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Joel P. Trachtman

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The Economic Structure of the Law of International Organizations

Joel P. Trachtman*

Abstract

The essence of an international organization is the delegation of decision-making authority from individual states to the organization, which represents the collectivity of member states. The focus of this Article is on the distinct formal structure and function of international organizations, as distinct from international law per se. This Article evaluates the reasons for creation of international organizations, as well as the reasons why particular structures of international organizations are utilized. It evaluates the relationship among assignment of subject matter authority, legislative capacity, adjudicative capacity, enforcement capacity, and membership. It examines how these features correspond to particular contexts of international cooperation.

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I. INTRODUCTION

The essence of an international organization is the delegation of decision-making authority from individual states to the organization, representing the collectivity of member states. The focus of this Article is on the distinct structure and function of international organizations, as distinct from international law *per se*. It would be simple to say that international organizations are to international law as firms are to contracts: that states form international organizations in order to reduce the transaction costs associated with cooperation, as compared to the entry into international legal rules without organizations. And it is true that the core questions are the same: why are these institutions formed, what powers do they have, and how are they exercised?

While this analogy has some power and allows us to refer to the literature of the theory of the firm,¹ it is too simple for several reasons. First, international organizations are more heterogeneous than firms (although firms, too, are heterogeneous). So, this Article will dissect international organizations before seeking to provide an economic analysis of each component. The sum of the components may differ from the parts, and so this Article will also discuss synergies and conflicts among different components.

Second, and for similar reasons, international organizations and international legal rules are not as dichotomous as they may at first seem. Indeed, a similar observation may be made also about firms and long-term contracts. Furthermore, international legal rules generally take advantage of a default set of “organizational” features of international society, even if they are not themselves housed within an international organization.

A. Defining International Organizations

Doctrinal definitions of international organizations are descriptively useful, but do not generally refer to features that are analytically interesting from a social scientific perspective. For example, a standard doctrinal definition of an “international organization” can be found in the Draft Articles on Responsibility of International Organizations (DARIO): “[I]nternational organization’ means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.” This formal doctrinal definition tells us little about the social function

¹ See generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Joel P. Trachtman, *The Theory of the Firm and the Theory of the International Economic Organization: Toward Comparative Institutional Analysis*, 17 NW. J. INT’L L. & BUS. 470 (1997).

of international organizations. Jose Alvarez lists three somewhat similar elements for use in defining international organizations: (1) establishment by agreement between states; (2) existence of at least one organ capable of operating separately from member states; and (3) operation under international law.² These also are largely important doctrinal parameters, but Alvarez's second parameter captures a fundamental analytical characteristic: independence.³ Independence is at the heart of delegation, as defined below, and is the central social scientifically salient characteristic of international organizations.

B. Dissecting International Organizations

Below, I list some key functional features of international organizations.

1. Delegation. How much authority does the international organization have? How much formal power does it have to affect state behavior? Referring to a political science literature on this topic,⁴ I adopt the term "delegation" to name this parameter. The concepts of "legislation" and "adjudication" mentioned below are best understood as modes of exercise of delegated authority: the international organization is *delegated* authority to make decisions—to legislate or to adjudicate—with respect to a particular issue. Delegation has three essential components: authority, independence in the exercise of authority, and bindingness.
 - a. "Authority," refers to the extent to which the international organization is granted decision-making power with respect to a particular subject matter.
 - b. "Independence," means independence from individual state control, not independence from the control of the group of member states as a collective principal. Independence from the control of the collective principal would be pathological, unless the collective principal is engaging in a self-commitment strategy.
 - c. "Bindingness," refers to the extent to which states must obey the rules of the international organization. For example, if exit from the international organization is costless, there is no bindingness, and consequently no delegation. While exit is often formally

² JOSE E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 6 (2005).

³ Abbott and Snidal provide a functional definition: "Two characteristics distinguish [international organizations] from other international institutions: centralization (a concrete and stable organizational structure and an administrative apparatus managing collective activities) and independence (the authority to act with a degree of autonomy, and often with neutrality, in defined spheres)." Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 9 (1998).

⁴ Kenneth W. Abbott, et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401–2 (2000) [hereinafter *Legalization*].

costless, it can be substantively costly: the costs of lost opportunities for cooperation may exceed the benefits of exit.

2. Legislation. Second, how does the organization make decisions for general application, within its area of delegation? We might refer to these decisions as “legislation.” Although not all decisions for general application are produced through formal legislative-style processes, for consistency of reference, I will refer to these decisions as “legislation.” The core question here, and one of “independence,” is to what extent individual states may veto or otherwise exercise a controlling influence over legislation.
3. Adjudication. Third, how does the organization make decisions for specific application to specific concerns or disputes? We might refer to these decisions as “adjudication,” although again, not all decisions for specific application are produced through adjudicative processes. Furthermore, while adjudication considers specific cases, the principles established may be of general application, overlapping with “legislation.” Again, independence is a critical parameter.
4. Enforcement. Fourth, can the organization apply sanctions to states, either directly or through authorization of application of sanctions by other states? In a very important sense, enforcement is necessary to delegation: unless decisions carry some force, the delegated authority on which the decision is based is ephemeral. Enforcement may enhance bindingness, but bindingness does not necessarily depend on *formal* powers of enforcement: informal enforcement may be sufficient in many cases.
5. Membership. Fifth, what is the composition of the organization—which states are members?
6. Synergies and Conflicts. Sixth, what synergies or conflicts are there between the various features of the international organization? Note that the central two features are delegation and membership, with legislation, adjudication, and enforcement best understood as subsidiary to delegation. Legislation, adjudication, and enforcement relate to the scope of delegated authority and the way in which it is exercised. How the delegated authority is to be exercised will affect how much authority is allocated to the organization. These features will also affect the membership of the organization.

There are other features that could be evaluated, such as the size or composition of the secretariat, the ability of the secretariat to set agendas or even make decisions, the expertise of the secretariat, the financing of the organization’s activities, etc. These are important, but because their effect is

largely informal, I do not address them here. This Article focuses on the formal legal powers and actions of formal international organizations.⁵

For all of these features, the most interesting question is what the effects are of each feature in connection with particular areas of international cooperation? Stated slightly differently, how do these features correspond to particular contexts of international cooperation? It is to be expected that states would choose particular features in order to respond to particular aspects of the relevant area of cooperation.

So there is no generally optimal international organization structure, but this Article suggests that, for each international cooperation area, there is an optimal international organization structure. I hasten to add that the optimal international organization structure for any particular cooperation area may be no international organization at all, or one that exists in formal terms, but has no delegation as I have defined it. It is also to be expected that economies of scale and scope might make it optimal to treat multiple areas of cooperation together within a single international organization. Economies of scale or scope or other synergies might make a structure optimal for addressing multiple areas, even if it is not otherwise optimal for any one of the particular areas.

In two separate seminal studies, leading groups of international relations scholars have proposed somewhat different features for taxonomizing international institutions (a broader concept than international organizations because “institutions” includes informal arrangements). Koremenos, Lipson, and Snidal (the “Rational Design” project) propose focusing on membership, scope of issues covered, centralization, rules for control, and flexibility.⁶ The list I

⁵ While this Article will focus on formal powers, international organizations may have important soft law functions. For example, the Basel Committee on Bank Supervision carries out most of its functions through accords that are not legally binding at the international level. These accords have important behavioral effects. See CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* (2012).

