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Agents or Trustees? International Courts in their Political Context

Karen J. Alter

No. 8

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Agents or Trustees?
International Courts in their Political Context

ABSTRACT

Principal-Agent (P-A) theory sees the fact of delegation as defining a relationship between states (collective Principals) and international organizations (Agents) with recontracting threats being the predominate way states influence IOs. Developing a category of Trustee-Agents, I argue that recontracting tools will be both harder to use and less effective at influencing the Trustee-Agents. Trustee-Agents are 1) selected because of their personal reputation or professional norms, 2) given independent authority to make decisions according to their best judgement or professional criteria, and 3) empowered to act on behalf of a beneficiary. Focusing on state-International Courts (IC) relations, the article develops an alternative explanation that highlights the need for international judges to balance legal fidelity with the significant international challenge of endeavouring compliance. The arguments are explored through three case studies of IC decision-making that call into question the “rational expectations” claim that ICs are tailoring their decisions to reflect the wishes of powerful states and avoid adverse recontracting.

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Agents or Trustees? International Courts in their Political Context[*]

INTRODUCTION

Principal-Agent (P-A) theory, a dominant international relations approach to analyzing state-international organization (IO) relations, sees the fact of delegation as creating a very distinct politics. The delegating actors (in the international context states) are by definition the Principals, presumed to have considerable power because they write the delegation contract, select the Agent, and financially support the Agent's operation. The Principal's authority to change the delegation contract (cut the Agent's budget, rewrite the Agent's mandate and rules, or fire the Agent) is seen as creating potent Principal "control tools" to mitigate Agent "slack" (unwanted Agent behavior that the Principal does not like and would not have chosen for itself). P-A theory does not expect Principal control to be complete, but the power to recontract is seen as an important source of Principal political leverage, and the primary axis of P-A relations is presumed to revolve around implicit or explicit recontracting threats combined with Agent concerns about inciting adverse recontracting.

International Courts (ICs) are institutional actors whose power and authority is entirely an artifact of state delegation. States write, and can rewrite, the rules ICs interpret, and the mandate and jurisdiction of the IC. States choose who will serve as a judge on an IC, and while it is next to impossible to fire an international judge for issuing unwanted decisions, states can choose not to reappoint an international judge after a relatively short term in office (4-6 years). How does the fact that ICs rely on a revocable delegated authority shape state-IC relations? Not much at all is my answer.

The primary objective of this paper is to urge a shift in the focus of state-IC relations away from the "delegation" aspect that animates P-A theory and away from the default assumption that the international courts constantly angle to avoid adverse recontracting.

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[*] This paper 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, and the participants in PIPEs at University of Chicago for comments on earlier versions of this paper. Special thanks to Robert Keohane who defended me against a highly critical onslaught, encouraging me to pursue the idea of courts as Trustees, to Jonas Tallberg, Darren Hawkins, Dan Nelson, David Lake and Mike Tierney, who while enthusiasts of P-A theory engaged my work constructively in numerous reads, and to Richard Steinberg who worked with me to identify cases that would strengthen the argument. 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 597at the University of Bremen.

Section I examines the assumptions underpinning P-A theory and the difficulty of assessing P-A claims. It argues that P-A hypotheses about whether delegation generates more or less Agent autonomy lead to contradictory conjectures about ICs that are largely unverifiable. To make P-A theory testable I narrow the theory to its core- the claim that recontracting concerns shape Agent behavior and are thus central to P-A relations. This core animates rational expectations claims that Agents will reflect the interests of the Principals even if we cannot find evidence of Principals actively seeking to influence the Agent.

Sections II and III provide different reasons to believe that recontracting concerns would not be central elements of State-IC relations. Questioning the assumption that delegation per se creates a relationship of Agent dependence on the Principal, section II builds on Giandomenico Majone's insight that delegation to enhance the credibility of the Principal has a different logic than delegation for transaction cost reasons (2001). Section II delineates factors that separate "Trustees" from "Agents" and explains why different politics ensue in delegation to Trustees compared to delegation to Agents. The Trustee category applies to all "Agents" 1) selected because of their personal and/or professional reputation; 2) given independent authority to make decisions according to the Trustee's best judgment and/or the Trustee's professional criteria; and 3) empowered to act on behalf of a beneficiary (where the beneficiary is different than the collective Principal). Even if politics in delegation to Trustees differs, this does not mean that Principal tools of control are ineffective. Section III shows how international political factors including the disparity of power in the international system and state's penchant for protecting national sovereign authority have led to decision-rules at the international level that make it very hard for states to exercise their collective Principal tools to stack ICs or credibly threaten IC's with adverse recontracting.

The critique of P-A theory is supported through the examination of three cases picked to provide variation in factors that some scholars see as generating variation in the independence and effectiveness of ICs (Slaughter, Keohane, and Moravcsik 2000: ; Helfer and Slaughter 1997: ; Posner and Yoo 2004). In all three cases the judges "slipped" beyond what was intended or wanted, yet the judges were not sanctioned nor were the legal interpretations reversed. Two of the cases—World Trade Organization (WTO) Appellate Body rulings regarding "unforeseen developments," and the European Court of Justice's extension of its authority to include some oversight of how nations organize their military—provide evidence of unwanted IC slippage where the rulings were respected and the political status quo clearly shifted. The third case- the International Court of Justice's condemnation of the US mining of Nicaragua's waters—shows slippage where the impact of the ruling is less clear. The Nicaragua case, though controversial, is used because it expands the claims beyond the "usual suspects" of powerful in-

dependent ICs showing that despite the ICJ's greater "dependence" and even though the ICJ knew its ruling would provoke a negative response, it still made a hard ruling the US did not want.

While the paper does suggest an alternative understanding of the influence of states over ICs, the larger point of this manuscript is to provoke a more fruitful debate about the relationship between states and international courts. The alternative to P-A theory is not that IOs have complete autonomy, or that IOs are not influenced by states or politics, or that states are completely unable to reign in a Trustee with a pattern of exceeding its mandate or deciding in ways the powerful dislike. The conclusion discusses the three larger goals of the critique, each of which is aimed at enhancing our understanding of how states do shape International Trustee behavior: 1) conceptually challenging the prevalent "rational expectations" argument that misdirects analysts to the issue of international Trustees rationally anticipating adverse recontracting; 2) provoking P-A theorists to themselves circumscribe and thereby improve their theory by exploring limits to its useful applicability; 3) shifting the focus of analysis back to the more open question of *what is the nature of state-International Trustee relations,* which will allow us to see how states live with independent Trustees by avoiding the domain of the Trustee where it is desirable and possible, and by compensating after the fact for unwanted Trustee behavior.

I. How can We Assess the Utility of Principal-Agent Theory?

The Principal-Agent approach is primarily a framework to describe functional delegation and the design choices states make when they delegate. Building on theories of cooperation, the P-A framework identifies both transaction cost reasons and credibility reasons to delegate to Agents (e.g. to have Agents monitor compliance, fill in incomplete contracts, make regulatory decisions, take the blame for unpopular rulings, or enhance the credibility of the Principal) (Pollack 2003: Chapter 1 esp p. 20). The value added of the P-A approach is its focus on the Principal's concern about Agent slack, identifying features of the delegation contract that help states monitor and/or sanction Agent slack. As a descriptive framework the P-A approach is neither testable nor falsifiable. By definition states create most IOs through delegation, and make decisions about designing the IO. There are always reasons for delegation decisions, and finding that the "reason" states delegate fits onto the P-A list of reasons, or that features of the contract allow for Agent monitoring or sanctioning is not support for P-A theory just like finding a different actual reason for delegation or for the contract features is not disconfirmation of the P-A framework.

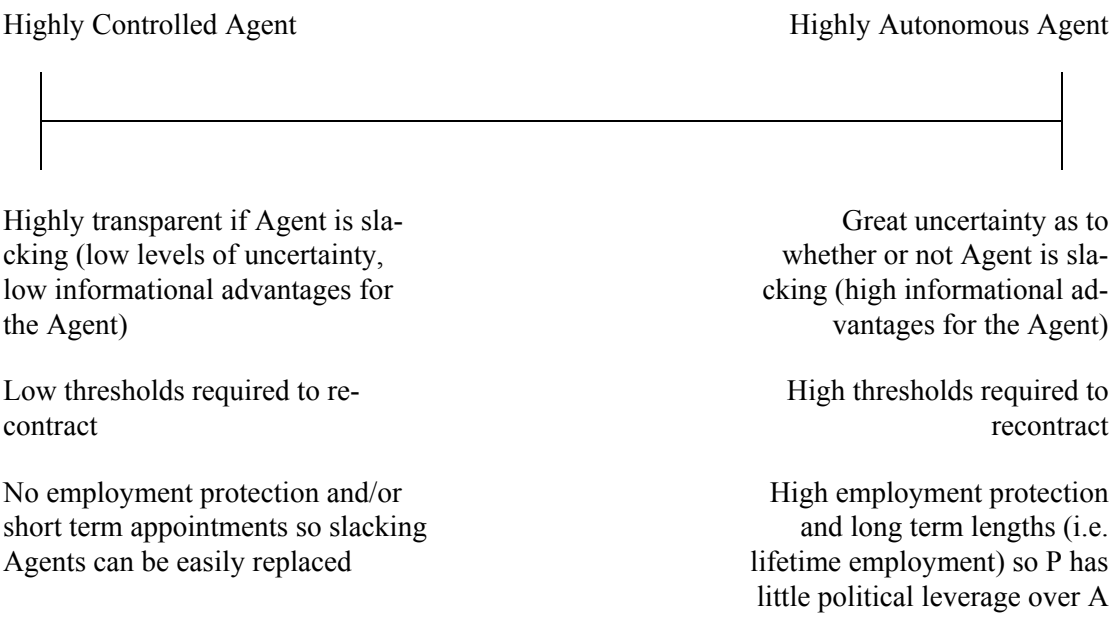
P-A analysis transforms itself into a potentially testable theory by generating predictions about how the contracting relationship comes to shape Agent behavior. P-A theory assumes that being the author of the delegation contract confers a hierarchical Principal

control over the Agent. The metaphor used by Michael Tierney, Darren Hawkins, David Lake and Daniel Nelson is revealing:

Delegation is a conditional grant of authority from a *Principal* to an *Agent* in which the latter is empowered to act on behalf of the former. This grant of authority is limited in time or scope and must be revocable by the Principal. Principals and Agents are, in the language of constructivism, mutually constitutive. That is, like “master” and “slave,” an actor cannot be a Principal without an Agent, and visa versa. The actors are defined by their relationship to each other. (Hawkins et al. 2004: 9)

The meta-assumptions of P-A also imply hierarchy. P-A theory assumes that Agents have their own preferences but they do not want adverse recontracting and actively seek to avoid it, and that Principals do not like Agent slack and ceteris paribus would use their recontracting power to sanction slacking behavior. The Principal’s unique and exclusive contracting powers—to appointment, fire, cut the budget, or rewrite the mandates of the Agent—are seen as conferring a privileged and hierarchical source of leverage over the Agent, providing the micro-mechanisms to understand how and why Principals control and influence the Agent. Rational expectations arguments fill where we do not actually see Principals using their control tools. Principals may rely on non-state actors, committees, or other “checks and balances” to monitor and check Agents, with the recontracting threat lurking in the background. Even if Principals never actually flex their contracting powers, Agents know that (by presumption) Principals have a preference to sanction slack. Agents (by presumption) wanting to avoid adverse recontracting, rationally anticipate Principal recontracting and adjust their behavior accordingly, avoiding behavior that can provoke adverse recontracting.

