

## II

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### *Delegation to international courts and the limits of recontracting political power\**

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International courts (ICs) clearly fit the paradigm of delegation examined in this volume. States operating as a collective principal create ICs through a revocable delegation contract; appoint IC judges; and can write or rewrite the mandate and laws that ICs interpret. Principal-agent (PA) theory expects courts to be among the more independent “agents,” intentionally so. As Giandomenico Majone argues, in delegation to enhance the credibility of a principal the “Fiduciary Agent” is made independent because “an Agent bound to follow the directions of the delegating politician could not possibly enhance the commitment” (Majone 2001: 110). Thus intentionally principals allow judges to be fired only for egregious acts unbecoming to their office, and judicial salaries are protected. Still, PA theorists expect states to have substantial tools of control because international judicial terms are short (4–8 years), because international judges may worry about their professional futures including whether or not their term is renewed, and because states can sanction ICs through rewriting their mandate, legislating to reverse their rulings, or through non-compliance.

\* This chapter has generated interest and comments from so many people, I am sure to forget some. I would like to thank Judy Goldstein, Brian Hanson, Lawrence Helfer, Ian Johnstone, Mona Lyne, Jide Nzelibe, Helen Milner, Jon Pevehouse, Eric Posner, Paul Stephans, David Steinberg, and the participants in PIPEs at the University of Chicago for comments on earlier versions of this paper. Special thanks to Robert Keohane who defended me against a highly critical onslaught, to Jonas Tallberg, Darren Hawkins, Dan Nelson, David Lake, and Mike Tierney, who while enthusiasts of PA theory engaged my work constructively in numerous reads, and to Richard Steinberg. This paper has benefited tremendously from the sustained challenges from participants in the project on Delegation to International Institutions and the later sharp critiques at the “Transformations of the State” Sonderforschungsberich 597 at the University of Bremen.

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While these expectations are shared by most PA theorists, studies employing PA theory to analyze ICs have offered contradictory predictions about whether and when we should expect IC autonomy. Geoffrey Garrett and Barry Weingast have argued that the European Court of Justice (ECJ) has far less autonomy than national courts because the ECJ fears re-contracting. They assert that ECJ decisions mainly select among the range of outcomes the most powerful states implicitly want (Garrett and Weingast 1993: 201). In a later co-authored article Garrett argues that when the ECJ is interpreting the provisions of European treaties that require unanimous support to change, ECJ autonomy is high but when the ECJ is interpreting directives or regulations that can be changed by a lower voting threshold, ECJ autonomy is lower (Tsebelis and Garrett 2001). Yet elsewhere Garrett argues that the ECJ will have greater autonomy when there is greater clarity in the law (because the ECJ can use the clarity for political cover) and when its case law is well established (Garrett et al. 1998). Mark Pollack and Jonas Tallberg argue that the ECJ is actually quite autonomous, even more autonomous than national supreme courts, because the rules to legislate over an ECJ decision makes recontracting extremely difficult and unlikely (Tallberg 2002b; Pollack 2003a: 201). Paul Stephan predicts that ICs – and especially the ECJ and WTO – will be far less independent than domestic courts to the point that “one should not expect ambitious, systematic, and comprehensive law coming from an institution endowed with the authority to develop unified law on an international level” because IC judges can be replaced after a short term in office (Stephan 2002: 7–8).<sup>1</sup> These arguments are not logically inconsistent; rather authors are drawing conclusions from different institutional rules that point in opposite predictive directions. But with these various arguments any PA claim can be made and pointed to as an “explanation” of an independent or dependent IC behavior.

Adjudicating the conflicting claims is likely impossible because of the fungibility of state preferences, difficulties measuring slippage, and overdetermination problems. Because state interests are fungible, a single ruling can be interpreted as evidence for contradictory claims. For

<sup>1</sup> This prediction cuts against international law scholars who expect the ECJ and the WTO to be among the more autonomous ICs because they have compulsory jurisdiction and the ECJ has private access (Helfer and Slaughter 2005; Posner and Yoo 2004).

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example, Garrett and Weingast use the ECJ's *Cassis de Dijon* decision<sup>2</sup> to support their claim for low ECJ autonomy arguing that the ECJ was influenced by powerful Germany which had a long-term interest in open markets (Garrett 1995: 174–75). Karen Alter and Sophie Meunier argue that Germany lost in the *Cassis* ruling, not only because the German government's argument as the defendant in the *Cassis* case was rejected by the ECJ, but also because as a high standard country Germany wanted either high European level standards or the ability to impose its standards on products produced outside of Germany (Alter and Meunier-Aitsahalia 1994: 539, 542). Bernadette Kilroy tests whether the ECJ appears to give preference to the interests of the most powerful states, finding that the ECJ responded more to the threat of non-compliance than the threat that states might sanction the ECJ (Kilroy 1995, and 1999). Mark Pollack assesses Kilroy's analysis, finding that despite her efforts Kilroy cannot rule out other explanations of ECJ decision-making – such as the argument that the ECJ decides the case purely on the basis of law, without varying its rulings according to the power or intransigence of member states, or the likelihood of state compliance (Pollack 2003a: 200). If we cannot use as evidence the positions governments articulate in the cases themselves or in public afterwards (because politicians may be acting strategically rather than sincerely), and we cannot agree on what states interests actually are (in which case we should also wonder how an IC judge is supposed to ascertain “state interests”), then concepts like relative slippage, autonomy, or retreat will remain variable depending on the analyst.

Instead of trying to adjudicate claims about relative autonomy, this chapter focuses on whether “re-contracting politics,” meaning the principal's ability to screen agents during the appointment process, to replace agents because of principal displeasure, or to otherwise change the delegation contract as a form of sanction, appears to be the tool of state political leverage PA theory expects it to be. States surely have re-contracting power in that they make appointments decisions and they can change the contract. But I argue that this power is not a significant tool of political leverage over ICs, and thus states do not have special powers over ICs by virtue of being part of the collective principle.

I offer two complementary reasons for why re-contracting politics are not the axis around which states and ICs seek to mutually influence each

<sup>2</sup> *Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, ECJ case 120/78, [1979] ECR 649.

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other. Section one makes an empirical argument, explaining the political and institutional factors undermining the effectiveness of recontracting tools as means to influence IC decision-making. The analysis implies that principal control tools may actually be weaker at the international level compared to the domestic level. Offering my own explanation for the puzzle of why states would design ICs that are in some ways less subject to influence than their domestic counterpart, I argue that the outcome of weak re-contracting tools is partly unintentional (negotiators, mimicking domestic delegation, likely do not realize the extent to which their re-contracting tools will be ineffective) and partly a result of the fact that concerns about international power politics essentially trump principal concerns about controlling ICs. In locating the source of the weak re-contracting tools in international political factors, this section contradicts the claim of the introduction and conclusion that the consequences of delegation to international entities, like ICs, are similar in the domestic and international realms.