⁶ Barbara Koremenos, et al., *The Rational Design of International Institutions*, 55 INT’L. ORG. 761, 763, 770–73 (2001) [hereinafter *Rational Design*]. In *Rational Design*, Koremenos, Lipson, and Snidal suggest five key dimensions of international institutions: membership, scope of issues covered, centralization of tasks, rules for controlling the institution, and flexibility of arrangements. See also Legalization, *supra* note 4, at 408–18. In *Legalization*, the authors focus on three elements of legalization: obligation, precision, and delegation:

Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. Precision means that rules unambiguously define the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.

develop above draws a great deal from their work. I separate legislation from adjudication within their “rules for control.” In addition, their concepts of scope of issues covered and centralization, when combined, is similar to the concept of delegation that I use.⁷ The concept of delegation that I use is adapted from the list suggested by Abbott, Keohane, Moravcsik, and Slaughter (the “Legalization” project).⁸ However, their use of delegation focuses on authority,⁹ while my use of delegation highlights the fact that authority without binding force and independence lacks behavioral implications.

I do not include flexibility from Rational Design, or precision from Legalization, because for my purposes these are subsidiary issues—I am interested in how the law is applied *in accordance with its terms*, and those terms will indeed include flexibility in the form of exceptions and escape clauses, as well as more or less precision in particular circumstances. Indeed, “flexibility” is included in all law in the sense that all law has limitations on its coverage. I address a concept similar to precision when discussing the distinction between more specific rules and more general standards in connection with dispute resolution, but for different purposes.

Generally speaking, Rational Design and Legalization have somewhat different purposes than mine here, as my focus is specifically on the formal role of organizations, and how formal features of authority and the exercise of authority might be chosen. For example, “scope” in the Rational Design work does not have any *formal* significance except to the extent that it is aligned with control.¹⁰ So, by focusing on the formal, I can ignore scope to the extent that it differs from my concept of delegation. Thus, for purposes of this Article, I will focus on the six aspects listed above.

⁷ Rational Design, *supra* note 6, at 770–72.

⁸ Legalization, *supra* note 4, at 415–18.

⁹ *Id.*

¹⁰ Rational Design, *supra* note 6, at 770–71.

To summarize, the following table describes the three components of delegation, as they each manifest themselves in legislative, adjudicative, and executive functions of international organizations:

Characteristics Type	Authority	Independence	Bindingness
Legislative	Legislative jurisdiction	Majority voting	Hard law
Adjudicative	Adjudicative jurisdiction	Independence from individual states	Hard law determination
Executive	Executive authority	Independence from individual states after appointment	Binding determinations

C. International Organizations and International Law

I am concerned in this Article with the distinct formal role of organizations, as opposed to international law itself, in international cooperation. Functionalist and neo-functionalist approaches to international organizations made the mistake of moving directly from international cooperation problems to organizational solutions. They elided a critical intermediate, and perhaps final, step: the utility of international law separate from the establishment of additional international organizational structures.¹¹ But organizations are costly, and would only be expected to be established where their benefits exceed their costs.¹² It is important to explain the need for international legal rules, and then separately

¹¹ See generally Ernst B. Haas, *The Study of Regional Integration: The Joys and Anguish of Pre-Theorising*, 24 INT'L. ORG. 607 (1970); see generally Ernst B. Haas, *Turbulent Fields and the Theory of Regional Integration*, 30 INT'L. ORG. 173 (1976).

¹² Randall Calvert, *The Rational Choice Theory of Social Institutions*, in MODERN POLITICAL ECONOMY 216 (J. Banks & E. Hanushek eds., 1995); ANDREW SCHOTTER, *THE ECONOMIC THEORY OF SOCIAL INSTITUTIONS* (2008).

and additionally to explain the need for international organizational structures to make, interpret, enforce, and administer the rules.

Not all international law requires a discrete organization. Much international law, including most customary international law but also certain treaties, lacks a specialized secretariat, surveillance, dispute settlement, decision-making, and other organizational functions. The great body of customary international law largely operates without specific organizational structures. One theoretical justification for international organizations is to reduce the transaction costs of international cooperation.¹³ This is the Coasean story of the market versus the firm, with the international organization playing the role of firm, and the general international legal system playing the role of the market.¹⁴

But it is important to recognize that the market has institutions too, and indeed is an organizational structure. Similarly, even without a function-specific organization, the general international legal system performs some of the organizational functions listed above. Therefore, the correct comparison is not between having an organization and not having an organization, but between the default organizational features of the international legal system, and an infinite variety of customized organizational features that can be established in function-specific organizations.

This comparison is analogous, within the original theory of the firm setting, to one between contracting on the one hand, and establishment of a similarly infinite variety of organizational features of a firm on the other hand. Indeed, given the possibility of long-term, complex contracting and limited-function firms, the strict firm-contract dichotomy can be seen as too stark. Rather, a more nuanced analysis is called for. This more nuanced analysis does not simply establish features along a continuum of less to more "organization." Rather, it is necessary to distinguish the role of different features of organization, to understand the role of each feature in facilitating transactions (or cooperation, as it is known in the international relations context), and also to understand the relationship among the different features. As a starting point in analysis, it is worthwhile to examine what analytical techniques are appropriate for application to these different features.

¹³ ELINOR OSTROM & ROBERT O. KEOHANE, *LOCAL COMMONS AND GLOBAL INTERDEPENDENCE* (1995).

¹⁴ Ronald Coase, *The Nature of the Firm*, 4:16 *ECONOMICA* 386 (1937).

D. Public Interest and Public Choice in International Organizations

Economic analysis of international organizations must operate at two levels.¹⁵ At the second level is the relationship between states in pursuit of their individual decisions based on their own state preferences. At this level, we can think in terms of maximization of state preferences, viewing the state as a black box that engages in international relations, and without questioning the source of its expressed preferences.

At the first level is the constellation of domestic politics in each state. This is where state preferences are formed, and of course state preferences are not simply the sum of citizen preferences. Just as state preferences may be formed in a way that is inconsistent with the sum of citizen preferences, international organizations may be formed in a way that is inconsistent with citizen preferences.

In fact, it is possible that international organizations are used to enhance the ability of certain political elites or interest groups to affect their preferred policies at the expense of the broader populace.¹⁶ Here, we can readily see that delegation could have adverse welfare effects on citizens. It might allow governments to hide their actions, or otherwise to avoid accountability for their actions. It might allow governments to collude, diminishing the value of competition in the supply of governmental goods.¹⁷

These levels of analysis are not exclusive: both the public interest and the public choice approach have explanatory power. Political operatives carry out the public interest to some extent due to mechanisms for accountability or altruism. Therefore, a model that included in the determinants of national policy only public welfare would be deficient, as would a model that included in the determinants of national policy only political official welfare. Rather, national policy will be determined by a combination of the welfare of political actors and their constituents. Public choice models that include public welfare as a determinant of political welfare are sufficient to do so. So are public welfare models that recognize the mediating effect of politics.

Future analytical models may incorporate behavioral economics perspectives. For example, biases toward loss aversion may result in

¹⁵ See generally Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L. ORG. 427 (1988).

¹⁶ See generally THE POLITICAL ECONOMY OF INTERNATIONAL ORGANIZATIONS: A PUBLIC CHOICE APPROACH (Roland Vaubel & Thomas D. Willett eds., 1991).

¹⁷ *Id.* at 27–40.

systematically inadequate delegation to international organizations, giving rise to a conservative sovereigntist bias.

Whatever model is chosen, there will be circumstances in which a greater aggregate of public and political welfare may be achieved by international cooperation, and a narrower group of circumstances in which international organizations are utilized to do so. To the extent that public welfare is a vector in national decision-making, national governments will tend to seek international cooperation that enhances public welfare.

