

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

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Abstract

In international relations applications, theorists employing Principal-Agent (P-A) theory have posited that the fact of delegation defines a relationship between states (collective Principals) and international organizations (Agents) where recontracting threats are the predominate way states influence IOs. Developing a category of delegation to international Trustees, I argue that recontracting tools will be both harder to use and less effective at influencing the Trustees. Trustees 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. These three factors account for the different politics between Principals and Trustees, a politics aimed at either keeping issues outside of the domain of the Trustee or at rhetorically engaging the Trustee's authority in an effort to persuade the common "beneficiary" whose loyalty and respect both States and the Trustee seek. In explaining why recontracting threats are not central to Principal-Trustee relations, the analysis bounds the realm in which we might expect P-A theory to apply, and provides a theoretical basis to question the "rational expectations" claim that ICs are tailoring their decisions to reflect the wishes of powerful states and avoid adverse recontracting.

Delegation of interpretive authority to international courts is expanding exponentially. In 1985 there were seven international legal bodies meeting the *Project on International Courts and Tribunal's (PICT)* definition of an international court, meaning a 1) permanent institution, 2) composed of independent judges 3) that adjudicate disputes between two or more entities, one of which is a state or international organization, 4) working on the basis of predetermined rules of procedure and 5) rendering decisions that are binding.¹ Today there are twenty-six international courts that meet this definition and they are increasingly active, having issued sixty-nine percent of their over 15,000 decisions, opinions and rulings since 1990.²

The promise of delegation to International Courts (ICs) is that ICs will create a legal and political space where regular politics and the power disparities in the world do not shape how the law is interpreted

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¹ <http://www.pict-pcti.org/matrix/matrixhome.html>

² Data by the author, published in (Alter 2006: 26). Temporal breakdown that shows rulings since 1990 as part of the overall Court's docket is not yet published (Alter Book manuscript in progress: Chapter 1).

and applied. The idea that ICs can take away state autonomy in interpreting international commitments, and empower actors outside of powerful states, is for many unsettling. A number of scholars have used the ideas of Principal-Agent theory (P-A) to argue that states are actually controlling what merely appear to be independent International Courts. P-A theory focuses on the unique tools of political control that states have by virtue of being part of the “Principal” body that writes, and thus can re-write, the Agent’s “delegation contract.” P-A theory posits that the ability of the Principal to “sanction” an Agent by changing the contract (firing or not reappointing the Agent, rewriting contractual terms to undercut the Agent’s realm of authority, or cutting the Agent’s budget) provides states with significant political leverage that they can use to reign in Agents who go astray. P-A theory expects political control to be incomplete-- some degree of “Agency slack” (unwanted Agent behavior) will be an inherent cost of delegation. The theory also expects courts to be relatively independent Agents compared perhaps to administrative agencies, if only because recontracting is harder to orchestrate with respect to courts compared to administrative agencies. But recontracting tools should nonetheless provide significant influence over IC decision-making. For example, Paul Stephan argues:

Knowing that they can be replaced, the members of the [international] 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)³

Most comparative judicial politics scholars reject out of hand arguments like Stephan’s above—of course judges are not mere agents of the states that create courts. Indeed examples of ambitious and systematic legal construction by international courts are easy to find (Stone Sweet and Brunell 1998; Burley and Mattli 1993; Weiler 1991). But one sentence rejections fail to convince because they do not take Principal-Agent arguments seriously enough. Surely there must be some limit on the autonomy of judges. Surely contracting tools must provide some influence over international judges. Convinced of the rational basis of their theory, proponents of P-A theory place the burden of proof on judicial politics scholars, demanding they show that state Principals are not the actual puppetmasters of ICs (Garrett 1995).

This article provides a theoretical basis to question Principal-Agent theory. Section I shows that while P-A theory appears to generate testable hypotheses, the generalized conjectures of P-A theory are unfalsifiable in practice. Since one can never prove that recontracting politics are not at play, the burden of proof rational choice scholars demand cannot be met. Instead, we need a good reason *not to presume* that recontracting politics are salient. The rest of the article provides such a reason.

Section II argues that delegation to Trustees is inherently different from delegation to Agents, with the result that Principal control tools will be harder to use, less effective, and thus not a salient feature of state-Trustee relations. Principals choose to delegate to Trustees, as opposed to Agents, when the point of delegation is to harness the authority of the Trustee so as to enhance the legitimacy of political decision-making. Trustees are 1) selected because of their personal reputation or professional norms, 2) given independent authority to make decisions according to their best judgment or professional criteria, and 3) empowered to act on behalf of a beneficiary. These three factors explain why the Principal’s recontracting tools will be less politically relevant.

The Trustee argument provides analytical boundaries that help one know when to expect Principal’s sanctioning tools to be politically significant. The name Trustee is not meant to imply that the Trustee is apolitical or immune to state pressure, or that there are no limits on Trustees. Rather, the claim

³ Other scholarship in this vein includes: (Garrett 1995; Garrett, Kelemen, and Schulz 1998; Garrett and Weingast 1993; Vaubel 2006).

is that the nature of a Trustee makes rhetorical and legitimacy politics, as opposed to recontracting politics, the primary axis of political interaction between states and international trustees.

Section III situates International Courts in the category of Trustee-Agents. I focus on two hard cases where ICs clearly acted against the wishes of powerful states, and in the face of clear sanctioning threats. The cases show how ICs respond to state pressure, and how because of their independence ICs play a role in promoting political change (even when a ruling is ignored). International Courts contribute to political change by delegitimizing circumspect arguments used by powerful state actors. IC rulings can shift the political status quo by providing an authoritative (re)interpretation of what the law means, and by providing incentives and resources for actors within and outside of powerful states to pressure governments to change their policy. I supplement the hard cases with additional examples where powerful and weak states engage in legitimacy and rhetorical politics with and through ICs, in an effort to facilitate political change.

