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The Challenge of COVID-19 and the World Health Organization's Response: The Principal-Agent Model Revisited

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THE CHALLENGE OF COVID-19 AND THE WORLD HEALTH ORGANIZATION’S RESPONSE: THE PRINCIPAL-AGENT MODEL REVISITED

MIRON MUSHKAT* AND RODA MUSHKAT**

I. OVERVIEW.....	487
II. INTRODUCTION	488
III. THE PRINCIPAL-AGENT MODEL AND THE LAW: A GOOD FIT?.....	495
IV. THE PRINCIPAL-AGENT MODEL AND INTERNATIONAL ORGANIZATION: CONVERGENCE OR DIVERGENCE?	511
V. ANATOMY OF COVID-19 OUTBREAK.....	530
VI. THE WHO’S RESPONSE TO THE COVID-19 CHALLENGE: TIPTOEING OR GLIDING THROUGH A HALF-OPEN DOOR?.....	546
VII. CONCLUSION.....	562

I. OVERVIEW

Despite post-Second World War aspirations to the contrary, the State-dominated Westphalian system remains the key ingredient of the global institutional architecture. Nevertheless, non-State entities have entered *en masse* the space accorded to them by the “gatekeepers” and have been able to exert some impact on policy outcomes across and within national borders. Both quantitatively and qualitatively, the most significant actors among the non-State players have been international organizations. A proper grasp of their relationship with their State “masters” is essential for students of international law and politics.

Agency theory has been invoked for this purpose and has proved to be a source of valuable conceptual and practical insights. The World Health Organization's (WHO's) underwhelming performance when confronted with an epidemic/pandemic of enormous magnitude and severity, however, suggests that there is considerable scope for placing the principal-agent model in a much broader context and examining it from an unconventional angle.

II. INTRODUCTION

Classifying international organizations is a task that allows for a considerable degree of latitude, with the pathway followed normally hinging on the purpose of the undertaking.¹ The criteria that are commonly used for such classification include membership (open versus restricted), geographic scope (global/universal vs regional), function (general vs specific orientation; as well as economic, judicial, political, social, or technical focus), nature of contracting parties (inter-State vs intergovernmental origins), and structural configuration (supranational vs intergovernmental/traditional-style).² These criteria

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1. See generally Pitman B. Potter, *The Classification of International Organizations I*, 29 AM. POL. SCI. REV. 212, 212–15 (1935) (introducing the importance of classification to the study of international entities as a means to “bring order out of the chaos”); Pitman B. Potter, *The Classification of International Organizations II*, 29 AM. POL. SCI. REV. 403, 403–04, 406, 411 (1935) (elaborating that the distinguishing feature of international organizations is that they function as institutions for international government) [hereinafter Potter II]; CLIVE ARCHER, INTERNATIONAL ORGANIZATIONS 30–34 (3rd ed. 2001) (examining different working definitions and essential characteristics of international organizations).

2. See Mizanie Abate & Alemayehu Tilahun, *Classification of International Organizations*, ABYSSINIALAW (Apr. 8, 2012), <https://www.abysiniaw.com/component/k2/item/477-classification-of-international-organizations> (introducing different criterion for classifying international organizations); Walid Abdulrahim, *Introductory Topics on International Organizations*, DR. WALID ABDULRAHIM PROFESSOR OF LAW, <https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/19->

are not mutually exclusive, the corollary being that international organizations may possess a number of salient characteristics that are not necessarily equal in prominence.³

The distinction between supranational and intergovernmental organizations is of interest to both black-letter-law jurists and positive international legal theorists, particularly the latter because of their concern with the origins, dynamics, stability, and performance of international governance regimes.⁴ This is a broad category encompassing international organizations which is generally and inevitably somewhat loosely equated, at the elementary level, with “a set of implicit or explicit principles, norms, rules, and decision making procedures around which actors’ expectations converge in a given area of international relations.”⁵

Supranational and intergovernmental organizations materially differ in their level of integration, a structural issue with behavioral implications looming large on the positivist agenda.⁶ Supranational organizations have the power to bind member States by their decisions, whereas their intergovernmental counterparts lack such

introductory-topics-on-international-organizations (last visited Sept. 30, 2020) (providing examples of international organizations based on functional elements).

3. See, e.g., ARCHER, *supra* note 1, at 30–34 (comparing definitions of international organization).

4. See, e.g., Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 2–3 (Stephen D. Krasner, ed., 1983) (emphasizing the importance of understanding an international regime’s effect on behavior).

5. *Id.* at 2.

