 sub-cases were essentially like-units, and that their particular “location” in the evolution of TCA was less important to institutional outcomes than the common rationalist and
ideational mechanisms specified. While suitable for the purpose of hypothesis testing, this assumption can be probed more critically in order to interpret the broad evolution of the regime.²

I propose two “interpretive principles” as answers to the above questions. These are theoretical conjectures implied by the study’s findings. Though they are consistent with the empirical results, they are not “explanations,” in the scientific sense, as they have not been tested as falsifiable hypotheses.

First, I posit that material forces are likely to place powerful constraints on what institutions actors will accept, but that, within those boundaries, ideational mechanisms can explain important swaths of variation. More precisely:

**S1: When institutional alternatives are similar in terms of policy outcomes, authority, and efficiency, and there is demand for such institutions, I will determine which institution comes to dominate transborder commercial dispute resolution.**

In other words, the scope for legal institutions to stray from the basic rationalist conditions that underlie them is constrained. In equilibrium, therefore, we are unlikely to observe a sharp divergence between rationalist and ideational mechanisms. But within these constraints, we can expect variation to be explained by ideational mechanism because firms, their basic needs met, will not have preferences over the precise form of institutionalization. This principle also suggests that commercial interests will not mobilize to create or defend dispute resolution institutions unless the alternatives are likely to render outcomes that they find unacceptable in terms of policy outcome,

² Note the arguments made by Greif in this regard, discussed in the introduction.
authority, or efficiency. This can explain why in several cases we observe policy outcomes that are consistent with the rationalist predictions, but processes more suggestive of ideational mechanisms.

This idea fits well with the findings discussed above. Delegation to lawyers to decide the form of dispute resolution institutions was observed across the historical record. Both the multilateral treaty negotiating exercises relied heavily on committees of legal experts to draft the needed provisions. The New York Convention negotiations in particular were decidedly legalistic. But even though the negotiators had scarcely any input from commercial interest groups, the end result—the New York Convention—essentially replicated the policy provisions of the earlier treaties (albeit in an updated fashion). In other words, it reproduced the policy goals that firms had originally lobbied for. This result came despite the development in the intervening decades of alternative models (e.g. the UNIDROIT plan) on the part of lawyers. The role of the British government (informed by its commercial interest groups) in tamping down the more ambitious and legalistic proposals of, for example, the French were crucial to this result.

A similar pattern of ideational mechanisms bounded by rationalist constraints was observed in several of the national cases. In the United States, the postwar period saw virtually no advocacy in favor of enhanced authority for arbitration on the part of commercial interests. And yet lawyers pushed decisively forward on this front, with the Supreme Court acting as a norm-leader. At other times, ideational mechanisms simply provided a convenient template, as in the adoption of a *consualdo*, and, later, private
grain arbitration boards in Buenos Aires, and the importation of Soviet arbitration models by China.

But how binding have the rationalist constraints proven? A principal-agent framework would suggest that legal groups may have enjoyed some slack in which to implement the institutional outcomes they most preferred, without crossing some threshold that would provoke a backlash from commercial interests. Indeed, there is some evidence of such slippage, but—interestingly—only in the efficiency dimension. As arbitration has evolved in the postwar period, it has become more “legalistic” in procedure, and more costly. Dezalay and Garth (1997) attribute this shift to the increasingly role of large Anglo-American firms in arbitration, which brought with them tactics developed in US litigation, such as extensive discovery processes, which add time and expense to legal proceedings. While the shift may have been originally rooted in this cultural difference, it was certainly also compatible with the interests of arbitrators and law firms, as expanded procedures meant higher fees. The findings from Chapter Three, in which firms report that arbitration is approximately equal to litigation in expense, are quite striking, as they imply that arbitral institutions and the lawyers who advise clients on their use have chosen the maximum price for their services the market will bear.