Section two moves away from the PA categories defined in the introduction of the volume, using the categories international law scholars use to explain variation in the ability of states to influence ICs – including whether or not states must first consent to an IC's jurisdiction and who has access to ICs. Law scholars' arguments suggest that states essentially pick their poison in delegation to ICs, choosing from the beginning to create more or less independent ICs with the knowledge that there is a relationship between the independence and the effectiveness of ICs. While the factors law scholars identify as important are part of the contract design, they do not give rise to re-contracting politics because they are not subject to re-contracting threats. In other words, once the poison is picked, different types of state-IC politics follow from the choice.

Section three draws together the arguments of the chapter and their implications for the themes of this volume. Rejecting the central role of re-contracting politics does not mean that states do not influence ICs, or that ICs are not subject to political influence. Nor is the claim that ICs can never be held accountable – no political actor is beyond sanction and reproach should it stray beyond what others will tolerate. Rather, the analysis suggests that being a member of the collective principal is not a meaningful source of state power, and that other modes of influence likely matter more than re-contracting power. For cases that make it to court, states use rhetorical and legitimacy politics to try to influence ICs. To the extent that rhetorical and legitimacy politics matter, other actors besides states may be actively involved. States also use fully legal

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avenues such as refusing to consent to jurisdiction, or settling out of court, or shifting dispute resolution to more controllable political venues in order to navigate around the fact that they do not want slippage yet beyond rhetorical influence they cannot control IC decision-making. While these arguments are not inconsistent per se per se with PA theory, the analysis suggests that PA theory itself will not be very useful in studying the dynamics influencing variation in international judicial decision-making across cases or even across international courts.

(RE-)CONTRACTING POWER AND STATE INFLUENCE OVER ICS

A number of scholars have argued that constitutional courts are more like trustees than they are traditional agents, and thus that the variables PA theory relies on are less likely to be helpful in understanding delegation to courts (Alter 2006; Grant and Keohane 2005; Majone 2001; Stone Sweet 2002).<sup>3</sup> But to say that some courts are more like trustees is not to say that states have determined to simply trust that ICs will exercise their discretion prudently. States are concerned about slippage, meaning they are concerned about international judges interpreting the rules of the collective principal in ways that were not intended and that the collective principal does not want and would not have agreed to. But here the problem of collective principals, discussed in greater detail in the chapter by Lyne, Nielson, and Tierney, manifests itself. The ICs interpretation may not be what the collective would agree to, but it likely does represent what a sub-set of states actually prefer. Thus IC slippage is really about ICs awarding victories in politically contested cases that state-litigants could not win in negotiations, and thus essentially rewriting through interpretation the law that states have agreed to. Because some actors actually prefer the new interpretation, returning to the status quo ante may be politically impossible. Even if a state-litigant chooses to ignore the IC ruling, the legal ruling itself can shift the political context by changing the status quo of what the law means in the eyes of others; by labeling a state's extant policy "illegal" popular support for the policy can be undermined. If one considers the thousands of international legal rulings that have been issued compared to the relatively small number of polemical rulings, it would seem that slippage is fairly rare. Despite

<sup>3</sup> These authors refer in passing to courts as "fiduciary agents" or "trustees." In a separate article I develop this category further (Alter 2005).

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its rarity, one need only consider the Bush Administration's concerns about the International Criminal Court to know that states care greatly about this slippage risk, even if 999 times out of a thousand states are happy with the job ICs are doing.

Thus the question emerges: even if courts are trustees, can the collective principal use the contracting tools – their power to appoint, power of the purse, or power to re-legislate – that they exclusively hold to shape how the international judiciary exercises its discretionary decision-making authority? If re-contracting tools were effective, then principals would have a source of power that other actors could not access, and thus a special leverage to wield vis-à-vis ICs. This section focuses on each of the traditional PA tools identified in the introduction to this volume, with the exception of monitoring tools and checks and balances,<sup>4</sup> reviewing the scholarship on whether or not re-contracting tools influence ICs. The best evidence we have suggests that these re-contracting tools provide little to no political leverage states can use vis-à-vis ICs. The question then is why do states have decision-rules that directly undermine their ability to sanction or influence wayward IC agents?

### *Screening and appointment processes as tools of principal control*

Scholars and politicians expect that judicial philosophy will influence how judges approach opportunities for interpretive discretion so that by selecting for certain types of judges, the principal may be able to influence judicial decision-making. There is some evidence to support this expectation. Max Schanzenbach convincingly shows that in the United States, Republican-appointed judges exercise their discretion regarding prison term lengths differently than do Democrat-appointed judges (Schanzenbach 2004). Eric Posner and Miguel de Figueiredo find that ICJ judges tend to vote with their countries 80 percent of the time, more than the 50 percent they expect if legal decision-making were random (Posner and De Figueiredo 2004). And Erik Voeten finds that European

<sup>4</sup> Monitoring and reporting is not really a tool of control for courts; courts openly publish their rulings, not so much to help states monitor them but because publication of rulings is the best way to create political pressure for compliance. Also, I fold what might be considered a discussion of checks and balances into the sanctioning/re-contracting discussion since re-legislating (traditionally considered a “sanction”) would also be the way ICs might be “checked” or “balanced” by political bodies.

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Court of Human Rights (ECHR) judges vote with their country 74 percent of the time (Voeten 2004). But whether the appointment process serves as a tool of control is another matter. Indeed none of these authors links their findings to arguments about principal control.

In the domestic context, Schanzenbach can show that appointment decisions affect legal outcomes because in his case a single judge is able to decide on the term length of the convicted criminal. But at the international level, judicial decision-making involves more than one judge. While one could imagine that screening effects could radically change US Supreme Court jurisprudence, which often turns on a single vote, it is harder to make the case that screening influences IC decision-making. Posner does not actually claim that legal outcomes are affected, though he does imply that judicial voting is biased in that votes are not randomly distributed across cases. But Posner includes in his count cases where the ICJ in whole or by majority sided with a particular country, not controlling for whether or not legal reasoning could explain a judge's vote equally as well. Erik Voeten rectifies these deficiencies, focusing on split decision cases where it is clear that legal factors are not determinative (otherwise the ruling would not be split) and controlling for when judges were part of a majority in finding for a legal violation—in which case the facts and law may matter more than the nationality in influencing judicial decision-making (Posner cannot use these controls because his “N” is already too small to generate statistically solid conclusions). With these controls, Voeten is able to identify only 31 rulings out the larger sample of 5,010 rulings where a country won its case by one vote and where its judge was in the majority, thus where in theory national selection effects of appointment could have shaped the legal outcome. Controlling for other factors shaping judicial decision-making, Voeten identifies 11 occasions where a state likely escaped sanction due to the strategic behavior of a country's judge (Voeten 2004). The cases of potential national selection effects are not particularly noteworthy, so it is not that these 11 cases are the most important rulings the ECHR has made. Overall Voeten's findings suggest that where there is sufficient legal ambiguity to generate a split decision (800 of the 5,010 ECHR judgments sample, thus 16 percent of ECHR cases), there is less than a 2 percent chance that selection effects could shape the legal outcome. It is also interesting to note that Voeten found no correlation between whether ECHR judges were appointed by left or right national governments and how judges voted in split decisions. Instead, the largest predictive factor of whether or not judges were “activist” in their votes

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was whether the country appointing the judge was also a member of the European Union.

