

Delegating Sovereignty to International Courts

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Abstract: Most scholars think of courts as a single category of adjudicative bodies or triadic dispute resolution. But courts play a variety of roles in the domestic political system. Increasingly, the roles and tasks delegated to ICs mimic in form and content the roles and tasks delegated to courts in liberal democracies. Thus where initially *international* courts were created to be dispute resolution bodies, now ICs are delegated the roles of administrative review, enforcement, and even constitutional review. This paper overviews the variety of judicial roles delegated to courts, explaining how each role puts courts in a different relationship to the state. The paper then considers how delegating a role to international courts is fundamentally different than delegating the exact same task to domestic courts, assessing the implications for national sovereignty of delegating specific roles to ICs.

Introduction

Most theories of law and courts—domestic or international—treat legal bodies as a single category, often for good reason. For those who believe in the overall good of the rule of law, distinctions among the way different courts promote the rule of law are irrelevant. But while it can make sense to consider all courts as a single category, to do so papers over the reality that courts play distinct roles within a political system. This article focuses on four distinct roles courts play within political systems—dispute resolution, administrative review, criminal enforcement and constitutional review. Some of these judicial roles have legislative actors delegating decision-making authority to courts as a means of social control, thus legislatures are primarily delegating to courts to bind others to follow the law. In other judicial roles, legislative bodies are binding themselves, delegating decision-making authority to courts to enhance their own credibility as a “rule of law” political system. Delegating to courts to control others is far less likely to be sovereignty compromising than is self binding—and thus we find variation in the ways in which judicial authority interacts with state power, and variation in the extent to which delegation to courts is sovereignty compromising.

In their earliest incarnations, international courts (ICs) played a single role—dispute resolution. Especially when the international court’s jurisdiction was not compulsory (so each party had to consent to jurisdiction on a case-by-case basis), ICs were unlikely to impinge on

national sovereignty. In the words of Eric Posner and John Yoo, the courts were “simple problem solving devices” used by the parties to share information and facilitate a settlement in the mutual interest of both parties.¹ Increasingly however, states are borrowing from the domestic palette and delegating to ICs the broader array of roles that one finds at the domestic realm. ICs are also appropriating for themselves new roles. Thus we can now find ICs playing all four judicial roles one finds in the domestic realm, both by intention and via a morphing of roles by judges on a court.

The literature on ICs has not caught up with the political trend. Scholars continue to lump delegation to ICs into a single category, usually considering ICs only as playing a dispute resolution role. In some cases, scholars keep their focus narrow because they only imagine or want to imagine ICs playing a very limited inter-state dispute resolution role. Whatever the intent, this lumping of all courts together obscures more than it illuminates at this point. As of 2003, there were seventeen active ICs, which together issued over 15,000 rulings from the over 26,000 cases that were raised in international judicial venues. Most of these cases actually are not dispute resolution cases; the bulk of the rulings come from the European Court of Human Rights, the European Court of Justice, and the European Tribunal of first instance—courts that are more often practicing administrative review than dispute resolution. In any event, only a very small fraction of these rulings are controversial because they both undermine national sovereignty and force unwanted decisions on governments. To eliminate any role for ICs because of the existence of some controversial rulings would throw the baby out with the bathwater. The question then is which types of judicial roles are problematic from a sovereignty perspective and which are not? The point is not to retain the roles that do not compromise sovereignty—indeed this may well be impossible to do. Rather, by better understanding the different roles courts play within political systems, and how the domestic and international contexts differ, we can better understand the differing politics generated by delegation to international courts.

We can learn a number of things by disentangling the roles delegated to courts. Where there is an intention for ICs to play roles other than dispute resolution, the design of the IC will be different. As many have argued, different designs for courts in themselves contribute to

¹ Posner, Eric A., and John C. Yoo. 2005. A Theory of International Adjudication. *California Law Review* 93 (1):1-72..

different caseloads and different judicial politics.² Thus the roles help us to understand the variation in design of ICs, and the relationship of this design to the types and numbers of legal cases raised. We can also learn where comparisons are alike, and where they are not alike, and thus how portable insights are. For example, it is obviously true the role of the merchant courts in Paul Milgrom, Douglass North and Barry Weingast study is vastly different than the role of the US Supreme Court in American politics.³ One could perhaps gain some insight into this difference from the institutional design elements much discussed in Principal-Agent approaches to studying delegation (e.g. term lengths for judges, recontracting rules for courts etc),⁴ but that would miss the point. A constitutional court is meant to play an entirely different role in the political system than is a body for private actor trade disputes—which is why the design of the courts are so different in the first place. The roles thus create a first cut for understanding key differences in the judicial enterprise, which themselves contribute to different designs for courts.

By examining the delegation logics behind the different judicial roles, we can also better understand differences in expectations and reactions to judicial law-making. Since judges do not pick the cases they are asked to rule on, and cannot kick back to the legislature every case where the law is ambiguous, the act of judging inevitably involves law making. Sometimes judicial observers interpret law making as part of the delegation package—they accept that the actors who created courts want judges to fill in details and expand the law when unforeseen circumstances arise. Sometimes judicial observers interpret very similar types of law making as “going too far”—exceeding the court’s mandate. One cannot predict which cases will be seen as acceptable, and which will be “going too far,” simply by the extent of innovation in the interpretation, or the extent to which a court undermines the desires and expectations of the most

² Keohane, Robert, Andrew Moravcsik, and Anne-Marie Slaughter. 2000. Legalized Dispute Resolution: Interstate and Transnational. *International Organization* 54 (3):457-488, Helfer, Laurence, and Anne-Marie Slaughter. 1997. Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal* 107 (2):273-391, Alter, Karen. 1998. Regime Design Matters: Designing International Legal Systems for Maximum or Minimum Effectiveness. Paper read at Seminar on NAFTA, the WTO and the EU, April 21, 1998, at Harvard Law School, Stone Sweet, Alec. 1999. Judicialization and the Construction of Governance. *Comparative Political Studies* 32 (2):147-184, Helfer, Laurence, and Anne-Marie Slaughter. 2005. Why States Create International Tribunals: A Response to Professors Posner and Yoo. *California Law Review* 93 (May):899-956, Posner, and Yoo. *A Theory of International Adjudication*.

³ Milgrom, Paul, Douglass North, and Barry Weingast. 1990. The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs. *Economics and Politics* 2:1-23..

⁴ This literature abounds. For a good overview of this literature as applied to delegation to international actors, see: Hawkins, Darren, Daniel Neilson, Michael J. Tierney, and David A. Lake. 2006. *Delegation under Anarchy*. Cambridge: Cambridge University Press, Pollack, Mark. 2003. *The Engines of Integration: Delegation, Agency, and Agency Setting in the European Union*. Oxford: Oxford University Press, Tallberg, Jonas. 2002. *Delegation to Supranational Institutions: Why, How and with What Consequence*. *West European Politics* 25 (1)..

powerful actors. Often the role of a court creates a distinct expectation, what political scientists label a “logic of appropriateness” for an actor. For example, we expect a constitutional court to tell legislative actors where they have crossed a constitutional line, and even accept as legitimate and appropriate rulings that involve major reinterpretations of the constitution. Yet we don’t expect an administrative court to fundamentally change what the legislature intended when it crafted a policy, and thus observers more readily label such changes as “activist.”

The article proceeds in two parts. Section I identifies four different roles courts play in a political system, focusing on the logic behind delegating a given role to a court, and the extent to which this delegation is sovereignty compromising. States are usually comprised of executive actors (often referred to as “the government”) and legislative actors. Legislative actors make the law, and governments implement the law. Most political philosophers locate the heart of sovereignty in the legislative actor—the body that makes the law. But courts also undermine the executive’s power to interpret the law as it sees fit. Delegation to courts may thus be autonomy compromising for both legislative and executive actors. I discuss both situations, but I consider sovereignty compromised when there are limits on the autonomy of legislative actors to craft whatever laws and policies it wants. The discussion starts by focusing on the logic of delegating different judicial roles in the domestic context, and then considers how international delegation may be inherently different.⁵ Section II examines the empirical record of delegating authority to international courts, showing that ICs are increasingly delegated all four roles. It also shows that limitations are created in some cases to try to keep delegation to ICs more “other binding” than “self-binding.”

My intuition is that actors advocating and endorsing delegation to ICs have little appreciation of the meaningful difference between the domestic and international contexts, and thus differences in delegating to courts domestically versus internationally.⁶ I believe this lack of understanding has contributed to the considerable surprise among politicians and scholars, and a

⁵ As the beginning of section I makes clear, there is a common denominator in delegation to courts, which does involve relinquishing executive power to interpret the rules as one wants. But in breaking down judicial roles, I then expand beyond my Trustee common-denominator argument, published elsewhere, which implied that delegation to ICs was always self-binding in the sense that it was meant to convince a third party (the putative beneficiary) of the validity of a decision. Alter, Karen J. Forthcoming 2007. Agent or Trustee: International Courts in Their Political Context. *European Journal of International Relations*.

⁶ Alter, Karen J. 2006. Delegation to International Courts and the Limits of Recontracting Power. In *Delegation and Agency in International Organizations*, edited by D. Hawkins, D. A. Lake, D. Nielson and M. J. Tierney. Cambridge: Cambridge University Press.

gap in expectations, when IC decisions that are similar in nature and scope to domestic rulings none-the-less generate political controversy. Regardless of if one shares this intuition, to compare accurately across the domestic and international divide, one must appreciate how international courts will inevitably be quite different than domestic courts, even when the reasons for delegation are the same, and even when the design, jurisdiction and mandate of a court are identical domestically compared to internationally. Section III concludes by drawing out the sovereignty implications of delegating authority to ICs.