Finally, it is appropriate to mention the possibility that a particular international organization may have little substantive function—little effect on the behavior of states. Perhaps this is because it is intended to serve a public relations function, or an obfuscatory function. While this is certainly a plausible possibility in some circumstances, it would not be plausible to argue that international organizations in general are designed to have little effect. This position is refuted by the variety of organizational structures and by the way that states seem to believe important things are at stake in organizational action. The fact that international organizations generally may affect behavior does not mean that the power of states is not important when an international organization is delegated authority. We can expect powerful states to play disproportionate roles in structuring and in operating international organizations.¹⁸ Indeed, we might observe that while the UN Security Council may have little independence vis-à-vis the permanent five veto-wielding members, it has substantial independence vis-à-vis other states.

II. DELEGATION IN INTERNATIONAL ORGANIZATIONS

Why are formal international organizations created, and why is formal legal power delegated from states to international organizations?¹⁹ Delegation is here the dependent variable. Transaction costs theory, agency theory, and game theory can provide plausible public interest rationales—sources of plausible independent variables. Public choice theory, on the other hand, suggests that domestic politicians may delegate authority to international organizations where they can garner more political support, perhaps by blaming international organizations for unpopular actions, by seeking to legitimate policies through international organization support, or by obscuring action from public view by carrying it out through an international organization. However, public choice theory also can utilize transaction costs theory, agency theory, and game theory

¹⁸ See RANDALL W. STONE, *CONTROLLING INSTITUTIONS: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY* (2011).

¹⁹ See Abbott & Snidal, *supra* note 3.

in order to understand how self-interested political actors might establish international organizations in order to further their own interests.²⁰

In their early work on international organizations, Abbott and Snidal included “independence” as a core aspect of international organizations.²¹ Indeed, without independence there is no delegation. That is, it is implicit in the concept of delegation that authority is shifted to the international organization in a way that individual states cannot completely control. It is important to say that by “independence,” I do not refer to a “Frankenstein” international organization as Andrew Guzman has described, that might depart from the mandate of its *collective* principal.²² So, the critical measure of “dependence” is the degree to which individual members may control decisions, and the critical measure of independence is the degree to which they cannot.

Using a random sample of international agreements, Barbara Koremenos finds that delegation is widespread, and that it often operates through dispute settlement.²³ The definition of delegation that Koremenos uses focuses on powers, without assessing how independently international organizations exercise their powers.²⁴

Compared to the delegation between domestic citizens and domestic governments, it seems that relatively little authority is actually delegated to international organizations. According to the principle of subsidiarity, this fact tells us little about the level of delegation to international organizations from a normative standpoint. International organizations are not states—they serve a different function. Therefore, the interesting question is whether the level of delegation observed matches well with the cooperation problems addressed by international organizations.

International organizations may serve to solve coordination problems through surveillance and communication, and to solve cooperation problems through similar techniques where surveillance and communication can support a

²⁰ See generally Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127 (2010).

²¹ Abbott & Snidal, *supra* note 3, at 16–23.

²² Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999 (2013).

²³ Barbara Koremenos, *When, What, and Why do States Choose to Delegate*, 71 L. & CONTEMP. PROBS. 151 (2008).

²⁴ *Id.* at 152.

cooperative equilibrium.²⁵ States seldom address cooperation problems by providing full authority to act and enforce to an international organization.²⁶

It might be argued that the UN Security Council is exceptional in this regard, although the permanent members' veto, as well as the need for member action to carry out decisions, imposes important limits on the degree to which authority can be seen as delegated to the Security Council. A more plausible exception is the legislative and adjudicative authority of the European Union, although some may argue that the European Union is *sui generis*. Other important exceptions include voting in the IMF and World Bank, which involve weighted voting, voting in technical organizations such as the Codex Alimentarius regarding food safety standards, and in the International Maritime Organization regarding shipping safety standards.

In connection with adjudication in the European Court of Justice, the European Court of Human Rights, the WTO, the International Tribunal for the Law of the Sea, the International Center for the Settlement of Investment Disputes, or within mixed arbitration facilities provided under bilateral investment treaties (BITs), broader authority appears to be delegated to these components of international organizations (even though BITs generally lack formal organizational structures, they utilize organizations such as the International Center for the Settlement of Investment Disputes).

This type of authority seems to be intended to resolve information and credibility problems *among* the principals.²⁷ Some discretion must be accorded to agents where the principals seek to enhance the creditability of their commitments: "[a]n agent bound to follow the directions of the delegating politicians could not possibly enhance the . . . commitment."²⁸ The growing literature of international administrative law seems focused on the separate issue of principal-agent problems between the international organization and member states or their citizens.²⁹

Below, I review three theoretical perspectives relevant to the explanation of delegation to international organizations: transaction costs theory, principal-agent theory, and game theory. I also discuss how these perspectives affect the

²⁵ See generally HELEN V. MILNER, INTERESTS, INSTITUTIONS AND INFORMATION: DOMESTIC POLITICS AND INTERNATIONAL RELATIONS (1997).

²⁶ See generally Andrew T. Guzman & Jennifer Landside, *The Myth of International Delegation*, 96 CAL. L. REV. 1693 (2008).

²⁷ DARREN G. HARKINS & WADE JACOBY, DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, 199–228 (Darren G. Hawkins, et al. eds., 2006).

²⁸ Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 EUR. UNION POL. 103, 110 (2001).

²⁹ The literature is now extensive. For an introduction, see generally Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

decision as to the breadth of coverage, and linkage, within an international organization.

A. Transaction Costs Theory

The Coasean theory of the firm hypothesizes that the reason individuals create firms (in our case, organizations) is transaction cost reduction.³⁰ The best way to think about this hypothesis is in terms of cost-benefit analysis. There are gains to be achieved from cooperation, and there are sovereignty costs associated with cooperation. Where there are positive net gains from cooperation and they exceed the transaction costs of cooperation, we would expect to observe cooperation. The need to consider gains from cooperation and sovereignty costs makes the transaction costs framework difficult to operationalize, just as the need to consider preferences makes the transaction cost framework difficult to operationalize in domestic policy analysis. States would be expected to seek to maximize their net benefits from cooperation by utilizing the institutional structure that maximizes the net transaction gains, net of transaction costs. The choices range from case-by-case cooperation to organizationally structured cooperation (analogous to the continuum between the market and the firm).

There are three broad categories of transaction costs in the international cooperation context. First, organizations can reduce transaction costs by reducing the costs of identifying, evaluating, and negotiating a Pareto-improving transaction. International organizations may address these costs through the application of expertise and by facilitating negotiations through secretariat services.

Second, transaction costs economizing can be extended to include game theoretic perspectives by including in transaction costs the costs of overcoming strategic barriers to cooperation. To the extent that the strategic context in which states find themselves maps into a prisoner's dilemma or another strategic model that could be resolved efficiently by a change in the payoffs effected through legal rules, an international organization might be useful. As discussed in more detail below, an organization can reduce the costs of inefficient strategic behavior by, for example, supplying information, certifying information, completing an incomplete contract, or changing the structure of retaliation and the payoff from defection. If these cost reductions, combined with the value of cooperation, are greater than the costs of cooperation, including sovereignty costs, then the organization may be justified.

³⁰ See generally Coase, *supra* note 14.

Third, transaction costs economizing can be extended to include principal-agent analysis by including in transaction costs the cost of reducing agency problems. (I discuss principal-agent theory separately below.) Again, if the net benefits, after taking into account the costs of addressing agency costs, are positive, then an organization may be justified.