Of course judges could also amplify their influence by persuading their colleagues to support their view. Indeed states seem to intend for this to occur, to ensure that national positions are represented in judicial deliberations. Thus regional organizations intentionally provide a space for a judge from each country, and de facto allow countries to select their judge, accepting whomever is nominated. Also, the ICJ has provisions to appoint special judges to ensure that each country has a national voting on their case. But by ensuring that both parties have national representation within the legal body, the effect can cancel itself out. The canceling effect is why showing that national voting does not per se show court bias.

It is not surprising that judicial screening tools are more effective at the domestic level compared to the international level. In the United States there is a politicized process for judicial appointments, one that allows the dominant majority to screen appointees based on their ideology. Given the effort political parties have invested in the judicial appointment process, it would indeed be surprising if selection politics did not have an influence. But at the international level there is no controllable international political process to shape who gets to nominated international judicial positions – rather each state has unilateral control over who they nominate. Sometimes powerful countries can veto nominations at the point that judges are being selected from a pool of potential candidates, and this is where politics of international judicial appointments occurs. Indeed there can be intense politics surrounding the choices for international judicial appointments, where there are choices to make (Steinberg 2004; Gordon et al. 1989). However, for regional ICs (e.g. the European Court of Justice, the Inter-American Court of Human Rights, and the European Court of Human Rights) one judge from each member state will be selected and states accept whomever a country nominates. Permanent members of the Security Council also get to select their own judge for the ICJ. Each country may well have specific criteria to screen for the type of judicial candidate they nominate. But there is no evidence that states coordinate their efforts, or that the result of these efforts is a bench with a philosophical slant that can be linked to appointment politics.

The ways ICs decide cases also blunt the effectiveness of the appointment process as a tool of control. While IC decisions are made based on a majority vote, it is not always possible to tell how different judges



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voted. The ICJ, International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, and the European Court of Human Rights regularly publish dissenting opinions. But the ECJ and the WTO Appellate Body never publish dissents, and the International Criminal Tribunals for Yugoslavia and Rwanda rarely publish dissents. (It is not yet clear what the ICC will do regarding dissents.)<sup>5</sup> Even where dissents are allowed, many IC rulings are actually made by small panels of judges and states generally have no control over which sub-set of judges will hear their case.<sup>6</sup> This means that to influence a court using the selection tool states would have to “correctly” influence the vast majority of international appointments – not just their own appointee – in a context where the nominees are put forward by the nominating state and not through a collective process.

It is even less likely that a fear of not being reappointed shapes judicial decision-making. Often IC judges are not reappointed, but rarely if at all is it because of the decisions they made on the bench. IC judges on universal legal bodies are regularly rotated out to create geographic representation on the court. Even where there is a permanent national seat international judges are regularly rotated out because each new national leadership wants a chance to appoint their own judge. While IC judges could in theory still worry about their life after they serve their term, in practice the international judges I have interviewed have not been very worried about this. There is no international judicial career trajectory because the pool of international judicial appointments is simply too small<sup>7</sup> and many IC judges are near retirement or see an appointment to an IC as a short-term professional experience in any event. While there may well be isolated examples where a person did not get a job they wanted because of their association with an IC (though I know of no examples), whether a judge could anticipate these situations, let alone moderate their behavior to avoid the situation, is highly

<sup>5</sup> The Rome Statute of the ICC says that there will be one decision but it “shall contain the views of the majority and the minority”; it is not yet clear how this will be handled in practice.

<sup>6</sup> This is not true for the panel stage for the WTO where states can select panelists, but the AB does not allow for state selection of judges. Also for ICJ cases where states have not consented to compulsory jurisdiction, states can participate in selecting the sub-set of judges who will hear their case. (Art. 31 Statute of the International Court of Justice describing the appointment of ad hoc judges.)

<sup>7</sup> There are 21 courts, with about 200 appointees from around the world who could be described as being “international,” judges and 191 states belonging to the United Nations (Alvarez 2003: 2).

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questionable. Even Richard Steinberg, who believes that the United States and Europe veto AB judges whom they suspect will be activist, does not argue that the concerns about reappointment lead judges to follow the wishes of the United States or Europe (Steinberg 2004: 264).

Thus while there are selection politics at the international level, they do not appear to give rise to an international judiciary with a particular philosophical slant let alone a judiciary that needs to worry that their actions on the bench will create personal limitations on their future professional achievement. The possible exception to this argument would pertain to the role of the prosecutor in an international criminal tribunal, a role that will be far more visible than that of a single judge on an international court. As I will discuss later, one way states seek to limit IC slippage is to keep cases from international judicial bodies. Criminal prosecutors decide which cases to investigate, and whether and how to plea-bargain outside of court. There is only one chief prosecutor, and the chief prosecutor will be able to tell those below him or her what to do. States that can control the selection of the ICC prosecutor may be able to influence which cases are taken to the ICC for resolution and perhaps even the arguments the prosecutor pursues in the cases, though not per se what the judges then do with the arguments raised.

*Control of the budget as a tool of principal control*

In order to protect judicial independence, principals often limit their ability to use the budget as a tool of influence. Thus we often find statutory limits on the ability of legislators to cut judicial salaries. In the international context, the way international legal processes work also limits the ability of principals to use budgets as a tool of control. For most international litigation the greatest costs are borne by the parties who hire lawyers to assemble the case and assemble all of the factual material needed to support their position, and provide some of the “costs” supporting the legal process. The IC’s budget covers translation, and support staff. To cut an IC’s budget would mainly slow down the legal process and the multilingual and timely accessibility of rulings, which may make the legal process even less appealing but will not per se control how IC judges deal with the cases before them.

International criminal courts are again different in that the office of the prosecutor shares the international criminal court’s budget. Cases can only go forward to the ICC when the prosecutor has a preponderance of evidence to support a conviction. By manipulating the prosecutor’s

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budget and helping or hindering the prosecutor, states can influence which crimes are investigated and whether or not the prosecutor can assemble a winnable court case. While the budget probably does not “control” how the IC judges interpret the law, it likely does effect which cases and what evidence is brought to the court in the first place.