I. The Logic of Delegation to Courts in Dispute Resolution, Administrative, Enforcement and Constitutional Roles

This section identifies the logic of delegation in four judicial roles one finds in domestic legal systems. The *dispute resolution* role usually pertains when two actors are involved in a contractual relationship, and a disagreement related to the contract is brought to a judge to resolve. The *enforcement* role has a judge monitoring states as they use their coercive power to enforce the law. The judge is asked to determine whether violations of the law occurred; once a violation is found, the state is authorized to use its coercive power to behave in ways that would otherwise be illegal and perhaps illegitimate. *Administrative review* has a judge checking the legal validity of the decisions, actions, and non-actions of public administrative actors. *Constitutional review* checks whether the law created by legislatures, and/or interpreted and applied by governments, coheres with the constitution. Because I am concerned with how delegating each role to courts impacts sovereignty, I focus on the relationship of the court and the state (both legislative and executive actors) inherent in delegating the role to a court.

I describe each role as a Weberian ideal type, focusing on the *function* for the state that the court is serving in each role. My ideal type approach provides a baseline window into why courts were given certain roles, and allows us to compare across roles, revealing how the logic inherent in the delegation act varies by judicial role. Section II adds an empirical analysis that locates different ICs within different roles based on an analysis of the different founding treaties for ICs, thus suggesting reasons why states have delegated certain roles to specific international courts. My claim is that the functional task delegated to the court provides a strong first cut of what the court will actually be doing, and of the expectations imbued in the act of delegation. After a brief methodological note about how I am using ideal types and functional analysis, this

section considers common denominator reasons for delegation to courts, and thus common denominator sovereignty costs in delegating to courts. I then discuss each role in turn, identifying how the relationship between the court and the state varies by judicial role in terms of the relationship between courts and the state.

A methodological note about functional analysis and ideal types

Functionalism has a bad name in the social sciences, raising well deserved red flags. Scholars making functionalist arguments have been criticized for assuming that the role an analyst observes an actor playing was the intended functional role, and/or for assuming the an observed role exists to perform the function it is imputed to perform. The empirical analysis here avoids these functionalist fallacies by examining the actual role delegated to international courts, as defined by jurisdiction and the design of a court articulated in the ICs' founding treaty. These treaties are costly to negotiate and ratify, and courts are expensive entities. Thus it is reasonable to infer that states created a court for specific functional reasons, and that the treaty telegraph the expectations of the role(s) the IC is likely to play.

The delegation act (the Court's founding Treaty) can provide a baseline insight into what states thought the court would be doing. But courts must first be activated by litigants raising cases; if they are not activated, they do not play their potential role. On the one hand, if courts are not activated, it is likely because potential litigants are either prevented from bringing cases, or have information that suggests there is no point in raising a case, in which case we might question the sincerity of the act of delegation itself. On the other hand, the cases brought to a court will significantly determine whether and how a court becomes a politically relevant actor. Often cases are complex, involving issue pertaining to more than one judicial role. Sometimes creative litigants intentionally present judges with questions that urge the judge to step beyond their traditional role. Judges sometimes seize the questions as an opportunity to expand their own role mandate. Usually there is a political constituency for this new role too, so that judges are not only serving themselves but also appealing to a sentiment within at least part of the body politic by expanding their mandate. To the extent that courts seize opportunities presented, and a significant number of political and societal actors embrace these new roles, we will see the role and the expectations for the court shift. In this way, a court can morph, coming to play a role that is far broader than the roles described in the original delegation mandate. Thus my functional

account is a baseline analysis, drawn from an empirical source. It tells us what was intentionally delegated, not what functional or judicial role an IC might come to play.

Ideal types are well known social science abstractions, useful in identifying essential characteristics and drawing distinctions. But by definition ideal types simplify and do not comport to reality.⁷ With respect to the analysis here, the ideal types both underemphasize and overemphasize variation one might find within a category. They underemphasize variation because, as comparative law scholars have shown, within a single role (e.g. administrative review, constitutional review etc), different designs and powers given to courts will be important in shaping *how* a court plays its role.⁸ In addition, variation in how judges and legal cultures employ notions like standing, burden of proof, the standard of review, etc will lead to meaningful cross-national variation despite the similarity in role across systems. The ideal types also suggest distinctions that can blur in practice. I do not expect courts to be fixed within a single category—indeed the empirical section will show that some international courts have been delegated multiple roles. But even within a single category, legal cases often blur the role distinctions. The categories are still helpful constructs in understanding the logic of judging in each role. The roles are like hats judges put on as they decide each issue. My argument is that each hat has its own logic which is known to the judge; as a judge dons a hat, it adopts the “logic of appropriateness” associated with a given judicial role.

Finally, the role of human rights judges fit awkwardly in these categories; reviewing the extent of basic rights protection puts the judge inherently in a constitutional review role, and in domestic system constitutional bodies are the primary or ultimate legal bodies reviewing whether or not the constitution has been respected. But international human rights courts were set up as enforcement bodies for human rights treaties. I discuss their awkward fit within my categories as I examine international enforcement courts.

⁷ The concept of an “ideal type” was introduced by Max Weber, who defined ideal types as ‘intellectual constructs developed by a synthesis of familiar arguments and views but exhibiting a “conceptual purity” that “cannot be found in reality.” Weber, Max. 1922. *Economy and Society*. Translated by E. Fischoff. Edited by G. Roth and C. Wittich. 1978 ed. Berkeley: University of California Press. Quoted in Hempel, Carl G. 1965. *Aspects of Scientific Explanation, and Other Essays in the Philosophy of Science*. New York: New York Free Press.

⁸ For example, the political role of constitutional courts will vary based on whether constitutional courts have abstract judicial review authority, concrete judicial review power, or both Stone, Alec. 1995. *Governing with Judges: The New Constitutionalism*. In *Governing the New Europe*, edited by J. Hayward and E. Page. Durham: Duke University Press..

The Common Denominators in Delegation to Courts

The core logic behind delegation of decision-making authority to a judge is well known.

In John Locke's words:

To this strange Doctrine, viz. that in the State of Nature, everyone has the Executive Power of the Law of Nature, I doubt but it will be objected, That it is unreasonable for Men to be Judges in their own Cases, that Self-love will make Men partial to themselves and their Friends. And on the other side, that Ill Nature, Passion and Revenge will carry them too far in punishing others. (Second Treatise §13)

This psychological reality is so widely understood that, according to Martin Shapiro, one finds throughout time and space examples of judges adjudicating disputes.⁹ But of course a judge in Locke's or Shapiro's sense can be anyone—the priest, a chief from a noble family, the king's representative, a government or political appointee, or a trusted acquaintance. The first question we should ask in considering delegation to courts is what do *courts* deliver which makes delegating authority to them attractive compared to possible alternatives?

The hallmark of a court, as opposed to alternative types of dispute resolution, is that judges make decisions based on the law. Litigants may favor using a court because they believe a disinterested judge will make a better decision than will self-interested actors, because they think law is on their side, and/or because they want to harness the legal apparatus to enforce their claim. The question in this paper, however, is why states delegate the interpretation and application of the law to courts? States delegate to courts to introduce a third-party between the legislative actors who make the law, the executive actors who implement the law, and the subjects of the law. Having independent judicial actors interpret the law, and review government compliance with the law, increases the credibility of any claim that the government is acting lawfully, and is itself committed to the rule of law. In terms of legitimacy, each time the state lets a court sanction a public official or public action, it signals its willingness to be bound the law. By showing its intolerance of law violations to other state employees and the public, the government also promotes respect for the law among its member employees, and society at large. Having judges apply the law to cases can also be politically convenient. From an efficiency perspective, states can use citizens as “fire alarm” monitors of public actors, having the legal process help check the behavior of publicly accountable actors. Legal accountability can also provide a public satisfaction when there are recognized abuses, facilitating scapegoating and

⁹ Op cite Shapiro 1981.

closure that can be helpful in moving on from a bad experience. It can also be politically attractive to let courts, rather than politicians, deliver the bad news that will disappoint domestic political actors. Thus there are many reasons for states to want courts to be the interpreters of the law.

The distance between political and legal decision-makers exists only to the extent that judges are seen as independent actors. Judges are, of course, also state actors-- indeed they are usually government employees. Thus governments often go to lengths to reinforce the perception that there is a separation between political and legal branches. In political systems where there is a commitment to a rule of law, judges are selected because of their qualifications as experts in the law, given multi-year (as opposed to ad hoc or temporary) appointments, guaranteed salaries sufficient to make them independent from the parties, and institutionally protected from budgetary manipulation by vindictive political actors. To convince the body politic that the law, and not the judge, is supreme, judicial rulings are also subject to review—by higher courts, and/or through publication and popular scrutiny.

Another common denominator is that judges control neither the sword nor the purse, and thus must either inspire the parties to comply voluntarily, or inspire some other actor to enforce the ruling for them. The easiest situation for all is when the parties voluntarily comply. Shapiro argues that the judge's desire for voluntary consent fundamentally shapes the behavior of judges. All judges, he argues, seek to convince the loser in the case that s/he truly was a neutral interpreter by trying to compromise, seeking to split the difference so that each side can declare partial victory, thereby maintaining the parties' faith that the process was not wholly biased against them. Where the difference can not be split, the judge must substitute the authority of their office for the consent of the party—using the symbols of judicial power, and couching their decisions in the law and in precedent so that the process seems objective as opposed to subjective.¹⁰

Where voluntary consent cannot be elicited by the ruling alone, the judge must appeal to other societal factors to facilitate compliance. Many argue that people obey the law out of a sense of obligation, fear of a sanction, or concern about social relations (friends, neighbors, business associates etc).¹¹ If the judge cannot rely on a sense of obligation, it must appeal to

¹⁰ Ibid.