P-A theory expects Principal control to be incomplete. Most P-A analyses have as a dependent variable explaining discretion/slippage, arguing that the size and extent of discretion/slippage is a function of 1) informational disparities that allow Agents to obscure their slippage and 2) recontracting decision-rules that create costs and difficulties associated with recontracting. By focusing on these factors, P-A theory generates hypotheses that locate different Agents along a continuum of highly “controlled” Agents to highly “autonomous” Agents, captured on the chart below. The implication of the continuum is that autonomous agents are more likely to slip compared to more controlled agents.



In a highly stylized world can one operationalize these variables to map different Agents onto the above continuum. But in the real world, the variables P-A theory relies on are highly fungible and at times even immeasurable, making points between the ideal-type extremes hard to define in a testable way. Also, it is not clear what to do when independent variables (information context, costs of recontracting, control over appointment/reappointment process) point in different directions.

A well-worn example reveals the inherent problem. Assume an Agent is ordered to use 10,000 soldiers to take a hill to win the battle, with the monitoring being the Principal's promise to look for the American flag on the hill. This is a pretty clear set of directions, yet within it are potentially contradictory elements. How is the analyst or the Agent supposed to know which aspect of the directions is most important to the Principal (10,000 soldiers or taking the hill or winning the battle) and thus what the Principal really wants? Assuming we can figure what the Principal really wanted, how can we rank order behaviors in terms of relative slippage? Consider the following scenarios.

Scenario	**Action**
Scenario A Win battle with extra troops	Agent takes the hill and plants the flag, but uses 20,000 instead of 10,000 soldiers to win the battle.
Scenario B Lose battle, 10,000 troops	Agent sends 10,000 soldiers to take the hill but loses the battle.
Scenario C Win battle, do not capture hill	Agent ignores order to take the hill as a suicide mission, but it wins the battle. The hill remains an isolated pocket of resistance until the war ends.

Scenario	**Action**
Scenario D Prioritizes an objective not in the order	Agent sees this particular battle as a sinkhole and believes its performance will be judged by the overall outcome of the war. It ignores the order and sends troops elsewhere. It wins the war.
Scenario E Prioritizes following order over larger objective	Agent takes the hill and wins the battle, but 100,000 soldiers are sacrificed in the effort and Agent loses the war.

P-A theory seeks to explain specific choices as well as general patterns. If there were two, three, or five armies, and two, three or five hills, could we look at what each army did and say Army A choosing scenario A was greater slippage than Army B choosing scenario B, etc.? How then would we know if P-A factors were explaining the Army's scenario choice, or something else like the battlefield conditions?

The tendency of P-A analysts to rely on revealed or deduced preferences to deal with measurement problems makes things worse because it assumes away the ambiguity. It might seem reasonable to ascertain from the Principal's anger that the army relied on 20,000 soldiers and not 10,000 as ordered, that the Army had slipped. But this revealed preference may be wrong because maybe the Principal had really wanted the army to win the battle and had said as much, focusing on the 10,000 soldiers' part only after it learned that it was desperately short of soldiers or that the whole battle was a mistake. There may also be background conditions that the Agent knows and uses to filter the order. What if the Colonel making the order was likely to be fired soon, or was a close ally of a General that was about to be purged? What if two Generals supported the order and two opposed it, so that the Principal was divided? Revealed preferences are even more problematic when one is interpreting a non-response. To assume that no adverse Principal reaction means that the Principal is satisfied (and thus there was no slacking) introduces a tautology by defining Agent slacking in terms Principal action, not Principal preferences.

The case of delegation to ICs is symptomatic of these problems. The difficulty of international negotiations often itself leads to vague and/or contradictory legal rules representing compromises. Even with clear rules, unexpected scenarios arise, political leaders change, and the underlying context shifts so that the Principal preferences when the rules were written may no longer apply. What litigant-states desire (e.g. to win their case) is not necessarily the same as what the Principal-states desire (to have the rules respected), and some members of the Principal may want one thing while others want something else. Also, we cannot tell how the P-A factors interrelate to know whether or not we should expect greater or lesser court autonomy in general or in specific cases.

Thus we get expectations that range across the map, and are essentially contradictory, depending on which aspect of IC design we examine.

Scholars employing P-A theory to the subject of the European Court of Justice, for example, have argued that the ECJ is not an autonomous actor *and* that the ECJ is a relatively autonomous actor. Geoffrey Garrett and Barry Weingast, using P-A analysis, pointed out “political actors have a range of avenues through which they may alter or limit the role of courts….the possibility of such a reaction drives a court that wishes to preserve its independence and legitimacy to remain in the area of acceptable latitude” (Garrett and Weingast 1993: 201). Their P-A analysis leads them to conclude that the ECJ has very little political autonomy so that its decisions mainly select among the range of outcomes the most powerful states implicitly want. Geoffrey Garrett and George Tsebelis later argue that there should be variation in ECJ autonomy; when the ECJ is interpreting the provisions of the Treaty 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 has argued (counter to most P-A presumptions) 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, Kelemen, and Schulz 1998). So is the ECJ autonomous or not? Mark Pollack and Jonas Tallberg use P-A theory to find that the ECJ is actually quite autonomous because the requirement of unanimity to overturn an ECJ decision makes reversing the ECJ hard to do (Tallberg 2002: ; Pollack 2003: 201). Where Garrett and Weingast expected the ECJ to be far less autonomous than national supreme courts because it is an international court relying on a treaty (Garrett and Weingast 1993: 201), Pollack expects the ECJ to actually be more autonomous than national supreme courts because revising EU law may require a higher voting threshold than changing a national constitution (Pollack 2003: 201). Paul Stephan’s P-A analysis focuses on the short term length for IC judges.

> A typical arrangement involves limiting the tenure in the adjudicatory bodies to short terms… Knowing that they can be replaced, the members of the tribunal have an incentive not to do anything that will upset the countries with nominating authority. In those cases where the members nonetheless veer off in an unanticipated direction, the nominating state can institute a course correction within a relatively short period of time by choosing "sounder" candidates for the tribunal. Thus 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. (Stephan 2002: 7-8)

His examples are the WTO and the ECJ. It should be said that Stephan holds a minority view about the activism of the ECJ and WTO.[1] The point is how can we compare Stephan's claim of low ECJ and WTO autonomy based on the term lengths of judges to Pollack's claim of high ECJ autonomy based on the decision-rules to reverse ECJ decisions? These alternative arguments are not logically inconsistent; they are focusing on different pieces of the elephant. But with these various arguments nearly any P-A claim can be made and pointed to as an "explanation" of an independent or dependent ECJ. And with these opposing claims, understanding the elephant becomes very hard indeed.

Because Principal preferences are highly fungible, because each claim is about an element of degree (relatively more or relatively less) and because there are P-A factors pointing towards both dependent and independent ICs, adjudicating the validity of different claims is hard even when there is no disagreement about the facts. This problem is certainly not unique to P-A theory. Yet the promise of P-A theory, and what makes it analytically alluring, is that its parsimonious hypotheses will be more clearly directional and testable. In its usage, however, P-A theory often becomes as analytically subjective, fungible and difficult to test as alternative explanations, including less quantifiable variables like legitimacy, reputation and logics of appropriateness.

Because we cannot operationalize many of the variables P-A theory relies on (like relative slippage), we probably cannot falsify P-A theory. But we should be able to ascertain whether relegislation, judges' professional fears, or concern about cutting budgets are at some deep level motivating IO decision-making. To do this we must first resist the temptation to save P-A theory by folding into it factors that are not per se about the contacting relationship. This is especially important in delegation to IOs because states are at the same time 1) members of the collective Principal, 2) powerful actors with a variety of ways to exert political influence, and 3) the objects IOs are trying to influence. To be analytically clear, we need to focus on how much the first role--states as members of the Principal--matters when we assess P-A theory. To say that any sign of a state having power confirms P-A theory would be a mistake for four reasons. First, usually a handful of unhappy states have no ability to actually wield their Principal power to sanction the IO, thus empirically it is usually false to presume that American or German influence is the same thing as a credible threat that Principals might recontract. Second, if we fold all mechanisms of power into the P-A framework, P-A theory will

[1] Many scholars have argued that the ECJ systematically and very ambitiously orchestrated a fundamental transformation of the European legal system. (Weiler 1991: ; Stein 1981: ; Rasmussen 1986: ; Burley and Mattli 1993) Jose Alvarez puts the ECJ in a category by itself in terms of its unusually bold activism (Alvarez 2003) Lawrence Helfer puts both the ECJ and the WTO into a special category because their rulings are more easily and likely enforced (Helfer 2003: 205).

become a garbage can theory of politics that amounts to little more than the widely known truths that states create IOs for good reasons, states have power in international relations, and actors relying on delegated authority (like all actors) seek where possible to avoid behavior that will provoke negative reactions. P-A theory potentially offers insight, and it should not be reduced to bland axiomatic claims. Third, conflating all sources of state power with Principal power will make it harder to ascertain why some states have more or less influence, and why state influence varies by issue even when the recontracting rules and information context hold constant. Fourth, there are many types of power which have nothing to do with being a member of the recontracting collective Principal and which are not unique to states. P-A theory puts Principals in a privileged category because only Principals write, and can rewrite, the contract. We need to know if this privilege is warranted, thus we need to know if being a Principal confers trumping, unique, hierarchical power.

Before I proceed, let me clarify why I am focusing on ICs and on the political leverage of recontracting tools. Because by all accounts courts are relatively independent “agents”, ICs are not the ideal case to reveal the limits of P-A theory. I focus on delegation to International Courts because ICs are my area of research. But I hope that readers will not reduce this analysis to a claim that P-A theory does not work well for the case of ICs. I believe that the category of Trustees is larger than ICs. Also, the arguments about how international political factors undermine the usability of Principal control tools potentially have implications for delegation to international Agents as well as Trustees. While my focus on recontracting is admittedly a narrow operationalization of P-A theory, I believe the contract is the heart of P-A theory. One can always add enough things in to explain a dependent variable, for example one could model into the state-IC relationship that ICs have “reputational” concerns and concerns about non-compliance. But now we are not talking about states as Principals, or focusing on the fact that Principals have delegated powers to the Agent in the form of contract that the Principal (and only the Principal) can alter. In my view, at the point add-ons unrelated to the contract are doing the heaving work, we are giving up the analytical relevance of the “contract” as the essential link providing Principal power and thus giving up the real value added of P-A theory. Instead we are back the a world of states and IOs, where Principal power is perhaps not even a central source of state influence. In other words, we are back in the world of international relations in general.