International relations scholars are right that states are concerned about IC behaving in ways they did not intend, and do not want. But principal-agent theory misleads in its emphasis on the existence as opposed to the usage of recontracting politics as a means to control IC decision-making. The ultimate goal of this manuscript is to call into question the “rational expectations” assertion that because Principals could sanction international courts, we should presume that courts are controlled agents, self-censoring to avoid a sanction. By providing theoretical reasons to reject the Principal control presumption, the analysis aims to redirect the analytical focus towards examining how ICs interact with states and how states live with the fact that they cannot control ICs—by maneuvering to settle cases outside of court, employing rhetorical politics to influence ICs, using legitimacy politics to respond to unwanted IC rulings, and when all else fails resorting to exit in the form of non-compliance or exit from the legal system altogether.

I: Empirical and Ontological Problems Within Principal-Agent Theory

P-A theory’s main attraction is its parsimony combined with the intuitive sense that delegation only makes sense if it serves that Principal’s interest. Most P-A analyses have as a dependent variable explaining Agent 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. The theory expects the contracting and information contexts to determine the autonomy of the Agent, and by conjecture the likelihood that an Agent will act in ways the Principal does not want.

Figure 1: P-A Theory’s expectations about Agent autonomy

Highly Controlled Agent	Highly Autonomous Agent
a. Highly transparent if Agent is slacking (low levels of uncertainty, low informational advantages for the Agent)	d. Great uncertainty as to whether or not Agent is slacking (high informational advantages for the Agent)
b. Low thresholds required to recontract	e. High thresholds required to recontract
c. No employment protection and/or short term appointments so slacking Agents can be easily replaced	f. High employment protection and long term lengths (i.e. lifetime employment) so P has little political leverage over A

While it makes sense that some Agents would be more autonomous than others, and while P-A theory seems to generate clear predictions, as a bundle the predictions of P-A theory are highly fungible. What if the nature of the delegation contract makes it highly transparent if the Agent is slacking (a) and includes short appointment terms (c), but there are high thresholds needed to recontract (e)? The theory does not prioritize its claims, which allows scholars employing P-A theory to make contradictory claims in support of the theory. For example, proponents of P-A theory have argued that the European Court of Justice (ECJ) is not an autonomous actor because judges need to be reappointed after a fairly short term in office, and because the ECJ fears adverse recontracting (Garrett 1995; Garrett and Weingast 1993; Tsebelis and Garrett 2001; Stephan 2002: 6-7; Vaubel 2006) *and* that the ECJ is a relatively autonomous actor because changing European rules requires unanimous support of states (Garrett, Kelemen, and Schulz 1998; Tallberg 2003, 2002; Pollack 2003).

Resolving which conjectures are right is harder than one might think. Who the “Principal” is should be ascertainable by looking at which actors have authority to change the delegation contract. Yet P-A studies sometimes label the wider public, national governments, national parliaments, or other political bodies as the Principal, shifting the political actors the Agent should be responding to. Also, like all rational choice theory, P-A theory lacks a conception of preferences. Instead, most P-A theorists rely on “revealed preferences” to ascertain what actors want, while at the same time accepting “rational expectations” arguments that assume that Agents automatically self-censor because they can rationally expect sanctions if they act in ways the Principal does not want. The problems associated with revealed preferences are well known. Principals may be divided and unable to act, and Principals may also self censor if sanctioning a wayward Agent will cause more grief than benefit. The “revealed preference” would then be false. The contradictory conjectures and measurement problems mean that for the same Agent, one can generate both expectations for control and independence from P-A theory, and one can find a way to rationalize any Agent action as consistent with Principal preferences.

Since we cannot empirically falsify the expectations of Principal control thesis, we must move to the level of ontology to question the theory. P-A theory assumes that the fact of delegation defines the nature of the relationship between the Principal and the Agent. Michael Tierney, Darren Hawkins David Lake and Daniel Nelson provide a good and clear definition of delegation, one that is revealing of the conceptualization that animates P-A theory:

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. 2006: Manuscript p. 6)

By this definition, the Principal *will have* the power to revoke or change the contract, and thus it will have contracting power over the Agent. Because the Principal constitutes the Agent, and is the only actor with contracting power to appointment, fire, cut the budget, or rewrite the mandate of the Agent, P-A theory suggests that being a Principal confers a unique, privileged and hierarchical source of leverage over the Agent. This shrunken universe, in which there are only Principals and Agents united by a contract, does not allow other actors to matter, or concerns other than recontracting to animate the Agent. Since recontracting is a power source that only the Principal can wield, sanctioning via recontracting becomes emphasized to the exclusion of other sources of power. Especially for international relations, conceiving of state power solely in terms of recontracting power is too limited. At the same time, to include as part of the P-A framework *any* type of state power would lose sight of the key notion that *being a Principal confers power*.

II. Delegation to “Agents” compared to Delegation to “Trustees”

P-A theory is intuitively compelling because it hardly seems rational to delegate meaningful power to highly independent actors who do not see themselves as one’s Agent. Giandomenico Majone explains this puzzle by identifying two different logics of delegation—delegation to capture efficiency gains, and delegation to increase the credibility of the Principal and of political decision-making. Where the goal is primarily to reduce transaction costs, Agents are chosen based on whether they will be faithful and the delegation contract is designed to enhance Principal control over the Agent. In fiduciary delegation, what I am calling delegation to Trustees, the goal is to convince some third party that their interests are being protected. For credibility-enhancing delegation the best strategy is to delegate to an Agent whose values visibly and systematically differ from that of the Principal, to make these Agents highly independent and to refrain from meddling because “an Agent bound to follow the directions of the delegating politician could not possibly enhance the commitment” (Majone 2001: 110). Majone is mainly trying to explain how different reasons to delegate lead to different contract design choices. But the difference between Agents and Trustees goes beyond contract design. The reason certain Agents are chosen, the expectations in delegation, the actual powers given to the Agents, and the Agent’s constituency can all vary so that the simple fact of delegation may not result in the author of the contract having privileged influence over the Agent.

Trustees are actors created through a revocable delegation act where the “Trustee” 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 beneficiary. Each of these factors contributes to a different politics between Principals and Trustees.