¹¹ Tyler, Tom. 2006. *Why People Obey the Law*. Princeton: Princeton University Press.

those who can create a sanction for help. The state may well be willing to back up the judge, lending its coercive apparatus to support legal rulings (e.g. throwing those in contempt of court into jail, seizing assets, or sending the police to enforce a ruling). Alternatively, societal opprobrium may be appealed to in order to encourage compliance. In either case, a judge must be sure to appeal to those who will help pressure for compliance with a legal ruling.

In sum, judicial decision-making is by intention expert decision-making, undertaken by disinterested legally trained actors. Unlike mediation or arbitration where the goal is to reach a settlement, judicial decision-making uses a rational-legal method of applying pre-existing rules to resolve disputes. It renders decisions in public ways, which can create precedent for the future.¹² These attributes of a court—the selection of qualified legal experts, the rational-legal method of decision-making by applying pre-existing rules, the formal fidelity of judges to the law, and the institutional independence of judges from political actors—are intended to convince the parties to the case and the wider public that the law, as opposed to the will of political actors, is shaping decision-making in the case at hand, and in general.

This argument implies no naiveté about who judges are or what they actually do. While judges are disinterested decision-makers in the sense that they do not have a personal stake in the outcome of the case,¹³ as Shapiro has argued, judges are not neutral or purely legal (as opposed to political) actors.¹⁴ Judges will prioritize the law over other possible bases of deciding, and judges usually come from elite classes, bringing with them all sorts of interpretive predilections.¹⁵ While these factors are politically relevant, what is important for this argument is that delegating to courts by intention introduces a separation between those who make the law (legislative actors and actors with delegated legislative authority), those who interpret the law, and those who enforce the law (administrative decision makers, the police, the executive branches etc). The reason to create this separation is that men are known to be poor judges of themselves and their friends, and of others when they have a stake in the outcome, thus the

¹² 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 across cases Merryman, John. 1969. *The Civil Law Tradition*. first ed. Stanford: Stanford University Press..

¹³ 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.

¹⁴ Courts are mainly substituting one political bias (the legal method of interpretation applied by predominately Western trained lawyers, who themselves come from the upper crusts of society) for another (a self-interested coloring of the law).

¹⁵ Dezalay, Yves, and Bryant G. Garth. 2002. *Global Prescriptions : The Production, Exportation, and Importation of a New Legal Orthodoxy*. Ann Arbor: University of Michigan Press..

broader public is less likely to believe that law is ruling supreme if those who apply the law (the police, the government, or bureaucrats) are the actors interpreting the law and determining if the law was violated.

It is worth pointing out the political relevance of this delegation. Delegating to courts the authority to define what “the rule of law” means can change in the nature of the political game itself. Judges can surely be influenced by political powers, and the legal process allows for settlements along the way with the result that the legal process itself can resemble diplomacy, straight up politics, and less formal third party 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 should be different than mediation or a political free for all because each party knows that if the dispute continues to the point of a legal ruling, the ruling will be made by pre-appointed judges who will decide the case by applying pre-existing rules. A number of studies show that where there is an independent judiciary, legal negotiation is more likely to take place in the shadow of the law, with out of court settlements coming closer to what the law requires.¹⁶ Thus the political game shifts even when a case is not decided by a court.

These common denominator aspects identify why delegation to courts is costly. That judges get to decide means that the parties in the dispute have lost their right to interpret the law to suit their interests nor the interests of their friends—in Locke’s terms, people give up the executive powers they theoretically hold in a state of nature because they prefer to trust neither themselves or others to be judges in their own cases. When states delegate their own executive power to courts, they give up sovereignty. They also intentionally compromise democratic decision-making, since judges are anti-majoritarian actors who are supposed to follow the law rather than the will of the majority. Said differently, if judicial actors play their intended roles, judges will at times disagree with, rule against, or render interpretations that run counter to what the makers and the enforcers of the law might have done, and what the democratic majority might prefer. These costs bring benefits though. Litigants can hope that a judge ruling in their favor will make it more likely that the loser in the case will change their behavior. Governments

¹⁶ Mnookin, Robert, and Louis Kornhauser. 1979. Bargaining in the Shadow of the Law: The Case of Divorce. *Yale Law Journal* 88:950-997, Tallberg, Jonas, and Christer Jönsson. 1998. Compliance and Post-Agreement Bargaining. *European Journal of International Relations* 4 (4):371-408, Busch, Marc L, and Eric Reinhardt. 2000. Bargaining in the Shadow of the Law: Early Settlement in Gatt/Wto Disputes. *Fordham International Law Journal* 24 (November-December):148-172..

and legislatures can hope that a judicial ruling in their favor increases the credibility of an action, imparting a “rule of law” imprimatur on a government act.

In thinking about costs of delegation, one should not forget that ultimately the subjects of the law can vote with their feet. They can avoid courts, ignore rulings, and/or agitate to change the laws or the judges. In other words, because judges do need to rely on others to want to follow or enforce their rulings, there is an ultimate political check upon their behavior. In this international realm, this exit option is especially important. Delegation to ICs clearly entails significant overall sovereignty costs. But ultimately each state retains the sovereignty to decide to ignore an IC ruling. Ignoring a court, in the domestic or international realm, can be costly. But ignoring the court is always an option, and states can usually survive the affront to the rule of law that comes with ignoring a legal ruling.

Delegation of *Dispute Resolution* Authority to Courts

Judicial dispute resolution is Martin Shapiro’s proto-typical role that courts play, because in Shapiro’s view every other sort of judging is a variation on the dispute resolution dynamic.¹⁷ Dispute resolution in its ideal-typical form is private law adjudication. Two private parties subject to the law bring a dispute to a judge, who renders an interpretation of the law that binds both parties. Shapiro identifies this judicial role as participating in social control. Judges are not picking the most equitable outcome, the outcome that suits their friend’s desire, or even their own personal favorite—they are choosing the legal outcome. In delegating dispute resolution authority to judges, state actors are seizing the desires of the parties to have a judicial resolution of a dispute as an opportunity to bring their laws into the private realm—into neighborly disputes, private business interactions, and even family decisions. These disputes are usually conceptualized as arising from contractual disagreements, differences in opinions regarding duties and obligations owed to each other, though the “contracts” are often informal and implicit. As mentioned, even if neither actor seizes a court in the dispute, the possibility of a judicial resolution that applies the law can shape out of court interactions.¹⁸

¹⁷ Shapiro, Martin. 1981. *Courts: A Comparative Political Analysis*. Chicago: University of Chicago Press..

¹⁸ This point was forcefully shown by Robert Mnookin and Louis Kornhauser who showed that even out of court divorce settlements resemble what the law requires Mnookin, and Kornhauser. *Bargaining in the Shadow of the Law: The Case of Divorce.*, and later that law shapes how actors identify what their negotiating preferences are Mnookin, Robert, Scott Peppet, and Andrew Tulumello. 2000. *Beyond Winning: Negotiating to Create Value in Deals and Disputes*. Cambridge: Harvard University Press.. On the other side, however, Robert Ellickson has shown that where societal norms run counter to the law, neighbors will settle their disputes on their own, without appeal to

In a rule of law system there is an expectation that public actors will be contractually accountable in the same terms as a private actor, and thus dispute resolution can also involve public actors. This is especially the case when public actors are engaged in behavior similar to that of private actors—for example, if the Army changes the terms of a contract to buy one million Humvees, or a school bus causes an accident, the public actors are liable in the same ways as private actors. Indeed in all likelihood the state wants its employees to follow the rules it creates so that private citizens will be willing to enter into trustful relationships like signing contracts or letting school buses bring their children to school. At the international level as well, since the 1950s the notion that sovereigns do not enjoy immunity in the commercial field has become widely accepted. Indeed at this point, in most countries domestic courts are unwilling to grant sovereign immunity to suits against foreign governments when they deem the dispute to involve a commercial interaction, as opposed to a state engaged in an “act of state” authority.¹⁹

How do we know dispute resolution authority when we see it? While it is easy to see when a court has been given explicit administrative review authority, or enforcement authority, dispute resolution is a catch-all category. Every “concrete” legal case has two parties who disagree (otherwise the parties would have settled out of court), leading to a judge interpreting and applying the law to render a ruling. Given its ubiquitous nature, judicial dispute resolution authority has to be identified in terms of what it is not. A judge stays entirely in a dispute resolution role when there is no question about the validity of the law itself, or about the validity of a public actor’s action executing the law. Dispute resolution is also not enforcement where a public prosecutor is charging a violation of the law. But because there is a coercive apparatus to enforce legal rulings, dispute resolution can easily resemble enforcement. Indeed compulsory dispute resolution mechanisms when combined with coercive rules for enforcement easily morph into a decentralized mechanism of legal enforcement.

Within this definition, domestic delegation of dispute resolution authority is primarily other-binding delegation, and thus minimally sovereignty compromising. The state is asking courts to hold private actors, and its employees, accountable to the rules of the game that it has defined. The reason to delegate this authority is social control—to radiate the rules the state

the law Ellickson, Robert C. 1991. *Order without Law: How Neighbors Settle Disputes*. Cambridge, Mass.: Harvard University Press..

¹⁹ Shaw, Malcom N. 2003. *International Law*. Oxford: Oxford University Press.

defines into the population at large and among the many individuals who work for the state.²⁰ Where there are questions about the law, the judge should be deferential to the legislative actors who wrote the law. Because delegation of dispute resolution authority is other binding, the interest of both the state and the judge are aligned. The judge wants the parties to follow the law as s/he defines it, and so does the state. Thus it is no surprise that those who control the levers of the state's coercive apparatus will lend coercive support to back up the enforcement of judicial decisions—at least in a domestic context.