II. ARE ICS “AGENTS” OR “TRUSTEES”?

One reason P-A theory is intuitively compelling is that it hardly seems rational to delegate meaningful power to highly independent actors who do not see themselves as one’s Agent. P-A theory can explain such delegation by drawing on the traditional rationalist argument that delegation to highly independent actors like constitutional courts and

central banks enhances the credibility of the Principal in the eyes of a third party (the public, or investors). The real question is what to do with this insight.

Giandomenico Majone builds on this insight to distinguish credibility-enhancing delegation reasons from transaction cost delegation reasons, arguing that the logics of contract design and Agent selection vary for each type of delegation. Traditional Agents, Majone argues, are selected for transaction cost reasons--because their expertise or knowledge is more detailed than that of the Principal, or simply to harness their manpower on behalf of the Principal. If the goal is simply to reduce transaction costs, it makes sense to select Agents based on whether they will be faithful and to design the delegation contract to ensure the Agent stays faithful. For credibility-enhancing delegation, however, the best strategy may be to delegate to an Agent whose values visibly and systematically differ from that of the Principal. Also, to make the delegation commitment credible, states may need to make these Agents highly independent and refrain from meddling because “an Agent bound to follow the directions of the delegating politician could not possibly enhance the commitment” (Majone 2001: 110).[2]

Majone’s argument has been critiqued as creating a dichotomy that in practice does not exist (Pollack 2003: 31-2). States delegate to courts for a great variety of reasons—some of which are transaction cost reducing (filling in contracts, monitoring, etc.), some of which are efforts to shift the blame for hard decisions onto other actors (Simmons 2001), and some of which involve enhancing the credibility of the state through self-binding (Moravcsik 1997).[3] For ICs in specific, states delegate very different types of tasks—constitutional review, administrative review, criminal enforcement, and dispute resolution—not all of which are about enhancing the credibility of the state or require agent independence (Alter 2004). Pollack is right that the category of “delegation to enhance the credibility of a commitment” does not exist in isolation of other reasons to delegate.

But Majone is right that the reason the “Agents” are selected matters. There are many mechanisms to help resolve disputes- some legal, some quasi legal, and some purely political. States delegate *to courts* because they want what such institutions deliver—decision-making based on pre-existing rules, with a perception that the process is neutral and not political. Delegation provides advantages precisely because states cannot control courts as a Principal controls an Agent. Any actor created through delegation that is 1) selected because of their personal and/or professional reputation; 2) given authority to make meaningful decisions according to the Trustee’s best judgment or the Trustee’s professional criteria; and 3) is making these decisions on behalf of a benefici-

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[2] A similar argument about the need for Trustee autonomy can be found in Tallberg, 2003 p.11.

[3] For more on the reasons why states delegate to international courts, see: (Alter 2003)

ary (i.e. the general public, cancer patients, refugees as a category, etc.) fits this “Trustee” situation, regardless of whether the delegation is also reducing transaction costs for the Principal.

Majone’s argument mainly endogenizes the variation P-A theory relies on, explaining why Principals would design some Agents to be quite independent, and thus why certain Agents are in fact more independent. But the difference between Agents and Trustees goes beyond contract design. Trustees bring into the delegation equation their own source of legitimacy (the reputation which led to their selection in the first place) (Franck 1990), an authority to make independent decisions based on independent professional criteria, and a third-party beneficiary whom both the Trustee and the Principal want to convince. The existence of the third party beneficiary means that the Principal’s position is no longer hierarchically supreme, rather both the Principal and the Trustee are trying to convince the third party audience that the behavior is legitimate. Indeed the Trustee really cannot only care about what the Principal wants; to cater to the author of the contract rather than the beneficiary of the trust would create a legitimacy problem for the Trustee. The Principal also cannot only care about controlling the Trustee. The Trustee may in fact be deemed not just more efficient but actually a superior decision-maker, and 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 recontracting.

Trustees who consistently and demonstrably exceed their mandate, compromising the interests of the beneficiary, can be dismissed. But the threshold for dismissal is high—single decisions that the Principal might have made differently are insufficient grounds for dismissal or reversal because Trustees are not political appointees who serve at the pleasure or on behalf of the Principal, rather they are supposed to make their own decisions according to best judgment or professional criteria. That said Trustees that repeatedly upset powerful actors can provoke a larger backlash which itself is likely counter to the interests of the Trustee or the beneficiary.

P-A theory seeks to explain Agent behavior through its focus on the politics emanating from the Principal’s fairly blunt sticks. Sticks generally work less well against actors who believe they are acting within their mandate, who are guided by strong professional norms, and who believe that their reputation or honor is on the line. The mandate, norms, and reputation of the Trustee also protect the Trustee from Principal recontracting as few want to sanction a Trustee for doing exactly what it was asked to do. The mandate, norms and reputation also constrain the Trustee from pursuing personal objectives because the Trustee’s reputation protects them only so long as other members of the Principal and the beneficiary see the Trustee as acting appropriately and within its delegated zone of discretion. Thus we enter the world where “persuasion” and “legiti-

macy of behavior” matters more than “tools of control,” where Trustees and Principals will need to justify their behavior to the beneficiary so that conflicts of interests will be cloaked in the language of contrasting interpretations rather than threats or sanctions, and where “logics of appropriateness” matter perhaps more than “logics of consequences”(March and Olsen 1999)—at least in terms of the consequences that fall on the Trustee personally. Table 1 below highlights the different politics lead to and emanating from delegation to Trustees compared to delegation to Agents.

Table 1: *Differences between Agents and Trustees*

	Agent	**Trustee**
Core Reason to delegate	**Transaction cost reasons:** Efficiency gains of having the Agent oversee the delegated task.	**Credibility reasons:** To capture the benefits of the Trustee’s decision-making reputation and/or to remove the taint of “politics” as shaping Trustee decision-making.
Selection Criteria	Principal will look for an Agent with similar values and views, an Agent who is trustworthy in addition to competent.	Trustee selected because of their personal reputation, and/or because the norms of decision-making in the Trustee’s profession are perceived as “good” by the wider public.
Expectations in Delegation	Agents are expected to do the Principal’s bidding, interpreting their mandate as the Principal would have wanted.	Trustees are supposed to make decisions on behalf of a beneficiary, using the guidelines in their mandate interpreted according to Trustee’s professional norms and best judgment.
Politics	Manipulating material incentives of Agents (e.g. Principal tools of control) *may* be central to shaping Agent behavior. But it is also possible that the politics of persuasion, legitimacy, and influencing shared understandings may matter equally or more than material incentives in shaping P-A relations.	Politics of persuasion, legitimacy, and influencing shared understandings will be central to influencing P-T relations. Principal’s sanctioning “control tools” will be of little use when Trustees care more about their professional reputation than about being fired or punished.

Not all IOs are Trustees, but the Trustee category applies beyond courts, so long as the actor has been selected because of its reputation and delegated independent decision-making power to act on behalf of a beneficiary. Seen through the lens of Trusteeship, a constitutional court is not the Agent of the legislature but the Trustee of the constitution on behalf of the demos. The World Health Organization (WHO) is the Trustee of the

public health on behalf of the people of the world. Central bankers are Trustees of the monetary supply, mandated to adopt anti-inflationary policies to assure firms that their investments and profits will not be eroded by inflation. Scientific agencies are the Trustees of science, advocating the particular policies that scientific research supports. The High Commissioner of Refugees is the guardian of refugees, doing what is best for the weak and dispossessed, not for powerful governments. Delegation to Trustees should not be seen as implying Principals are delegating to selfless saints or for altruistic reasons. Delegation is still serving the purposes of the Principal, and politics and political calculations still shape Trustee decision-making, sometimes running roughshod over the interests of the beneficiary.

III. CAN STATES MITIGATE IC SLIPPAGE USING THEIR RECONTRACTING PRINCIPAL TOOLS OF CONTROL?

Slippage is behavior that is unintended and undesired by the Principal, even if it is within the zone of discretion granted to the Trustee. For courts, the concern is not really that judges will shirk (i.e. refuse to decide cases or reject legal methods of decision-making). Shirking is fairly easily rectified and extremely rare because it is seldom in the interest of the court either. The real concern is that in politically contested cases ICs can award victories that litigants could not win in negotiations and essentially rewrite through interpretation the law that binds states. Reversing such slippage can be politically impossible because legislators can lack the political support to relegislate (Marks 1989: ; McCubbins, Noll, and Weingast 1989). Even if a state-litigant chooses to ignore the 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, and by labeling a state’s extant policy “illegal” popular support for the policy can be undermined. It this ability of ICs to shift the meaning of international law and with it the political context that makes delegation to ICs so fundamentally transformative of international relations. One must 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.

The previous section suggested theoretical reasons why Trustees might not be focused on anticipating Principal’s preferences in specific cases—because Trustees are asked to make decisions based on their best judgment and professional norms, because Trustees care more about their reputation than what the Principal wants, and because only decisions that clearly violate the interests of the beneficiary and exceed the mandate of the Trustee make the Trustee politically vulnerable to Principal retaliation. But even if these arguments are true, nothing stops the collective Principal from using its power to appoint, power of the purse or power to relegislate as tools to shape how the international judiciary exercises its decision-making authority. This section explains

why the traditional P-A control tools are not more politically effective in creating a controllable international judiciary, or in reversing IC slippage. While the analysis is focused on ICs in specific, the *reason* why Principal control tools are often ineffective has more to do with international politics than anything else. Even as Trustees ICs should be more subject to political influence compared to their domestic counterparts because of the short term appointments of IC judges. Yet because states fear that IOs and international law will either come under control of the powerful, or be taken over by the weak, states have opted for decision-rules that hamper their ability as members of the collective Principal to wield the tools that remain within their prerogative to use. The difficulty in using remaining tools of control combined with IC judges seeing themselves as “trustees of international law” rather than agent’s of powerful international states, make judge-trustees far less likely than traditional IO-agents to focus on what the powerful states want. Powerful states know this only too well—which is why the US often refuses to sign justiciable international agreements, avoids ICs with “compulsory jurisdiction,” and why George Bush has gone to such lengths to challenge the ICC.

Even if judges are “trustees” exercising their delegated power, the appointments process can be a tool to “stack a court” in a certain direction, and the re-appointment or promotions process can be a source of ongoing political leverage over judges. A number of scholars have observed that appointments to international courts are hotly contested, and highly political (Steinberg 2004: ; Gordon et al. 1989), which is not the same thing as saying that International Courts are stacked in a certain direction. Because weak states do not want the strong states to be able to stack an international court, there is no controllable international political process to shape who gets nominated international judicial positions--- rather each state is given 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. 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. And even when there is a choice to be made and powerful states have virtual vetoes over who is selected, the level of screening of IC judicial candidates is inherently limited especially when the nominee is a law professor, domestic judge, or domestic civil servant whose decision-making is fairly hard to assess (Steinberg 2004: 264). The ways ICs decide cases also blunts the effectiveness of the appointment process as a tool of control. While IC decisions are made based on a majority vote, many ICs prefer to or are required to issue their rulings unanimously, making monitoring of individual judges fairly hard. Also, most 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.[4] 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 can be rotated out to create geographic representation on the court, or to allow a different party or domestic political institution to have a turn appointing the 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[5] 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 questionable. Even Richard Steinberg who believes that the US and Europe veto AB judges who they suspect will be activist does not argue that the concerns about reappointment lead judges to follow the wishes of the US or Europe (Steinberg 2004: 264).