6. See MILES KAHLER, INTERNATIONAL INSTITUTIONS AND THE POLITICAL ECONOMY OF INTEGRATION 18 (1995) (observing that “integration produces stronger institutions that are more centralized, rule based, and wider in scope”); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 22–23 (2004) (noting that the majority of international organizations are “convening structures for horizontal networks of national officials” while a genuinely supranational organization constitutes “an entity distinct from national governments that has a separate identity and loyalty and which exercises some measure of genuine autonomous power.”); see also MATTHEW SPARKE, INTRODUCING GLOBALIZATION: TIES, TENSIONS, AND UNEVEN INTEGRATION 1, 12 (2013) (examining globalization as both a process of increasing integration, and as a codeword in political speech, impacting policymaking); NEIL WALKER, INTIMATIONS OF GLOBAL LAW 204–05 (2015) (calling for reconciliation of the various strands of global law, “aided and abetted by the ‘constructivist’ turn in transnational legal and political thought.”).

capacity.⁷ Genuine supranational organizations are a rare species and supranationality is often a feature of an institutional arm rather than the organization as a whole.⁸ Consequently, the dichotomy has lost its sharpness and has evolved into a spectrum, with “pure” supranationality and a “pure” intergovernmental constellation at its two ends.⁹ By extension, the real question confronting positivistically inclined international legal researchers is the degree to which members exert influence over institutional decision-making.¹⁰

The degree of a member’s influence in decision-making, in turn, hinges on the interplay between factors that bolster or hamper supranationality.¹¹ On balance, the emphasis in the academic literature—whether exhibiting cognitivist, liberal, or realist leanings—has been on the “bright” side of the picture.¹² Gradually,

7. See Abate & Tilahun, *supra* note 2 (noting that “supranational” is often the characteristic of a particular organ within an organization rather than the organization as a whole); Abdulrahim, *supra* note 2 (listing characteristics of supranational organizations).

8. See Abate & Tilahun, *supra* note 2 (stating that currently only one organization can be considered supranational); Abdulrahim, *supra* note 2.

9. See, e.g., Abate & Tilahun, *supra* note 2 (comparing characteristics of intergovernmental organizations to supranational organizations); Abdulrahim, *supra* note 2 (defining the two ends of the spectrum as traditional or supranational organizations).

10. See Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and its Critics*, 103 AM. J. INT’L L. 209, 217–18 (2009) (listing the necessary conditions for codifying a rule into a treaty-like document).

11. See generally MICHAEL R. LUCAS, NATIONALISM, SOVEREIGNTY, AND INTERNATIONAL ORGANIZATIONS 7–25 (1999) (discussing the factors that affect supranationality, such as, the relationship with Nation States, global problems, increase in the number of Nation States since WWII, etc.).

12. See generally Fedor Meerts, *Considering Cognitivism’s Contribution: Possibilities for Constructive Cooperation Between Rationalist and Cognitivist Theorists of International Regimes*, E-INT’L REL. (Apr. 26, 2008), [https://www.e-ir.info/2008/04/26/considering-cognitivism’s-contribution-possibilities-for-constructive-cooperation-between-rationalist-and-cognitivist-theorists-of-international-regimes](https://www.e-ir.info/2008/04/26/considering-cognitivism's-contribution-possibilities-for-constructive-cooperation-between-rationalist-and-cognitivist-theorists-of-international-regimes) (arguing that knowledge-based (cognitivist) theories can be seen “as a necessary addendum to [interest and power based theories], but must also be seen as a necessary alternative to them.”); Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES 1, 4 (Stephen D. Krasner, ed., 1983) (comparing orthodox and embedded liberalism); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT’L ORG. 485, 488, 505–07

however, the pendulum has shifted, even if not decisively, toward the “dark” side.¹³ This shift has manifested itself in an acknowledgment that some of the forces operating in the global arena may be both conducive and detrimental to international regime formation and development, and that the powerful forces hindering institutional deepening and cohesion (as well as a possible transition from soft to hard law in that context)¹⁴ are unlikely to recede into the background.¹⁵

Two “negative” influences, have been accorded significant weight in the moving supranationality equation—transaction costs¹⁶ and sovereignty costs.¹⁷ The former are a source of uncertainty because

(1988) (elaborating on the five propositions of realism: (1) States are the major actors in international affairs, (2) States behave as unitary, rational agents, (3) international anarchy shapes the motives and actions of States, (4) States in anarchy are preoccupied with power and security, and (5) international institutions affect the prospects of cooperation only marginally).

13. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 422–23 (2000) (introducing criticisms and justifications of soft law that implies that soft law—law that “falls short” of legalization—is a failure).

14. See *id.* at 422.

15. See *id.* at 456 (noting that it is not clear whether international legalization will continue at the same rate after its remarkable expansion following WWII, and that States and non-State actors can still achieve many of their goals through soft legalization because “soft law is valuable on its own, not just as a steppingstone to hard law”).