At the international level, however, dispute resolution authority can become self-binding because the subjects of international law are primarily states, not private citizens.²¹ When international dispute resolution bodies lack compulsory jurisdiction, ICs continue to play a Lockean dispute resolution role—cases only make it to court because both parties prefer a judicial resolution of the dispute. Compliance with such rulings tends to be high, because in consenting to the court's jurisdiction, states have pretty much pre-consented to accept whatever the judge decides.²² When ICs with dispute resolution authority have compulsory jurisdiction, and especially when there are legal enforcement mechanisms, dispute resolution can easily morph into a (decentralized) enforcement role with litigants raising cases in order to enforce an international legal norm.

The self-binding nature of international dispute resolution changes somewhat the logic of delegation of dispute resolution authority from a social control logic, to a credibility enhancing logic. States may want to self-bind to dispute resolution as a sort of decentralized enforcement mechanism, so as to enhance the credibility of their commitment to an international agreement.²³ But now compliance with such rulings will be more problematic. At the domestic level, states

²⁰ Op cit. Shapiro.

²¹ One finds international courts involved dispute resolution between private contractors and international institutions, which still has the “other binding” character to the extent that states are binding IOs to follow understood commercial rules of the game as they sign contracts with private vendors.

²² This is not to say that courts are more effective in changing behavior in this context. As many have argued, compliance is not the same thing as effectiveness. Raustiala, Kal. 2000. Compliance and Effectiveness in International Regulatory Cooperation. *Case Western Reserve Journal of International Law* 32:387-440, Helfer, and Slaughter. Why States Create International Tribunals: A Response to Professors Posner and Yoo. Raustiala, Kal, and Anne-Marie Slaughter. 2002. *International Law, International Relations, and Compliance*. In *The Handbook of International Relations*, edited by W. Carlsnaes, T. Risse and B. Simmons. London: Sage Publications.

²³ The WTO system, for example, explicitly blurs the line into an enforcement role. The case starts as dispute resolution—both state parties pick panelists they prefer in the hopes of finding a middle ground resolution. But the case can end as enforcement, with a permanent Appellate Body determining the extent of the damage caused by the violating country's behavior, and authorizing the victim state to do what would be otherwise illegal—to construct a purposely discriminatory and trade diminishing barrier.

had an interest in enforcing dispute resolution court rulings, because they shared the court's social control objective. But they don't necessarily share the court's desire to control themselves. Since the interest of states and the courts are not clearly aligned at the international level, compliance with and enforcement of international dispute resolution rulings is likely to be more problematic.

Delegation of *Enforcement* Authority to Courts

While it is commonly said that courts “enforce the law,” it is always states, with a monopoly on the legitimate use of force, which enforce the law by punishing those who violate the law. States can enforce the rules on their own—using their extensive coercive power to punish those who violate their rules. In a rule of law system, however, the task of overseeing the legitimate use of coercive power is delegated to judges. In this “enforcement” role, the judge essentially monitors the state's use of its coercive power, and thereby they help convince the public that the state is not abusing its power.

How do we know an enforcement role when we see it? Criminal law enforcement is the easiest to recognize. A court is given jurisdiction over a body of law that defines crimes regarding persons and/or property, and cases are raised by a public prosecutor who charges a defendant with violating the law. If the prosecutor manages to convince the judge that the defendant violated the law, the judge will authorize the state to do what would otherwise be illegal and illegitimate—to deny a person their liberty, to seize their property, or to even take the individual's life. This delegation is self-binding in the sense that judges are holding governments accountable to following the rules they set for themselves. Since the police tend to be seen as actors with a stake in finding someone to pin a crime on, the requirement that a prosecutor first convince a judge that there was a violation helps assure the public that the police and the state are not abusing their authority.

There can also be law violations without violence, where the stigma “criminal” is intentionally not used. In the international context, one finds both criminal enforcement (international war crimes courts) and “infringement proceedings” where an international commission raises an “infringement” suit, triggering a legal proceeding where the judge determines if a state's behavior was incompatible with the requirements of the Treaty. Sometimes international bodies can levy a fine against a state maintaining an illegal policy, and

other times the legal ruling itself is meant to evoke social opprobrium by calling an action illegal, and thereby painting a “scarlet letter” on the behavior.

For the discussion here, we can label as an intentional delegation of enforcement authority when states require legal enforcers (the police, or another prosecutorial type enforcement actor) to first convince a judge of a law violation before coercion can be applied. International Criminal courts clearly fit the category, as do international courts presiding over “infringement proceedings” instigated by an international commission (as happens in the European Union and the Andean Pact, for example). As mentioned above, dispute resolution mechanisms where in the end the court authorizes retaliation blur the line between dispute resolution and enforcement roles.²⁴

International human rights courts also awkwardly fit this category. Both the European Court of Human Rights (ECHR) and the Inter-American Court of Justice (IACHR) were set up as enforcement bodies. Private claims would be investigated by a Commission, which would issue a report that was not per se legally binding. The Commission or the state concerned (but not the complainant) could decide to bring the case to the Court for further review. The Court could find a violation and order compensation for the victim, though no punitive damages.²⁵ The Latin American Human Rights court, however, lacked an essential ingredient for an enforcement court—compulsory jurisdiction. Actors guilty of law violations will seldom voluntarily sign up for a legal case against them, and indeed without compulsory jurisdiction the Inter-American Commission and Inter-American Court of Human Rights have been severely hampered in their efforts to enhance respect for Inter-American Human Rights convention.

In 1998, the European Court of Human Rights eliminated the Commission, allowing direct access to the court by private litigants.²⁶ With this change, the ECHR came to resemble more a constitutional court especially because the subject matter of human rights is inherently

²⁴ See note 23.

²⁵ The European system is very briefly described in Steiner, Henry J., and Philip Alston. 2000. *International Human Rights in Context : Law, Politics, Morals*. 2nd ed. Oxford: Oxford University Press.. For a fuller treatment see: Robertson, A.H., and J. G. Merrills. 1994. *Human Rights in Europe*. Manchester: Manchester University Press.

²⁶ The change was adopted for efficiency reasons—the Commission had started letting most cases through, at which point it made little sense to require the case to first be heard by the Commission. The change in political context was also certainly relevant. The gate-keeping role of the Commission was originally very important-- it helped assure European states that had little experience with judicial review that the human rights enforcement mechanism would not be used to intervene in internal politics or in policy debates. By 1998, the ECHR and judicial protection of human rights was politically popular. The ECHR had shown itself not to be a partisan political instrument, and European states had themselves become comfortable with the role of judicial review within their political systems.

constitutional in nature. But the IACHR and ECHR continue to lack an essential element for constitutional review; their rulings do not nullify laws that are found to violate the treaties. In most cases, the violations found do not pertain to human-rights-violating laws but rather to practices that may or may not be formally authorized state policy—in which case there isn't a law that requires a change. Still, most people expect a judicial finding that a government practice is unconstitutional will lead to a change in the practice. As a formal matter, compliance with International Human Rights rulings only requires compensation for the victim. While a government may risk more suits if it continues with its practice, suits are rare and a government is not required to change its practice as a remedy for the finding of a violation.

As mentioned, in delegating an enforcement role to courts, states are usually self-binding. In the domestic realm, however, since criminal courts will be reviewing and ruling on cases at the prosecutor's request, governments have a big say over which are brought to court for review. Thus the sovereignty costs for domestic criminal enforcement are minimal.

Ad hoc international Tribunals are primarily “other binding”- set up by the Security Council to have jurisdiction over crimes committed by others in a specific place and during a specific time period. Permanent members of the Security Council could easily block the creation of a court where they did not want one, and few UN member states needed to fear the precedent of a court since few UN states were themselves involved in the types of gross violations that could lead to creation of an ad hoc criminal court.

The ICC is fundamentally different, because its jurisdictional reach is not limited geographically or (in the future) temporally. While the United States hoped to keep the ICC under the Security Council's control, requiring the prosecutor to get Security Council authorization to proceed, it was unsuccessful in its efforts. The Security Council can request a delay in prosecution for six months at a time, but it takes a positive action to get a delay, and support for delay needs to be maintained in order to keep the international prosecutor at bay. Thus the sovereignty costs for delegating authority to the ICC are significantly higher compared to delegating the same authority in the domestic realm, and compared to delegating the same authority to ad hoc international criminal tribunals. At the same time, the appointment of international commissions/prosecutors can be influenced by powerful states, and the international prosecutor will need resources (financial and informational) to investigate crimes and compile cases. While states may be unable to control ICC judges, they still have significant

tools to influence international prosecutors through the control of information and the ICC budget.²⁷

Delegation of *Administrative Review* Authority to Courts

Not all political systems committed to the rule of law require that *legislative bodies* (the voice of the general will and national sovereignty) be held accountable to a higher law. While constitutional review authority may not be an essential element of the rule of law, all rule of law systems require that the government officials, who do not make law but rather develop policies to implement the law and who make day to day decisions to apply the law to private entities, be legally accountable. Administrative review is the main judicial means to hold governments accountable.

Seen through lens of divided government, delegation of administrative review authority is other-binding. Legislative actors write the law the administrative actors are to apply, and then delegate to courts the job of reviewing administrative applications of the law. In principal-agent terms, the legislature is the Principal, the government entity is the Agent, and administrative review courts provide a “fire alarm” system of legislative oversight to ensure that the administrative entity respects the will of the legislature.²⁸ Thus the core administrative review role tells judges to be deferential to the legislative body, and to defer to the will of the legislative body over that of the public administrator as they interpret and apply the law.

We can recognize a court with administrative review authority from its jurisdiction. Courts with the authority to hear cases regarding the legality of a government action, policy or regulation, or to hear “actions to annul” or “failure to act” charges regarding decisions or non-decisions of public implementers of the law, have administrative review powers. For administrative review to have any meaning, the actors subject to government decision-making must be able to bring suits challenging arguably illegal government behavior. Thus administrative review courts have compulsory jurisdiction and private access so the actors impacted by government decision-making can challenge arbitrary decisions. Administrative

²⁷ This argument is developed more fully elsewhere. See: Alter. Delegation to International Courts and the Limits of Recontracting Power.