States can also exercise their influence by changing the delegation contract itself-cutting the court’s budget, changing the court’s mandate or jurisdiction, or legislatively overturning IC interpretations. With the exception of criminal courts, cutting an IC budget is not an effective 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. The IC’s budget covers translation, and support staff. To cut an IC’s budget would mainly slow down the legal process and the multi-lingual 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 different in that the office of the prosecutor shares the international criminal court’s budget. By manipulating the prosecutor’s budget and helping or hindering the prosecutor, states can influence which crimes are investiga-

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[4] This is not true for the panel stage for the WTO where states can select panelists. 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.)

[5] There are twenty-one 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),

ted and whether or not the prosecutor can assemble a winnable court case. While the budget probably does not effect how the IC ultimately rules, it likely does effect which cases are brought to the court in the first place.

Changing the mandate of an IC could potentially be effective, if it were in fact possible. Changing an international treaty requires unanimous support of every state—a threshold that is very hard to reach. Sanctioning an IC also requires building a political coalition of states. Countries committed to the norm of judicial independence as a matter of principle resist efforts to punish an IC for acting within its zone of discretion. Weaker states hesitate to dilute the autonomy of an IC as they benefit from having an international forum in which power is equalized. And powerful states hesitate to give up their veto right because the weaker states are more numerous.

The ECJ is the only case I am aware of where states attempted to change the ECJ's jurisdiction and authority because (according to a British representative) the ECJ was creating "significant unforeseen consequences for member states [that] have been disproportionate in their effect and have created severe practical problems"(Tallberg 2003: 119). This view seemed to have support in Germany, where German Chancellor Helmut Kohl publicly accused the ECJ of activism, noting "we have an example of something that was not wanted from the beginning. This should be discussed so that the necessary measures can be taken." (Tallberg 2003: 118). Specific sanctioning proposals were offered, though the actual proposals were relatively tame. British Euro-skeptics had publicly leaked that the government wanted to "clip the court's wings" and would propose a political veto of the ECJ be created. The idea, however, never left the UK home office because it would have been flatly rejected by other states.[6] Instead Britain suggested that governments create time or state liability limits for EU law, an appeals process, limitations on retrospective effects, and the right to accelerate the legal process. None of these proposals came even close to passing. Jonas Tallberg notes that "The majority of the members in the reflection group were not prepared to back the UK proposals… no single proposal ever gathered the support of a majority, never mind the unanimity required for treaty revision."(Tallberg 2003: 120)[7] The EU may be somewhat exceptional because it is composed of liberal states committed to judicial independence and supranationalism (Rubenfeld 2003), and therefore perhaps unusually respectful of

[6] "Government to demand curb on European Court." By Kevin Brown, *Financial Times*, 2 February 1995, p.9). In interviews in the British Foreign and Commonwealth Office officials knew of the idea, but never seriously considered it because it would never pass (10 November 1995, London).

[7] This case is discussed in much more detail by Tallberg. See also Alter, 2001 (Chapter 5) and Alter 1998.

judicial independence.[8] While I am aware of countries that have withdrawn from IC jurisdiction to protest IC rulings and IC independence (Helfer 2002), I am unaware of any example of states collectively revoking or circumscribing the jurisdiction of an IC. It is in practice more common to find an IC's jurisdiction extended than the inverse.

Cases of relegislation to reverse an IC ruling, while not unheard of, are also surprisingly rare. Indeed, in the EU, where in some cases only a qualified majority is needed to relegislate, there are only four known examples of legislation intentionally added to counteract an ECJ decision, examples that are not per se "sanctions" in light of undue activism.[9] There are few examples of relegislation because states tend to disagree about which policy is best, and thus are unable to unite behind an alternative interpretation. For example, we find that unified 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 US and Europe are happy with *amicus* briefs being allowed. US anger at the ICJ's Nicaragua ruling (discussed below) led to the withdrawal of the US from the ICJ's compulsory jurisdiction, but no change in international law regarding the use of force. And even though many European countries were unhappy about the costs of the ECJ's *Barber* ruling equalizing the retirement ages of men and women, states were only able to limit the ruling's retrospective effects, so the decision itself was not reversed. 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

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[8] A few ICs have political mechanisms to reverse IC judgments. WTO panel rulings and AB decisions can be rejected on unanimous vote of the Dispute Settlement Body, and ICC decisions can be set aside by an assembly (Rome Statute Article 119). The voting rule to use these mechanisms remains very high so that the more numerous developing countries cannot unseat rulings or decisions that powerful countries want. In practice these mechanisms have never been used, and they are considered to be largely ineffective.

[9] The Barber protocol is discussed in this paragraph. The ECJ's *Grogan* ruling challenging Irish policies that limit people from traveling to Britain to get an abortion was not reversed in law or in fact, rather 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. 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. And two declarations were added to the organization of German, Austrian, and Luxembourg public credit unions to counteract an ECJ ruling regarding competition law. These cases are discussed briefly in (Chalmers 2004: 15, notes 55-56)

statutes and roles (Pierson 2004: ; Thelen 2004). It is significant that the legal principals stay on the books because they may well be used in the future as authoritative sources of precedent.

It is not impossible that Principal tools of control can work, yet the way states have organized international institutions—requiring diverse membership within IO bureaucracies, allowing national nomination of international appointments, and requiring unanimity to legislate anew—makes it hard for Principal control tools to be used effectively. We do not see states improve their “tools of control” not because the tools work or Principals are happy with the status quo, but rather because potential solutions have greater downsides than the benefit of potentially being able to use the control tools to mitigate IC slippage. A requirement that all national nominations to international courts be collectively made would set a precedent about external interference in an area of national choice and national representation that few would want. While one could imagine monitoring mechanisms for judicial appointees—like selecting only people with international reputations that can be scrutinized—any requirement would limit what is already a very limited pool of people with fluency in the language of deliberation, competence in international law, and the time and desire to serve. Finally, states tend to disagree amongst themselves as to what is and is not “slippage” and about how to remedy such slippage. These reasons are behind Richard Steinberg’s assessment that even though concern about judicial law-making has been raised seventy times by representatives of fifty-five WTO member states in the last ten years (p. 256), and a number of political reforms have been offered, these reforms “are untenable politically” and unlikely to be adopted (Steinberg 2004: 273-4).

Majone’s argument was that Trustees are purposely designed to be independent. Certainly the difficulty in dismissing judges mid-term 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 veto rights to facilitate relegislation, and the unwillingness of states to subject IC decisions to a veto by some version of qualified majority, are artifacts of a deep normative support for judicial independence combined with international power politics.

IV. TESTING WHETHER CONTRACTING THREATS INFLUENCE IC BEHAVIOR

If not contracting concerns, what is shaping IC decision-making? ICs seek to build their reputation as non-political legal decision-makers while endeavoring compliance with the law. The way judges build their reputation is by striving to ensure their decisions are seen as procedurally fair, unbiased with respect to the parties to the suit, and supportable with legal reasoning (Gibson and Caldeira 1995: , 1992). Meanwhile especially international judges are concerned about “endeavoring compliance” with international

law. In domestic legal systems states back up court rulings with enforcement mechanisms, and exit from the law and the political system is costly, thus judges need not worry too much about endeavoring compliance with the law. In the international realm, enforcement mechanisms for international law are partial at best, and exit through non-compliance is always a live option. The goal of ICs is neither to punish states for having broken international law[10] nor to elicit compliance with legal rulings at any cost. The larger aim of international law and international legal mechanisms is to encourage and prod states to respect their international legal commitments. If a state chooses not to comply with the legal ruling, it is not necessarily a stain on the court's reputation or authority.[11] But since the larger goal is to facilitate future compliance with the law, ICs are often willing to work with governments towards the goal of eventual compliance.

The goals of building a court's reputation through legal fidelity and endeavoring compliance can be in tension with each other. The art of judging is to balance these two objectives, and the correct balance of the two is something that judges, politicians and pundits will often disagree about. Indeed most of legal politics is oriented around negotiating and influencing this balancing act. Governments, NGOs and legal scholars try to convince judges and the public that certain interpretations of the law will be preferable on normative, legal, or political grounds. Governments, as parties to the suit, and third parties able to participate in international legal proceedings, try to shape how the law is understood, and influence how international legal rulings are interpreted, playing to the incentives and reputation of the IC itself. And states pull on the desire of ICs to endeavor compliance, trying to persuade judges that certain interpretations would be politically impossible or normatively illegitimate in their country.

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[10] With the exception of international criminal law, most international legal systems do not retrospectively punish states for violating the law. For example, the WTO allows retaliation only for continued violation of WTO, not to compensate for past violation. The European Court of Human Rights authorizes compensation for litigant that wins their case, but no punitive damages or compensation for other victims of the illegal behavior. With the narrow exception of non-implementation of an EC directive in a timely fashion, ECJ decisions only carry sanctions when member state continue to defy an ECJ ruling.

[11] Some P-A scholars have incorporated non-compliance into their framework by arguing that noncompliance is a stain on the court's reputation and authority, and thus a punishment ICs seek to avoid. I disagree. Most non-compliance (compensated or otherwise) is politically invisible and does not harm the IC's authority one way or another. Rampant non-compliance undermines the authority of the whole legal order, but most observers conclude that the law or political system itself is the problem, not the court, and they blame political leaders or non-complying actors. Courts may even 'choose' non-compliance, issuing rulings that they know will be ignored because they prefer to prioritize the legal principle and their own reputation for legal decision-making.

Three aspects of this interpretive politics are worth underscoring. P-A theory expects Principals to be in a hierarchically privileged position compared to any other actor because of their unique power to recontract. But in the legitimacy politics of interpreting the law, judges are in a privileged position (at least once a case is in court) because they ultimately decide the case and there is a heavy presumption that their decision is legally authoritative. Second—states may have more resources than non-state actors in these interpretive politics (non-state actors may be excluded from arguing in court, and governments may be better able to shape media coverage than are non-state actors). But being a member of the collective Principal does not in itself lead to unique influence let alone political control over the legitimacy politics of persuasion or over how the legal ruling will be understood by the so-called “international community.”[12] Third—the venue and deliberative style in which interpretive politics takes place is very different than the negotiating table dominated by the Principal. Courtroom politics take place in an environment highly constrained by law and legal procedure, where judges have a privileged position because they get to ask the questions, decide what is and is not relevant, and determine the outcome. The post-ruling legitimacy politics take place in the public arena where the audience is the Trustee’s beneficiary, not the Principals themselves, and where states are joined by other non-state actors in trying to influence the larger public debate.