*Clear rules as a tool of principal control*

States fight over every word in international legal agreements, yet winning these fights does not ensure that state interests are protected over time. Not only can courts interpret even clear rules in ways states never intended, they regularly fill in where rules are vague, and on their own set the “standard of review” – the burden of evidence that will be required by judges for a finding in favor of a plaintiff. Many legal cases turn on the standard of review. For example, though WTO member states drafted clear rules on when safeguards are legal, the WTO appellate body added a standard of review that the damages had to have been “unforeseen” before safeguard protections would be legal, using this standard to find against safeguards protections by the United States and Argentina.<sup>8</sup>

Because writing more precise rules is no insurance against IC slippage, states often try to mitigate international judicial slippage by writing explicit caveats into the law itself. For example, the Danish wrote into the Maastricht Treaty a protocol that allows them to limit Germans from buying vacation homes in Denmark and the Irish wrote a protocol stating that nothing in the EU treaties can overrule Ireland’s constitutional provisions regarding abortion.<sup>9</sup> Caveats like these abound, but they require states to select at the time of negotiation a small handful of issues to champion since international negotiators will want to limit the number of caveats they agree to. Where other negotiating parties will

<sup>8</sup> Argentina – Safeguard Measures On Imports Of Footwear WT/DS121/AB/R Report of the Appellate Body, December 14, 1999. WTO Appellate Body Report: United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia AB-2001-1, WT/DS177,178/AB/R (01-2194), adopted by Dispute Settlement Body, May 16, 2001. These cases are discussed in Alter 2005.

<sup>9</sup> See the Protocol on the Acquisition of Property in Denmark in the Treaty on a European Union and the very last “Protocol Annexed to the Treaty on European Union and to the Treaties Establishing the European Communities the High Contracting Parties in the Treaty on European Union.

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not agree to a caveat in the law, states often note with their ratification a “reservation” that asserts for the country an exception to the treaty. The number of reservations a country asserts is also politically limited lest one anger fellow signatories who will not feel that the agreement is actually reciprocal. Also, while states can assert reservations, courts will not per se accept them as legally valid. Indeed the legal effect of “reservations” on binding obligations is far from clear (Swaine 2005).

The thing to remember is that even with caveats and reservations, as time evolves new governments and interests arise, interpretations of the caveats can change, and thus many state interests can become unprotected over time. For example, when states agreed to the EC’s Equal Treatment directive they added Article 2(2) that said: “This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.”<sup>10</sup> At the time this caveat was negotiated, British and German law explicitly allowed derogations to the requirement of equal treatment for the military.<sup>11</sup> These caveats did not stop the ECJ from later asserting its authority to oversee the limits of excluding women from military positions. The ECJ ultimately upheld UK exclusions of a female cook from the Royal Marines because the presence of a woman could undermine group cohesion in an elite unit, but it found Germany’s constitutional ban on woman in combat-related roles to be too comprehensive and therefore discriminatory.<sup>12</sup> Germany embraced

<sup>10</sup> Council Directive 76/207/EEC of February 9, 1976 on Equal Treatment for Men and Women in Employment, OJ [1976] L 39/40.

<sup>11</sup> Article 85(4) of the United Kingdom’s 1975 Sex Discrimination Act states: “nothing in this Act shall render unlawful an act done for the purpose of ensuring the combat effectiveness of the naval, military or air forces.” In Germany women were only allowed to serve in the band, or in the medical services, and by a provision in the German constitution (the Basic Law) were explicitly prohibited from “render [ing] service involving the use of arms” (German Basic Law Article 12 a (4)). These exceptions were arguably consistent with Article 2(2) of the Equal Treatment Directive, and were never challenged by the European Commission as a violation of European law probably because the realm of the national security remained firmly a national issue and a policy area where sex discrimination had long accepted as the norm.

<sup>12</sup> *Sirdar v. Army Board*, Case C-273/97, 1999 E. C.R. I-7403, [1999] 3 C. M.L. R. 559 (1999). *Alexander Dory v. Federal Republic of Germany*, Case C-186/01 judgment of March 11, 2003. *Tanja Kreil v. Bundesrepublik Deutschland*, Case C-285/98, 2000 E. C.R. I-69.

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the ECJ's outside pressure, changing its constitution and actively integrating women in a number of roles in the military (Kuemmel 2003; Liebert 2002). But one must only look at the efforts to exclude the ECJ for foreign policy issues to know that states did not and would not have agreed to let the supranational European court rule on *any* issue related to how they organized their national militaries if they had been given the choice.

Empirically speaking, there is little solid evidence that more precise rules limit IC autonomy. Indeed Geoffrey Garrett, Daniel Keleman and Heiner Schulz actually expect greater precision to facilitate ECJ independence because the court can use the precise wording as political cover (Garrett et al. 1998). While a special edition of *International Organization* hypothesized about a relationship between the level of precision of a legal rule and its influence in general, the volume as a whole was unable to substantiate the link (it did not try to link precision to slippage) (Goldstein et al. 2001). Instead in that volume Karen Alter found that a number of factors unrelated to rule precision shaped whether or not the ECJ comes to influence domestic policy (Alter 2000) and Kathryn Sikkink and Ellen Lutz found in Latin America that more legalized and precise rules regarding torture had actually less influence than less legalized rules regarding disappearances and democracy (Lutz and Sikkink 2000).

*Sanctions through rewriting the delegation contract  
as a tool of principal control*

Legislative bodies always retain the right to change the law if they are unhappy with how it is being applied or interpreted by judges. Geoff Garrett has argued that the threat that states might go back and rewrite a rule helps mitigate judicial slack (Garrett 1995; Garrett et al. 1998; Garrett and Weingast 1993; Tsebelis and Garrett 2001), but the empirical support for this claim is far from conclusive. One can find plenty of examples of politicians playing to their political base by condemning the actions of "unaccountable judges." Yet compelling examples of serious threats on courts, like President Roosevelt's threat to "stack" the US Supreme Court, or Charles De Gaulle's threat to eliminate the French Conseil d'Etat (Parris 1966), are very rare. Even attempts to legislatively reverse a court – such as the Republican Congress's recent effort to overturn judicial decisions in the Terry Schiavo case – are surprisingly rare.