²⁸ This conceptualization of administrative review is consistent with the argument made by Barry Weingast and Mark Moran and Kal Raustialia. See: Weingast, Barry R., and Mark J. Moran. 1983. Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission. *Journal of Political Economy* 91 (51):765-800, Raustiala, Kal. 2004. Police Patrols & Fire Alarms in the Naaec. *Loyola of Los Angeles International and Comparative Law Review* 3 (Spring):389-413.

court rulings do not substitute a specific judicial decision for the contested administrative decision, rather they remand the case back the administration so that it can try again to make a decision that will not be rejected by the court.

Administrative review differs from constitutional review in that judges are not ruling on the validity of the law itself, but rather whether a particular government decision or policy is congruent with the law, and/or whether the policy has been implemented in accordance with the law. There can be great variation in the extent of administrative check created through administrative review. Some administrative review statutes require litigants to show not only that an administrative decision was wrong, but also that it was “arbitrary and capricious” in its application to the litigant. Such a standard tells courts to grant administrators significant deference in how they interpret and apply rules—so long as the administrative decision can be justified as having some legitimate justification based in the authorizing statute (and thus is not arbitrary), the administrator’s decision will stand. Some statutes mainly require that administrators follow a certain procedure to make decisions, in which case the judge mainly checks if the administrators followed each step before issuing their decision. Some statutes, however, define how an administrator is supposed to make decisions. Administrative review of such statutes can involve judges checking the facts to see if the administrator made the correct decision.

International administrative review is in large part the “other binding” tool of divided government that one finds in the domestic realm. Where there are supranational administrative actors administering global rules, one tends to find international judicial review of these actors (e.g. the Law of the Seas, the Andean Pact, the European Union, the Central American Integration system).

But international administrative review can also be self-binding. The main implementers of international law are states, not IOs. Thus we have also seen ICs explicitly granted review authority over domestic administrations. For example NAFTA chapter 19 panels (which are not permanent international courts) are by design intended to review whether American, Canadian and Mexican administrations and administrative courts have made the correct decision in subsidy and anti-dumping cases. The European Court of Justice was also from inception designed to review both Commission decisions and whether national administrators were implementing

policies on agriculture, social security for migrant workers, customs policy etc correctly.²⁹ Delegation in these contexts was meant to both help implementers of complex international rules, and reassure other states that countries would not practice favoritism or undermine the meaning of their commitments during implementation.

If we think of sovereignty residing in the legislative body, as opposed to the executive body, then administrative review is not sovereignty compromising. When ICs are reviewing the decisions of international institutions—like the Seabed Authority, the Andean Secretariat, the General Secretary of Common Market of Eastern and Southern Africa (COMESA), or the European Commission—administrative review is also not sovereignty compromising. When ICs are reviewing domestic implementation of international policies—like Europe’s complex agricultural subsidy system—administrative review is minimally sovereignty compromising.

But both domestically and internationally, administrative review can quite easily slip into more sovereignty compromising review. This is especially true because of the line between reviewing the *application* of a law (administrative review) and reviewing the *validity* of a law (constitutional review) is a fine one.³⁰ When ICs are reviewing the decisions of national administrations to see if they cohere with international rules, international administrative review can be deeply sovereignty compromising—which is not to say it should be avoided. For example the WTO’s *Shrimp-Turtle* ruling ended up as a sort of international administrative review of the United State’s implementation of Congress’ ban on importing shrimp caught by boats lacking turtle protection devices.³¹ The ruling could be seen as an attempt at diplomacy—rather than condemn the objective of the ban or Congresses effort to protect turtles, the appellate body condemned the blanket way in the rule was applied by the administrative agency in charge. Still, an American policy with significant public support was condemned by an international body, creating constraints on how Americans pursue their environmental protection objectives.

²⁹ Indeed the ECJ’s innovated preliminary review mechanism was created for this purpose—to allow challenges to the implementation of European rules that were raised in domestic courts could be channeled to the ECJ for review. See: Pescatore, Pierre. 1981. Les Travaux Du <<Groupe Juridique>> Dans La Négociation Des Traités De Rome. *Studia Diplomatica* (Chronique de Politique Etrangère) XXXIV (1-4):159-178.

³⁰ The distinction matters in legal circles, and legal rulings turn on the distinction—thus the line between administrative and constitutional is real. Indeed in France the *Conseil D’Etat* (Council of the State) for many years refused the authority to enforce European law supremacy because it could only assess the implementation of a law, not whether or not the French law was valid. See: Alter, Karen J. 2001. *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*. Oxford: Oxford University Press..

³¹ Add citation to Shrimp turtle

Delegation of *Constitutional Review Authority*

While the rule of law requires that governments (like private actors) be held accountable to law, it does not require checks on what is the law, and thus on how legislative bodies use their own legislative authority. In fact many philosophers (like Thomas Hobbes and Jean-Jacques Rousseau) have considered the right of the authors of the law (legislators) to decide what serves the public interests to be the essence of what it means to be sovereign. Those who believe there should be no limits on the sovereign create systems with no constitutional review body. The United Kingdom fits in this model. It has no constitution or constitutional court, though it is certainly a “rule of law” country. Other philosophers (like John Locke) believe that sovereign power ends up being exercised better when it is subject to checks and balances. Those who believe in checks and balances create political systems with constitutional review mechanisms. Thus constitutional review is a choice within a rule of law system.

As Jon Elster notes, a constitutional commitment is both self-binding pre-commitment on the part of the legislature, and an other binding choice made to bind future legislative actors and units within the political system to the constitutional bargain.³² But with the power to nullify laws and policies that contradict the constitution, constitutional review can be destabilizing, shifting power away from those with majority control the political apparatus. For example, French President De Gaulle created a the *Conseil Constitutionnel* (Constitutional Council), which he stacked in his favor, as tool to strip away amendments which might be added by the Parliament to the laws he proposed. Later, when the French constitution was revised to allow a group of sixty members of the National Assembly to refer laws to the *Conseil Constitutionnel*, the Council became a sort of “third legislative body” the minority could appeal to reverse decisions made by the majority.³³ In post-war Germany, where Adolph Hitler had used the political system to enact the laws of Third Reich, the *Bundesverfassungsgericht* (Federal Constitutional Court) was created both to lock in states rights protections within the federal system, and to create absolute limits on what all future legislative bodies could do.³⁴ In both of these examples, Constitutional review has become a mechanism to bind parts of the government

³² Elster, Jon. 2000. *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints*. Cambridge ; New York: Cambridge University Press.

³³ Stone, Alec. 1992. *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective*. New York: Oxford University Press.

³⁴ Kommers, Donald. 1994. The Federal Constitutional Court in the German Political System. *Comparative Political Studies* 26 (4):410-491, Kommers, Donald. 1989. *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham: Duke University Press.

to a political deal created at one moment in time. The mechanism requires majorities to either stick to the original deal, or build a political consensus to change the constitution (which often requires a higher level of political support, either a supermajority or support of the majority of constituent units).

Constitutional review is designed to ensure the constitutional bargain shapes future politics. While there are no international constitutions, just comprehensive international treaties that contain constitutional elements, there are examples of intentional delegation of constitutional review authority to international courts. Like in the domestic realm, the delegation reveals an intent to limit what the international institutions could do in the future. The European Union, the Andean Pact, and the Common Market of Eastern and Southern Africa have political bodies that are, in essence, legislative bodies capable of creating rules, policies, and even laws that are directly binding on member states. The international courts in these political systems (the ACJ, COMESA court and the ECJ) were explicitly empowered to hear challenges to the collective decisions raised by member states or private actors. In these cases, raised either directly to the ACJ, ECJ or COMESA court or referred to the ACJ or ECJ from a national court, the court determines whether acts taken by these legislative actors are *ultra vires* (exceeding the authority of the bodies). If a law were *ultra-vires*, it would be nullified. In this example, states are self-binding against their own potential desire to use an international body expansively. Since European laws can be created based on qualified majority voting, supranational constitutional review can also be a means for the minority to challenge decisions of the majority.³⁵

In the above example, supranational constitutional review authority does not necessarily compromise national sovereignty, so long as the court is simply reviewing the validity of supranational rules. But international courts have also assumed a sovereignty compromising constitutional review authority to review the compatibility of national and international rules. Law scholars call the phenomenon the “constitutionalization” of an international treaty, by which they mean that the treaty is elevated to a sort of constitutional (supreme) status by the rulings of the court. The ECJ’s declaration of the supremacy of European law was such a

³⁵ Germany, for example, challenged the EU’s Banana protocol which was passed despite its objections Alter, Karen J., and Sophie Meunier. 2006. Banana Splits: Nested and Competing Regimes in the Transatlantic Banana Trade Dispute. *Journal of European Public Policy* 13 (3):362-382..

constitutionalizing act.³⁶ Some see the creation of the WTO, and the WTO appellate body's jurisprudence, as constitutionalizing the WTO Treaty (though others disagree.)³⁷ And European Court of Human Rights rulings are often seen as constitutional decisions, since it is often politically untenable for European governments to maintain policies that violate the basic rights of citizens.