Importantly, however, this slippage is not driven by legal norms that compete with commercial interests. Were this the case, we would have to conclude that the rationalist constraints on the ideational mechanism were somewhat flexible. Instead, it is the material interests of firms that account for the divergence between principal and agent.
Second, I posit that the development and institutionalization of law as a means for mediating market relations will lend progressively greater force to ideational factors over time. Legalization is a self-reinforcing process. As rules and institutions come to organize market relations, the individuals who shape and interpret those rules—lawyers, judges, arbitrators—gain increasing influence over outcomes. Over time, then, we should observe the following:

**S2: In the absence of legalization, R2 determines baseline outcomes. But legal fields strengthen and market relations legalize over time, I2 becomes increasingly determinative.**

Note that of the 14 national sub-cases, as well as the intergovernmental case, the ideational mechanism performed best during the most recent periods (postwar for the intergovernmental regime and the United States, Argentina after the return to democracy, and reform-era China). These were the periods in which legal fields have been at their strongest, and in which the pro-arbitration norm has grown most embedded within them. This is, of course, not the only time when ideational mechanisms proved important (they were also significant during the state-building era in Argentina and the colonial United States), but S2’s expectation of growing institutionalization and entrenchment seems to bear out.

3. Implications for the study of institutional diversity in global governance

The study has explained how a crucial global public good—the rule of law for transborder commercial exchange—has been provided by a shifting mix of public and private institutions at the domestic, intergovernmental, and transnational levels. What
implications can be drawn for other areas of global governance, many of which are increasingly characterized by a diversity of institutional arrangements?

First, the study reinforces the importance of considering the full spectrum of institutions that form global governance. There is a natural tendency amongst students of world politics to focus on institutions that involve “high” politics, or that appear frequently on policymakers’ agendas and in the media, or that best fit existing theoretical approaches. These tend to be “traditional” intergovernmental organizations. Scholars have therefore largely missed institutions like the one considered here, despite the crucial role they play in the world economy. If IR scholars are to explain global governance, it is important to consider all its manifestations, and not to select on the dependent variable by only considering one kind of institutional outcome.

Second, the study suggests how rationalist theories can account for the diversity of global governance by emphasizing the ability of interest groups to arbitrage across institutional alternatives at different “sites” of political contestation—what I have termed “three-level games.” IR theory has long recognized the value of explaining institutions as the products of states (and the interest groups they represent) a) selecting the institutional features that most closely match their preferences and b) bargaining with other interest groups and/or states to achieve the desired result. Institutional outcomes therefore reflect the constellation of power and interests around a certain policy problem. But analogous processes of course occur in both domestic politics and in private-private interactions beyond the state, and institutions may result from any or all of these interactions. We
must therefore consider the choice not just between one intergovernmental organization or another (as, for example, in the Rational Design framework), but rather the choice between various kinds of domestic, transnational, and intergovernmental arrangements, or combinations thereof. How well institutional outcomes within each of these spheres meets actors’ preferences will depend on the constellation of power and interests surrounding each of the three interactions, as well as the innate features of various institutional outcomes (e.g. the territorial bounds of the state).

The three-level games concept provides a framework for analyzing private governance in world politics, not a general theory of variation in the public-private nature of global governance. To generate testable hypotheses, it was first necessary to describe institutions in terms of dimensions over which firms have preferences (policy, authority, efficiency). These will of course vary somewhat by issue area, though I would submit that the types of dimensions considered here—what rules does an institution create, who is bound by these rules, how authoritative are they, and what do they cost to create and employ?—are likely relevant for many others.

This approach to the study of institutional variation in global governance would, I believe, improve the field’s understanding of the relationship between public and private governance. Existing theories tend to employ, uncritically, a received, dichotomous distinction between public and private institutions. As an ideal type, scholars imagine the modern state as an autonomous actor encompassing a broad swath of society and ruling with coercive force. Private institutions, in contrast, are seen as just the opposite:
particular to a certain social group or groups, and asserting authority only to the extent
their subjects acquiesce. Cutler et al. argue that public governance is broad, coercive, and
general. Private governance, in turn, is variable in scope, voluntary, and specialized
(Cutler, Haufler et al. 1999). Brousseau and Raynaud place private governance between
public regulation and private contracts, describing it as both collective, like public
governance, but also voluntary, like bilateral contracting (Brousseau and Raynaud 2006).
Similarly, Kolliker argues that as “cross-sectoral externalities” increase, institutions are
more likely to be public, but highly specialized or autonomous social sectors will prefer
private governance (Kolliker 2005).

These distinctions are likely true on average. But actually existing institutions, state or
non-state, of course vary with respect to the broadness of the groups they represent, how
coercively they rule, and other factors of theoretical interest. When this is the case, the
public-private distinction may obscure as much as it illuminates. To see the problem,
consider the dimensions of scope and authority. As ideal types, public and private
institutions divide neatly along these dimensions, as is shown in table 37. Public
institutions are general and coercive, while private ones are particular and voluntary.