1) *Trustees are selected because of their personal and/or professional reputation.* Where traditional “Agents” are chosen *because* they are expected to be faithful to the Principal, “Trustees” are chosen *because* they bring their own source of legitimacy and authority. Michael Barnett and Martha Finnemore identify four types of political authority actors can have. Traditional Agents have *delegated authority*, meaning their power comes from the Principal having authorized the Agent to act within a certain domain, and thus the authority is attached to the office, not the office holder. *Moral authority* comes from embodying and serving a set of shared higher ideals, with the moral status as a defender of these ideals providing a basis of authority. *Rational-legal authority* is an artifact of the decision-making process, when rules are applied in a like fashion across a body of cases by disinterested actors imparting a perception of procedural justice and neutral fairness. *Expert authority* comes from specialized knowledge that is highly respected (Barnett and Finnemore 2004: 22-29). Trustees are selected because they personally, or their profession in general, have moral, rational-legal and/or expert authority. Because Trustee’s reputation is so central to their professional and personal identity and success, Trustees care greatly about maintaining their authority and may even choose a political sanction over an action that would be seen as compromising their identity as a moral, rational-legal or professional decision-maker.

2) *Trustees are given authority to make meaningful decisions according to the Trustee’s best judgment or the Trustee’s professional criteria.* Robert Keohane and Ruth Grant observe that there is an actual difference in what Trustees (e.g. “discretionary Agents”) have been asked to do, and this difference shapes expectations and interpretations regarding whether or not Trustees have slipped:

The trustee model of delegation...presupposes that officials will use discretion. Hence, the implicit standard for abuse of power differs from that implied by the Principal-Agent model. Deviations of the Agent’s actions from the Principal’s desires would not necessarily constitute abuse of power. A representative or officeholder could defend an unpopular exercise of power as legitimate by showing that it both was within the officer’s jurisdiction and actually served the purposes for which he or she was authorized to act (Keohane and Grant, 2005: 32).

3) *Trustees are making their decisions on behalf of a beneficiary.* Trustees have a putative beneficiary that differs from the Principal. 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 their behavior is legitimate. The Trustee cannot put the interests of the Principal over that of the beneficiary without engendering legitimacy problems for itself. The Principal also cannot only care about controlling the Trustee because 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.

These three differences contribute to the different politics between Principals and Trustees. Contractual politics will mainly be present at the moment of appointment. Once appointed, threatening a Trustee with adverse re-contracting (e.g. threatening to fire the Trustee, cut its budget, change its mandate etc.) will be relatively ineffective for a few reasons. First, the threats themselves will not be very credible because members of the Principal will need to convince other Principal members that the Trustee has acted inappropriately, beyond its delegated zone of discretion, before there will be enough support to sanction the Trustee. Second, threatening sanctions tends to be less effective against actors guided by strong professional norms, who believe they are acting within their mandate, and who believe that their reputation or honor is on the line (Johnston 2001). Third, threatening sticks is less likely to win hearts and minds of the beneficiary when actors (judges, the population etc) believe that the decision itself is legitimate (Hurd 1999). Since contracting threats will be relatively ineffective, and moreover because Trustees are more concerned about their reputation and maintaining their authority than they are about Principal sanctions, the main means and modes of state-Trustee contestation will be rhetorical, persuasive, and legitimacy based as opposed to material and threatening.

Table 1 highlights the different politics leading to and emanating from delegation to Trustees compared to delegation to Agents. The argument is that differences in politics stems from the selection criteria of the actor being given delegated authority, suggesting that delegation in transparent information contexts where recontracting rules are identical can none-the-less give rise to very different politics. The two categories sit at ends of a continuum. When the sole authority of the Agent is based on delegated authority, the actor is a pure Agent and the modes of politics are more likely to be focused on recontracting politics. When the Principal selects the "Agent" because of their reputation as a moral, rational-legal or expert decision-maker and gives them discretionary decision-making power to decide for the good of a beneficiary, we have delegation to Trustees. Meanwhile, as Daniel Carpenter Darren Hawkins and Wade Jacoby have shown, the more the Agents develops relationships with their constituency, creating a personal or office-based reputation for moral, expert, or rational-legal authority, the more the Agent move towards the Trustee end of the continuum (Carpenter 2001; Hawkins and Jacoby 2006 (forthcoming)).

Table 1. Agents and Trustees- Two ends of a Continuum in delegation

	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.
Source of Political Authority	<i>Delegated Authority.</i> Authority based on the fact of delegation. Office holder may develop a reputation for <i>rational-legal, expert</i> or <i>moral authority</i> to build their independence.	Authority resides in the office-holder. Trustee brings with them a personal or professional <i>Moral Authority, Rational-Legal Authority</i> and/or <i>Expert Authority</i> .
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	<i>Contracting Politics:</i> Manipulating material incentives of Agents through sanctioning threats (e. g. Principal tools of control). Should the Agent develop expert, rational legal and moral authority, rhetorical and legitimacy politics will become more important.	<i>Rhetorical Politics:</i> Actors offer self-interested interpretations of existing rules, norms, and precedents and appeal to the Trustee’s mandate, role and Trustee member’s philosophies in an effort to persuade. <i>Legitimacy Politics:</i> Those unhappy with Trustee decisions seek to delegitimize the decision in the eyes of the beneficiary by identifying inconsistencies between Trustee mandate and professional norms and Trustee behavior. <i>Contracting Politics:</i> Appointment decisions provide a moment for Principals to exercise contracting control. Once appointed the Trustee contracting politics are likely to be relatively ineffective so long as the Trustee can defend its behavior as within its zone of discretionary authority.

This conceptualization defines the terrain where we might expect the recontracting politics discussed by Principal-Agent theory to be most relevant. In delegation to Agents, the Agent chosen only has delegated authority, and is largely substitutable which contributes to recontracting politics being a politically salient source of Principal power. In delegation to Trustees, the Trustee may be substitutable, but the Trustee has an independent source of authority that provides the Trustee with an element of political protection. This conceptualization widens the types of political power that are salient in political interaction. It also widens the circle of relevant political actors because both the Trustee and the Principal play to a wider audience (the “beneficiary”) as do other actors in the polity.