16. See Krasner, *supra* note 4, at 12 (“Regimes can make agreement easier if they . . . reduce other transaction costs, such as costs of organization or of making side-payments.”) (citing Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES 141, 154 (Stephen D. Krasner ed., 1983)); see also Robert O. Keohane, *The Demand for International Regimes*, 36 INT’L ORG. 325, 339–41 (1982) (regimes develop when “the costs of making ad hoc agreements on particular substantive matters are higher than the sum of the costs of making such agreements within a regime framework and the costs of establishing that framework.”); Michael J. Gilligan, *The Transaction Costs Approach to International Institutions*, in POWER, INTERDEPENDENCE, AND NONSTATE ACTORS IN WORLD POLITICS 50, 52–55 (Helen V. Milner & Andrew Moravcsik eds., 2009) (defining transaction costs and conceptualizing transaction costs in the international political context).

17. See Scott Cooper et al., *Yielding Sovereignty to International Institutions: Bringing System Structure Back In*, 10 INT’L STUD. REV. 501, 508, 511–12 (2008) (laying the foundations of why States may concede sovereignty to an international organization and what factors may increase their willingness to do so); see also David Epstein & Sharyn O’Halloran, *Sovereignty and Delegation in International Organizations*, 71 LAW & CONTEMP. PROBS. 77, 82 (2008) (defining sovereignty

they may facilitate progress toward supranationality and retard it at the same time.¹⁸ Prior to the incorporation of transaction costs into international regime theory it was assumed and mathematically demonstrated, by proponents of decentralized cooperation theory, that collaboration among States could fruitfully take place in the absence of international organizations.¹⁹

The archetypal international politico-legal transaction is an agreement or a treaty (e.g. the Kyoto Protocol, North American Free Trade Agreement, and the North Atlantic Treaty).²⁰ To engage in such activity may be a resource-intensive endeavor involving substantial negotiation costs, contracting costs, monitoring costs, enforcement costs, and so forth.²¹ When these costs are modest, international cooperation may indeed be pursued in an institutional vacuum but, when they are sizable, there may be a strong incentive to establish an international organization for addressing issues of mutual interest on an ongoing basis in order not to get caught in an endless cycle of resource-consuming interactions.²²

costs as the difference between the policy a country would independently enact as a non-member and the same policy the country enacts once the it becomes a member of an international organization); Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 120–22 (2008) (setting out the understanding of State sovereignty as a bundle of properties rather than a single characteristic).

18. See Kenneth W. Abbott, *The Many Faces of International Legalization*, 92 AM. SOC'Y INT'L L. 57, 61 (1998) (analogizing transactions costs to problems in contract negotiations that make softer arrangements or softer commitments more desirable).

19. See, e.g., Duncan Snidal, *Political Economy and International Institutions*, 16 INT'L REV. L. & ECON. 121, 123–24 (1996) (recalling the “Cooperation Under Anarchy” as being borderline anti-institutionalist and evolution toward institutional development); see also Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 3, 6–7 (1998) (juxtaposing decentralized cooperation theory with regime theory).

20. See Gilligan, *supra* note 16, at 54 (identifying the “transaction” in the international political context as an agreement or treaty).

21. *Accord id.* at 52.

22. See also *id.* at 55, 62 (observing that States would forgo negotiating altogether if the value of the transaction would not cover the transaction costs); Krasner, *supra* note 4, at 12 (describing the various causal variables affecting the development of regimes); Keohane, *supra* note 16, at 331–32 (analogizing international regimes to an economic market, where States decide which regimes “buy” based on the analysis of relative prices and cost-benefit calculations).

As indicated, however, the relationship between transaction costs and supranationality does not follow a linear pattern.²³ The point is that, beyond a certain threshold, institution-building that entails increased organizational autonomy and a lesser dependency on powerful external constituencies may inflate transaction costs, particularly if it associated with a switch from soft to hard law.²⁴ By its very nature, the latter gives rise to perceived difficulties stemming from the complexity of the (notably technical) issues commonly faced, coordination problems, implementation challenges, loss of policy flexibility, and the like.²⁵ In such circumstances, States may balk at paying the apparently hefty price potentially incurred and may refrain from venturing far along the supranationality pathway.²⁶

As noted, sovereignty costs have an even more pronounced dampening effect, and less equivocally so, in this respect, if genuinely embraced, supranationality ineluctably translates into an erosion of State power, a prospect which countries and their leaders are reluctant to contemplate.²⁷ This does not mean that joining and participating in international institutions is without benefits, but the considerable ramifications for the exercise of sovereignty ought to be duly recognized.²⁸ Indeed, this is not merely a question of rationally

23. See, e.g., Todd Sandler & Jon Cauley, *The Design of Supranational Structures: An Economic Perspective*, 21 INT'L STUD. Q. 251, 260–62 (1977) (identifying three primary transaction costs that would impact the relationship between transaction costs and supranationality).

24. *Accord* Abbott & Snidal, *supra* note 13, at 434–36 (discussing the benefits and costs of hard and soft legalization).