Whether or not constitutionalizing acts of ICs have the intended effect depends mostly on the reaction of the country whose policy is condemned. An international legal obligation is binding on a government in the sense that it has an obligation to respect its international commitments. But international law does not create an obligation that is legally binding within national political systems. Indeed many countries find that international legal rulings do not create internal direct effects or even binding internal obligations. Indeed few lawyers saw the ICJ's *Avena* ruling as requiring American courts to release or stop administration of the death penalty for convicted criminal's whose embassy's had not been notified of the charges. A country's whose policy was condemned by the European Court of Human Rights or the Appellate Body of the World Trade Organization can pay compensation and then be in compliance with the ruling even if they do not actually change the policy condemned by the court. But, if national courts accept an international decision as authoritative, international legal rulings can attain a constitutional status. This has happened in some countries for ECHR rulings, and it has happened with European Union law. The ECJ's 1964 declaration of European law supremacy had no direct internal effect within member states. Indeed for a long period of time (ten to twenty-five years), the ECJ's supremacy jurisprudence was rejected by national courts. Eventually, however, most member state's high courts found ways to make national doctrine compatible with the general gist of the ECJ's supremacy doctrine. At this point, an ECJ finding against a national law has a constitutional effect—it will inspire a government to change the contested policy to be in compliance with European law.³⁸

³⁶ Stein, Eric. 1981. Lawyers, Judges and the Making of a Transnational Constitution. *American Journal of International Law* 75 (1):1-27, Weiler, Joseph. 1991. The Transformation of Europe. *Yale Law Journal* 100:2403-2483.

³⁷ Petersmann, Ernst-Ulrich. 1995. The Transformation of the World Trading System through the 1994 Agreement Establishing the World Trade Organization. *European Journal of International Law* 6:161-221, Dunoff, Jeffrey. 2006. Constitutional Conceits: The Wto's 'Constitution' and the Discipline of International Law. *European Journal of International Law* 17 (3):647-675, Jackson, John. 1998. *The World Trade Organization: Constitution and Jurisprudence*. London: Royal Institute of International Affairs.

³⁸ Alter. *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*.

The Fundamental Risk of Delegation to Courts

This section has defined four roles that courts play in the international political system. In each role, the legislature was the actor delegating interpretive authority to a court. In some cases, the legislature was binding itself, but in other cases, the legislature was primarily binding others—either private actors within society, state actors that were supposed to be implementing the legislative will, or international agencies. Table 1 below summarizes the extent to which delegation to courts in each role is self-binding or other binding, examining the domestic context separately from the international context. *Other-binding* delegation is based on a logic of social control—the authors of both the law and the delegation contract are using courts to help ensure that other actors follow the rules they created. *Self-binding delegation* is based on a logic of credibility enhancement. Where publics might be suspicious of self-serving interpretations of the law by public actors, governments and legislatures can gain credibility by entrusting the interpretation of the rules to independent courts. In some roles delegation to courts is both self binding and other binding, but in other roles there is a choice whether or not legislative actors only bind others, or whether they bind themselves too. The table shows that a number of roles where domestic delegation to courts is other-binding there is a risk that delegating the same role to an IC might become self-binding, especially if judges interpret their mandate expansively.

Regardless of if a judicial role is primarily other binding or mostly self-binding, delegation to courts involves sovereignty costs. Delegation involves a risk that judges will interpret the law differently than governments or legislative bodies might want, and there is always a risk that judicial roles will morph over time. These delegation risks are more problematic at the international level than the domestic level, both because it is once a court gives an interpretation of the rule, it is extremely harder to re-write the international rules to restore a status-quo ante compared to the domestic context, and because any finding against a national law inevitably strikes at the heart of national sovereignty. This is true even if IC rulings do not create direct internal effects. Of course this is the whole point of international judicial review-- to make it harder and more costly for a country to defend the legitimacy of policies labeled “illegal” by an authoritative international legal body.

Even though delegation to ICs tends to be more self binding compared to delegation to domestic courts, there are ways to limit the reach of ICs. The next section examines the empirical

record in delegating different roles to ICs, and shows how states have sought to limit the extent of sovereignty delegated to ICs.

Judicial Role	Functional Role	How we know it when we see it	Who is bound by delegation to domestic courts	Who is bound by delegation to international courts
Dispute Resolution (Private Law, contract enforcement)	Judge applies state's law to resolve a dispute between private actors, or between public and private actors, radiating state social control into private law disputes.	Defined mostly in terms of what it is not. Jurisdiction to interpret the law in concrete cases raised before it. There is no explicit authority to review the validity of the law, or of public acts. Cases are raised by disputants, not by public prosecutor-type actors.	Other-binding —private actors are bound to follow rules set by the legislature. Public employees of the state are held accountable to the rules in similar terms as private actors.	Self-binding in the contractual sense that governments and in some cases legislatures are held accountable to their international commitments.
Criminal Enforcement	Court ensures that public authorities have reasonable evidence and grounds for punishing those who violate the law, granting a legal imprimatur to state exercise of coercive authority.	Jurisdiction in cases brought by public prosecutors/Commission's regarding an enumerated list of crimes, or a set of Treaty rules.	Legislative other-binding, Governmental self binding- government is creating oversight mechanisms for its use of coercive force. By controlling the prosecutor, however, governments can significantly influence the extent of judicial oversight.	Other binding in the case of ad hoc criminal courts- the states creating ad hoc court jurisdiction usually do not themselves fall under the court's jurisdiction. and/or Self binding for international enforcement mechanisms—infringement mechanisms, the ICC, Human Rights conventions.
Administrative Review	Court oversees public administrators to ensure their decisions were legal-- meaning made following proper procedure, consistent with the requirements of the law, and not arbitrary or capricious.	Jurisdiction in cases concerning the legality of any public action (e.g. regulation, directive, or decision of a public actor), or the public actor's "failure to act."	Legislative other-binding - Legislature is binding administrative agencies to follow their rules	Legislative other binding when states are binding IOs to follow international rules. and/or Self binding when ICs oversee domestic application of international rules.
Constitutional Review (judicial review)	To hold legislative actors to a constitutional bargain, to make sure they do not exceed their authority, or violate constitutional provisions, when they exercise sovereign authority.	Jurisdiction to review the validity of any act, regulation, directive, or decision of an IO or of a national government.	Legislative and Governmental other binding- tying the hands of future legislatures to stick to a constitutional bargain. and Self binding- creating absolute limits on legislative authority.	Primarily other binding where ICs have constitutional authority to assess whether international acts are <i>ultra vires</i> . and/or Self binding to the extent that ICs can assess the compatibility of national rules and international rules. Legal impact of an IC ruling will be determined in large part by domestic system.

II. Delegation to International Courts: The Empirical Record³⁹

(I'm running out of time here—but at least the data is presented in heavy tables! I didn't get back to the logic of appropriateness argument, or why some ICs had administrative & constitutional roles. This explanation is in the above section, but probably bears some repeating)

As mentioned, there are always risks in delegating interpretive authority to courts. But there are ways to make international delegation of a single role more other-binding than self-binding, and ways to minimize the risk that a judge will interpret the law in ways state does not like. The easiest way to limit ICs from ruling on cases states do not want is to limit access to a court-- to require consent to jurisdiction (e.g. make the court's jurisdiction non-compulsory) and to only allow states to raise suits. Limiting access makes ICs more dependent on pleasing states, since states will not consent to jurisdiction if they do not like court rulings.⁴⁰

Yet we increasingly find that ICs as a class are being given compulsory jurisdiction, and states are allowing private access. Currently sixteen of the twenty existing ICs have compulsory jurisdiction, and fourteen allow private actors to raise cases directly in front of a court. Elsewhere I have discussed this evolution in the design of international courts, grouping ICs into “old” and “new” style international courts. “Old style” international courts-- the Permanent Court of Justice, the Permanent Court of Arbitration, and the International Court of Justice (ICJ)—were primarily dispute resolution bodies. While on paper these courts may have had enforcement authority, without compulsory jurisdiction ICs could only really be used for interpretive disputes, in cases where both parties pre-agreed to abide by the interpretation of the law given by the IC. Werner Levi has argued that this limitation was intentional, with states refusing compulsory jurisdiction provisions to allow them to avoid IC authority.⁴¹ “New style international courts” are the now very large number of ICs that: 1) have compulsory jurisdiction, 2) are designed at least in part to hold states accountable to their international obligations (as evidenced by compulsory jurisdiction combined with an explicit or implicit jurisdiction to hear cases involving state non-compliance); and 3) allow private actors access. There is a clear trend

³⁹ This section is adapted from Alter, Karen J. 2006. Private Litigants and the New International Courts. *Comparative Political Studies* 39 (1):22-49.

⁴⁰ Whether it is good for ICs to be dependent is another question. While Posner, Yoo, Slaughter and Helfer tend to disagree on the benefits of independent courts, they do agree that courts lacking compulsory jurisdiction and private access are less independent than courts with compulsory jurisdiction and private access. Posner, and Yoo. *A Theory of International Adjudication*, Helfer, and Slaughter. *Why States Create International Tribunals: A Response to Professors Posner and Yoo*.

⁴¹ Levi, Werner. 1976. *Law and Politics in the International Society*. Beverly Hills: Sage Publications.

towards the “newer” style ICs, as revealed in Table 2 that includes twenty existing ICs meeting the Project on International Court and Tribunal’s definition of an “international court.”⁴² At this point we can fairly say that most ICs fit this “new style” model, and nearly every IC created since 1990 fits this new style. The final column supports the notion that ICs with compulsory jurisdiction and private access hear more cases, but it also shows that not all “new style” ICs are equally active. Where courts existed before 1990, I break out the judicial activity since 1990. Where ICs were created after 1990, there is a single entry regarding the judicial activity of the court.