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Why are these cases so rare, and why are the examples all domestic? It is only really possible to relegislate over a legal ruling when one political party has commanding control over the legislature so that a populist political attack can become a political reality. At the international level no one actor or party has commanding control over the legislative process, and states tend to disagree about which policy is best, making them unable to unite behind an alternative interpretation. Thus developing country outrage at a WTO appellate body ruling regarding *amicus* briefs has led to blocked efforts to reform the WTO dispute resolution mechanisms, but not a reversal of the *amicus* brief ruling, in large part because the United States and Europe are happy with *amicus* briefs being allowed (Schneider 2001). US anger at the ICJ's Nicaragua ruling<sup>13</sup> led to the withdrawal of the United States from the ICJ's compulsory jurisdiction, but no change in international law regarding the use of force.

The most likely venue one might find international relegislation to counteract an IC decision is the European Union, since the EU produces copious legislation that sometimes requires only a qualified majority vote. Yet despite Garrett's claims of ECJ re-contracting threats, and despite widespread public disenchantment with European integration, Damian Chalmers could identify only four examples of legislation intentionally added to counteract an ECJ decision, examples that were not per se "sanctions" in light of undue activism (Chalmers 2004: 15, nn. 55–56).<sup>14</sup> The most well-known example was the "Barber Protocol" adopted because many European countries were unhappy about the costs of the ECJ's *Barber* ruling equalizing the retirement ages of men and women. Yet this protocol only limited the *Barber* ruling's retrospective

<sup>13</sup> ICJ judgment of 26 November 1984 – Jurisdiction of the Court and Admissibility of the Application. ICJ Judgment of 27 June 1986 – Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*) – Merits.

<sup>14</sup> (1) The Barber Protocol is discussed in this paragraph. (2) A protocol was added to the Treaty on the European Union saying that nothing in the EU treaties could undermine Ireland's constitutional provisions regarding abortion. Yet this provision did not reverse the ECJ's *Grogan* ruling challenging Irish policies that limited women from traveling to Britain to get an abortion. *Grogan* stands; Ireland no longer tries to restrict women from traveling to the UK to get an abortion; and abortion services remains legally classified as falling under EU rules regarding the free movement of services. (3) When the ECJ ruled against a German affirmative action policy (in the *Kalanke* ruling) on the basis that the EC directive disallowed such policies, states corrected the directive. (4) Two declarations were added to the organization of German, Austrian, and Luxembourg public credit unions to counteract an ECJ ruling regarding competition law.

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effects; the decision itself was not reversed. Nor could Mark Pollack link this “sanction” to any change in ECJ behavior: “[I]ndeed one might argue that the Court’s post-*Barber* jurisprudence, rather than constituting a generalized retreat, represents a return to the pre-*Barber* pattern in which the Court generally, but not always, opts for a broad interpretation of Article 141, most often over the objections of one or more . . . member governments” (Pollack 2003a: 200).

Judges will tell you, perhaps in a fit of denial, that they consider the separation of powers to mean that legislatures write laws, and judges interpret laws. Since it is always the prerogative of the legislature to change the law, they argue, re-legislation is not a political or social sanction that undermines their reputation. But we do not have to take judges at their word to believe that re-legislation is not a sanction. That we find so little serious discussion of re-legislation viewed as a political sanction implies either that judges do not slip, that they slip yet there is not support to re-legislate, or that others do not see the well-being of judges as adversely affected by legislatures changing legal texts.

Arguably ICs hesitate to aggressively apply legal principles that generate great controversy, but the law in question and the legal interpretations remain on the books to be dusted off when political tempers cool or in a less contentious political context. Institutions change over time through reinterpretation of statutes, by shifting the emphasis from one provision in a statute to another, or by seizing on and giving new life to moribund yet latent statutes and roles (Pierson 2004; Thelen 2004). Indeed the US Supreme Court’s famous *Marbury v. Madison* ruling remained a dead letter for years. Only through time did the *Marbury* ruling come to be seen a defining moment when federal judicial authority was established, changing the course of US constitutional and judicial history forever.

*Why are principal re-contracting tools so weak?*

It is not impossible that principal tools of control can work, nor is it the case that a belief in the sanctity of judicial independence is stopping states from using the tools they have – after all, governments show little compunction about using their re-contracting tools to influence domestic judiciaries. The question is why have states chosen appointment rules and re-legislation rules at the international level that undermine their ability to credibly threaten or influence international judicial actors? The analytical problem in answering this question is the difficulty

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involved in interpreting what has not happened. Some would read the lack of state sanctions against ICs as a revealed preference, arguing that the reason principals neither use nor change their control tools is that ICs do not slip in ways principals care about. Brian Marks has shown the flaws of this answer. Using game theoretical modeling, Marks shows that even when a majority of legislators oppose a judicial ruling, and the voting rule allows for the majority to change the legislation, the majority may not relegislate. Marks concludes that “inaction is neither a sufficient nor necessary condition [to signal that something is acceptable to] a majority of legislators. Nor can we conclude that the absence of legislative reaction implies that the court’s policy choice leads to a ‘better’ policy in the view of the legislature” (Marks 1989: 6).

Since we cannot rely on revealed preferences, we need theory to fill in the rational behind the perplexing behavior we observe – in this case principal delegation to international courts that are in many ways even less subject to principal influence than their domestic counterparts. Let me suggest an “isomorphic mimicry meets international politics” explanation of why we find such weak principal control tools at the international level.<sup>15</sup>

Governments likely delegate to ICs for the same reasons they delegate to domestic courts – to have courts fill in contracts, resolve disputes, and to use legal mechanisms to help monitor compliance (McCubbins et al. 1989; Milgrom et al. 1990; Weingast and Moran 1983). But in undertaking delegation for these reasons, likely neither negotiators nor the national legislators who ratify international agreements have fully thought through how the international context is in fact quite different from the domestic context. The context is different in a number of ways.

First, changing international agreements is far harder than changing domestic agreements, and in this respect international agreements are more similar to constitutions than they are to domestic statutory law. The difficulty in changing rules stems both from the heterogeneous interests of states at the international level and from international voting rules shaped by power concerns rather than legislative efficiency and principal control objectives. Voting rules in international institutions tend to be designed to allow a small number of powerful states to block the legislative will of the majority, and a large number of weak states to block the

<sup>15</sup> For a similar type of isomorphic argument where domestic institutions are imported to the international level, see McNamara 2002.



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will of the powerful. Such rules make it difficult to get agreement on anything, and especially difficult when it comes to reversing slippage – a “joint decision-trap” context (Scharpf 1988) where few may like the status quo yet no one can agree to a new status quo (Alter 2001: 195–98).