25. See *id.* at 422, 434–37 (concluding that States face tradeoffs in choosing levels of legalization).

26. See *id.* at 439–40, 444 (hypothesizing that a State may prefer different forms of legalization in different issue-areas because constraints on national autonomy and sovereignty vary across issues).

27. See Cooper et al., *supra* note 17, at 509 (noting that the anarchical nature of the international system ingrained self-help views in States and made States reluctant to part with their sovereignty); see also Epstein & O'Halloran, *supra* note 17, at 90–91 (suggesting that the sovereignty costs a State pays and the benefits the international organization receives from the cooperation with that State affect the State's power or leverage within that organization); Hathaway, *supra* note 17, at 115–16, 120–22 (contextualizing the development of international law within the trend of globalization).

28. See Cooper et al., *supra* note 17, at 508–09 (stating the majority view that States choose to delegate their authority to international organizations, either

weighing the material gains and losses because, as evidenced by intensifying strains within the European Union (EU),²⁹ the quintessential supranational organization, the costs may have a cognitive/psychological dimension.³⁰

Given the presence of significant enabling and restraining factors, progress toward supranationality has unavoidably been moderate and uneven, schematically akin to the cycles of globalization and deglobalization observed in the socio-economic domain.³¹ Consequently, the relationship between States, led by Anglo-American democracies, and the elaborate network of international institutions that they have created in the post-Second World War era of embedded liberalism³² has been rather complicated.³³ It may be argued that this dilemma

because of a State's normative orientation and identity, or because delegation provides a State with material benefits); Epstein & O'Halloran, *supra* note 17, at 78, 84 (noting that countries can receive associational benefits and network externalities by joining other countries in an international organization); *see also* Hathaway, *supra* note 17, at 141–45, 148 (noting that delegation to international bodies can allow States to achieve goals that otherwise would be impossible).

29. *See, e.g.*, Martin Loughlin, *The Erosion of Sovereignty*, 45 NETH. J. LEGAL PHIL. 57, 69–76 (2016) (examining the erosion of sovereignty in the European Union); Martin Gurri, *Brexit and the Fate of Sovereignty*, DISCOURSE (Feb. 25, 2020), <https://www.discoursemagazine.com/politics/2020/02/25/brexit-and-the-fate-of-sovereignty> (describing Brexit as: “a nearly perfect specimen of the anti-establishment revolts;” and reporting how “every populist issue points beyond itself to the breakdown of sovereignty”).

30. *See* LUCAS, *supra* note 11, at 28, 30 (summarizing Louis Snyder's view on nationalism and the modern Nation State, Snyder's approach stresses nationalism's psychological roots and nationalism's “complex combinations of political, economic, social, and cultural roots); *see also* David A. Lake, *The New Sovereignty in International Relations*, 5 INT'L STUD. REV. 303, 319–20 (2003) (cautioning that hierarchy should not be overlooked when studying international relations); Stephen Tierney, *Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation State*, 54 INT'L & COMPAR. L. Q. 161, 173, 181 (2005) (noting that the nationhood can provide a form of psychological security and a sense of historical continuity).

31. *See* PETER A.G. VAN BERGELJK, *DEGLOBALIZATION 2.0: TRADE AND OPENNESS DURING THE GREAT DEPRESSION AND THE GREAT RECESSION* 11 (2019) (explaining deglobalization trends in international trade and finance sector).

32. *See* JUDE C. HAYS, *GLOBALIZATION AND THE NEW POLITICS OF EMBEDDED LIBERALISM* 11 (2009) (defining embedded liberalism as the “domestic social compact on which the post-World War II international economy was built [upon].”).

33. *See, e.g.*, Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999, 999–1000, 1009–25 (2013) (noting the trade-off between the preservation of State control over the international system

bears similarities to a situation where an actor driven by conflicting forces gives with one hand and takes away with the other.³⁴

A number of explanatory frameworks have been offered to account for the underlying dynamics.³⁵ The one most widely relied upon has been the principal-agent model, which conceives of States as principals and their representatives at international organizations and even nationals employed at such institutions as their agents.³⁶ The aim of this article is to re-examine this model in light of the recent WHO response to the emerging COVID-19 threat. The ensuing sections outline the model's application in legal analysis, its use in dissecting the interplay between States and international organizations, the WHO's structural-functional underpinnings, outbreak of the COVID-19 pandemic, WHO response thereto, and its implications for the principal-agent model (which are also briefly addressed in the conclusion).

III. THE PRINCIPAL-AGENT MODEL AND THE LAW: A GOOD FIT?

Delegation, which involves the assignment of authority by one party to another, is a phenomenon frequently encountered in numerous spheres of personal and professional activity.³⁷ It features perhaps

and the creation of effective and productive international organizations).