It is not possible to determine in the abstract whether an international organization would have greater net transaction gains compared to those resulting from a simple treaty without a specific organization formed around the treaty. Rather, this question can only be answered in connection with specific cooperation problems, and, importantly, in connection with the particular organizational design proposed. The question of which would have greater net benefits is to a great extent dependent on the question of the structure of the international organization. So, the comparative question is not between having an organization and having no organization, but is instead between having no organization and having different types of organization. The methodology that is indicated is comparative institutional analysis, proposing a variety of alternative institutional structures, and evaluating which is most likely to maximize net benefits. If the net benefits are negative, then cooperation is unattractive.

Oliver Williamson sees transaction costs economizing as the main purpose of vertical integration—of formation of organizations.³¹ Vertical integration is seen as a governance response to a particular set of transaction dimensions, including high asset specificity as the principal factor. In the international law context, asset specificity occurs when one state makes investments that are dependent for their value on the cooperation of other states. For example, consider a “weakest link” public good, in which each state must invest to create the public good, but any state’s investment is wasted unless all states contribute.

Assuming asset specificity, it may be useful to establish devices to constrain opportunism in order to realize gains from cooperation, depending on the costs and benefits of these devices. Organizations may be used to constrain opportunism. Organizations may specify discrete rules, but are, under positive transaction costs, always incomplete. Even the discrete rules are incomplete in their interpretation, application and enforcement.

States may use a variety of methods to complete their contracts *ex post*. One method is simply to negotiate regarding new circumstances as they come up. This method, which is the default international law position, may give rise to stalemates or inefficient strategic behavior. A second method is to provide for a legislative system that involves less than full unanimity, or that has other expediting characteristics. A third method, with a somewhat different domain, is

³¹ See generally OLIVER WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985).

to provide for dispute settlement, with all of the varieties of dispute settlement structure that may be available. Koremenos finds greater delegation under complexity, and also that delegation is often in the form of dispute settlement.³²

So, in determining whether an international organization would be useful, it would be important to evaluate the strategic setting, the magnitude of the payoffs, the capacity for informal enforcement, and other aspects of the circumstances. It is a complex determination, as the types of commitments that would be appropriate are interdependent with the types of institutional structures that would be appropriate to enforce them, including the design of the international organization.

B. Principal-Agent Theory

As Coase suggested, we must compare the costs of transactions in the market with the costs of operations within an organization. Within an organization, much of the question of transaction costs can be understood in terms of agency costs. Thus, a related lens by which to view delegation is through principal-agent theory, in which a collective principal (the member states) delegates certain authority to an agent (the international organization) in order to accomplish particular purposes.³³ The agent cannot be expected to be perfectly faithful to the principal: agents may shirk their duties and may take advantage of the principal's trust. The costs occasioned by shirking and self-dealing, and by measures designed to limit shirking and self-dealing, are "agency costs." Measures designed to limit shirking and self-dealing must overcome information problems in connection with monitoring agent performance, and must provide for effective responsive control.

Grants of authority from a principal to an agent may be structured with greater specificity (rules) or lesser specificity (standards). Under lesser specificity, the agent exercises more discretion. Agency contracts can never be complete, and so agents always exercise some discretion. For example, under the US constitutional context, standards such as "due process" delegate a great deal of discretion to judges to determine what is required.

Principal-agent theorists in political science view the level of discretion granted to agents "as the result of conflict between principal and agent preferences, the ability of principals to write detailed rules, the degree of conflict

³² Koremenos, *supra* note 23, at 168–81.

³³ See DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 27.

among collective principals, and the availability of alternative means by which the principals can control the conduct of agents.”³⁴

C. Game Theory

Delegation is simply a grant of authority over a particular issue area. Considered alone, it is no different from the grant of authority over a particular behavior that arises from the creation of a legal or contractual rule without an organizational structure.

The game theoretic analysis of delegation of authority to international organizations is based in the first instance on the game theoretic analysis of international law in general. International legal rules that impose costs in connection with violation can change the payoffs from defection and, therefore, change the structure of the game. International organizations can be used to improve the credibility of states’ commitments, by monitoring compliance and completing incomplete contracts.³⁵ This can be critical to avoiding a prisoner’s dilemma in which the dominant strategy is defection, but it can also be important in other strategic contexts. For example, even in a coordination game, such as a stag hunt, where there are no direct incentives to defect, it may be that concerns about the reliability of compliance by others lead to defection in order to achieve a smaller payoff than that available from cooperation. With legal rules that add to the costs of defection, players may rely more on compliance by others, and therefore have a greater incentive to comply themselves.

What causes states to enter into a treaty creating an international organization? As suggested above, we must begin by asking what causes states to enter into international law.³⁶ Epstein and O’Halloran develop a formal model of delegation, focusing on the degree of policy distance between the policy adopted by the international organization and the ideal policies of its member states.³⁷ Their approach focuses on discrete policies developed as an offer by the international organization, in anticipation of responses by possible member states. In other words, Epstein and O’Halloran assume that states know what

³⁴ JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY*, 215 (2002).

³⁵ See generally ANDREW MORAVCSIK, *THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT* 78 (1998); Mark Pollack, *Delegation and Discretion in the European Union*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS*, *supra* note 27.

³⁶ See JOEL P. TRACHTMAN, *THE FUTURE OF INTERNATIONAL LAW: GLOBAL GOVERNMENT*, 22–40 (2013).

³⁷ David Epstein & Sharyn O’Halloran, *Sovereignty and Delegation in International Organizations*, 71 L. & CONTEMP. PROBS. 77, 81–82 (2008).

policy they want at the time that they enter into the organization.³⁸ This accords well with their assumption that states can always withdraw from an international organization,³⁹ so that, in effect, the “entry” game is a continuous game, and a constraint on international organization independence. Because the game continues, states do always know their policy goal and can act on it at any given moment. The possibility of exit eliminates uncertainty.

However, where exit is a costless option, we might say that there is no real delegation in a formal sense: states simply are not bound by the rules or decisions of the organization because they can dis-apply those rules or decisions at any time. Koremenos finds that explicit withdrawal clauses are significantly correlated with the variable she terms “delegation,” suggesting that withdrawal clauses are a way of reducing sovereignty costs.⁴⁰ This suggestion seems correct, but somewhat trivial: as the cost of exit is reduced, the binding force of international law is also reduced, and sovereignty costs are consequently reduced. The cost of exit must be taken into account in assessing the extent of delegation. In order for delegation in the sense I have used it to exist, exit cannot be costless. As costs of exit decline, the degree of delegation declines.

The assumption that states can withdraw is formally valid for most international organizations, but there may indeed be international organizations that provide no formal means of exit, and there may also be important informal inducements to remain within an international organization after entering it.⁴¹ Formal rules may be given power by informal costs of exit. The costs of exit may be positive, even if they are not strictly prohibitive. There are relatively few instances of states exiting international organizations.

We might assume that states will only remain members of an international organization to the extent that the discounted value of future payoffs from membership, plus the cost of exit, is greater than the costs of membership. In this sense, an international organization for which this condition is true would be self-enforcing. So, it is entirely possible that a single adverse decision or rule would not be sufficient to induce a state to exit.

Given formal and informal constraints on exit, it may be useful to relax the assumption that states can exit without cost, and under these circumstances, there is uncertainty how delegation will affect any given state’s policy preferences. Given uncertainty, we might say that delegation occurs in a

³⁸ *Id.* at 84.

³⁹ *Id.*

⁴⁰ Koremenos, *supra* note 23, at 152.

⁴¹ See generally Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

“constitutional moment” in the Buchanan and Tullock sense:⁴² a moment at which a Harsanyiian “veil of uncertainty” allows states to agree on constitutional change even though, indeed, because, they are uncertain of the possible future results of the delegation.