Where delegation to Agents creates the potential for exploitable slippage, delegation to Trustees actually changes the nature of the political game. The Trustee is another decision-maker whose judgment and authority can be used to challenge the behavior of others, including of members of the Principal. Trustees do not only undermine state power or the interests of the powerful; Trustees can also be a tool of the powerful promoting shared interests and goals. The political game, however, is different because the Trustee is independent. State and non-state actors can bring the Trustee into political interactions, and the mere existence of a Trustee can jar the political process, mobilizing potential challenges and inserting the Trustee's own ideas and views into the political realm.

To call an actor a Trustee is not to say that they are "out there" beyond anyone's control. A Trustee can be influenced by appointment politics, and rhetorical and legitimacy politics. The "nuclear option" of re-contracting (e.g. removing a Trustee or eliminating the office altogether) remains should a Trustee stray beyond what the power elite or body politique can accept.⁴ Nuclear politics are usually not part of regular politics because the nuclear option destroys both the good and the problematic aspects of delegation. For delegation to international actors, the nuclear option requires collective decision-making, which makes it an even harder political option to pursue. A far more likely political response is to circumvent a Trustee whose decisions one does not like; new tasks will be given to other Trustees or Agents and issues will be settled outside of the realm of the Trustee to avoid their interference. The next section explains how International Judicial Trustees are influenced by their political context, and contribute to changing international politics.⁵

III: International Judicial Trustees in International Politics

The Trustee argument places great importance in the reason for which the actor with delegated authority was chosen. Bringing in a third party decision-maker can be helpful when parties are unable to resolve a dispute on their own, but the third party can be anyone-- a government or political appointee, an independent arbiter who serves as a go-between, a mediator who hears all sides and renders a decision, or an independent judge. The first question we should ask in considering IC-Trustees is what do courts deliver which makes delegating authority to them attractive compared to alternatives such as diplomatic negotiation, arbitration, and mediation?

When a political appointee or member of the government resolves a dispute, there will be a presumption that the outcome is influenced by political factors. Arbitrators and mediators are chosen to be independent from the disputants, but the process of dispute resolution is still political by design. The arbitration process takes place in secret (as in diplomatic negotiations); third party appointments and settlements are pretty much one-shot deals for the arbiters and the parties alike; and there is no requirement that settlements cohere with the requirements of law or even bear the scrutiny of others. Legalized dispute resolution is an intentionally chosen alternative to these more political modes of dispute resolution. In delegation to courts, judges are selected because of their qualifications as experts in the law and given multi-year (as opposed to ad hoc) appointments. The legal process allows for settlements along the way and aims at facilitating compromise, thus it can resemble mediation (especially if the parties decide to seal an agreement or stop before the issuing of a legal ruling). But negotiation in the shadow of a court is different than mediation. Each party knows that if the dispute continues to the point of a legal ruling, the ruling will be made by applying pre-existing rules—thus legal negotiation takes place in the shadow of the law (Mnookin and Kornhauser 1979). Legal rulings are subject to review—by higher courts, or through publication and popular scrutiny. The public and legal nature of court rulings is why even civil law judges (where rulings formally speaking apply only the case at hand) seek consistency

⁴ Mark Pollack uses this phrasing, arguing that the "nuclear option" is ineffective because it is so extreme (Pollack 1997).

⁵ Larry Helfer makes a similar argument but where Helfer temporalizes when political pressure is used (pre versus post ruling), the argument here stresses legitimacy and rhetorical tools over appointment and sanctioning tools to influence ICs (Helfer and Slaughter 2005).

across cases (Merryman 1969). Thus judicial decision-making is by intention expert decision-making, undertaken by disinterested actors using a rational-legal method of applying pre-existing rules to resolve disputes.

While judges are meant to be neutral decision-makers in the sense that they do not have a personal stake in the outcome of the case,⁶ as Martin Shapiro shows judges are not actually neutral or purely legal (as opposed to political) actors. Judges are civil servants, applying laws crafted by and for the most powerful actors in society. Because judges choose victors in cases, and inevitably end up making law, judges are also political actors. For Shapiro, the noble lie of judicial neutrality is a necessary fiction inherent to the “logic of triadic dispute resolution,” developed and reinforced by judges and the power elite to convince the “loser” in the case that they had a fair chance at winning, and that the decision was not subjective or “political.” (Shapiro 1981: Chapter 1). Inherent to this noble lie is the notion that the “rule of law” serves the larger social interest. As Alec Stone Sweet argues “legal norms derive much of their force from the perception that they represent an expression of the social interest, one that is fundamentally superior to the expression of interests of one person or just a few people” (Stone 1994: 11).⁷

The Trustee argument opens up the question of what are the modes of political influence? In the domestic realm, the appointment and promotion process is often a potent tool to influence the judiciary, wielded by whoever has dominant control of the executive and legislative branches of government. The international constitutional order established after World War II, however, was tailor made to ensure that any “international” decision requires the political support of multiple states. Thus in contrast to the domestic process where political branches can control the nomination process, in the international realm each country chooses which individuals it nominates for international positions. Selecting from among international judicial nominees is certainly politicized (Steinberg 2004; Gordon et al. 1989); the larger point is that the overall nomination and appointment/reappointment process cannot be controlled by any one state or organized group of states. Sometimes powerful countries can veto nominations at the point that judges are being selected from a pool of potential candidates, but for regional ICs (e.g. the European Court of Justice, Andean Court of Justice, the Inter-American and the European Court of Human Rights) one judge from each member state will be selected and states accept whomever a country nominates. Permanent members of the Security Council get to select their own judge for the ICJ, but the rest of the ICJ’s judges are chosen to provide geographical representation. Often IC judges are not reappointed, but usually it because the political leader in a country changed, or because representation needs to be rotated across constituencies. While there may well be isolated examples where an international judge did not get a job they wanted because of their association with an IC, whether a judge could anticipate these situations, let alone moderate their behavior to avoid the situation, is highly questionable. The probably unintended outcome is that international courts may be even more insulated from appointment politics than their domestic counterparts (Alter 2006: 317-21).