The next three cases suggest the validity of this alternative argument but mainly substantiate the claim that ICs can slip without engendering reversal or sanction, and this slippage can be politically meaningful, shaping the behavior of states and international politics more generally. The first case-- the WTO “unforeseen developments” case—represents slippage that shifted WTO rules for safeguard protections, changed US policies, and altered the political context in which reforms to the Safeguard Agreement will be negotiated. The second case—the ECJ’s rulings regarding gender discrimination in the military—shows slippage over time where incremental developments over twenty years contributed to the ECJ entering into a sensitive domain of national authority with relatively little controversy and significant transformative effects. The third case--the ICJ and the US mining of the harbors of Nicaragua—shows slippage that directly contradicts the expectations of P-A theory because the IC ruled against a super-power

[12] Indeed Ian Johnstone has shown how the UN Secretary General uses its legal authority and bully pulpit to influence state behaviour, Jonas Tallberg and Susanne Schmit have shown how the European Commission can use the European legal system to pressure states, and Kathryn Sikkink has shown how non-state actors have drawn on international norms to build political pressure from below, forcing governments to change their practices. (Johnstone 2003), (Tallberg 2003: ; Schmidt 2000) (Sikkink and Lutz 2001: ; Keck and Sikkink 1998: ; Risse, Ropp, and Sikkink 1999).

where it knew it would be sanctioned and the ruling ignored. The ICJ's ruling was ignored in this case, but I still use this example because it supports the "trustee" argument by suggesting that sanctioning concerns are not foremost on the mind of judges deciding hard cases.

Case Study 1: WTO Unforeseen Developments Case

Because many forms of trade protection have been eliminated through the General Agreement on Tariffs and Trade (GATT), and now the World Trade Organization, some countries have turned to anti-dumping and safeguard measures as a tool of protection. Use of these tools is regulated by WTO rules. GATT rules up until the Uruguay round negotiations required a country adopting safeguard measures to compensate those countries hurt by their measures, or face retaliatory sanctions. Adopted in 1994, the new Safeguard Agreement eliminated the right to retaliate or seek compensation for the adoption of safeguard measures so long as the safeguard provisions were to last less than three years (Lawrence and Stankard 2001).[13] A number of countries were unhappy with the Uruguay round agreement regarding both dumping and safeguard measures, believing that the agreements did no go far enough to address abusive use of these tools. But according to Mickey Kantor, the chief negotiator of the US during the Uruguay Round negotiations, the United States threatened to walk out at the last minute "unless our trade laws and philosophical underpinnings were preserved."(Greene 2001: 1)

In 1997 Argentina invoked WTO Safeguard provisions to impose duties on imports of European footwear, an action that was challenged by the EU. In dispute were the conditions under which the safeguard measure can be invoked. Article XIX of GATT 1994 allows "Emergency Action on Imports of Particular Products" if *unforeseen developments* lead to or threaten to lead to "serious injury to domestic producers." But the Agreement on Safeguards has no mention of the requirement that the disruption be "unforeseen." Argentina contended that the injury in itself was "unforeseen." Argentina also argued that an investigation of the negotiating history of the Safeguard provision reveals that negotiators had intentionally not required that injury be "unforeseen." Argentina pointed out that the EU itself seemed to share this understanding of the Safeguard agreement, since it removed from domestic legislation any requirement that the damage be "unforeseen." The panel agreed with Argentina, but the WTO's Appellate Body (AB) did not. In December of 1999, the Appellate Body reversed the panel ruling, arguing that the terms of the WTO agreement must be understood together. In essence the AB created a legal hierarchy among WTO provisions, putting the language of Artic-

[13] To avoid compensation, countries had often negotiated Voluntary Export Agreements, which violate GATT rules. The right to compensation for safeguard provisions was eliminated in hopes that it would end the practice of negotiating voluntary export agreements.

le XIX of GATT over that of other aspects of the GATT agreement, including over the Agreement on Safeguards. The AB ordered that any imposition of safeguard measures subsequent to the GATT 1994 agreement meet the test to show that the damage was unforeseen.[14]

The US had participated as a third party in the footwear dispute, arguing that balancing conflicting language of Article XIX and the safeguard measure was the job of politicians. Any tensions in the terms of the agreement, it argued, should be resolved through diplomatic negotiation (p. 19). The US was especially interested in the issue of "unforeseen developments" because it uses safeguards to protect industries facing significant import pressure. As in Europe, US law did not require the International Trade Commission (ITC) document that "unforeseen developments" were creating of the trade disruption. The ITC merely had to conclude that no other cause was greater than the rise in imports in causing the injury (Lawrence and Stankard 2001). In 1999, just about the time that Argentina's safeguard measures were condemned, the United States implemented safeguard measures for three years against Australian and New Zealand lamb imports. The US claimed that the composition of Australian and New Zealand imports had changed, creating serious damage to US industry. These measures were immediately challenged using the argument that the US had failed to show that the lamb market disruption was "unforeseen."

The WTO panel applied the AB's footwear precedent and determined that the US had failed to justify that the circumstances leading to the disrupted lamb meat market were unforeseen. The US appealed the panel ruling arguing that the panel nullified the difference between the "conditions" for applying a safeguard measure (which were set in the footwear case) and the "circumstances" which must be demonstrated in order to apply a safeguard measure, which is what the panel condemned (p.5-6). At issue was whether or not the panel could question how the relevant United States court conducted its fact finding. The US argued that the ITC report demonstrated that the existence as a matter of fact that "unforeseen developments" merited the application of safeguard provisions. Australia argued that the ITC report did not justify this finding, and thus the report itself was not enough to show a factual condition of "unforeseen developments." The AB sided with Australia, finding that the ITC must demonstrate in its finding that unforeseen developments existed.

Together these two cases are noteworthy in a couple of respects. First, this is a clear case of the AB making law. Terence Stewart, Patrick McDonough and Marta Prado note that the AB "breathed live back into" the concept of "unforeseen developments" which

[14] Argentina – Safeguard Measures On Imports Of Footwear WT/DS121/AB/R Report of the Appellate Body 14 December 1999.

many members had considered a “dead letter” of the 1947 and 1994 GATT agreements (Stewart, McDonough, and Prado 2000: 661)—dead because GATT panels had not read Article XIX as requiring that states show that damages were unforeseen. Even more, the AB added this requirement to the Safeguard Agreement, even though it appears that the requirement that injury be “unforeseen” was intentionally excluded from the Safeguard Agreement. While the collective Principal did not agree to the requirement that states show that damages were unforeseen before they legally impose safeguard position, it is also hard to say that the “Principal” opposed the AB jurisprudence. All we can say is that the AB used its interpretive space to shift the status quo meaning of WTO law in a way that some countries probably prefer but could not win in political negotiations, and this shifting upset some members including the United States. The anger was enough to pressure the United States Trade Representative to articulate a “strategy” to counter “faulty WTO decisions” regarding safeguard provisions (U.S. sets strategy to address 'faulty' WTO decisions 2003).

Second, in requiring the ITC to demonstrate in its ruling that the trade developments were “unforeseen,” the AB’s Lamb Meat ruling seemingly reversed the accepted norm that states should be trusted to have made reasonable factual findings. The extent to which states should be trusted in their factual findings is labeled, in legal terms, the “standard of review.” The issue of the standard of review is in no ways unique to the WTO, and there is no one answer to the question “what should be the standard of review.” John Jackson and Steven Croley show that there was no clear GATT era jurisprudence regarding the “standard of review.” The 1951 Hatter’s fur ruling seemed to grant quite a bit of deference to national governments, requiring a challenger to show that national factual interpretation was “clearly unreasonably great” before the GATT panel would question its validity.[15] The Hatter’s fur precedent was invoked by both Argentina and the United States who argued that the Hatter’s fur precedent implied that damages severe enough to warrant safeguard protection were ipso facto unforeseen. But this deference had contributed to making the “unforeseen development” aspect of GATT law a dead letter, and it was rejected by the AB.

While subsequent GATT panels had sometimes been more willing to require some justification of the domestic fact finding, there was no accepted practice requiring states to demonstrate the validity of their factual findings regarding the source of economic damage to domestic industry. Writing in 1996 Croley and Jackson could only identify

[15] GATT Dispute Settlement Panel, "Hatter's Fur Case", Report On The Withdrawal By The United States Of A Tariff Concession Under Article Xix Of The GATT, 1951, Paras. 8-14, cited in WTO Dispute Procedures, Standard Of Review, And Deference To National Governments (Croley and Jackson 1996: 196)

the “standard of review” issue as something the Appellate Body would need to address, and advise caution:

> panels should be cautious about adopting "activist" postures in the GATT/WTO context. For one thing, the international system and its dispute settlement procedures, in stark contrast to most national systems, depend heavily on voluntary compliance by participating members. Inappropriate panel "activism" could well alienate members, thus threatening the stability of the GATT/WTO dispute settlement procedure itself. Relatedly, panels should recognize that voluntary compliance with panel reports is grounded in the perception that panel decisions are fair, unbiased and rationally articulated (Croley and Jackson 1996: 212)

Let me underscore that their concern was not recontracting but rather the fragility of the dispute settlement procedure itself and the need to show the rationality, impartiality and legal fidelity of the decision while endeavoring compliance with AB rulings.

The United States did respect the Lamb Meat decision. It took the full time allowed under WTO rules to bring its policy into accordance with the Appellate Body ruling, but in November 2001 it removed its safeguard protections, 9 months before they were set to expire (US ends lamb import quotas 2001). Because of domestic pressure, the US had to replace the safeguard protections (which did not require any public expenditure) with a subsidy program that cost 42.7 million dollars (US ends lamb import quotas 2001). Between October 2001 when safeguard protection was still in place, and May 2002 after protection was lifted, lamb imports rose 24%-- New Zealand lamb imports increased 43%, and Australia’s imports 11% (WTO win widens US lamb market 2002). The Lamb Meat case was not the only safeguards case the US lost in front of the WTO. By 2001, the US had lost five out of six cases where US measures were challenged in front of the WTO the US (though not always because of “unforeseen developments) (Lawrence and Stankard 2001).

As mentioned, there is pressure within the US to renegotiate the Safeguard Agreement to allow the US to win more cases (U.S. sets strategy to address 'faulty' WTO decisions 2003: ; Ledet 2003). Whether the US actually will re-open negotiations, let alone succeed in removing the parts of WTO law it dislikes, is yet to be seen. Until recently the US had a defensive position that Safeguard and Anti-Dumping agreements were not open to renegotiation, mainly because developing countries wanted to open negotiations so as to strengthen their ability to use the WTO system to counter abusive imposition of anti-dumping and safeguard practices. If the US tries to renegotiate the Safeguard agreement it would open the agreement up to changes it may not like, and it would face steep opposition from developing countries. To win its fight in the context of what is called the Doha Development Round would take considerable political resources. To hold the status quo line requires almost no resources.