34. Compare Rosemary Foot et al., *Introduction, in US HEGEMONY AND INTERNATIONAL ORGANIZATIONS: THE UNITED STATES AND MULTILATERAL INSTITUTIONS* 5, 8 (Rosemary Foot, S. Neil MacFarlane, & Michael Mastanduno eds., 2003) (analyzing the apparently conflicting behavior of the United States in multilateral institutions), with Simon Chesterman, *Asia's Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT'L L. 945, 957–62 (2016) (examining Asia's under-participation and under-representation "despite the fact that Asian States have arguably benefited most from the security and economic dividends provided by international law and institutions").

35. Abbott & Snidal, *supra* note 19, at 6–8 (reviewing the different theories offered to explain international organizations).

36. See Ronald Vaubel, *Principal-Agent Problems in International Organizations*, 1 REV. INT'L ORG. 125, 126 (2006) (providing a visual representation of the principal-agent problem of international organizations).

37. See generally ROBERT B. NELSON, *EMPOWERING EMPLOYEES THROUGH DELEGATION* 2 (1994) (providing an example of delegation in a professional office setting); John R. Graham et al., *Capital Allocation and Delegation of Decision-Making Authority within Firms*, 115 J. FIN. ECON. 449, 449–50 (2015) (examining delegation in a corporate setting); Mark Thatcher & Alec Stone Sweet, *Theory and*

most prominently in the institutional space, both the profit-oriented and not-for-profit segments, where substantial resources are channeled toward structuring superior-subordinate relationships in a manner designed to enhance accountability, efficiency, employee/member motivation, fairness, and transparency.³⁸ In that context, properly executed delegation is generally regarded favorably and contrasted with more coercive supervisory styles involving a high degree of micromanagement.³⁹

Delegation is also an integral component of democratic discourse.⁴⁰ Athenian-type forms of political organization, featuring direct grassroots participation in communal decision-making, have largely been consigned to history and have been supplanted by representative

Practice of Delegation to Non-Majoritarian Institutions, 25 W. EUR. POL. 1, 1 (2002) (introducing the emerging practice of delegation by States and government entities to non-majoritarian institutions); Sabrina Schneider & Michael Leyer, *Me or Information Technology? Adoption of Artificial Intelligence in the Delegation of Personal Strategic Decisions*, 40 MANAGERIAL & DECISION ECON. 223, 223–24 (2019) (studying the impact of choice complexity and cognitive perception on the delegation of a strategic decision).

38. See Lukas Angst & Karol Jan Borowiecki, *Delegation and Motivation*, 76 THEORY & DECISION 363, 382 (2014) (concluding that the principal can change her agent's beliefs and perceptions about delegation by plausibly conveying her motives to her agent); Patricia M. Sias & Frederic M. Jablin, *Differential Superior-Subordinate Relations, Perceptions of Fairness, and Coworker Communication*, 22 HUM. COMMUN. RSCH. 5, 5 (1995) (examining the complex relationships between differential superior-subordinate relations, fairness perceptions, and coworker communication); see also J. Peter Venton, *A General Theory of Delegation, Accountability and Empowerment*, 12 CAN. J. PROGRAM EVALUATION 163, 167, 183 (1997) (explaining how the delegation-accountability relationship can potentially improve performance although it also presents the challenge of getting the agent's commitment to meet the principal's expectations); see generally Benedict Mathebula & Brian Barnard, *The Factors of Delegation Success: Accountability, Compliance and Work Quality*, 8 EXPERT J. BUS. & MGMT. 76, 76, 86 (2020) (discussing the importance of maintaining a strong bond between subordinates and their managers); ROBERT NELSON, EMPOWERING EMPLOYEES THROUGH DELEGATION 4, 5 (1994) (explaining the benefits of effective delegation).

39. See DANIEL GOLEMAN, RICHARD BOYATZIS & ANNIE MCKEE, PRIMAL LEADERSHIP 4–5 (2002) (emphasizing the importance of a leader's mood and tone when delegating to subordinates).

40. See Dietmar Braun & Fabrizio Gilardi, *Introduction*, in DELEGATIONS IN CONTEMPORARY DEMOCRACIES 1, 1–2 (Dietmar Braun & Fabrizio Gilardi eds., 2006) (exemplifying how delegation is very commonly used in the political phenomenon of democratic representation).

variants.⁴¹ Swiss-like hybrids, combining direct and indirect (i.e. via intermediaries) citizen engagement in policy formulation at the national level⁴² do exist but are a scarce commodity.⁴³ Instead, the democratic territory is predominantly populated with representative governance regimes of different shapes.⁴⁴ In such institutional environments, authority essentially grows from the grassroots through a chain consisting of the legislature and multiple layers of the executive branch.⁴⁵

Despite the many advantages of delegation, it is not without its problems.⁴⁶ The principal-agent model purports to pinpoint and, where feasible, provide remedies for the problems inherent in the concept of delegation.⁴⁷ This analytical vehicle centers on two actors, a principal and an agent.⁴⁸ In a relationship entailing the transfer of authority from one party to another, the former is the delegator and the latter is the delegatee.⁴⁹ As outlined, such a transfer may prove rewarding for both parties and generate positive externalities to boot.⁵⁰ Yet, even if

41. See also NADIA URBINATI, REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY 2–3 (2006) (comparing genuine democracies to the modern representative democracies).