Given that international courts are hard to “stack” or control via appointments, the way to influence international judges is to through appealing to judges’ philosophical leanings regarding how to interpret ambiguity and to the reputational interests of the international court. Like most decision-makers, ICs are not themselves able to implement their rulings. Because judges want compliance, they are often willing to work with litigants towards the goal of eventual voluntary compliance. To be clear, non-compliance is not a “sanction” states threaten in order to influence international judges. All courts seek voluntary compliance, and all judges make compromises towards this end (Shapiro 1981: 5-8). Judges need to balance their objectives of enhancing their authority in the eyes of their key constituency (the legal interpretive community and the population as a whole) while inspiring compliance with their rulings by those who care more about the outcomes than the legal basis of the ruling. Thus the “strategy of judging” involves persuading interpreters of legal decision-making (including fellow judges and the legal

⁶ Professional ethics demand a judge recuse himself from cases where they have a personal connection to the subject matter or any party in the dispute.

⁷ These arguments have a long lineage in the political theory. See: (Tamanaha 2004)

community) of the legal merits of an interpretation while inspiring policy makers and the broader public to comply by convincing them of the merits or the legitimacy of their ruling (Murphy 1964; Epstein and Knight 1998).

The philosophies of how judges should interpret ambiguity and the strategic interests judges have in inspiring compliance shape the realm in which rhetorical and persuasive politics takes place, providing constraints on judicial-decision-making. 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. 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. When litigants lose in their rhetorical efforts to convince the judge, they will themselves play to judges' audience using legitimacy politics, seeking to challenge the sources of judicial authority. They will question the rational legal basis of the decision by trying to portray the ruling as an interpretive outlier, beyond normal legal decision-making techniques. They will impugn the moral authority of judges by questioning whether the judges are truly neutral and expert interpreters of the law. If all else fails, they will ignore the ruling and/or seek to place themselves outside of the authority of the court.

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 rhetorical and 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 rhetorical politics of persuasion or over how the legal ruling will be understood by the so-called “international community.” Third—the venue and deliberative style in which interpretive politics takes place is very different than the negotiating table dominated by state actors. 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 as well as other members of the collective Principal.

The following cases suggest the validity of this alternative mode of analysis by showing the irrelevance of recontracting politics and identifying how rhetorical and legitimacy politics manifest themselves. I purposely selected “hard cases” where it is clear that the IC issued an interpretation that powerful states did not intend and would not want. I selected cases from the WTO and the ICJ because these institutions vary in key features that international lawyers expect to shape the independence and effectiveness of ICs.⁸ The WTO has a dispute resolution mechanism that begins with what is essentially a panel of mediators whose members are appointed by the disputants. Should a disputant be unhappy with a panel ruling, the case can be appealed to a permanent Appellate Body (AB), comprised of seven appointed members rotated over time from the membership of the WTO. The ICJ is the supreme judicial body of the United Nations. Where the WTO system has compulsory jurisdiction (e.g. no consent to litigation is required for the case to proceed), the ICJ's jurisdiction is only compulsory between countries that have signed on to the “optional protocol” that commits them to participate in any suit brought against them.⁹ Europe's supranational courts fit the argument here, but I intentionally avoided a European

⁸ In a debate about IC independence, a consensus emerged that that courts with compulsory jurisdiction are more independent, as are courts with access for non-state actors because states are less able to control which cases make it to ICs. These design features of ICs tend to be static, and thus do not provide leverage for repeated recontracting threats. For a discussion of this debate, see: (Alter 2006: 331-34)

⁹ The ICJ can also be designated within treaties as the final interpreter of international agreements, and given compulsory jurisdiction for specific agreements. This is why the United States could withdraw twice from the ICJ's compulsory jurisdiction—once with respect to the ICJ's general jurisdiction, and then more recently with respect to

example because some scholars perceive European courts as a category of their own, and Europeans as more tolerant international law and independent judges. The end of this section compares the cases, and expands the analysis beyond these two 'hard' examples.

Case Study 1: WTO Unforeseen Developments Case

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." The issue at stake in this case study was who decides which of the two possible interpretations of WTO rules prevails when applying Safeguards.

In a 1997 case, the EU challenged the legality of an Argentinean safeguard on footwear. Argentina defended its safeguard by arguing that it was not required to show that the damage was unforeseen, and at any rate the injury in itself was "unforeseen." Appealing to WTO judges inclined to protect the "original intent" of WTO agreements, Argentina argued 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 existing domestic legislation any requirement that the damage be "unforeseen." The panel agreed with Argentina, but the Appellate Body (AB) 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 Article XIX of GATT over that of other aspects of the GATT agreement, including over the Agreement on Safeguards, to create a requirement that users of safeguards prove that the import damage was unforeseen.¹⁰

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 to be resolved through diplomatic negotiation.¹¹ 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. Australia immediately challenged the measures arguing 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 to the AB arguing that its International Trade Commission (ITC), which had issued a report authorizing safeguard measures, had established the fact that damages were a result of "unforeseen developments." But the AB agreed with Australia that the ITC failed to demonstrate that the import damage was unforeseen.¹²

These cases are examples of the AB "filling in the law," or as US Senate Finance Committee Chairman Max Baucus implied, "overstepping their bounds by imposing obligations on the United States that do not exist in WTO rules."¹³ The Lamb-Meat ruling also established a new and higher "standard of review," requiring states to substantiate their factual findings.

Criticism of the WTO system was at a zenith right at time the AB issued its Lamb-Meat ruling. The US was experiencing a "losing streak," where it had been subject to more complaints than any other

its jurisdiction over issues related to the Vienna Convention on Consular Affairs.

¹⁰ Argentina – Safeguard Measures On Imports Of Footwear WT/DS121/AB/R Report of the Appellate Body 14 December 1999.

¹¹ Ibid p. 19.