TABLE 2: OLD AND NEW STYLE ICs, BY DATE ESTABLISHED

International Courts	Date Established/ Created	Compulsory Jurisdiction	Jurisdiction for noncompliance suits	Private Actor access	Total Cases (last year included in figures) ¹	Total cases since 1990
Old Style Courts						
International Court of Justice (ICJ)	1945/1946	Optional Protocol			104 contentions cases filed, 80 judgments, 23 Advisory opinions (2003)	30 Judgments, 45 new cases filed, 3 advisory opinions (2003)
Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries (OAPEC)	1980/1980	So qualified as to be meaningless ¹		X By optional state consent	2 cases (1999)	**
International Tribunal for the Law of the Seas (ITLOS)	1982/1996	Optional Protocol + (exception, seabed authority & seizing of vessels)		Seabed authority & seizing of vessels only	13 judgments (2004)	
New Style Courts						
European Court of Justice (ECJ)	1952/1952	X	X	X	2497 infringement cases by Commission, 5293 cases referred by national courts, 7528 direct actions (2004)	1580 infringement cases by Commission, 3048 cases referred by national courts (2003) ¹
European Court of Human Rights (ECHR)	1950/1959	X	X	X (as of 1998)	8810 cases deemed admissible, 4145 judgments (2003)	8140 cases deemed admissible, 3940 judgments (2003) ¹
Benelux Court (BCJ)	1965/1974	X	X	Indirect*		**
Inter-American Court of Human Rights (IACHR)	1969/1979	Optional Protocol	X	Commission is a gate keeper	104 judgments, 18 advisory opinions, 148 orders for provisional measures (2003)	95 judgments, 8 Advisory opinions, 146 orders for provisional measures (2003)
Court of Justice of the Cartagena Agreement (Andean Pact) (ACJ)	1979/1984	X	X	X	31 nullifications, 108 infringement cases, 711 preliminary rulings (2004)	
European Court of First Instance (CFI)	1988/1988	X	ECJ hears these cases	X	2083 decisions from 3003 cases filed (figures exclude staff cases) (2004)	
Central American Court of Justice (CACJ)	1991/1992	X (some exceptions) ²	X	X	65 cases, 21 Advisory opinions, 30 rulings, 7 cases dismissed for lack of competence, 7 cases in progress (2004)	

⁴² Excluded are: the African Court of Human Rights (not yet established), Southern African Development Community Tribunal (not yet established), the Court of the African Union (2003), three different Courts of the Economic Community of West African States (established 1996-2001), and the East African Court of Justice (2001). A decision was made to merge the African Court of Human Rights into the African Union, hence my report of twenty-six ICs meeting PICTs definition. ¹ Note that state membership has expanded significantly since 1990.

European Free Trade Area Court (EFTAC)	1992/1995	X	X	(Via national courts, advisory opinions only)	59 opinions (2003)	
Economic Court of the Commonwealth of Independent States (ECCIS)	1992/1993	X	X	X	47 cases, not clear if they are ruled on yet (2000)	
Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)	1993/1998	X	X	X	3 judgments, 1 order (2003)	
Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)	1993/1997	X	X	X	4 opinions, 27 rulings (2002)	
International Criminal Tribunal for the Former Yugoslavia (ICTY)	1993/1993	X	X	X (Defendant Only)	75 public indictments, 18 completed cases, 11 judgments (2003)	
General Agreement on Tariffs and Trade (GATT) ³ World Trade Organization Appellate Body (WTO) ⁴	1953- 1993	-			229 cases, 98 rulings from GATT era	
	1994	X	X		304 disputes formally initiated, 59 appellate rulings, 115 panel reports in WTO era (2003)	
International Criminal Tribunal for Rwanda (ICTR)	1994/1995	X	X	X (Defendant Only)	58 cases in progress, 17 completed cases (2003)	
International Criminal Court (ICC)	1998/2002	X	X	X (Defendant Only)	3 situations under investigation, but no indictments or rulings to date	
Caribbean Court of Justice (CCJ)	2001/2005	X	X	X	Began operation April 2005	
International Criminal Tribunal for Sierra Leone (ICTSL)	2002/2002	X	X	X (Defendant Only)	11 indictments proceeding, 2 withdrawn due to death (2003)	
Total International Judicial Activity					29261 admissible cases filed or under investigation, 12736 completed decisions, opinions or rulings	16908 admissible cases filed whether or not they result in rulings
Complete Cases Only					14886 completed decisions, opinions or rulings	12736 completed decisions, opinions or rulings
European Courts Only					11552 (78%) total decisions, opinions or rulings	8621 (68%) total decisions, opinions or rulings

Republished from Alter 2006. Data since 1990 was added to this table. The data was compiled by author, based on the best information available on the PICT website, updated by visiting the websites of the international courts and consulting scholarship where available. Courts are constantly changing how they report usage, thus one can find discrepancies between most recent postings and the data collect here—in 2003. * = no cases ** = data not available.

If one takes ICs as a single category of “courts,” Table 2 presents a trend towards creating more “European style” courts—international courts accessible to private citizens, and meant to help enforce the law. This first impression shifts somewhat if one considers delegation to ICs by role. By attaching access rules to specific roles, limiting the types of questions allowed in each role, and creating exceptions to an ICs jurisdiction, states can limit the risk in delegation, limiting the extent to which they actually delegate away sovereignty. Table 3 identifies the delegation of specific roles to ICs, and whether an IC has compulsory jurisdiction and private access in a given role. I classified the roles by looking at how the court’s jurisdiction was defined

in its founding treaties.⁴³ Underneath the name of the role, I explain the type of jurisdictional authority that is associated with each role and provide a sample treaty article for each role. ICs can play more than one role; at the international level treaty drafters usually break down the types of legal issues international courts can adjudicate into separate treaty articles, with different access and compulsory jurisdiction rules for each article. Thus a single court may play more than one role, and have different access rules for each role.⁴⁴ States are also able to define jurisdiction to limit access, so that delegation stays other-binding rather than self binding. For example, for the ITLOS private actors have access and the court's jurisdiction is compulsory for two situations only: when private actors want to challenge decisions of the Seabed authority, and when private actors (with the support of their government) sue for the release of a seized vessel. Beyond these situations, ITLOS has neither compulsory jurisdiction nor private actors. Thus looking just at ITLOS we can see that states have bound the Seabed authority to follow certain rules, and self-bound only for the adjudication of disputes involving the seizing of vessels.

⁴³ I do not consider whether an IC can play a role via an “advisory opinion” since such opinions are not binding nor do I consider IC roles with respect to employees of the IO.

⁴⁴ The CACJ is an exception to this rule—it has a single article that lists a long variety of issues and cases the court has authority to adjudicate.

TABLE 3: DELEGATION TO ICs AND ACCESS RULES BY ROLE- AS DEFINED BY THE COURT'S DELEGATION CONTRACT

(After first assigned role, only court's acronym is used, making it easy to see which courts have multiple roles)

Judicial Role	ICs with role	Compulsory Jurisdiction	Private Access	Notes
<p>Dispute Resolution General jurisdiction to “interpret the meaning of the law” or to “ensure that the law is respected,” jurisdiction to resolve disputes. Note that PICT’s definition of an IC requires an IC to be permanent, and to hear cases involving IOs or states.</p> <p><i>ICJ Statute of the Court, art. 36</i> 1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.</p>	International Court of Justice (ICJ)			There is an optional protocol where signatories agree to accept compulsory jurisdiction. The ICJ can also be designated the interpreter of treaties, and there can be compulsory jurisdiction for specific treaties only.
	International Tribunal for the Law of the Seas (ITLOS)	Limited	Limited	Compulsory jurisdiction & private access exists only in cases involving the seizing of vessels, and the plaintiff’s government must consent to the case being raised. Seabed authority can adjudicate contractual disagreements between private actors for issues related to the rules of the Seabed authority.
	World Trade Organization Permanent Appellate Body (WTO)	X		Provisions of the “Understanding on Rules and Procedures Governing the Settlement of Disputes” suggest that the aim of dispute settlement “to preserve the rights and obligations of Members under the covered agreements”—and thus in part enforcement
	European Free Trade Area Court (EFTAC)	X	Limited	EFTAC can review questions sent to it by national courts based on cases raised by private actors, but its opinions are not binding in these cases.
	European Court of Justice (ECJ)	X	De Facto	Private individuals can raise cases in national courts, which then get referred to the ECJ for resolution. ECJ rulings are binding.
	Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries (OAPEC)	Limited	Limited	There is an implicit compulsory jurisdiction, but only so long as the disputes do not infringe on the sovereignty of any of the countries concerned. States have the option of consenting to jurisdiction in a suit raised by a private actor.
	Caribbean Court of Justice (CCJ)	X	Limited	CCJ is authorized to decide on case a by case basis if the needs of “justice” require allowing private access for the case.
	Economic Court of the Common- Wealth of Independent States (ECCIS)	X		
	Central American Court of Justice (CACJ)	X	X	
	Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (OHADA)	X	X	OHADA- Private actors can directly appeal national court rulings to OHADA court.
	Court of Justice for the Common Market of Eastern and Southern Africa (COMESA)	X	Limited	Private actor access is limited to contracts between private actors and COMESA institutions.
	Benelux Court (BCJ)	X		
	Andean Court of Justice (ACJ)	X	X (Since 1996)	1996 reforms allow individuals to raise challenges to national policies at the Andean court