Second, international law differs from domestic law in that the subjects of domestic law are generally private actors where the subjects of international law are sovereign states. PA models of delegation to the judiciary which Weingast et al. build on are administrative and civil courts models.<sup>16</sup> In domestic administrative and civil law contexts, the interests of the government and the courts are aligned; in the words of Martin Shapiro, courts are branches of the state itself, working in tandem with the government to advance state social control over the population (Shapiro 1981: 17–28). Only in a constitutional review role do the interests of courts and states not align since in constitutional review courts are checking legislative power. This difference between constitutional review and other judicial roles is why rational choice scholars like Jon Elster and Giandomenico Majone create separate concepts and categories for delegation to constitutional courts, which they see as “self-binding” as opposed to “other-binding” (Majone 2001; Elster 2000).<sup>17</sup> While most of the functional tasks that are delegated to ICs are very similar to the administrative review and dispute resolution roles given to domestic courts (Alter 2006), because ICs will be issuing rulings vis-à-vis state actors, they will inherently be constraining the exercise of national sovereignty, just as constitutional courts limit the exercise of legislative sovereignty. This means that delegating the exact same functional monitoring or filling in tasks to an international court will be different compared to the domestic context. Add to the difference in legal subject that often international law has a “supreme” status over conflicting domestic or local laws. Thus even if states do not intend to create constitutional international courts, and think they have only asked IC to interpret the rules they collectively agreed to, in fact states often get ICs that end up practicing constitutional review over sovereign states.

<sup>16</sup> Even in administrative contexts rational choice scholars find that factors other than principal interests are of greater influence on administrative decision-makers. See Weingast and Moran 1983; Caruson and Bitzer 2004.

<sup>17</sup> Note that Stone Sweet’s and Majone’s trustee model is based on constitutional courts in a domestic context (Stone Sweet 2002; Majone 2001). Keohane and Grant extend the trustee category to courts in a discussion of the overall of accountability of IOs in world politics (Grant and Keohane 2005), and Alter to ICs in specific (Alter 2005).

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Differences in the international compared to the domestic context cut two ways. To the extent that states delegate to ICs with an expectation that their government will have the same tools of influence over courts internationally as they do domestically, they are likely relying on a false analogy. But there is a third relevant difference between the international and domestic context: exit through non-compliance carries fewer political liabilities for international law compared to domestic law. Governments have a big stake in maintaining the political sanctity of the “rule of law” at home. Their internal legitimacy as well as external financial attractiveness for foreign capital depends on private actors having faith that their lives and investments will be safe because legal rules will be respected and enforced. Governments do not have as big a stake in maintaining the “international rule of law,” and they are advantaged compared to other international actors when it comes to convincing their population that national interests should trump (Alter 2003: 792–96). Because “non-compliance” with IC rulings is not too politically costly, delegation to ICs comes with a built-in insurance policy. No matter how bad the slippage, governments can walk away from an IC sanction with relatively little pain.<sup>18</sup>

The empirical support for this “isomorphic mimicry meets international politics” explanation is best revealed through detailed historical analysis of particular delegation decisions. In my book *Establishing the Supremacy of European Law*, I historically establish the very clear and open intent that states had in delegation to the ECJ –states saw themselves as creating an international administrative review court for the European Coal and Steel Community’s High Authority, and they intentionally modeled the ECJ directly on the French Conseil d’Etat. When the Treaty of Rome was drafted, the ECJ’s role was slightly transformed, though states never agreed to make European law supreme to national law or to elevate the Treaty of Rome into a constitutional document. Instead the ECJ itself asserted the direct effect and supremacy of EC law, transforming the Treaty of Rome into a form of constitution (Stein 1981; Weiler 1991), and states ended up with a court that was fundamentally different than what they intended (Alter 2001: ch. 1).

<sup>18</sup> WTO rulings can create real financial costs, but rich states especially can find these costs bearable so that compliance becomes a choice they can buy their way out of. For some, the inability of the WTO system to provide meaningful pain for rich countries is a flaw in the design of the WTO system (Pauwelyn 2000).

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Short of historical accounts for all existing courts, there is suggestive evidence for this “isomorphic mimicry” explanation that is more broadly generalizable. If states assumed that international courts would be like their domestic brethren, we could understand why states were in many cases willing to delegate to ICs the drafting of their own procedural rules for decision-making. We could also understand the apparent lack of concern for controlling ICs that went into the design of international judicial appointment processes. And we can understand the legitimacy problems ICs face, since states did not think they signed up for having ICs rule national policies illegal or shift the meaning of international agreements.

The question remains as to why states have not learned that uncontrollable ICs present dangers they do not like, adjusting their behavior accordingly. On the one hand, they have learned. The United States was once a great champion of international courts, and it has turned into the chief opponent of delegating authority to ICs. Also, whereas in the past the statutory rules regarding ICs were drafted in small committees, and pretty much adopted by the larger plenum wholesale,<sup>19</sup> the far more detailed and contested debates over how and what power was delegated to the ICC reveal that states are trying to involve themselves more in decisions regarding delegation to ICs. European citizens are also clearly paying more attention to the substance of their delegation in the European Union. Still, we can find the model of international delegation to highly independent ICs replicated for newly created ICs, since the historic independent IC is the model championed by states who want to limit the ability of the most powerful states to influence ICs.<sup>20</sup> Indeed while there was great haggling over the design of the ICC, the United States ultimately lost in its efforts to create an ICC with a Security Council veto.

Perhaps the larger reason we do not see states act to improve their “tools of control” is because the potential solutions have greater

<sup>19</sup> For discussions of the negotiations of the ECJ and Andean Court statutes, see Pescatore 1981; Keener 1987. In the WTO context as well, it appears that larger battles in the Uruguay Round involved substantive trade issues and that the design of the dispute resolution mechanism was not a subject of sustained negotiation by state parties.

<sup>20</sup> The various ad hoc criminal courts follow similar models, and the proposals for new regional trade and human rights courts in Africa appear to be drafted based on boilerplate texts about the European Court of Justice and the European Court of Human Rights.

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downsides than the benefit of a more controllable IC. Perhaps states *have rejected* suggestions aimed at creating a more controllable IC because they do not want the strongest countries to have even more influence over ICs, nor are they willing to create any precedent for external interference in national choices about who represents them in ICs. Perhaps they also fear that efforts to control the ICs would undermine the legitimacy of these fragile legal institutions, undermining the benefits of delegation to independent ICs. These reasons could explain Richard Steinberg's assessment that even though concern about judicial law-making has been raised 70 times by representatives of 55 WTO member states in the last ten years (Steinberg 2004: 256), and a number of political reforms for the WTO legal process have been offered, these reforms "are untenable politically" and unlikely to be adopted (Steinberg 2004: 273-74).

Giandomenico Majone argued that in delegation to fiduciary agents, the "agent" is purposely designed to be independent (Majone 2001). Certainly the difficulty in dismissing judges mid-term and of cutting their salaries is by design, to help protect the independence of judges. But the difficulty of using the appointment process to shape IC decision-making, the unwillingness of states to cede their voting rights to facilitate re-legislation, and the unwillingness of states to subject IC decisions to a veto by some version of qualified majority, are probably artifacts of international power politics and the apprehensions states have about subjecting the international legal process to more of these politics.