D. Scope and Linkage

A discussion of delegation must include the question of what issues are included within a single international organization structure, and the issue of scope of issues covered is in turn related to membership. The choice of issues to address within a single structure may depend on issues such as economies of scale and scope in connection with the international organization mechanism.

On the other hand, the choice of issues may depend on the ability to construct a “package” that will be acceptable to the participants at the outset, and that will be “self-enforcing” as a package moving forward. States may delegate authority—accept rules or mechanisms that can make rules in the future without their additional consent—over a particular area of concern to other states only in exchange for reciprocal commitments by the other states. Under asymmetry, the reciprocal commitments would be required to include other areas with complementary asymmetric profiles.⁴³ For example, if India wants greater market access for certain manufactured goods in the US, the US may demand greater market access in India for *other* goods in which the US has commercial interests, or the US may demand greater protection of intellectual property rights in India.

In game theory studies of cooperation over time, one of the critical factors that can determine cooperation is “the shadow of the future.” The shadow of the future refers to the possibility that non-cooperation today will produce retaliation in the future.⁴⁴ The power of the shadow of the future is affected by the degree of linkage among issues, and the frequency and magnitude of future opportunities for retaliation. The frequency may be increased—and its power thereby magnified—by expanding the scope of issues that are linked to one another. Thus, for example, if the game is not the narrower game of prescriptive jurisdiction in antitrust, but the broader game of prescriptive jurisdiction more generally, or the even broader game of international law compliance, the play is

⁴² See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

⁴³ See generally Ronald B. Mitchell & Patricia M. Keilbach, *Situation Structure and Institutional Design: Reciprocity, Coercion, and Exchange*, 55 INT'L ORG. 891 (2001).

⁴⁴ See Joel Trachtman & George Norman, *Measuring the Shadow of the Future: An Introduction to the Game Theory of Customary International Law*, 2008 U. ILL. L. REV. 127 (2008).

repeated more frequently, allowing greater opportunities for retaliation and greater incentives for compliance.

One of the assumptions underlying game models such as the prisoner's dilemma is that the game is self-contained. Casual observation of international society suggests that there are many linkages, however, with the result that few issues can be isolated. Players can bind one another in a variety of ways, including by linking the present game to other games in a "supergame."⁴⁵

Firms—and states—operate in multiple markets and encounter other firms, or states, in multiple contexts: as competitor here, as supplier there, as coconspirator elsewhere. Industrial organization economists studying the effect of multimarket contact have found that this cross-sectoral activity may support cooperation. For example, Giancarlo Spagnolo has noted that in the case of multimarket contact, cooperation "can be viable in a set of markets even when in the absence of multimarket contact it could not be supported in any of these markets."⁴⁶ This is a powerful corrective for scholars who examine individual international law rules or treaties to inquire whether they are self-enforcing.

One important difference between the commercial context and the international relations context is that state relations in the international context almost always cross a number of sectors. States relate to one another in a variety of contexts, with varying roles in each context. In one context, a particular state may be concerned about the scope of its prescriptive jurisdiction, whereas in another context it may be concerned about the scope of its responsibilities to protect foreign diplomats. As a result, while there may be a "carbon reduction game" that is separate from the "trade liberalization game," these games can be linked. In fact, states regularly link issues in international relations, with the result that it is not possible to establish precise boundaries for any particular game: "with all side payments prohibited, there is no assurance that collective action will be taken in the most productive way."⁴⁷

This discussion suggests that international cooperation in different sectors may be mutually supportive, and that there may be a kind of network effect that makes each additional instance of cooperation more attractive than it would be absent existing instances. This game-theoretic perspective provides support for the early neo-functionalist hypotheses regarding international economic integration.⁴⁸ Broader organizations may allow this type of mutual support with

⁴⁵ *Id.*

⁴⁶ Giancarlo Spagnolo, *Issue Linkage, Credible Delegation, and Policy Cooperation* 128 (Ctr. for Econ. Policy Research, Discussion Paper No. 2778, 2001).

⁴⁷ BUCHANAN & TULLOCK, *supra* note 42, at 153.

⁴⁸ See, for example, DAVID MITRANY, *A WORKING PEACE SYSTEM: AN ARGUMENT FOR THE FUNCTIONAL DEVELOPMENT OF INTERNATIONAL ORGANIZATION* (1944).

reduced transaction costs, and perhaps greater legitimacy, and may also offer economies of scale and scope. On the other hand, broader organizations could reduce the domain of interorganizational competition.

However, it is important to point out that this mutual support is not dependent upon inclusion within a single organization. A Ronald Coase or Herbert Simon perspective recognizes the essential fungibility between internal organizational arrangements and contractual arrangements in a market. In the present context, this means that it does not necessarily matter whether functions are separated in function-specific international organizations or are integrated within a single organization, such as the UN or perhaps the WTO⁴⁹ Within a single organization, the critical question will be how these different concerns or functions are integrated. Furthermore, under path dependence, given that the WTO exists, and no World Environmental Organization yet exists, there may be actions, such as adding functional environmental responsibility to the WTO, that make sense today yet would not make sense were the starting point different.

III. LEGISLATION

International organizations can be created to preside over a static set of rules, in which case there would be no delegation in a legislative sense. Rather, new rules would be made through the default rules of the general international law system.

It is also possible to accord international organizations decision-making or legislative power of various kinds, and this legislative power is one type of delegation. However, it is unusual for international organizations to have legislative power based on majority voting.⁵⁰ Examples of some that do include the European Union, the IMF, the World Bank, and the UN Security Council in particular circumstances. I do not include the World Trade Organization because, despite formal provisions for decision-making by majority voting, decisions are generally made only by consensus, and larger normative changes require amendments, which only bind their signatories.

Giovanni Maggi and Massimo Morelli show that a key parameter in determining whether to choose majority voting is the governments' discount factors, representing their patience.⁵¹ As Maggi and Morelli explain, their model

⁴⁹ See Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004).

⁵⁰ See Yoram Z. Haftel & Alexander Thompson, *The Independence of International Organizations*, 50 J. CONFLICT RESOL. 253, 258 (2006) (finding that among regional organizations in their sample, decision-making is almost always by consensus).

⁵¹ Giovanni Maggi & Massimo Morelli, *Self-Enforcing Voting in International Organizations*, 96 AM. ECON. REV. 1137, 1138 (2006). See also George Norman & Joel Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005).

posits that “the voting rule is chosen *ex ante*, under a veil of ignorance about future issues. Thus, the optimal voting rule maximizes the *ex ante* expected utility of the representative member subject to self-enforcement constraint: a government must have incentive to comply with the collective decision even if it happens to disagree with it.”⁵²

With high discount factors—greater valuation of future payoffs from cooperation—there are smaller incentives for defection, and less need for what Maggi and Morelli determine are the compliance benefits of a rule of unanimity. Greater likelihood of repeated play and greater frequency of interaction—increasing the amount at stake over a shorter time—also promote compliance. But note that the frequency of interaction parameter need not be limited to interaction *within* a particular organization or issue area.⁵³

Thus, their model “predicts that a non-unanimous rule is more likely to be adopted in organizations where governments are more stable, and in ‘busier’ organizations.”⁵⁴ They also find that greater correlation in the preferences among member states increases the likelihood of a non-unanimous voting rule. Furthermore, a non-unanimous rule may be efficient where there is external enforcement.