Table 37: Public and private governance ideal types

<table>
<thead>
<tr>
<th>Scope</th>
<th>Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Coercive</td>
</tr>
<tr>
<td>General</td>
<td>Public</td>
</tr>
<tr>
<td>Particular</td>
<td>X</td>
</tr>
</tbody>
</table>

3 We can even identify theoretical reasons for this positive correlation between scope and authority. An
institution can only become general if it has imposed itself over a polity, or if an entire polity has willingly
acquiesced to it—the Hobbesian and Lockean views of the state, respectively. In the first case coercive
power created the political institution; in the latter case the polity created coercive power. In both, however,
coercive authority exists. Private institutions, like the Lockean state, are created through consent, but
because the scope of that consent is more limited, the authority it produces is less coercive—fewer
members of the polity, and thus less coercive power, stand behind it.
This view is generally assumed in political science, but it conflates what we might call juridical variation (is an institution formally public or private?) with functional variation (is it coercive, representative, etc.?). If we are to explain institutional variation with reference to an institution’s attributes, this approach misleads us because in reality, the picture is much more complicated, for at least three reasons.

One, actually existing public and private institutions do not divide neatly into opposite squares in the matrix above. Public institutions may be, in practice, quite limited in scope and lack coercive authority (e.g., failed states, or states with little autonomy vis-a-vis a dominant social group. Argentina between independence and the 1850s provides one example). Private institutions, in turn, can be both general (e.g. the Catholic Church in medieval Europe) and coercive (e.g. the family or the clan, or, in this case, GAFTA or FOSFA).

Two, the conventional public-private distinction does little to describe the key dimensions in the realm of transborder politics. For domestic issues, which implicate only members of a national polity, states may be considered general institutions. But under conditions of globalization, fewer and fewer collective action problems fall neatly into national boundaries. By definition, transborder commercial dispute resolution does not. For such issues, nation states must be considered particular institutions, and their coercive power, instead of being assumed, depends instead on their ability to obtain compliance from actors outside their boundaries. One way to do so is, of course, to create an intergovernmental organization. These institutions are public in that they are the
creatures of governments. But, like the ideal typical private institution, they are more often than not both particular in scope (only addressing a subset of the world), and have only voluntary authority (their rules must be accepted by states in order to apply).\footnote{The few cases of genuinely supranational authority that do exist—e.g. some aspects of the European Union, the International Criminal Court—are the exceptions that prove the rule.} Indeed, the similarities between global institutions and private orderings—both political institutions defined by their location outside of the state—have been recognized in the literature (Barkun 1968; Keohane and Ostrom 1995).

Three, as noted above, the literature does not account for the possibility that hybrid institutions may combine different kinds of authority into a single institution. Transborder commercial dispute resolution provides a striking example of this phenomenon. The private tribunals that hear cases are particular and voluntary, and so “classically” private. But the decisions those panels hand down are coercive, backed by an array of public laws and intergovernmental institutions.

Finally, and perhaps more controversially, the study shows that a diversity of theories may be needed to fully explain institutions beyond those “traditionally” considered by IR theory. Cutler (2003) makes a much more forceful argument from a Gramscian perspective, arguing that ideas—in this case, legal norms—are the main drivers of institutional outcomes. Rationalist institutionalism, then, cannot explain the kinds of transnational governance outcomes we have considered here, she argues. Adopting a hypothesis-testing framework, I find, instead, that rationalist forces are key, but also that ideas do indeed play a role. As discussed above, we would not be able to explain much of
the institutional variation in transborder commercial dispute resolution without I1 and I2, though they are less important than R1 and R2 and, I suggest, ultimately subordinate to them. Still, it is the legal nature of the issue area, and the strong organizational fields, professional norms, and technical expertise associated with law, that makes the ideational mechanisms relevant. Note that similar conditions may apply to other areas of global governance in which non-traditional institutional forms are observed. A number of authors, for example, have studied the role of private governance in technical or phyto-sanitary standard setting (Büthe 2009; Büthe and Mattli 2011; Koppell forthcoming). These are also areas in which expertise and epistemic communities play a significant role. Or consider the technical transgovernmental networks that play a major role in financial governance, regulating banks, accounting firms, insurance companies, and others (Masciandaro 2011; Young 2011). These are public institutions, but not “traditional” multilateral organizations, and also mix a high degree of professional expertise with more conventional inter-state bargaining settings.