Case 2: The ECJ and Women in Combat-Related Roles

The European Union is primarily about facilitating peaceful cooperation among European countries and building a common market. Yet included in the Treaty of Rome is a stipulation that in this common market there must be equal pay for men and women (Article 119). This social objective came to be part of the Common Market for economic reasons: France was required by its constitution to pay men and women equally, and it did not want other countries to gain a competitive advantage by relying on inexpensive female labor (Hoskins 1996: Chapter 3). In the 1970s, with Social Democratic governments in power in a number of European countries and activist members within the European Commission, a directive extending equal pay to include equal treatment for men and women was adopted. Directives are binding in the end to be achieved, and they allow for national choice in how to achieve the directive's goal. Article 2(2) of the Equal Treatment directive allowed for derogations to the requirement of equal treatment, noting:

> 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.[16]

British and German law explicitly allow derogations to the requirement of equal treatment for the military. 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.

Enter the European Court of Justice. Directives are only binding in the end to be achieved, and there was in European law no legal standing for private litigants to invoke directives in national courts to challenge a national policy. This meant that only the Commission could challenge a Member State decision to exclude a policy area from falling under the Equal Treatment Directive. In 1974 the ECJ ruled in *Van Duyn* that directives can, in certain situations, create direct effects so that private litigants can so-

[16] Council Directive 76/207/EEC of 9 February 1976 on Equal Treatment for Men and omen in Employment. OJ [1976] L 39/40.

metimes draw directly on directives to challenge national laws.[17] The ECJ's *Van Duyn* jurisprudence provoked revolts by the German Federal Tax Court and the French Conseil d'Etat, each of which argued that the ECJ was exceeding its authority and transforming the legal tool of a "directive" into the legal form of a "regulation" (which is directly effective and explicitly binding). Eventually, however, the notion that directives could create direct effect was accepted (Alter 2001: 98-104, 151-157). Also in the late 1970s and 1980s, drawing on cases raised by women's groups seeking to enforce the Article 119 of the Treaty of Rome and the Equal Treatment directive, the European Court of Justice developed an extensive case law on equal pay and equal treatment (Hoskins 1996). Many if not most of these developments were quite unforeseen when the Article 119 and the subsequent directive were adopted, and at times the developments were unwelcome by governments that did not share the equal treatment agendas enshrined in European law (Alter and Vargas 2000). This ECJ case law had become well accepted by the 1990s, to the point that it was no longer controversial.

In 1994 Angela Maria Sirdar was denied a job as a cook in the British Royal Marines, because the Royal Marines did not recruit women except to serve in the Royal Band. Sirdar argued that her exclusion as a cook violated European Law. In the *Sirdar* Case, the ECJ accepted the argument that the Royal Marines can exclude women because they are "special force" within the British Military relying on the military cohesion of its all male membership.[18] The *Sirdar* ruling did not require a change in British policy, but it signaled that the ECJ would be involved in reviewing employment rules within the military—a domain that had previously been seen as remaining within the exclusive prerogatives of member states.

In 1996 Tanja Kreil applied for a job in the German Bundeswehr in weapon electronics maintenance. Like Sirdar, Kreil wanted a combat supportive role, but Kreil's role required working with arms- something expressly prohibited in the German Basic Law. In the suit before the ECJ, the German, Italian and United Kingdom governments all argued that decisions concerning the organization and combat capacity of the armed forces lay outside the scope of Community law (Points 12-13 summarized in the ECJ ruling). The European Court rejected this argument, asserting that "Although it is for the Member States..to take decisions on the organisation of their armed forces, it does not follow that such decisions must fall entirely outside the scope of Community law." Instead the ECJ required states to justify any derogation from the general requirement of equal treatment for men and women. Whereas the ECJ accepted the derogation justification in the *Sirdar* case*,* in the *Kreil* case it found that the blanket exclusion of women

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[17] Van Duyn v. Home Office, ECJ case 41/74, [1974] ECR 1337.

[18] Sirdar v. Army Board, Case C-273/97, 1999 E.C.R. I-7403, [1999] 3 C.M.L.R. 559 (1999)

from many roles in the German military violated the European Communities equal treatment directive.[19]

The equal treatment substance of the ruling was not novel, but its application to the realm of a state's military was a big step. Still, the decision was not wholly unwelcome. A number of actors in Germany had been advocating for years that women should be allowed to play greater roles in the Bundeswehr. In the 1970s, notwithstanding the European Community's Equal Treatment directive, opposition from women's groups, peace movements and the military itself limited reformers from expanding the role for women beyond serving in the medical services and the band (Liebert 2002: 13).[20] But by the late 1990s German soldiers were already serving alongside women servicewomen from NATO countries, contributing to shifts in soldier's attitudes. Moreover, the German Bundeswehr was under significant stress because German troops were starting to be deployed in international missions. Since German conscripts may not be sent out of Germany, the German military's volunteer army needed to expand. The peace movement had been a chief opponent of a greater role for women, mainly because without an army of sufficient size, deployment would not be an option (Liebert 2002: 13). But the ability of Germany's Red-Green coalition to actually deploy the German military in NATO and UN out-of-area operations signaled a defeat of the peace movement and a change in German attitudes.

While the time for a change was ripe, German policy would not have changed without the ECJ decision—at least not when it changed. Writing in *Die Zeit* the week of the ECJ decision, Constanze Stelzenmüller argued that it was not a question of "if" Germany would change its constitution--- since it *must* in light of the ECJ ruling—but rather *how* Germany would change its constitution (Stelzenmüller 2000). Gerhard Kuemmel concurs with the idea that the ECJ decision was the catalyst: "recent steps to open the Bundeswehr to women do not stem from genuinely political initiatives as one may have thought, but from a court ruling that required to political sphere to take some action."(Kuemmel 2003: 4) Changing the German Constitution did not, in the end, prove that difficult, in large part because the German government embraced the idea expanding the role of women in the military. Only one member of the Bundestag spoke against the ECJ decision as "a clear transgression" because the domain of the military did not fall under European Union authority (Liebert 2002: 16). Within ten months of

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[19] Tanja Kreil v. Bundesrepublik Deutschland, Case C-285/98, 2000 E.C.R. I-69.

[20] A 1973 initiative of the Social Democratic party in Germany had led to the partial opening to women in 1975—allowing women to serve in the medical services. This extension both helped the Social Democrats trumpet "The Year of the Woman" and relieve a shortage of medical service staff in the Bundeswehr. In 1991 the right to serve in the band was extended to women (Kuemmel 2003: 3).

the ruling Germany had changed its constitution, and initiated an extensive transformation of the German military, allowing in women and working to shift social attitudes of soldiers so as to dismantle resistance to women in the military(Kuemmel 2003). The number of women in the military went from 4173 in 1999 to 7734 in 2002, with 2752 women serving in armed troops (Liebert 2002: 9-10), and we are only beginning to understand the larger impact this change will bring (Kuemmel 2003).

That Germany seemingly welcomed the ECJ decision as a helpful catalyst for needed changes does not undermine the point that the ECJ decision was well beyond what states intended when Article 119 and the Equal Treaty directive were written, and beyond what they would have themselves chosen. European countries could always, on their own, decide to integrate women into the military. Together the *Sirdar* and *Kreil* rulings forced governments to defend their choices in an area of national prerogative and made the ECJ the final judge on whether or not restrictions on women in the military are legal (Harries-Jenkins 2002: 764). The ECJ showed skillful judicial diplomacy in its jurisdictional expansion. To rule against the Royal Marines would have been politically explosive. Moreover, by first allowing the derogation to equal treatment for the Royal Marines, the ECJ could reassure states that it was not going to be a radical force of change. The Kreil ruling was followed three years later by the ECJ's Dory ruling where the ECJ qualified even more the extent to which it would interfere in national choices regarding the organization of the military. Dory argued that in light of the ECJ's Kreil ruling, it was inconsistent to exempt women from compulsory military service. The ECJ reasserted its Kreil precedent that the area of national security is not immune from ECJ oversight, but found state decisions about the choices of military organization and conscription remain national decisions(Szyszczak 2003).[21] I would argue that this decision was not a reversal of Kreil, a response to political pressure, or a sign of concerns about re-contracting. Rather all judges recognize that certain types of decisions are for political bodies to make. Given how intentional member states have been about keeping the ECJ out of the sphere of state security,[22] and the issue of equal treatment separate from issues related to the military, and given the symbolism involved in any EU decision that touches on national defenses, it is highly doubtful that, if asked, European states would have agreed to let the ECJ be involved at all with decision regarding the organization of domestic security.

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[21] Case C-186/01 Alexander Dory v Federal Republic of Germany, judgment of 11 March 2003

[22] The ECJ was excluded from any role in the Common Foreign and Security Policy, and its role in reviewing issues regarding asylum and immigration is circumscribed so as to allow states to maintain final authority where issues of state security are concerned.

Case Study 3: The ICJ, the US, and the Mining of Nicaragua's harbors

In January 1984, the government of Nicaragua decided to sue the United States in front of the ICJ for supporting a rebel movement aimed at overthrowing the government of Nicaragua. Having learned of the impending suit US Secretary of State George Shultz wrote a letter informing the UN that the US was withdrawing from the compulsory jurisdiction of the ICJ, but only with respect to Central American countries (Reichler 2001: 31). The US then sought a summary dismissal of the suit. If there was ever any doubt of how the Reagan administration would respond, George Shultz's letter and the US's attempt to have the suit dismissed for lack of ICJ competence made it clear that the Reagan administration would reject any ICJ ruling on the merits of the case.

On May 10, 1984 the ICJ unanimously rejected the US appeal to summarily dismiss the suit and ordered the US to cease and desist in its mining of the Nicaraguan harbors.[23] In the subsequent jurisdiction phase of the Nicaragua case the US government raised again the arguments that Nicaragua had never formally submitted its ratification of the Statute of the Permanent Court of International Justice (PCIJ), thus the US was not bound to participate in proceedings.[24] It claimed that the ICJ lacked jurisdiction to decide on issues regarding the use of force, and specifically whether or not US action was "self defense." The US argument was that it was involved in "collective self-defense" aiding the countries in the region, including El Salvador, and that it had withdrawn from the ICJ's compulsory jurisdiction for cases from Central America. The ICJ rejected all of these arguments.[25] By rejecting as legally significant that Nicaragua had technically not submitted its ratification properly, the ICJ also willingly passed on an exit opportunity, clearly choosing to enter the political fray in a case where it knew that the Reagan administration would be deeply unhappy.

Accepting jurisdiction in the case was risky. The US withdrawal from the ICJ's compulsory jurisdiction was easy to reject—the US was bound to give six months advanced notification before withdrawing. But it was clear that any ICJ ruling would be ignored and contested. Moreover, at the jurisdiction phase of the suit, El Salvador wanted to submit a testament that it believed it was under attack, and wanted help from the US. The ICJ refused to consider the submission, arguing that such a submission was only relevant at the merits phase of the suit.[26] The American judge on the ICJ, Judge Stephen Schwebel, loudly dissented both on the decision not to accept El Salvador's

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[23] ICJ Order Of 10 May 1984 – Request For The Indication Of Provisional Measures.

[24] Nicaragua had wired confirmation of its ratification of the statute, but the formal document had somehow never arrived in Geneva.)