Conversely, Maggi and Morelli also show that where an international agreement must be self-enforcing (there is no external enforcement), an organizational rule of unanimity (or consensus) may be efficient under certain circumstances. In order to do so, they find that unanimity eliminates the possibility for defection, but there are at least two reasons why this would often not be the case. First, states may vote cynically, never intending to comply with the resulting rule, but perhaps hoping that others will do so.⁵⁵ Second, even without cynicism, unanimity can result from “package deals” under circumstances in which a state agreeing to the package would prefer not to comply with one or more components of the package.⁵⁶ In addition, circumstances may change such that a domestic political equilibrium that

⁵² Maggi & Morelli, *supra* note 51, at 1138.

⁵³ See generally Norman & Trachtman, *supra* note 51 (explaining the role of multi-sector interaction).

⁵⁴ Maggi & Morelli, *supra* note 51, at 1138.

⁵⁵ Maggi and Morelli only examine truthful equilibria. *Id.* at 1144. Maggi and Morelli’s model involves voting over just two options: against or in favor of a collective action that can only provide benefits only if all participants contribute. Given the binary nature of voting in this model, a voter can never gain from voting cynically. However, in other policy circumstances, states may have incentives to vote cynically.

⁵⁶ Maggi and Morelli recognize this issue. *Id.* at 1151.

supported entry into the relevant obligation no longer exists to support compliance with the obligation.⁵⁷

Consent would tend to imply compliance in circumstances only (i) where consent is known to be based on domestic political support for the behavior that constitutes compliance (even then the domestic political equilibrium may change so as to undermine the tendency to comply); and/or (ii) where the giving of consent activates a lobby that believes that promises should be kept. So, consent is not sufficient for compliance, but nor is it necessary for compliance, because, as I have argued above, multi-sector contact may induce compliance in a way that makes the larger relationship self-enforcing while the narrower rule is not. Indeed, Maggi and Morelli suggest that the availability of transfers expands the range of discount factors for which a rule of majority voting is sustainable.

But perhaps even more importantly, the assumption that most rules of international law or treaties must be self-enforcing may be too strong as well. The common understanding of international law in the economics literature assumes is that for international law to be effective, it must have the characteristics of a self-enforcing contract.⁵⁸ The tools of analysis used by economics for particular legal rules or regimes is thus non-cooperative game theory, where it is assumed to be impossible to enter into exogenously binding contracts. Rather, the internal dynamics of the rule or regime must be structured so that it is endogenously binding—so that it has internal dynamics that will result in compliance.

Much of this analytical perspective is factually dependent on the definition of the scope of the game being played. For example, if the game is isolated as the “reduction of tariffs on bananas game,” or even as the broader “trade liberalization game,” then perhaps the requirement for self-enforcing contracts is appropriate. If instead, we understand the trade liberalization game as part of a broader “general international law game,” then it is not true that the trade liberalization component must itself be self-enforcing. Rather, the question is whether the general international law game is self-enforcing. Similarly, in domestic society, we do not need to ask whether the domestic “environmental protection game” is self-enforcing, because it is embedded in a broader legal and constitutional system. The domestic system starts out equally anarchic to the international system.⁵⁹

⁵⁷ See generally Trachtman, *supra* note 20.

⁵⁸ See generally Giovanni Maggi, *The Role of Multilateral Institutions in International Trade Cooperation*, 89 AM. ECON. REV. 190 (1999).

⁵⁹ See generally, Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

It is true that in anarchy, we must search for self-enforcing agreements. But similar to the fundamental basis for domestic law, the self-enforcing character of international law must be assessed looking at the totality of the international law relationships between states, rather than by isolating individual relationships. There is a much greater possibility for reciprocity, and for what we might call a self-enforcing system, when we examine the entire set of relationships, and examine them across time, than when we examine a single obligation. The economists' perspective, expecting individual legal rules or organizations to be self-enforcing when considered separately and in the short term, is both ignorant of the networked power of law and impotent to address long-term, highly asset specific, and asymmetric, cooperation problems. As to both domestic law and international law, we might say that each individual thread of obligation may be weak or strong—if it is weak, it will be unable to sustain cooperation. However, once a variety of threads are woven together in a “fabric” of society, the fabric can be considerably stronger than any individual thread.

One important finding of the Maggi and Morelli work is that if external enforcement is available, the *ex ante* efficient rule is typically some type of majority voting.⁶⁰ But I have argued above that a rule of unanimity, as suggested by Maggi and Morelli, would not necessarily solve enforcement problems, because unanimity does not necessarily imply subsequent compliance. So there may be fewer circumstances in which a rule of unanimity would be attractive.

IV. ADJUDICATION

Dispute settlement has at least a dual role.⁶¹ First, it is a tool by which states can begin to enforce rules. Second, it is also a method of completing an inter-national contract. Thus, dispute settlement includes two types of delegation. Both require some degree of independence in order to constitute delegation.⁶² Enforcement is predicated on the ability to complete the contract in order to determine the rights and duties of the parties. But it is possible to determine the rights and duties without further formal enforcement activities. Therefore these two functions should be evaluated and structured to some extent independently.

Under significant uncertainty as to the future state of affairs, states would wish to establish complex state-contingent contracts. However, contracting is

⁶⁰ See generally Philippe Aghion & Patrick Bolton, *Incomplete Social Contracts*, 1 J. EURO. ECON. ASSN. 38 (2003); Joel Guttman, *Unanimity and Majority Rule: The Calculus of Consent Reconsidered*, 14 EURO. J. POLIT. ECON. 189 (1998).

⁶¹ See generally Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171 (2008).

⁶² See Koremenos, *supra* note 23.

costly, limiting the ability to specify state contingencies. On the other hand, by specifying general “standards,” and delegating to dispute settlement bodies the responsibility to apply these standards, states are able to include complex state-contingency in their contracts, with significantly lower variable contracting costs.

This problem has been examined most extensively in the international trade area, and the insights developed seem adaptable to other areas of international organization. Horn, Maggi, and Staiger have argued that the WTO can be viewed as an incomplete contract whose form is endogenously determined.⁶³ They find that the WTO includes an interesting combination of “*rigidity*, in the sense that contractual obligations are largely insensitive to changes in economic (and political) conditions, and *discretion*, in the sense that governments have substantial leeway in the setting of many policies.”⁶⁴ They observe that “there is a *wide array of policy instruments*—border measures and especially ‘domestic’ measures—that should be constrained to keep in check each government’s incentives to act opportunistically.”⁶⁵

Under significant uncertainty as to the future state of affairs, states would wish to establish complex state-contingent contracts. In the area of domestic regulation, the magnitude of domestic benefits from the regulation, and the magnitude of harm to foreign persons, is uncertain. However, contracting is costly, limiting the ability to specify state-contingencies in detail. On the other hand, by specifying general standards, and delegating to dispute settlement bodies the responsibility to apply these standards, states are able to include complex state-contingency in their contracts, with significantly lower variable contracting costs.

The need for state-contingent contracting in order to promote efficiency in the trade-off between domestic regulation and international trade suggests that dispute settlement in international trade will continue to be an important institutional feature. That is, the problem is not necessarily that there are unexpected disputes because of a failure to agree clearly on specific rules. Rather, it is efficient not to agree on more specific rules and to leave determination under specific circumstances to dispute settlement. In these cases, it is better to have general standards rather than more specific rules. Many areas of international law have a similar dynamic. Of course, the design of a dispute

⁶³ Henrik Horn et al., *Trade Agreements as Endogenously Incomplete Contracts*, 100 AM. ECON. REV. 394, 406 (2010).

⁶⁴ *Id.* at 395.