WHAT DOES SHAPE WHETHER INTERNATIONAL COURTS  
ARE MORE OR LESS INDEPENDENT?

Law scholars generally do not use the language of principal-agent theory to think about judges as strategic or politically influenced decision-makers, knowing that the factors driving judicial strategy have less to do with re-contracting concerns than with achieving the judicial goals of influencing policy and the behavior of other actors (Murphy 1964; Epstein and Knight 1998; Murphy et al. 2002). International law scholars also generally do not use PA theory to hypothesize about what makes ICs independent or effective,<sup>21</sup> yet they are very interested in

<sup>21</sup> An exception is a recent article by Lawrence Helfer and Anne-Marie Slaughter. What they call the "formal/structural" mechanisms correspond in part to the mechanisms identified by PA theory. Ex ante structural tools include writing

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whether states control ICs and how state control relates to IC effectiveness. Recently Eric Posner and John Yoo contrasted “dependent courts,” where the parties to the dispute are allowed to select arbiters, from “independent courts,” where IC judges are selected in advance of the dispute. Lawrence Helfer and Anne-Marie Slaughter offer many challenges to Posner and Yoo’s finding that dependence is associated with effectiveness (Helfer and Slaughter 2005), yet they largely accept the notion that certain ICs are more independent than others. The debate highlights that there is variation in the design of ICs that occurs below the radar screen of traditional PA variables, variation that shapes the extent to which ICs can be more or less independent actors.

Yoo, Posner, Helfer, and Slaughter agree that courts with compulsory jurisdiction are more independent, as are courts with access for non-state actors because states are less able to control which cases make it to ICs. Courts where parties can choose their judges and where consent to jurisdiction is required are less independent because the judges must please the parties or the states won’t appoint them again or bring them cases in the future. How independence relates to effectiveness is contested. Yoo and Posner want to find that independence is bad, but their argument that independence makes courts less effective uses compliance levels as the measurement of whether or not ICs are effective. We know that compliance and effectiveness are two separate issues (Raustiala 2000), and that high levels of compliance does not per se mean that regimes are effective (Downs et al. 1996). Slaughter and Helfer criticize Yoo and Posner for this, but they also call into question some of their empirical measurements and interpretations. Without wanting to take sides in the debate, I should say Yoo and Posner are relative outliers as most scholars either associate the factors that contribute to IC independence with effectiveness (Helfer and Slaughter 1997; Keohane et al.

precisely defined legal rules, defining methods and standards of review that allow deference to states, allowing state reservations when legal obligations are adopted, allowing reservations or requiring state consent for an IC to have jurisdiction in the case, limiting access to the IC, and screening tools used in the original appointment. Ex post structural tools include re-legislation of international legal rules to “correct” and IC interpretation, renegotiation of the tribunal’s jurisdiction, refusal to reappoint judges, delaying implementation of a decision, or unilateral withdrawal from a tribunal’s jurisdiction (Helfer and Slaughter 2005). They do not test whether these tools are effective, and one should consider that these arguments are offered as a retort to Eric Posner and John Yoo’s argument that independent ICs are bad in and of themselves (Posner and Yoo 2004).

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2000; Helfer and Slaughter 2005) or consider the ICs with the qualities associated with independence (the ECJ, ECHR, and WTO) to be among the more effective ICs in terms of their ability to make rulings on important issues and to have their rulings respected.

More important is the common ground in the arguments which suggests that principals “pick their poison” in the design choices for ICs. If they want to really bind themselves and others to comply with an agreement, they design ICs to maximize their enforcement capabilities – agreeing to compulsory jurisdiction, wider access, and sanctions that can be associated with IC decisions. When principals are more wary about delegating authority to an IC, they require consent to jurisdiction and make IC rulings purely declaratory to make non-compliance less costly. If these scholars are right, we have two more reasons for why re-contracting politics do not seem to be at play. First, the decisions to consent to compulsory jurisdiction and the access rules for ICs adds an element of endogeneity to explaining delegation, suggesting that states pick the type of delegation they want in the first place, either choosing independent or dependent courts. (This endogeneity argument holds, however, only so long as the principal gets the court it chose.) Second, after the design is set, the delegation decision is fixed. Even if states should change their mind, independent courts are not amenable to ongoing re-contracting politics.

An interesting yet puzzling footnote to this debate is that increasingly ICs are designed with compulsory jurisdiction and non-state actor access (Alter 2006; Romano 1999). What is driving this turn to enforcement through international courts, and towards private access and compulsory jurisdiction, is a real puzzle. Principal-agent explanations of why states “delegate” to international courts cannot really explain why delegation is more common today compared to the past. Those who do focus on the timing of the trend mainly offer observations that surely are correct: the end of the Cold War likely facilitated the creation of many of the new international courts; the proliferation of regional trade agreements has contributed to a proliferation of international courts operating within specific regions (Romano 1999; Brown 2002). Such explanations do not explain the design trend or really explain the delegation. The closest we come to an explanation of the design trend is the work of James McCall Smith who argues that delegating enforcement to more legalized third-party dispute resolution bodies is associated with deeper trade agreements with more specified obligations and a greater desire by parties to have compliance with the agreement (Smith 2000).

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Elsewhere I show that certain design choices are associated with the delegation of certain judicial roles, suggesting that a functional intent for the court drives judicial design choices (Alter 2006). But while this “functional explanation” can account for the variation in observed design, the possibility of judicial roles morphing across roles suggests that any delegation to courts is subject to unintended consequences, and the puzzle of why states seem to repeatedly and increasingly be creating ICs they can’t control remains unanswered.

HOW STATES LIVE WITH INDEPENDENT INTERNATIONAL  
COURTS: MOVING BEYOND PRINCIPAL-AGENT THEORY

This chapter offers two separate yet complimentary reasons for why recontracting politics will not be the central axis through which states seek to influence ICs. (1) International political factors have led states to create decision rules that make re-contracting tools especially ineffective at shaping international judicial decision-making. (2) The elements of contract design that influence the extent to which ICs will be independent from states do not themselves give rise to re-contracting politics, meaning they are not amenable to re-contracting threats.

Let me add a third argument which I develop in more detail elsewhere (Alter 2005): delegation to trustee-agents may simply be fundamentally different than delegation to agents, giving rise to a different sort of politics. Trustee-agents are defined by three factors.