¹² WTO Appellate Body Report: United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia AB-2001-1, WT/DS177,178/AB/R (01-2194), adopted by Dispute Settlement Body, 16 May 2001.

¹³ U. S. sets strategy to address "faulty" WTO decisions. 2003. Saigon Times Daily, January 2, 2003.

country, and had lost about seventy percent of its cases (Greene 2001). In addition to losing legal suits, the US was finding that advantages it had won in negotiations were being undermined. Jenna Greene quotes an interview with US negotiator Mickey Kantor who, when negotiating the WTO safeguard agreements, had threatened to walk out “unless our trade laws and their philosophical underpinnings were preserved.” In 2001 Mickey Kantor argued that the dispute settlement process was being used as an alternative avenue of attack: “Clearly, they are trying to do by indirection what they couldn’t do by direction,” Kantor argued (Greene 2001: 1).

In response to WTO rulings, American critics of the WTO system published articles about how the WTO dispute settlement body is “anti-democratic” with AB judges exceeding their authority (Barfield 2001, 2002). Alan Wolff of the New American Foundation stated his concerns this way: “substitution of the outcomes preferred by judges, replacing positions taken by the decision-makers in the Executive Branch, is not acceptable. At the international level it is intolerable, and a threat to the continued legitimacy of the WTO system itself.” (Wolff 2000) The rhetoric was fierce, and anger at the ruling was enough to pressure the United States Trade Representative to articulate a “strategy” to counter what it called “faulty WTO decisions” regarding safeguard provisions.¹⁴ Meanwhile, the United States respected the Lamb Meat decision, removing its safeguard protections 9 months before they were set to expire at a cost of 42.7 million dollars.¹⁵ The U.S. has continued to comply with WTO rulings, removing in December 2003 safeguard measures on U.S. steel in response to a WTO ruling and European threats to retaliate against products from U.S. states where President George W. Bush was vying for reelection votes (Jung and Kang 2004).

Case Study 2: The ICJ, the US, and the Mining of Nicaragua’s harbors

In January 1984, the government of Nicaragua sued the United States in front of the ICJ for supporting a rebel movement aimed at overthrowing its government. Secretary of State George Shultz immediately informed the UN that the US was withdrawing from the compulsory jurisdiction of the ICJ with respect to Central American countries (Reichler 2001: 31) and sought to have the suit dismissed for lack of ICJ competence, signaling the US would aggressively challenge any ICJ intervention. Yet in May 1984, the ICJ unanimously (meaning even with the vote of the US judge) rejected the US summary dismissal request and ordered the US to cease and desist in its mining of the Nicaraguan harbors.¹⁶ In the jurisdiction phase, the US government repeated its argument that Nicaragua had never formally submitted its ratification of the Statute of the Permanent Court of International Justice (PCIJ),¹⁷ that the US had withdrawn from the ICJ’s compulsory jurisdiction for cases from Central America, and 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 argued that it was involved in “collective self-defense” aiding the countries in the region, including El Salvador, and tried to have testimony from El Salvador admitted to the proceedings. The ICJ refused to accept El Salvador’s testimony, finding that the “collective self-defense” argument could only be made at the merits phase.¹⁸ By rejecting as legally significant that Nicaragua had technically not submitted its ratification properly, the ICJ willingly passed on an exit opportunity, choosing to enter the political fray in a case where it knew that the Reagan administration would be deeply unhappy. The American judge on the ICJ, Judge Stephen Schwebel, loudly dissented both on the decision to accept jurisdiction and the decision not to accept El Salvador’s statement until the merits phase. While alone in his dissent, Schwebel’s two hundred and sixty one pages (Hight 1987: 2)

¹⁴ Ibid.

¹⁵ US ends lamb import quotas. 2001. Agra Europe, November 16, 2001, 7.

¹⁶ ICJ Order Of 10 May 1984 – Request For The Indication Of Provisional Measures.

¹⁷ Nicaragua had wired confirmation of its ratification of the statute, but the formal document had somehow never arrived in Geneva.

¹⁸ ICJ Judgment Of 26 November 1984 - Jurisdiction Of The Court And Admissibility Of The Application

of passionately argued text provided fodder American opponents could use to bolster their criticisms of the ICJ's subsequent decision.

The US responded by notifying the UN that it was withdrawing from the ICJ's general compulsory jurisdiction (for all countries, not just Central American countries) and by boycotting the merits phase of the proceedings. The US and El Salvador's arguments in support of the collective self-defense were never made, contributing to legal and procedural gymnastics critics exploited in questioning the legal legitimacy of the ruling (Franck 1987; Bork 1989/90: 40-41; Bork 2003; D'Amato 1987; Moore 1987). 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.¹⁹ This ruling led to retaliation; the United States withdrew from the ICJ's general compulsory jurisdiction—never again to return. The question for this study is why the ICJ was not seemingly dissuaded by the certain US anger and non-compliance with its ruling. 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?

... 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 Cases Together

These are “hard cases” in that ICs were taking on powerful countries, interpreting the law in ways that the Principal did not intend and would not have collectively agreed to. Important for this analysis is that there was no formal sanction of either court—judges were not replaced, the court's mandates were not rewritten, the law in question was not rewritten, nor were budgets cut. Whether the ICJ suffered from its Nicaragua ruling is in the eye of the beholder. Eric Posner argues that the ICJ was explicitly sanctioned (by the US withdrawal from its compulsory jurisdiction) and implicitly sanctioned by declining usage (Posner 2004). Posner's argument focuses on the “relative” decline in the ICJ's docket; the ICJ's docket did not grow in tandem with the expansion of states in the international system meanwhile great power use of the ICJ decreased over time. While we cannot know what the ICJ's case load would have been absent the Nicaragua ruling, the ICJ's case load continues to grow even at a time of proliferating legal venues that can siphon off demand for ICJ rulings.²⁰ Compliance with ICJ decisions also appears largely

¹⁹ ICJ Judgment Of 27 June 1986 - Military And Paramilitary Activities In And Against Nicaragua (Nicaragua V. United States Of America)- Merits