The point is that, given the high level of delegation to experts across a range of important transborder policy questions, outcomes are likely to be influenced not only by “power politics” but also by ideas. Cutler may overstate the size of the anomaly this phenomenon represents for traditional IR approaches, but certainly she is correct that the field cannot ignore these dynamics. But is it politics? Or are such concerns better left to legal scholars or sociologists? This may ultimately be a matter of taste, though I believe the present study—which shows that considering such mechanisms improves our understanding of the institutions that provide a crucial public good—makes a strong case for their
inclusion in the study of world politics.

4. Implications for managing interdependence

Transborder commercial dispute resolution differs from other topics in world politics in several important ways. It has a long history, it displays a wide range of institutional forms, and these institutions have proven, in the modern era, enormously successful at providing the rule of law for a large portion of the global economy. This is rare. Despite the growth of global governance in the postwar era, it is difficult to identify areas of world politics in which global institutions are successfully managing interdependence. Even the most developed regimes, such as trade, have become deadlocked. And in other areas, such as climate change, the global public goods deficit poses a grave threat to the welfare of the entire planet.

A common problem across issue areas is the difficulty of effective policymaking at the multilateral level. As globalization has deepened, in no small part due to the success of the postwar multilateral framework, it has arguably pushed interdependence to such a degree that global deals are both less likely and less efficacious. A range of roadblocks can be identified. One, the rise of new powers outside the West and its allies means that more de facto veto players exist across a range of issues. Moreover, because these new powers differ from established ones in their level of development, and, in some cases, their domestic political institutions, they widen the range of preferences that must be accommodated in global deal-making. Two, the kinds of problems subject to the logic of interdependence have become more complex, penetrating deeper into societies (for
example, trade negotiations used to be mainly in terms of tariffs and quotas, but more recently a broader range of trade-related policies like intellectual protection and phytosanitary standards are the subject of inter-state debate). Three, previous institutionalization has created decision-making processes that do not always reflect the contemporary balance of power (such as the Security Council), undermining both the legitimacy of international institutions and discouraging the countries they disenfranchise from relying upon them.

The effect of these shifts is to weaken the ability of countries to solve global collective action problems with the “traditional” institutional machinery of interstate cooperation. Under the theories developed in this study, then, we would expect actors to turn more and more to alternative institutions that can solve transborder collective action problems. It would be naïve to expect such alternatives to offer a panacea to the ongoing challenges of global governance. As this study has shown, institutional arbitrage increases the chance that actors’ will realize their preferences, but remains constrained by the institutional alternatives that correspond to the constellation of power and interest at each locus of political contestation. At the same time, it would be foolhardy for policymakers to not take advantage of the partial solutions they may offer.

Within the area of commercial dispute resolution, we may remain optimistic that the effective hybrid system through which the rule of law is provided today will endure into the future. Under the theories considered here, we would not expect a significant shift in institutional arrangements unless there is a decisive shift in market conditions—e.g. the
widespread emergence of monopolistic or oligopolistic industries—that precipitates corresponding alteration in firm demand. Even if trade were to decline radically for a period, it is likely the institutional structures for commercial dispute resolution would survive. After all, the basic policies put in place in the 1920s emerged following the Great Depression and WWII essentially unaltered.
BIBLIOGRAPHY


(1924). Bills to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the states or territories or with foreign nations. Subcommittees of the Committees on the Judiciary. 68th Congress, 1st Session. Washington, DC.


Bao, C. (2011). Interview with the author. October 19. Hong Kong, Secretary-General, HKIAC.


Bernheimer, C. L. (1921). Letter from Bernheimer (New York Chamber of Commerce) to King (San Francisco Chamber of Commerce) of August 9, 1921. Record of the New York Chamber of Industry and Commerce. New York, Columbia University. **MS 1440 Box 113.**


Caldwell, P. (2011). Interview with the author. October 19. Hong Kong, founding Council Member, HKIAC.


Bibliography


Davis, C. L. and M. Wilfl (2011). Joining the Club: Accession to the GATT/WTO. APSA.


Zhao, X. (2011). Interview with the author. October 25. Beijing, Professor, Renmin University School of Law; Arbitrator, CIETAC, BAC, WIPO, SIAC.