[25] ICJ Judgment Of 26 November 1984 - Jurisdiction Of The Court And Admissibility Of The Application

[26] ICJ Order Of 4 October 1984 – Declaration Of Intervention Of The Republic Of El Salvador.

statement and on the decision to accept jurisdiction in the case. While he was alone in his dissent, Schwebel's long and passionately argued dissenting opinions provided the fodder American opponents used when they asserted the illegitimacy of the ICJ's subsequent decision and defended the legitimacy of the US's subsequent behavior.

The US responded to the ICJ's jurisdictional ruling by notifying the UN that it was withdrawing from the ICJ's compulsory jurisdiction (for all countries, not just Central American countries) and by refusing to participate in the merits phase of the proceedings. This meant that El Salvador's declaration of collective self-defense was never made, and that the US never defended itself—two more factors that critics seized on when they condemned the rest of the proceedings. The Reagan Administration then ignored the proceedings, and the ICJ ruling. All of these behaviors were predictable and telecast in advance. Still, the ICJ went on to roundly and completely condemn the US in its ruling on the merits—it did not sidestep key issues or offer much that the Reagan administration could feel vindicated by.[27]

The question for this study is why the ICJ was not seemingly dissuaded by the certain US anger and non-compliance with its ruling. In fact none of the judges hearing the case were sanctioned and each member of the Nicaraguan defense (most of whom were American or European) went on to what those involved see as celebrated careers (Reichler 2001: 27). US conservatives still disdain the Nicaragua decision, but one finds the Nicaragua decision excerpted in nearly any casebook on international law, with no commentary questioning its legal validity. Not only have the legal principles of the rulings *not* been reversed, but the core legal principles advanced in the decision—the right of the ICJ to evaluate the legality of the use of force, the illegality of supporting insurgent armed conflicts and of mining foreign harbors—appear to have been largely accepted as legally valid even if they are still not uniformly respected (Gray 2000).

While the ICJ was not reversed, there were real costs to this ruling in terms of exit and the legitimacy of the ICJ in the eyes of some Americans. Whereas before, the Reagan administration had withdrawn from the ICJ's jurisdiction in cases from Central America, now the United States withdrew completely from the ICJ's compulsory jurisdiction—never again to return. A more lasting effect is that US conservative opposition to international adjudication deepened and hardened. The decision also made the US (and arguably other countries) more reluctant to use the ICJ. But as Richard Falk notes, they became more reluctant precisely because the ICJ was not under US control:

> the reason the United States did not want the case to go before the Court was in large measure because any self-respecting impartial lawyer could predict the outcome. I

[27] ICJ Judgment Of 27 June 1986 - Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America)- Merits

> would argue that any kind of “impartially” selected tribunal of jurists, that was not chosen from any of the contending countries or their close allies, would have come to the same decision as the World Court did. Anyone in the Legal Adviser’s Office would have been able to anticipate that. Therefore impartiality is very intimidating. The United States would have been much more likely to go to the World Court if it could have been confident of its partiality (Gordon et al. 1989: 517).

The larger unanswerable question is whether the ICJ would be in a better place today if it had taken the cautious approach of finding it lacked jurisdiction, perhaps just for technical reasons like the failure of Nicaragua to formally submit its ratification documents. Many people saw the mining of the Nicaraguan harbors and the aiding of the Contras as clear violations of international law. These people would have seen the ICJ’s refusal to hear the case as evidence of the ICJ caving to US pressure—which may have been a greater stain on the ICJ’s reputation than a decision that was ignored by the Reagan Administration and which angered American conservatives. Paul Reichler—the lawyer who recruited the legal team and organized Nicaragua’s legal strategy—sees the ICJ’s calculation this way:

While the reaction in most quarters was hostile to the White House for its rejection of the Court, some U.S. academics criticized Nicaragua and its lawyers, especially [Nicaragua’s American lawyer Abe Chayes], for bringing a case that caused the U.S. walkout. They argued that Nicaragua's suit undermined respect for the Court by demonstrating its powerlessness--for surely a superpower like the United States would continue pursuing a foreign policy it considered vital to its national interests even if the Court ordered it to stop, and the Court had no means of enforcing its order…Does not all this weaken the Court and undermine its legitimacy--at least as to pronouncements involving peace and security? Is not the whole edifice of international adjudication, already fragile, put at risk?

> These are penetrating and difficult questions. Although the Court could not refer to them in its decision on jurisdiction, I have little doubt that they weighed as heavily on the judges. But in addressing these questions, we should not forget that the legitimacy of the Court and the prospects for the rule of law in international affairs are at stake whether the Court decides or refuses to decide the case before it.... And in the circumstances, it is only in The Hague that Nicaragua can face the United States on equal terms. It is the only forum where the outcome is not predetermined by the disparities of military and economic power between the parties. In the countries of the world that are possessed of neither the purse nor the sword, it would be a severe blow to the legitimacy and moral authority of the Court as well as to the claims for international law, if the door to that forum were closed. (Reichler 2001: 38)

Taking the Three Cases Together

The three cases involve ICs taking on powerful countries, making rulings that states did not intend and would not have collectively made. The *Kreil* and *Nicaragua* rulings have neither led to sanctions against the judges nor a legislative reversal. We do not yet know the end of the story regarding the Safeguard Agreement, but there is good reason to believe that the AB will neither be sanctioned nor reversed because developing countries will fight tooth and nail against any reversion to the status quo ante of a weaker Safeguard Agreement. One might have expected the ICJ to be the more politically influenced of three legal bodies because it is by design the least independent of the three ICs (the ICJ lacks compulsory jurisdiction, and has no enforcement mechanism for its rulings) (Helfer 2003: ; Posner and Yoo 2004), yet it too made an independent and bold ruling despite the certainty of a negative reaction by the Reagan administration.

All three rulings changed the political context in which the specific issues were discussed. The WTO ruling and the ECJ ruling led to very different policies being adopted by the countries that lost the cases, and any Doha Round negotiations regarding the Safeguard Agreement will take place with the understanding that current WTO law requires states show that damages were “unforeseen.” The ICJ arguably shifted the domestic status quo of the Nicaragua policy ever so slightly. The lawyer who put together Nicaragua’s legal team identified the objective of the legal suit as shifting the few votes in the US Congress needed to defeat Contra-Aid. Fifteen days after the ICJ’s first ruling against US efforts to summarily dismiss the suit, Congress for the first time voted against Contra-aid (Reichler, 2001: 34). The ruling also became another tool for use by actors opposing the Reagan Administration’s Nicaragua policy. These effects are modest to be sure-- the Reagan administration mostly ignored the ICJ and its policy imploded for reasons unrelated to the ICJ decision.[28]

One may contest that these are but three cases. True, but I would caution that significant and empirically extensive multi-method efforts to study of P-A predictions with respect to the ECJ have not yielded better evidence for claims that sanctioning concerns or the power of the litigant states shape ECJ decision-making. The ECJ may be a somewhat exceptional IC, but it is the only case where scholars have sought to test P-A predictions and the reasons P-A theory has not fared well has less to do with the distinc-

[28] When Sandinistas downed a contra airplane with a CIA Agent aboard, it became clear that the Reagan administration had violated the Senate’s Boland Amendment of 1982 prohibiting the federal government from providing military support "for the purpose of overthrowing the Government of Nicaragua.” The Iran-Contra scandal followed, damaging the reputation for the entire Contra-aid policy. The ICJ had ordered the US to pay reparations to Nicaragua. These were never paid, rather after the Arias Peace plan was initiated, and a new president of Nicaragua elected, the demand for reparations was dropped to pave the way for aid to the new government.

tiveness of the ECJ than it does with the methodological challenges of substantiating the expectations of P-A theory.[29]

One may also contest that real issue is a concern about compliance, and compliance was not politically problematic for the *Kreil* case and the ICJ was in fact ignored. Compliance with IC decisions and international law could certainly bear improvement, which is likely true for federal rules and domestic supreme courts as well.[30] But an IC that prioritized compliance over other objectives would likely end up sacrificing the goals of the agreement as well as its own legal legitimacy and political authority. Compliance is not the same thing as effectiveness, and as many have argued the real issue is the ability of the international agreements to induce states to change their behavior to achieve the agreement's objectives (Raustiala 2000). The real effectiveness test for ICs is not compliance with its rulings but the counterfactual of what would the out-

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[29] Bernadette Kilroy set out to test the P-A expectation that the ECJ responded to sanctioning threats, coding ECJ decisions to see if they were biased in favor of the more powerful states (Kilroy 1999: , 1995). Kilroy herself found that the ECJ responded more to the threat of non-compliance than the threat that states might sanction the ECJ. Considering Kilroy's analysis, Pollack finds 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 2003: 200). Pollack's own analysis of ECJ case law regarding gender equality came to a similar conclusion. When testing the claim that the ECJ retreated in its jurisprudence in response to the Barber Protocol, Pollack finds scant evidence… "Indeed 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." (p. 200).

[30] Compliance with IC rulings are actually quite high especially when one considers that it is often the hardest of cases that end up in front of an IC (the easier cases having settling out of court): 65 to 75% of ICJ decisions (Paulson 2004), 62% of GATT rulings (Busch and Reinhardt 2000: 471) and 88% of WTO rulings (up until 2000) have led to full or partial compliance (Posner and Yoo 2004: 41). Compliance rates with European law violations pursued by the Commission and with decisions of the European Court of Human Rights appear to be even higher (Zorn and Van Winkle 2001: ; Borzel 2001). Compliance rates with the Inter-American Court of Human Rights are far less impressive (Posner and Yoo 2004: 41), but it is also true that the Inter-American court has very few cases—a fact which may be related to the low compliance levels. As Abraham and Antonia Chayes argue, the goal of full compliance is likely unrealistic in any political context (Chayes and Chayes 1993). In fact we do not actually know whether compliance rates for ICs are vastly worse than compliance rates for national supreme court decisions. The one study that has compared compliance across three levels (the national, the EU, and the WTO found that national compliance was no better, and in some respects worse, at the national compared to the supra-national and international levels (Zürn and Joerges 2005).

come have been absent the IC? Absent the WTO legal system the US would have continued its safeguards on lamb and steel, and likely continued to use its Section 301 tool (Reinhardt 2000). Absent the ECJ, Germany would likely not yet have allowed women into so many roles in the military, and European countries would likely not have equalized their pension schemes. Absent the ICJ Belgium would not have cancelled its indictment of the Congo's foreign minister Abdulaye Yerodia Ndombasi and many boundary disputes would still be on-going (Paulson 2004). This sample of findings likely understates the effectiveness of ICs because focusing only on a handful of key rulings overlooks many other rulings, and the many the cases settled in the shadow of a potential court ruling.[31]

The larger question of this paper is whether a focus on the contract nature of delegation helps us understand the relationship between ICs and states. My answer is that emphasizing that ICs rely on revocable delegated authority obscures more than it illuminates. This does not mean that ICs are unaccountable free agents; state recontracting is not the only tool of accountability (Keohane and Grant Forthcoming 2005). Considering the many rulings of ICs, slippage is actually a relatively rare phenomenon. This is because factors other than contracting concerns are at play. ICs are greatly constrained by the challenge of endeavoring compliance in a context where ICs have weak to no enforcement capabilities, and national governments have significant autonomy to decide whether or not they keep international covenants. Courts that seek to be progressive forces of change must also worry about inciting backlash by political leaders or domestic populations. These factors, more than a fear of adverse recontracting, keep highly independent IO Trustees accountable to popular sentiment and the sentiments of states.