²⁰ Not counting the ten cases dismissed by the ICJ during the Yugoslavian war, forty-four ICJ rulings in contentious cases were issued in the twenty years since the Nicaragua ruling (an average of 2.2 cases per year), compared to fifty

constant over time, and certainly not declining (Schulte 2004; Paulson 2004). Posner's claim for declining ICJ legitimacy is based on great power usage of the ICJ. Meanwhile Constance Schulte sees growing ICJ legitimacy as measured by the rise in non-great power use (Schulte 2004: 2 and 404). We can also see that the ICJ was not cowed by the US response to its Nicaragua ruling. When Iran turned to the ICJ to condemn the US's 1987 attacks on its oil platform, the ICJ accepted jurisdiction in the case although the bases of jurisdiction was perhaps more questionable than it had been in the Nicaragua case.²¹

One may contest that the real issue is whether or not states comply with IC rulings, and the ICJ was in fact ignored in the Nicaragua case. Compliance with IC decisions and international law could certainly bear improvement, though it is not clear that compliance with international rulings is much worse than compliance with federal rules or domestic supreme court rulings.²² But the real effectiveness test for ICs is not compliance but the counterfactual of what the outcome would have been absent the IC. In these very hard cases, the rulings influenced politics and policy. The WTO ruling led to a change in US and Argentinean use of safeguards in the cases at hand. Moreover, 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." For the ICJ case, the Nicaragua team was trying to undermine the legitimacy of Reagan's policy by turning against the US the same arguments it had used in its 1980 ICJ case against Iran (Reichler 2001: 23-4). Their efforts worked, and even the ICJ's critics acknowledge that the ruling had costs. Robert Bork argues: "Even before the Court's decision, Carlos Arguello, Nicaragua's ambassador to the Netherlands...announced that a decision against the United States would be a serious political and moral blow to them.' And so it was." (Bork 1989/90: 7) More concretely, Congress was deeply divided on Contra-Aid, and supporters of the suit hoped an ICJ ruling would shift the votes a few key politicians. The strategy arguably worked; 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).

My focus on hard cases led me to select cases where ICs decided against the powerful United States. But the point is not that ICs upset powerful states. The US wins many of its cases brought to international courts. Indeed during the same time period as the ICJ's Nicaragua ruling, the Reagan administration asked for and embraced an ICJ ruling in the Gulf of Maine demarcation case because letting the ICJ decide the boundary dispute allowed the US and Canadian federal governments to distance themselves from a decision that was bound to make fishermen working in the border area unhappy.²³ Despite acrimonious ICJ cases which Iran and the United States protested (and largely ignored), Iran and the United States cooperated with a specially created claims tribunal that resolved disputes over the

one rulings in the thirty-eight years before the Nicaragua ruling (an average of 1.3 rulings per year).

²¹ The Nicaragua case involved provisions of the UN Charter where the ICJ is the highest interpretive body. For the Oil Platform case, the ICJ based its jurisdiction claim on a friendship, commerce and navigation treaty that existed between the Shah's Iran and the US (Bekker 2003).

²² 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; Börzel 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. 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 (Zorn and Joerges 2005).

²³ Case concerning delimitation of the maritime boundary in the Gulf of Maine Area, International Court of Justice, Judgment of 12 October 1984

frozen Iranian assets. These other cases highlight how powerful and weak actors alike appeal to ICs to enhance the credibility of a decision, even if they do not always follow international legal decisions.

There are also many less difficult cases, where states would not have agreed in advance to expansions of international legal authority over certain domains of law, yet they were not bitterly opposed to the international judicial rulings that were made.²⁴ For example, the European Court of Justice expanded its authority to consider equal treatment of men and women in the military, even though organization of national defense is outside of the European Union's jurisdiction and even though applicable Equal Treatment directive explicitly allows for derogations like excluding women from military roles.²⁵ While Germany and Britain would never have assented to ECJ authority over military matters, they did not contest the ECJ's assertion of authority to review their military's gender policies.²⁶ Indeed the German government actually changed its constitution to comply with the ECJ's *Kriegl* ruling, allowing women in combat support positions. The Social Democratic German government arguably used the *Kriegl* ruling as political cover, to enact a change that its coalition Green party had long opposed because allowing women in the military increases the possibility that German soldiers can be stationed in combat contexts (Liebert 2002).

In the hard and less hard cases discussed here, legal rulings were part of a larger strategy where judges in essence worked with sympathetic actors within states to help promote political change (Harlow and Rawlings 1992). Often governments were not particularly unhappy with slippage—indeed in some cases judicial decision-making facilitated a desired change as in the *Kriegl* case discussed above. Where political actors were unhappy, they sought to impugn the authority of the court rather than to impose sanctions, as in the WTO's and ICJ's cases discussed above.

This discussion has admittedly covered only a handful of cases. Hard cases can show the limitations of an explanation (in this case that sanctioning concerns drive IC decision-making), but they cannot show it in a general way nor can they establish the merits of an alternative explanation. There are a few larger N studies that have sought to test how appointment and power politics affect IC decision-making (Kilroy 1999, 1995; Posner and De Figueiredo 2004; Posner 2004; Voeten 2005). These studies fail to show that sanctioning concerns influence judicial decision-making.²⁷ With the exception of Erik Voeten's study on split decision-making in the European Court of Human Rights, the findings of the large N studies have been persuasively questioned to the point that it is hard to claim that case studies are less

²⁴ Judicial politics literature focusing on the European context is replete with such examples (Alter and Meunier-Aitsahalia 1994; Alter and Vargas 2000; Conant 2002; Stone Sweet 2004; Cichowski 2004; Green Cowles, Caporaso, and Risse-Kappen 2001; Tallberg 2003). Within the area of human rights, there is also extensive literature on how non-governmental actors use international law (including sometimes international courts) as vehicles of political change (Sikkink and Lutz 2001; Risse, Ropp, and Sikkink 1999).