⁶⁵ *Id.* at 395.

settlement mechanism is intimately related to the types of commitments that would be included in an international treaty.⁶⁶

A somewhat different role for dispute settlement is to facilitate a rule of efficient breach, by reliably calculating damages. An international agreement may be designed to allow efficient breach, whereby a state may avoid its obligations by paying specified damages to the obligee state. This is expected to be efficient where the value of violation is greater than the value of the calculated damages. But an escape clause of this nature is dependent on an independent third party to calculate the damages.⁶⁷

In the enforcement role, dispute settlement declares who is right and who is wrong, removing the subject treaty from the default international legal mechanism of auto-interpretation. This declarative role can have important informal effects, and these may be sufficient to induce the desired level of compliance even without formal remedies.⁶⁸ I discuss the enforcement role below.

V. ENFORCEMENT AND SURVEILLANCE

Like legislation and adjudication, enforcement is a type of delegation. States delegate enforcement capability to international organizations in order to address cooperation problems by increasing the costs of defection in a way that could not be done, or done as efficiently, without an organization. While states themselves may participate in enforcement actions, the international organization may engage in surveillance, or in determining and publicizing violation, supporting state action.

Models of international cooperation are often based on a prisoner's dilemma, with a self-enforcing equilibrium resulting from an assumption of a grim trigger strategy in response to defection, and a shadow of the future that exceeds in value the one-time benefits of defection. The theoretical problem

⁶⁶ See Giovanni Maggi & Robert Staiger, *The Role of Dispute Settlement Procedures in International Trade Agreements*, 126 Q. J. ECON. 475 (2011).

⁶⁷ See generally B. Peter Rosendorff, *Stability and Rigidity: Politics and Design of the WTO's Dispute Settlement Procedures*, 99 AM. POLI. SCI. REV. 389 (2005).

⁶⁸ Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1263–76 (2004); Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179, 197 (2002); Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303, 304 (2002); see also James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L. ORG. 137, 146 (2000).

with the grim trigger strategy is that because it is collectively irrational it is not “renegotiation-proof.”⁶⁹

That is, after a defection, a coalition of states will have incentives to come together and cooperate with the defector, depriving the grim trigger of credibility and therefore effectiveness. The reasoning is that equilibrium strategies that enforce cooperative outcomes by the use of this type of punishment can be undermined by the deviator offering to renegotiate, proposing that the punishment phase be abandoned in favor of a return to cooperation: a “let bygones be bygones” argument.⁷⁰

A dispute resolution mechanism that is neutral, upon which states cannot exercise undue influence, can limit the possibility of defection under these circumstances.⁷¹ Even though the organization may have no actual enforcement power, its ability to delay judgment and to impose ex ante unknown costs on the parties provide incentives for cooperation.

In addition, enforcement by an organization can solve second order collective action problems in punishing defection. “Punishment almost invariably is costly to the punisher, while the benefits from punishment are diffusely distributed over all members. It is, in fact, a public good.”⁷² Theory suggests that these public goods may be undersupplied—in the case of this second order (the first being the cooperation problem being addressed) collective action problem, defectors will not be punished sufficiently. By establishing an international organization to carry out punishment, or to ensure that punishment is carried out, the second order collective action problem may be overcome, providing a credible threat of punishment, and therefore resulting in an equilibrium of compliance.

An organization can also solve problems of asymmetric information. As Paul Milgrom, Douglass North, and Barry Weingast argue with respect to the non-state institutions that enforced compliance among early medieval

⁶⁹ See generally for example, Joseph Farrell & Eric Maskin, *Renegotiation in Repeated Games*, 1 GAMES & ECON. BEHAV. 327 (1989); DREW FUDENBERG & JEAN TIROLE, GAME THEORY 174 (1991).

⁷⁰ Indeed, this is not uncommon in international law discourse. See generally, for example, Scott M. Sullivan, *Changing The Premise Of International Legal Remedies: The Unfounded Adoption Of Assurances And Guarantees Of Non-Repetition*, 7 UCLA J. INT'L L. & FOREIGN AFF. 265 (2002). An obvious counterargument to this, of course, is that renegotiation unravels by “forward induction.” Once the players understand that defection and promises of future compliance will go on indefinitely, would they not decline to renegotiate the first time?

⁷¹ Alexander Thompson & Duncan Snidal, *Guarding the Equilibrium: Regime Management in the WTO*, paper presented at the Annual Meeting of the American Political Science Association (2005); Mikhail Klimenko et al., *Recurrent Trade Agreements and the Value of External Enforcement*, 74 J. INT'L ECON. 475, 476 (2008) (an institution can facilitate cooperation by defining how parties condition their negotiation on history).

⁷² JON ELSTER, THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER, 41 (1989).

merchants, “[i]t is the costliness of generating and communicating information—rather than the infrequency of trade in any particular bilateral relationship—that, we argue, is the problem that the system of private enforcement was designed to overcome.”⁷³ In developing this view, the authors argue that third-party dispute settlement can assist in developing cooperation. They argue, in particular, that third-party dispute settlement can solve the following information problem: if two parties have a dispute in which one accuses the other of defection, how can other members of the community determine whether the accusation is true?⁷⁴ Milgrom, North, and Weingast conclude that within the municipal context, given the lack of empirical evidence about the costs of running different kinds of institutions, it is not possible to develop a formal model to show that their proposal for third-party dispute settlement (with the equivalent of a law merchant) minimizes information costs. They opine, however, that such a system seems to incur only the kind of costs that are inevitable, and that it seems well designed to minimize those costs. The Milgrom, North and Weingast “law merchant” is a private purveyor of information and evaluation. The players accept its use in order to develop an efficient equilibrium.

We might consider the extent to which formal international institutions such as the International Court of Justice, the WTO’s dispute settlement process or its Trade Policy Review Mechanism fulfill a similar role in connection with states, and whether NGOs such as Amnesty International or the World Wildlife Fund, or informal institutions such as the Basle Committee (bank regulation) or the Waasenaar Arrangement (export controls on dual use commodities), can do so in particular niches. In the context of the WTO, Giovanni Maggi argues that this type of law merchant role in multilateral dispute settlement tends to be more important when there are stronger bilateral imbalances of power across states.⁷⁵

Greater compliance may be a result of fear of either multilateral retaliation, or reputational effects, although the difference between these two phenomena is largely a matter of the motivation of third states. Tribunal declarations may also mobilize domestic constituencies to induce compliance.⁷⁶

Where the declaration alone is deemed insufficient to induce the desired level of compliance, dispute settlement can be the basis for imposition of

⁷³ Paul R. Milgrom, et al., *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges and the Champagne Fairs*, 2 *ECON. & POL.* 1, 3 (1990).

⁷⁴ *Id.* at 19.

⁷⁵ Maggi, *supra* note 58.

⁷⁶ Karen Alter, *The European Union’s Legal System and Domestic Policy: Spillover or Backlash?*, 54 *INT’L. ORG.* 489, 507–8 (2000); Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 *INT’L ORG.* 661, 675 (2000).

penalties or authorization of retaliation against the violating state. Thus, dispute settlement has an important role in inducing compliance with international law.⁷⁷

VI. MEMBERSHIP

The number of members necessary to make entry into an international organization worthwhile depends on several factors, including most importantly the type of cooperation problem that the international organization addresses. For example, if the problem involves a public good that can only be created if all states participate (a “weakest link” public good), then membership must include all states. In other contexts, there appears to be a tradeoff between degree of delegation, on the one hand, and breadth of membership, on the other hand.⁷⁸ Presumably, this is because of variation in the preferences and patience of different states.

If cooperation depends on an equilibrium of universal compliance,⁷⁹ as suggested above, it may be appropriate to exclude states that are relatively impatient and therefore less likely (require a bigger future payoff) to comply. It depends, of course, on the magnitude of future payoffs compared to the benefits of defection. In this way, the extent of membership may depend on the scope of delegation: a package deal that is more likely to result in greater incentives for continued compliance may be sustainable among a broader group of members. If it is possible to exclude states that are more impatient or that have less interest in the cooperative outcome, such exclusion may be appropriate.