- I. While trustee-agents are empowered by a revocable delegation decision, they are selected because the principal wants to harness the personal reputation or professional norms associated with the trustee-agent. Because trustees value their reputation, they will be guided more by professional norms than by concerns about principal preferences, sometimes dying on their sword rather than be seen as caving to political pressure. This element of trustee behavior helps us understand why the ICJ condemned Ronald Reagan’s Nicaragua policy even though it knew the decision would be ignored and that the United States would respond by withdrawing from the ICJ’s compulsory jurisdiction.<sup>22</sup>

<sup>22</sup> For a discussion of this case, see Alter 2005.

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2. Trustees also differ from traditional agents in that they are granted independent decision-making discretion and thus are not expected by others to act as the agent of the principal (Grant and Keohane 2005). Indeed the trustee may in fact be deemed not just more efficient but actually a superior decision-maker, so that efforts cast as “political interference” or exceeding state or principal authority can alienate the trustee’s constituency and members of the principal whose support is needed for re-contracting.
3. Trustees have a putative third-party beneficiary who is different from the principal. Because both the trustee and the principal are vying for the political support of the beneficiary, neither the trustee nor the principal can be exclusively focused on what they or each other may most want. I argue that this difference between delegation to agents versus trustees makes re-contracting politics less effective and forces states instead to use rhetorical and legitimacy politics to try to influence ICs (Alter 2005). This trustee argument is consistent with the chapter of this volume by Darren Hawkins and Wade Jacoby who suggest that the selection of an agent is itself important because agents can behave differently from each other even if they are situated in the same re-contracting environment, meaning even if the rules for appointment, reappointment, monitoring, and sanctioning are basically the same.

None of this implies that ICs are not influenced by states, that states are unconcerned about independent ICs, or that ICs are not political actors. The larger point is that re-contracting politics, a privileged tool only the principal can employ, is not where state–IC relations are likely to play themselves out. A number of implications follow from these arguments.

*Factors other than principal control tools likely matter more in determining IC independence.* While the factors PA theory expects to generate variation (decision rules and informational contexts) may not shape the relative independence of ICs, international law scholars expect access rules and whether or not there is compulsory jurisdiction to be related to IC independence. This list in itself is certainly too narrow if one considers that the European Court of Justice and the Andean Court of Justice are by design institutionally identical yet play very different political roles within the legal common market systems they inhabit (Alter 2005). Also, the arguments about the greater ability to use appointment and budgeting tools vis-à-vis the ICC suggests that different sorts of legal processes may be amenable to different sorts of political tools – namely that



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criminal courts may simply be different than ICs that are primarily involved in dispute resolution. Together these arguments suggest that viewing ICs as a single category may in itself be fundamentally flawed. Instead, the political contexts, legal rules themselves, and legal processes themselves may vary by IC and case, and these factors may shape the extent to which ICs can act independently from states.

*Because states cannot control ICs, states need other mechanisms to make slippage less problematic.* States clearly do care about IC slippage. Thus the question really should be how do states live with the potential for slippage, given that their recontracting tools provide little protection? I have offered a few suggestive answers to this question. First, states accept that exit through non-compliance is an insurance policy for their concerns. Viewing exit as a built-in insurance mechanism can in itself provide insight into the construction of international legal rules and international legal mechanisms.<sup>23</sup> Second, there is a large politics aimed at trying to keep important cases away from ICs, so that ICs do not have an opportunity to issue rulings states do not want. For example, we see the United States going to considerable lengths to negotiate special agreements to try to keep countries from cooperating with any ICC investigation of Americans (Kelley 2005). This politics in no way suggests a lack of IC influence. Rather, states are bargaining in the shadow of the court, negotiating to settle cases outside of court. There is much to suggest that bargaining in a court's shadow (as opposed to in court itself) may present the best prospect of using ICs to influence state behavior (Busch and Reinhardt 2000).

*Legitimacy politics may be how states and ICs try to mutually influence each other.* Because ICs do not have coercive enforcement powers, they must rely on legitimacy politics as their principal tool of influence. Meanwhile, IC dependence on other's perceptions of their reputation and authority makes international judges subject to legitimacy politics being used against them. A number of implications follow. First, PA theory focuses on the issue of principal control. Once we enter the world of legitimacy politics, we should expect that principals can easily lose control (Hurd 1999, 2005; Risse et al. 1999). Second, the means and

<sup>23</sup> Joost Pauwelyn sees this option as part of the WTO dispute resolution system itself, present in the system's reliance on reciprocal sanctions as the main tool of enforcement and also visible in many aspects of WTO law itself (Pauwelyn 2000, 2005).

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modes of legitimacy politics are rhetorical rather than material (Schimmelfennig 2003; Johnston 2001; Müller 2004). Third, in legitimacy politics there may be actors other than states and ICs that may invoke and use these politics. For example, Jonas Tallberg (2002) and Susannah Schmidt (2000) have shown how the EU's Commission employs the EU legal system to influence states; Ian Johnstone (2003) has shown how the UN General Secretary uses international law as a tool of political influence; Ian Hurd (2005) has shown how Libya used the United States's own norms against it; and Margaret Keck and Kathryn Sikkink (1998) have shown how transnational advocacy networks can use legitimacy politics as a tool of influence.

To the extent than these arguments are right, starting from PA theory to understand judicial behavior may be simply unhelpful. PA theory mainly looks at the decision rules for appointments and recontracting and informational disparities to generate variation in the independence of actors, and it expects more independent actors to slip more. Both of these expectations may be wrong. There may be other contextual factors far more important than decision-rules that account for variation in agent behavior (Alter 2000), and even independent actors may have reasons not to aspire to "slip." PA theory as an analytical orientation tends to generate exaggerated expectations about the role of re-contracting politics and about the influence of principals as political actors. Also, precisely because PA theory tries to connect insights about domestic institutions to insights about international institutions, the theory itself may obscure our ability to discern how the nature of international context generates different behavior, leading similar institutional actors to behave differently than their domestic counterparts. While one could try to model in ideas like trust, reputation, or concerns about non-compliance into PA models, it is not clear that the framework itself – inspired by the insight of delegation – is the best means toward this end. Indeed there are many ways to make institutions accountable (Grant and Keohane 2005). Why should an analyst privilege re-contracting politics just because delegation takes the form of a revokable contract?

The promise of delegation to ICs, or perhaps the nightmare of some, is that ICs will create a legal and political space where regular politics and the power disparities in the world do not shape outcomes. If delegation to ICs succeeds in creating this space, IC interpretations of international rules will be more authoritative than states auto-interpreting the rules

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to suit their interests, bringing with it a loss in state latitude and autonomy. This is the intent behind delegation to ICs, but it is not an intent or context that PA theory best elucidates. Yet this intent and outcome is important because delegation to ICs changes the international political context. ICs do influence state behavior, and states cannot control ICs. For this reason, the realm which ICs and states share creates an alternative venue in which politics plays itself out, attractive to litigants precisely because states do not control this venue.