42. See CLIVE H. CHURCH, THE POLITICS AND GOVERNMENT OF SWITZERLAND 1–22 (2004) (examining Switzerland’s bottom-up approach to politics).

43. See DAVID HELD, MODELS OF DEMOCRACY 7 (2006) (examining the diversity of democratic models).

44. See generally *id.* at 1–10.

45. See DELEGATIONS IN CONTEMPORARY DEMOCRACIES, *supra* note 40, at 1–2 (explaining the Burke method of governance where the citizen’s authority is delegated through a deputy who works with other deputies to define the “common will”).

46. See *Advantages and Disadvantages of Delegation: Effective Delegation Skills?*, STRENGTHSCAPE, <https://strengthscape.com/advantages-and-disadvantages-of-delegation/> (last visited Sept. 30, 2020) (highlighting some of the disadvantages of delegation such as lack of knowledge of employees, lack of trust, lack of interest, lack of credit, and lack of authority).

47. See Jean-Jacques Laffont, *Introduction*, in THE PRINCIPAL AGENT MODEL: THE ECONOMIC THEORY OF INCENTIVES xi, xi (Jean-Jacques Laffont ed., 2003) (exploring the question of what is the optimal structure of the contract that the principal should offer to the agent).

48. See *id.*

49. *Delegator*, BLACK’S LAW DICTIONARY (11th ed. 2019); *Delegatee*, BLACK’S LAW DICTIONARY (11th ed. 2019).

50. See STRENGTHSCAPE, *supra* note 46 (highlighting the advantages of delegation such as best use of human resources, extra time for managers to work on more critical tasks, faster work process, stronger team spirit, improved interpersonal

undertaken on an entirely voluntary basis, it may engender serious conflict due to the fact that the interests of the principal and the agent may not fully converge in practice, prompting the former to take steps not wholly compatible with the objectives of the latter.⁵¹

The classic example of the inherent discord between principals and their agents is found in the realm of business administration, where shareholders'/principals' and managers'/agents' goals often merely partially overlap.⁵² The underlying friction is further compounded by asymmetric information that allows the better-informed party/manager/agent to chart his or her own course without reference to the less informed party, which is endowed with greater authority/shareholder/principal.⁵³ In such circumstances, elaborate monitoring devices and incentive-based mechanisms may have to be introduced to bring about a closer alignment between the interests of principals and their agents.⁵⁴

Another commonly invoked example is that of elected representatives/agents whose actions do not suitably reflect the wishes of their constituencies/principals or government officials/agents who pursue policies that deviate from legislators'/principals' intent.⁵⁵

and intrapersonal communication, inflow of new and innovative ideas, stronger “bench strength” of the team).

51. See Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 64 (2010) (cautioning that the risk posed by this conflict of interest increases when an asymmetry of information in the agent's favor exists).

52. See Günter Bamberg & Klaus Spremann, *Prologue*, in AGENCY THEORY, AGENCY, INFORMATION, AND INCENTIVES 1, 2 (Günter Bamberg & Klaus Spremann eds., 1987) (explaining that the principal-agent relationship is often more complex and has more than two actors).

53. See Matthias Kiefer, Edward Jones, & Andrew Adams, *Shareholders and Managers as Principal-Agent Hierarchies and Cooperative Teams*, 9 QUALITATIVE RSCH. FIN. MKTS. 48, 53 (2017) (discussing the negative effects of asymmetric information).

54. See Laffont, *supra* note 47, at xvi–xvii (explaining the effect of principals committing to revelation mechanisms); see also Ronald Strausz, *Delegation of Monitoring in a Principal-Agent Relationship*, 64 REV. ECON. STUD. 337, 337–39 (1997) (arguing that delegation of monitoring is possible and profitable).

55. See Dietmar Braun & Fabrizio Gilardi, *Conclusion*, in DELEGATIONS IN CONTEMPORARY DEMOCRACIES 239, 239–40 (Dietmar Braun & Fabrizio Gilardi eds., 2006) (noting that the relationship between principal and agent is “subject to opportunistic behavior and therefore to suboptimal outcomes”); see also Sean

Again, this is a “chain of command” fraught with difficulties stemming from asymmetric information between principals and their agents, placing the former in a position of relative disadvantage.⁵⁶ Like in business administration, the focus of remedial strategies in the “political marketplace” is on monitoring and incentivizing agents,⁵⁷ coupled with accountability and transparency-enhancing initiatives⁵⁸ (also favored by promoters of sound corporate governance).⁵⁹

Gailmard, *Accountability and Principal-Agent Theory*, in OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 90, 93 (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014) (criticizing the plenary power of the State and the protection it provides for politicians even if they act in ways that are not compliant with their principal’s goals).