²⁵ Article 2 (2) says the directive “does not apply to occupational activities for which by reason of their nature of the context in which they are carried out, the sex of the worker constitutes a determining factor.” (Council Directive 76/207/EEC of 9 February 1976 on Equal Treatment for Men and women in Employment OJ [1976] L 39/40)

²⁶ *Sirdar v. Army Board*, Case C-273/97, 1999 E.C.R. I-7403, [1999] 3 C.M.L.R. 559 (1999). *Tanja Kreil v. Bundesrepublik Deutschland*, Case C-285/98, 2000 E.C.R. I-69.

²⁷ Bernadette Kilroy actually finds that non-compliance concerns matter more than the power of the states in the case. Eric Posner and Michael De Figueiredo find judicial bias, but not due to sanctioning concerns of judges. The best and most comprehensive of these studies finds very little support for the claim that appointment politics influence legal outcomes. Eric Voeten notes that most European Court of Human Rights rulings had unanimous judicial support, suggesting that the law in question was fairly clear and determinative. Where there was sufficient legal ambiguity to generate a split decision (800 of the 5010 ECHR judgments sample, thus 16% of ECHR cases), there was less than a two percent chance that judicial bias or selection effects could shape the legal outcome. It is also interesting to note that Voeten found no correlation between whether ECHR judges were appointed by Left of Right national governments and how judges voted in split decisions. Instead, the largest predictive factor of whether or not judges were “activist” in their split-decision votes was whether the country appointing the judge was also a member of the European Union.

reliable than the larger N studies that focus on explaining international judicial decision-making.²⁸ Case studies have the added benefit of allowing one to tease out more fully the various political forces at play. These cases show how ICs interact with powerful actors. ICs rely on legal techniques to provide authority for their rulings, and know that anger in one case will not lead to sustained political boycotts (which is not to say there are no costs to angering powerful states). Even where ICs lack sufficient authority to induce respect for their rulings, they influence the political process by providing a focal tool to organize political coalitions and a legitimacy boost to actors trying to challenge arguably illegal state policy. A conclusion suggested by these cases is that any quantitative study of international judicial decision-making must equally test for how rhetorical, legitimacy and legal concerns shape IC decision-making, in addition to how sanctioning or power concerns may matter.

V. Conclusion: Moving Beyond P-A Presumptions

The main disagreement with P-A theory is over its assumption that states have a special hierarchical power by virtue of their unique contracting power. This assumption puts the focus of state-IC relations on recontracting powers—appointment mechanisms and sanctioning tools—to the exclusion of other sources of power and of actors other than states and ICs. The analysis offered here suggests that being a member of the Principal confers relatively little power of its own in delegation to Trustees because Trustees have been given discretionary authority, because Trustees care more about their reputation than Principal sanctioning, and because both states and ICs are seeking to convince a larger beneficiary (domestic publics) of the legitimacy of their actions. In challenging the epistemology of P-A theory, and providing a theoretical explanation for Trustee independence, this article challenges rational expectations arguments that seek to first require one show ICs are acting independent of state wishes before any claim of IC influence can stick.

To reject P-A analysis is not to say that politics does not matter in international judicial decision-making. Merely by enforcing the law ICs serve as the handmaidens of the political interests behind international law—powerful states. States as litigants influence which questions are raised in court. And political factors such as domestic politics within a country, legal muscle in the case and compliance concerns surely influence 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.

The thrust of this argument is that the presumption should be in favor of IC independence rather than Principal control. Giving up the idea that states are the hidden puppet-masters of ICs allows us to instead focus how international politics is being transformed by the existence of an alternative venue of

²⁸ Mark Pollack criticizes Kilroy's work for failing to control for other, equally plausible explanations—such as the argument that the ECJ decides the case purely on the basis of law. Pollack also challenges the claim that the ECJ changed its behavior after the “sanction” of the Barber Protocol (Pollack 2003: 200). Eric Posner and Miguel De Figueiredo multiply their “observations” by coding each judicial vote as a single observation. But they are only working on a sample of 105 ICJ rulings, and they do not control for whether “biased voting” actually shaped legal outcomes. Roslyn Higgins points out the problem in this method-- at most a handful of ICJ cases in any judicial career even presents the opportunity for the types of judicial biases Poster and De Figueiredo discuss (Higgins 2003). Eric Voeten, who also finds that ECHR judges overwhelmingly vote with their country, does not make this mistake. Voeten argues that voting with one's country does not support claims of judicial bias because there are many reasons for a judge to side with their country. Voeten case base is 500 times larger than Poster's and De Figueiredo; he could find only 11 out of 5010 rulings where a “biased voting” could have shaped a legal outcome, and the 11 cases were not particularly important or political cases so one cannot say that judges vote with their country when it matters most.

international politics—namely international legal arenas. The possibility of IC review of state policy may make states more willing to negotiate and settle out of court so as to avoid providing international legal bodies with an opportunity to establish legal precedents.²⁹ Rulings and interpretations backed by international judges may help shape international rhetorical politics, and differences in a litigant's ability to muster skilled legal teams may be an alternative means through which power comes to shape international political and legal outcomes.³⁰

This analysis also helps explain the current legitimacy politics surrounding ICs and international law. The more unhappy powerful states are about IC independence and influence, the more we will hear about the illegitimacy of international legal bodies. Within the United States, conservative writers are vociferously questioning the legitimacy, utility, impartiality, effectiveness and authority of ICs (Bork 2003; Rabkin 2005; Barfield 2001; Posner and De Figueiredo 2004; Posner 2004), while more multilaterally oriented scholars are seeking to bolster the legitimacy, authority, and democratic accountability of international courts (Helfer and Slaughter 1997, 2005; Schulte 2004; Terris, Romano, and Swiggart forthcoming). Serious social science work can help cut through this debate, if the international judicial politics studied are those that ensues *because* states do not control ICs, and *because* international court rulings influence the political process.

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²⁹ Early work on this topic includes: (Reinhardt 2000; Tallberg and Jönsson 1998; Davis 2003)

³⁰ Early work on this topic includes: (Guzman and Simmons 2004; Davis 2003)

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