Uncertainty regarding the preferences of states in the future may suggest excluding states that are near the margins.⁸⁰ On the other hand, uncertainty regarding preferences may promote stochastic symmetry that can induce agreement regarding majority voting or binding dispute settlement institutions: under uncertainty regarding their own preferences over issues that may arise in the future, states can be expected to agree to institutions that maximize aggregate welfare on a probabilistic basis, even if their actual eventual welfare is impaired.

⁷⁷ See Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 51, 59–60 (2003); Majone, *supra* note 28, at 104.

⁷⁸ See Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT’L L. 47, 78 (2012).

⁷⁹ There are also cooperation settings that can sustain some non-compliance without breaking down.

⁸⁰ See generally Rational Design, *supra* note 6.

Theory does not generally predict, however, that “the more severe the enforcement problem, the more restricted the membership.”⁸¹ This proposition is based on the work of Mancur Olson. Olson based his perspective on the assumptions that the benefit of cooperation declines with the number of players, that the costs of monitoring increase with the number of players, and that the costs of organizing retaliation increase with the number of players. However, these assumptions are general conjectures about the world and are not necessarily true in any particular circumstances. Moreover, these assumptions are only a subset of the parameters worth considering.⁸² Furthermore, in the case of club goods—for which the benefits are excludible—a cooperative equilibrium is easier to establish.⁸³

Epstein and O’Halloran posit that international organizations are held together by network externalities, such as free trade.⁸⁴ A network externality exists for an institution when the value of the institution to any one party increases as additional parties are added. Not all international cooperation problems will have the characteristic of network externalities. This is easily seen in connection with regional organizations or organizations that address a problem of concern to only a subset of states. There may be transaction costs or strategic reasons why adding additional states may reduce welfare instead of increasing welfare for each state. Indeed, it may also be true that strategic limits on cooperation can become greater as *more* welfare is produced,⁸⁵ so that network externalities would *not* hold an international organization together.

VII. SYNERGIES

Each international organization is designed to respond to a particular international relations context. As noted at the outset, the different features of international organizations interact with one another, so the sum is definitely different from the parts. In addition, it is worth noting that the features of international organizations are implicitly embedded in, and combined with, the general international law system.

This Article focuses on formal powers, so my definition of “delegation” focuses on formal authority, or jurisdiction. This is generally exercised through the ability to make binding legal rules or decisions through legislation or

⁸¹ *Id.* at 783 (citing MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 2 (1965)).

⁸² See generally Norman & Trachtman, *supra* note 51.

⁸³ See generally James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965).

⁸⁴ Epstein & O’Halloran, *supra* note 37, at 78.

⁸⁵ See SCOTT BARRETT, *ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING*, 204 (2003).

adjudication. So, the measure of delegation is dependent on the measure of bindingness of law. This is not so much a matter of synergy as one of definition. But it is also true, again as a definitional matter, that voting or procedural rules that give individual states the ability to avoid the binding force of law reduce the scope of delegation. In this sense, “independence” is necessary for delegation. Conversely, states may be willing to accord greater nominal authority to an international organization if they can undermine its independence through mechanisms that give individual states control over legislation or adjudication. For example, the UN Security Council could not have been accorded the powers that it has without according a veto to the permanent five members.

But it is also true that a blanket rule of “dependence,” or non-delegation, would have to be predicated on a view that binding law is never useful, or that the ability to make binding law without unanimity is never useful. Not all international relations issues require binding law, but some do.⁸⁶ And we have seen that the circumstances under which a voting rule of unanimity is likely to be optimal are limited. The design question for drafters of treaties forming international organizations is that of the extent of the utility in the context at hand of law that is based on less-than-unanimous voting, or dispute settlement that is independent.

There is also an interaction between delegation and membership, insofar as some states might view a rule of less-than-unanimous voting, or dispute settlement that is independent, as providing net probabilistic benefits, while others may not. Under these circumstances, the latter group of states would be excluded, or would require a payoff of some sort. Whether the benefits to the former group are sufficient to fund the payoff to the latter would determine whether the formation of the organization for the broader group is Kaldor-Hicks efficient.

We have also seen that there is an interaction between enforceability and membership—each state can be expected to make its own calculation of whether to comply or not, based on its own preferences and patience. If the international organization’s benefits would be undermined by non-compliance by some group of states, then it may be beneficial to exclude from membership states less likely to comply. Of course, if the exclusion of such states would reduce the benefits produced by the international organization below the level of its costs to members, then the international organization would not be expected to be formed.

Finally, there is a relationship between adjudication and legislation, which may be one of complementarity or substitutability, depending on the

⁸⁶ For example, Chris Brummer has argued that international cooperation in financial regulation does not generally require binding law. *See generally* BRUMMER, *supra* note 5.

circumstances. Binding adjudication may provide a mechanism by which to complete a treaty in a way that makes the treaty viable, and so may complement the legislation. On the other hand, there are circumstances in which states may be able to make a rule only if it is more flexible, and greater flexibility may come from reliance on the default international legal rule of auto-interpretation, rather than binding third-party dispute settlement.

In addition, the literature of rules and standards suggests that each of legislation and adjudication serve different purposes as social tools of decision-making. In this sense, they are substitutes, but with different costs and benefits.

VIII. CONCLUSION: VARIATION IN DELEGATION, LEGISLATION, ADJUDICATION, ENFORCEMENT, AND MEMBERSHIP

An international organization designer would first assess the international concern to be addressed. Here we have issues of externalities, international public goods, or possibilities of economies of scale or scope in providing government services. Within each of these categories, there is variation. The core analytical question is concerned with the state's incentives to engage in cooperative behavior. For example, if the international concern has the characteristics of a coordination game, each state is interested in joining and complying, so long as other states do so. If the international concern has the characteristics of a prisoner's dilemma, each state does best by defecting while the other states cooperate. If cooperation is more efficient than defection, then states have a choice of instruments by which to induce cooperation. Informal means, including surveillance and informal punishment, may provide the optimal combination of benefits of cooperation and costs of cooperation. International legal rules, without formal organization, may do so. Or, some form of international organization may do so. But there are many forms of international organization. What accounts for variation?

Where the international concern has the characteristics of a coordination problem, in which states have no incentive to defect, there is no need for punishment. A forum for communication, and perhaps a system of surveillance to provide assurance regarding compliance, may be all that is necessary. If the international concern requires a complex, or a changing, response, there may be a need for dispute settlement or legislative capacity in order to specify *ex ante* or judge *ex post* what counts as compliance.

Where the international concern has the characteristics of a prisoner's dilemma, in which defection is the dominant and inefficient strategy, the role of international law is to modify the payoffs such that the dominant strategy is cooperation. It is possible that an international legal rule, standing alone, can modify the payoffs sufficiently. However, there may be circumstances in which

additional features beyond the international law default system become appropriate. For example, independent surveillance may solve information problems regarding compliance so as to facilitate punishment. A dispute settlement mechanism may solve other information problems. An independent capacity and mandate to enforce the law, assigned to an international organization, or perhaps to individual harmed claimants, may address the second-order collective action problem that could otherwise undermine punishment, and therefore, compliance.

All international law is incomplete. While states may use the default international law system, which largely leaves interpretation and construction to informal debate among states, in order to address gaps, they may decide instead to establish a dispute settlement system to do so. They might determine to establish a system for legislative capacity to fill the gaps as they are identified using a more deliberate, generalized, and diplomatic, mechanism that puts less stress on the judicial system.