56. See Jeffrey S. Banks & Barry R. Weingast, *The Political Control of Bureaucracies under Asymmetric Information*, 36 AM. J. POL. SCI. 509, 509–10 (1992) (explaining the influence that interest groups have, based on their ability to provide information to political actors); see also Patrick Balles, Ulrich Matter, & Alois Stutzer, *Special Interest Groups Versus Voters and the Political Economics of Attention*, INST. LAB. ECON. 40 (Nov. 2018) <http://ftp.iza.org/dp11945.pdf> (describing the balancing game that politicians must play in order to balance voters’ wishes and special interests demands).

57. See PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 3–4 (1993) (explaining some of the approach to accountability in government, which include (1) the performance accountability method that centers on the establishment of incentives and reward for desired outcomes and (2) the compliance accountability method that rests on efforts to assure conformity); *Monitoring Government Activity*, CITIZEN ADVOC. CTR., <https://www.citizenadvocacycenter.org/monitoring-government-activity.html> (last visited Sept. 30, 2020) (providing multiple examples of the Citizen Advocacy Center, a non-profit organization’s government monitoring activities); see also Simon M. Burgess, Carol Propper, Marisa Ratto, & Emma Tominey, *Incentives in the Public Sector: Evidence From a Government Agency*, INST. LAB. ECON. 2 (July 2012) <https://www.econstor.eu/bitstream/10419/62541/1/720520940.pdf> (analyzing the effectiveness of the incentive scheme in the public sector).

58. See Evert A. Lindquist & Irene Huse, *Accountability and Monitoring Government in the Digital Era: Promise, Realism and Research for Digital-Era Governance*, 60 CAN. J. PUB. ADMIN. 627, 631–32 (2017) (explaining that, as a result of calls for accountability, many governments are becoming more “open” by sharing data and other transparency measures).

59. See Niamh M. Brennan & Jill Solomon, *Corporate Governance, Accountability and Mechanisms of Accountability: An Overview*, 21 ACCT. AUDITING & ACCOUNTABILITY J. 885, 887 (2008) (highlighting the importance of institutional investors in corporate governance accountability mechanisms); see also Benjamin Fung, *The Demand and Need for Transparency and Disclosure in Corporate Governance*, 2 UNIVERSAL J. MANAGEMENT 72, 79 (2014) (calling for an increase in various corporate accountability measures to calm capital market

The concept of delegated authority and, by extension, the principal-agent model looms large in legal scholarship and practice. This is particularly true for administrative law,⁶⁰ constitutional law,⁶¹ and contract law.⁶² As will be illustrated subsequently, however, the interest in that structural-functional configuration is by no means confined to these three branches of the discipline/profession.⁶³ Indeed, agency relationships, which are ubiquitous, almost invariably have a legal dimension even where the agent exercises implied authority which is not granted in express terms (e.g. is derived from conduct or custom, rather than delineated in a written contract).⁶⁴ The corollary is that delegated authority and the principal-agent model are analytical constructs whose relevance transcends established divisions within the law and traditional boundaries within the socio-legal space.⁶⁵

volatility).

60. See Chester F. Krizek, *Administrative Law: Delegation of Powers; Constitutional Law*, 13 MARQ. L. REV. 56, 57 (1928) (explaining the wide-spread concerns about the U.S. administrative law system and its “natural danger of delegating power to a few individuals”); see also Francisco Cardona, *The Delegation of Administrative Decision-Making Powers: A Toll for Better Public Performance*, OECD/SIGMA 6, <https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf> (last visited Sept. 30, 2020) (explaining the notion of administrative delegation).

61. See Whitney R. Harris, Comment, *Constitutional Law: Delegation of Legislative Power*, 24 CAL. L. REV. 184, 184–92 (1936) (explaining how the constitutional mandate for the three branches of government function as a delegation system); see also Georg Haibach, *Comitology After Amsterdam: A Comparative Analysis of the Delegation of Legislative Powers*, MAASTRICHT J. EUR. & COMPAR. L. 1–3 (1997) http://aei.pitt.edu/825/1/scop97_3_1.pdf (explaining that the process of a State signing on to an international treaty provides for States to also institute multilateral delegation schemes with the other parties to the treaty).