V. CONCLUSIONS: MOVING BEYOND P-A ASSUMPTIONS

This analysis argues what many people already accept—that courts are independent legal actors. Yet this analysis still keeps states as powerful actors. So one may ask why all the fuss, and where does the point of disagreement lie? Even though we know that courts are perhaps atypical "agents," many people still find it hard to believe that *international* courts could act independently let alone exert any influence over powerful state

[31] Authors who study how the shadow of the law affects bargaining have found that negotiation often reaches an outcome similar to what a court would have decided because both parties know the case can go to court should negotiations fail (Mnookin and Kornhauser 1979). For the international realm it seems that settlement in the shadow of the law is actually more likely before a case goes to court. Lawrence Busch and Eric Reinhardt find that cases settled before a GATT or WTO panel are established are far more likely to lead to plaintiff satisfaction (Busch and Reinhardt 2000), implying that the legal system has greater effects than one can observe by focusing only on cases litigated.

actors. This article explains IC independence and IC influence over states. The disagreement with P-A theory is the special hierarchical power P-A theory expects states to have by virtue of their unique contracting power. This analysis suggests that being a member of the Principal confers relatively little power of its own in delegation to Trustees, and especially in the international context. States remain powerful actors, but neither hierarchically above nor uniquely able to participate in the legitimacy politics created by and surrounding ICs.

My questioning of P-A theory is aimed at three objectives.

1) Blunting the ubiquitous rational expectations retort

As a statement of methodology it may be true that “the fact that a court’s decisions are neither overturned nor the subject of considerable controversy does not demonstrate that [the court] exercises real discretion” because “a court that can take decisions that will provoke an adverse political reaction may prevent those reactions by avoiding such decisions” (Garrett and Weingast 1993: 202). Yet just because ICs *could* be self-censoring to avoid adverse recontracting does not mean that ICs *are* likely self-censoring.

There are numerous examples of IC decisions that go beyond what states intended when they wrote the law, that would never have been chosen by states themselves, that disappoint powerful actors, and that lead to political change that otherwise would not have occurred. In a subset of these cases—like the *Kreil* case-- states are plausibly content to lose the case, and thereby have international judicial pressure to overcome domestic political barriers to change. In other cases, it requires logic that only Jerry Seinfeld could believe to explain away an example of ICJ activism—like the unforeseen damages cases. When theories are unfalsifiable, as are P-A theories and rational expectations claims, the best one can do is say that there is good reason to shift the default assumption. This analysis provides many good reasons to shift from P-A theory’s default assumption that states as Principals are implicitly orchestrating IC behavior, and thus to subject rational expectations arguments to far stricter scrutiny.

First, as Section II argued the Trustee nature of ICs creates the ability for ICs to act autonomously. A Trustee’s reputational authority helps it weather adverse Principal reactions, and even provides the Trustee with an incentive *not* to bend to Principal preferences. Second, for delegation to ICs in specific, Principal control tools actually seem to be quite difficult to wield. ICs are hard to stack; IC judges are unlikely to be personally sanctioned for their rulings; IC decisions are almost never reversed; and IC mandates are pretty much never scaled back. In fact ICs *should* rationally anticipate no adverse recontracting even if they disappoint powerful countries like the US, or the vast

majority of countries as the WTO's Appellate Body did when it allowed amicus brief submissions.[32]

States obviously have decisive influence in writing the law. We should expect the law to reflect the interests of the most powerful states (Steinberg 2002), and for ICs to enforce the law, thus we should expect a naturally high congruence between IC decisions enforcing the law and the intentions of the Principal. While we need not reflexively reject that states are influencing IC decision-making, as a matter of empirical inference we should assume that evidence of state unhappiness with legal rulings is sincere and meaningful, that IC decisions that seem to depart from the clear or previously accepted understandings of the law are likely reflecting IC independence As Terry Moe once said: "A new public agency is literally a new actor on the political scene. It has its own interests, which may diverge from those of its creators, and it typically has resources—expertise, delegated authority—to strike out on its own should the opportunities arise. The political game is different now: there are more players and more interests to be accommodated."(Moe 1990: 121) ICs are key actors changing the international political game. We should focus on understanding how the international political game has changed, rather than the ways in which it is potentially still controlled by states.

2) Provoking P-A theorists to circumscribe the realm in which P-A theory is analytically useful, and thereby improve their theory

This argument is not per se outside of the P-A framework—nothing involving delegation is. When Principals delegate, they always have rational "reasons" for doing so. Furthermore, any "Agent" can be located somewhere on the continuum of constrained to autonomous actors. The question is whether P-A theory provides novel analytical leverage to understand the ongoing Principal-Agent relationship? That extreme behavior can be addressed through the contract does not mean that normal behavior is controlled through the contract—and court law-making as well as rulings that upset the powerful are par for the course in judicial politics. Nor is it per se true or helpful to say that Agents at some level always worry about recontracting, that more autonomous Agents slip more, or that decision rule X leads to relatively greater autonomy than decision rule Y. While P-A theory could be broadened to bring in enough factors to explain IC behavior, or we could map State-IO relations as multiple principal relationships even though it takes collective behavior to change the contract. But we should question how far we want to go to save P-A theory. In my view, the power of P-A theory comes form its parsimonious focus on the contracting nature of the P-A relationship. Circumscribing the

[32] United States--Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R DSR (Dispute Settlement Reports) 1998:VII 2755 (Oct. 12, 1998 adopted, Dispute Settlement Body, Nov. 6, 1998) pps. 53-54 & 76.

universe in which we expect P-A theory to provide useful analytical leverage in assessing a relationship (in this case the relationship between states and IOs) would, in my view, be a good way to strengthen not weaken P-A theory.

P-A Theorists should consider whether there are inherently different types of delegation. Expectations matter. We would expect P-A tools to work well in the context of political appointees because those involved know that the point of the political appointment process is to keep administrative leaders in touch with the desires of political bodies. Delegation to Trustees is an inherently different situation, in large part because those involved intend and expect Trustees to behave differently than traditional Agents. We should expect the insights about the differences between traditional Agents and Trustees to hold even if the information context across institutions does or does not vary, and recontracting decision-rules do or do not vary. And this insight should even hold in delegation to traditional Agents where Agents develop expertise and a reputation that is popular among the receivers of Agent decision-making, widening the circle of those with expectations about what should and should not happen (Carpenter 2001).

International relations scholars should question the applicability of P-A theory to the international realm. Even if you reject that expectations matter, it is still clear that P-A tools are likely to be much harder to use in the international compared to the domestic realm because the international “Principal” must act collectively to sanction or control an Agent, meanwhile states’ penchant for protecting national sovereignty leads to decision-making rules that are often antithetical collective decision-making at the international level. P-A theory also translates less well to the international context because states are not like a junior congressman whose sole source of authority comes from his membership in the collective Principal. States—both strong and weak-- have varied sources of power that are above and beyond what an ordinary member of the domestic collective Principal often has, translating into tools of leverage that have nothing to do with recontracting power and that may not even be discernable by examining traditional sources of actor power (wealth, voting system, coalition politics, military might etc). These points are obvious, yet for those looking to generalize P-A theory to the international realm, these essential differences are easily overlooked.

P-A analyses should pit P-A expectations against alternative explanations: Ultimately the only way to tell if P-A theory is providing insight is to pit P-A expectations against alternative explanations. Only by comparing alternative explanations can we tell if IOs behavior is primarily shaped by states preferences or something else entirely. Studies on P-A theory should actively seek to ascertain where and when state preferences matter more than other contextual factors or other non-state political factors in influencing specific IO behaviors. Scholars who do continue to use P-A analysis to study IOs should be especially careful to consider whether the cooperation context or nature

of the cooperative game (coordination games, cooperation games, prisoner's dilemma, chicken etc)(Oye 1986) is the primary factor shaping IO behavior rather than variation in state preferences or control tools.

3) Switching the Questions we are Asking

The promise of delegation to ICs 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, it will bring a loss of state control that practitioners and political scientists may find uncomfortable. If delegation to ICs is effective in its objectives state power will be undermined, non-state actors will be able to use the law written by states as a political tool of influence, states will at times be thwarted from pursuing their most preferred policy, and international relations will be transformed.

This promise (or perhaps nightmare depending on one's perspective) is often not realized. The reason the promise is not achieved, however, may have less to do with states controlling IC decision-making than with pre- and post-ruling politics that are aimed at keeping cases from ICs, or blunting the impact of unwanted IC rulings. Precisely because states cannot control IC decision-making they have had to employ a series of tactics to avoid unwanted IC rulings. These tactics are observed by legal scholars, but are yet to be investigated systematically by political scientists—yet they are central to state-IC politics and to understanding how international legalization is influencing international politics (Goldstein et al. 2001).

In terms of pre-ruling politics, political scientists should ask: what are the sources of variation in which cases make it to court? How do legal caveats and reservations shape IC decision-making? How is collusion or extra-legal pressure used to keep cases from court? How often do states shift disputes to less legalized forums that are more controllable, and how does the ability to orchestrate this shift shape the politics of international law and international relations? How does the creation of compulsory jurisdiction, and with it the loss of state ability to keep cases from court, change an IC's docket, decision-making, and influence in international relations? How does the ability of private litigants to raise cases in ICs undermine the ability of states to keep cases out of court, and are ICs with private litigant access in fact more independent, and more activist than ICs without private litigant access?[33] In terms of post-ruling politics, scholars should ask: How do states respond to IC rulings that shift the previously understood meaning of international law? How is the legitimacy of international law changed when state consent is no longer the sole basis for international law? How does the ability of ICs to is-

[33] For arguments on this question see: (Keohane, Moravcsik, and Slaughter 2000: ; Helfer and Slaughter 1997: ; Posner and Yoo 2004)

sue independent authoritative interpretations of the law empower non-state actors and weaken state power?

These questions only make sense once we embrace the idea that states are not hierarchically in charge of ICs, and are influenced by independent interpretations of ICs.

To reject P-A analysis is in no way to say that politics does not matter in international judicial decision-making. Merely by enforcing the law ICs serve as the handmaiden of the political interests behind international law. States influence and often control which questions are raised in court. And political factors surely shape which actors tend to win in court, which cases are settled out of court, how judges exercise their judicial discretion, and what happens to legal rulings after they are issued. To question the utility of P-A theory is simply to say that a different sort of politics is at play, a politics where states' monopoly power to recontract matters little, where internationally negotiated compromises can be unseated through legal interpretation, where states can come to find themselves constrained by principles they never agreed to, and where non-state actors have influence and can effectively use international law against states. Once states agree that the meaning of international law can be determined by IC interpretations, they are no longer the "masters of the treaty" or of international politics. Political scientists should we investigate how international politics is in fact transformed as a result.

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