<p>Enforcement Jurisdiction regarding an enumerated list of crimes or jurisdiction to hear infringement suits against states. Cases generally are raised by a public prosecutorial type actor.</p> <p><i>ICC Rome Statute, art. 5 -</i> The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: The crime of genocide; Crimes against humanity; War crimes; The crime of aggression.</p>	International Criminal Court (ICC)	X	As Defendant	Prosecutor raises cases. A state, or the Security Council can refer a matter to the Prosecutor, but he can also initiate investigations on his own.
	International Criminal Tribunal for the Former Yugoslavia (ICTY)	X	As Defendant	(same as above)
	International Criminal Tribunal for Rwanda (ICTR)	X	As Defendant	(same as above)
	International Criminal Tribunal for Sierra Leone (ICTSL)	X	As Defendant	(same as above)
	EFTAC	X		
	ECJ	X		Commission raises infringement suits.
	ACJ	X	X	Secretary General raises infringement suits. 1996 reforms allow individuals to raise infringement suits against national governments—though this provision seems to be a dead letter.
	COMESA	Limited		The Secretary General raises infringement charges. A Council of States must agree to have the matter referred to the Court.
	CACJ	X	X	There is no designated supra-national prosecutor. The court has general authority to hear infringement suits brought by any actor with standing, including states, private actors, and community institutions.
	Inter-American Court of Human Rights (IACHR)			A Commission raises a suit. States can sign an optional protocol consenting to compulsory jurisdiction.
<p>Administrative Review Jurisdiction in cases concerning the “legality of any action, regulation, directive, or decision” of a public actor, or the public actor’s “failure to act.”</p> <p><i>EC Treaty, art. 230</i> The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB... It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an</p>	European Court of Human Rights (ECHR)	X	X (Since 1998)	Pre- 1998 only a Commission could raise cases. In 1998 the Commission was eliminated and direct access for private actors was allowed (Protocol 11), substantially altering the role the ECHR de facto plays. At first countries could opt in to Protocol 11 if they chose.
	ITLOS-Seabed Authority	X	X	Court’s not allowed to review the validity of Seabed policies. Its review is confined to deciding claims that the application of Seabed Authority rules or procedures would be in conflict with the contractual obligations of the parties to the dispute, claims concerning excess of jurisdiction or misuse of power.
	ECJ & CFI (Court of First Instance)	X	X	
	EFTAC	X	X	
	ACJ	X	X	
	COMESA	X	X	
	BCJ	X	X	
CACJ	X	X		

essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. (Article 232 allows “failure to act” suits on similar terms)				
Constitutional Review	COMESA	X	X	Designed primarily for challenging COMESA policy.
Jurisdiction to review the validity of any legislative act, regulation, directive, of an IO.	ECJ	X	X	Originally designed to challenge European policy only. The treaty was “constitutionalized” by the ECJ’s declaration of EC law supremacy, combined with national court referrals of challenges to national policy. Thus de facto the ECJ to reviews the compatibility of national law and European law.
<i>Court of Justice of the Cartagena Agreement (ACJ) Treaty, Article 17:</i> It is the responsibility of the Court to declare the nullity of Decisions of the Andean Council of Foreign Ministers and the Andean Community Commission, Resolutions of the General Secretariat, and the Agreements referred to in Article 1, paragraph e), if enacted or agreed upon in violation of the provisions comprising the legal system of the Andean Community, and even for the deviation of power, when requested by a Member Country, the Andean Council of Foreign Ministers, the Commission of the Andean Community, the General Secretariat, or natural or artificial persons whose rights or interests are affected as provided for in Article 19 of this Treaty.	ACJ	X	X	In 1996 ACJ authority was expanded to allow direct challenges to national policies that violate Andean rules.
	CACJ	X	X	Designed primarily for challenging CACJ policies.
	<i>Post 1998 ECHR?</i>	X	X	With 1998 ECHR changes, does it now play essentially a constitutional role?
	<i>CCJ?</i>	X	X	The role of the CCJ in the common market is yet to be defined.

The notes in the table above give a sense of the ways in which IC jurisdiction gets limited for specific roles. Many of the role delegations come with limitations on access where state policy might be the subject of a legal challenge, meanwhile access is very open for challenging supranational institutions and their policies. For example, there are almost no limitations on access for administrative review,⁴⁵ and mechanisms for constitutional review of IO policies are also unrestricted. In other words, much of the role delegation to ICs is other-binding delegation. Also, because of my interest in delegation of sovereignty, I excluded from the tables and the data the other-binding role of ICs in resolving disputes between IOs and their employees within the overall institution. But IC's role in hearing employee complaints is significant; it closes a long-standing loophole through which international institutions and their employees were essentially beyond the reach of law.

One finds that self-binding delegation comes with far more caveats. Dispute resolution mechanisms with compulsory jurisdiction either come with caveats, or they are essentially unused—with the notable exception of the WTO, the Andean Court of Justice and European Courts.⁴⁶ Table 1 shows that OAPEC, ECCIS, COMESA, OHADA, and CACJ—ICs with implicit compulsory jurisdiction and in some cases private access-- are very lightly used, suggesting that potential litigants have reasons to avoid international dispute resolution. The lack of cases suggest that the delegation of authority may not be what it appears on paper.⁴⁷

Thus we find a stark paper trend of creating ICs with both private access and compulsory jurisdiction, where the access is mostly for “other binding” roles. Meanwhile European courts stand out as exceptions to this observation, both because of the extensive jurisdiction of European courts to review national behavior, and because of their heavy usage. Looking back to Table 1, European courts account for 78% (11552 of 14886) of the total completed decisions, opinions and rulings of ICs overall.

It is noteworthy that the statistical dominance of European courts is dropping. If one considers just rulings since 1990, European courts account only 68% (8621 of 12736) completed

⁴⁵ The exception is the Seabed authority where efforts are undertaken to protect private property contractual rights.

⁴⁶ Because of my interest in delegation of sovereignty, I excluded disputes between IOs and their employees from the tables and the data on IC usage. But IC roles in hearing employee complaints is significant, because it closes a long-standing loophole through which international institutions and their employees were essentially beyond the reach of law.

⁴⁷ The CCJ is too new to draw any conclusions; and the BCJ and EFTA court have been largely supplanted by the ECJ and the expansion of the EU, which can explain their lack of use.

decisions, opinions and rulings. The difference is explained both by the creation of new ICs since 1990 which are adding to the total judicial activity of ICs, and a rise in activity of the older ICs. The CACJ, EFTAC, ECCIS, COMESA, OHADA, CCJ, and all of the international criminal tribunals are post 1990 creations. Also, if one considers the average case-load per a year today compared to the case-loads in the 1970s and 1980s, the ICJ, IACHR, the ACJ, and the WTO dispute resolution mechanism are more active now than in the past, even though in some cases there are now rival bodies to hear disputes these legal bodies might have heard in the past. Indeed the Andean Court has awoken from a slumber to become the 4th most active international court after Europe's courts—and its usage continues to grow.⁴⁸ The total non-European percentage of international judicial activity is rising, at the same time as European Court's have expanded their jurisdictional reach—through the creation of a Tribunal of First Instance and post-Cold war expansion in membership of European institutions that has nearly doubled the size of each institution. Thus we are seeing a second element of delegation to ICs- the increasingly willingness of state parties to actually use international courts. This is a post-Cold war phenomenon, suggesting that there is a meaningful change the willingness of states to delegate authority to ICs, even if it is self-binding delegation.

III. Conclusion- The Sovereignty Costs of Delegation to International Courts

Four new categories to analyze courts, plus data from over twenty international courts is a lot to compile and digest. By way of conclusion, and because the winter holidays are looming, let me conclude with some observations.

States intentionally chose to self-bind through delegation to courts. The novel argument of this paper, however, is that not all delegation to courts (domestic or international) is sovereignty compromising self-binding—indeed quite a lot of it is other-binding delegation. Section I argued that certain judicial roles pretty much guarantee that courts will, at least sometimes, be ruling against governmental or legislative actors. Constitutional review invites courts to overrule majority legislative decisions, and administrative review invites courts to upset government policies. It would be disingenuous to then lament that courts are doing what they were asked to do in these rules—actually reviewing the actions of the powers that be. At the same time, not all of this delegation is intentionally self-binding, or self-binding in fact. At the international level, is not sovereignty compromising to delegate to ICs the review of IO policies either in the form of administrative review or constitutional review, nor are ad hoc

⁴⁸ Andean Court cases seem to be mostly about intellectual property (well over 90% of the cases). Laurence Helfer, Karen Alter, and Maria Flo Guertzovich have a project underway examining this activity.

criminal courts examples of self-binding delegation. Thus a lot of the delegation to ICs we observe, which comes with compulsory jurisdiction and private access, is intentional other-binding delegation.

Delegation of authority to ICs has risen markedly since 1990. New ICs are being created, and usage of ICs is rising just about everywhere—but it isn't clear that the bulk of the change is self-binding delegation. It is hard to pull out of the raw data the extent to which the delegation trend is sovereignty compromising. The raw numbers do not tell us whether a case challenges national policies or IO policies, nor do they tell us who actually wins. For example, 74% of ECHR cases involve questions about the national criminal justice systems.⁴⁹ European legal systems are notoriously slow, and prisoners in jail have a lot of time on their hands. It isn't clear that rulings in these cases overwhelmingly go against governments, or that they are unwelcomed as sovereignty compromising. The same can be said for the now over 1000 rulings of the Andean Court of Justice—it isn't clear if governments dislike Andean oversight, or if they lose these cases. Indeed it is mostly the Americans who are complaining about a loss of sovereignty, and they are doing so based on a relatively small number of cases. Locating US unhappiness in the broader context suggests that IC compromising national sovereignty in unwelcome ways is a fairly rare phenomenon.

But this analysis has focused primarily on intentional delegation of authority, not on the examples where ICs expand beyond their assigned mandate. There are well known examples of ICs interpreting both the law and their mandate expansively, though again these rulings are far more the exception than the rule. None-the-less, as Section I showed, delegation to courts always involves giving up the “executive authority” to interpret the law as one sees fit, and it opens the door to the possibility that ICs will expand their mandate.

Where I can use help- I'm sure I've lost a bunch of you by now—it would be helpful to know where you get lost. I am trying to make the categories both clear, tight, and useful— do the 4 categories work as categories? Do the arguments about self-binding & other-binding work?

The data here is thrown at you—mostly undigested and overwhelming in detail. What would be helpful to make the data more useful? I intentionally kept my discussion of international delegation in Part 1 anecdotal. Should I put in more anecdotes (single cases) throughout, or would that just have more moving pieces to lose the reader in Part II?

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⁴⁹ Cichowski, Rachel. 2006. Courts, Rights and Democratic Participation. *Comparative Political Studies* 39 (1):50-75. p. 63

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