62. See DON MAYER, DANIEL WARNER, GEORGE SIEDEL, & JETHRO K. LIEBERMAN, *BUSINESS LAW AND THE LEGAL ENVIRONMENT: MASTER OF ACCOUNTANCY EDITION* (2012) https://saylordotorg.github.io/text_business-law-and-the-legal-environment-v1.0-a/s41-relationships-between-principa.html (providing an introduction to agency law). See generally Muhammad Masum Billah, *Agency Contract Under Conventional La and Islamic Law as Manifested in the Civil Code of Oman: A Comparative Analysis*, 4 ELEC. J. ISLAM. & ME. L. 109, 109–26 (2016) (discussing the principal-agent theory under Islamic law jurisdictions).

63. See *Principal-Agent Law*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/principal-agent-laws.html> (last visited Sept. 30, 2020) (comparing a principal-agent relationship to an employment relationship).

64. See *id.*

65. See generally Laffont, *supra* note 47, at xi (comparing multiple models of

Nevertheless, given its strict assumptions about interpersonal dynamics and its tight structure, the model's explanatory power may well vary according to circumstances. This tendency toward variation becomes apparent when examining the model's application in different institutional milieus, with such an effort yielding results that range from clear-cut to ambiguous. Two concrete examples may shed light on this indeterminacy, or the principal-agent model's seeming contextual validity, and at the same time its possible contextual limitations—the United States enormous federal procurement system⁶⁶ and the elaborate United States judicial hierarchy,⁶⁷ subject to the qualification that there is nothing uniquely American about both cases.⁶⁸

Within the principal-agent theoretical framework, it is posited that a procurement officer acts as an agent for a principal (or principals).⁶⁹ The identity of the principal depends on attributes of the political regime and the policy issue at hand.⁷⁰ In a democratic setting such as in the United States, it could be citizens, taxpayers, Congress, or the executive.⁷¹ In a non-democratic environment, and contrary to liberal values, it might be the top layer of the political pyramid or a figure presiding over it (e.g. the king in an absolute monarchy).⁷² If the logic underlying the principal-agent model holds, the procurement officer/agent is likely to have objectives that do not fully coincide with those of the principal (however defined).⁷³

principal-agent theory and its applications in various social, economic, and political spheres).

66. See Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 64, 66 (2010) (noting that the U.S. federal procurement system has grown remarkably over the past several decades, totaling over \$500 billion annually according to the 2009 White House memo; and utilizing agency theory as a model to assess the federal procurement systems and its reform efforts).

67. See generally Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535 (2011).

68. See Yukins, *supra* note 51, at 67 (“Under this model, the procuring official may be said to act as an agent for a principal (or principals). That principal may shift from one political culture to another.”).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* (cautioning that the agent in acting on behalf of the principal may have

This incongruity is compounded by the asymmetry of information that characterizes the relationship between the two and the advantages that inevitably accrue to the procurement officer/agent as a result of that crucial imbalance.⁷⁴ The more adept and resourceful the procurement officer/agent, the greater the potential impact of the unequal distribution of information.⁷⁵ Monitoring devices and incentive-based instruments may mitigate agency conflict in such circumstances, although they may not eliminate it altogether.⁷⁶ Of course, the more severe the conflict between the principal and the agent, the greater the need for robust compatibility-restoring apparatuses.⁷⁷

The situation is further complicated by the fact that, in reality, the dyad turns into a triad.⁷⁸ Specifically, due to the prevalence of contracting in procurement, the principal-agent relationship is extended to encompass a contractor retained by the agent, who is designed as a “subagent.”⁷⁹ Again, if the premise underlying the principal-agent model pertains to this set of circumstances, the gap between the goals of the principal and those executing agent-like responsibilities may significantly widen because the subagent may be inclined to pursue her own interests and capitalize on any information asymmetries working in her favor in the process.⁸⁰

A procurement system is assessed in terms of properties such as competition promotion, customer satisfaction, efficiency, integrity, risk avoidance, transparency, uniformity, and value enhancement.⁸¹ The principal-agent model offers noteworthy insights into each of

goals that diverge from those of the principal and that this conflict of interest must be tempered by monitoring and bonding).

74. See Yukins, *supra* note 51, at 67 (observing that “the more sophisticated the agent/official in relation to the principal (the king, the parliament, etc.), the more likely there is an asymmetry of information, and therefore, the more acute the need for principal-agent controls.”).

75. *Id.*

76. See *id.* (suggesting monitoring and bonding as measures to mitigate conflict of interests).

77. *Id.*

78. See *id.* at 67–68 (“The principal-agent model can be extended to encompass the contractor in procurement.”).

79. *Id.*

80. See Yukins, *supra* note 51, at 68.

81. *Id.* (citing Schooner, *infra* note 100, at 103.).

these properties.⁸² Thus, while competitive procurement via an intermediary (formally referred to as a “lead systems integrator”) appears to be a sensible strategy from a conventional economic perspective, agency theory suggests otherwise.⁸³ The reason is that marginal costs may outweigh the marginal benefits due to the distortion of the principal’s interests and the resource-consuming measures implemented to minimize it.⁸⁴

The principal-agent model may also indicate how to seek customer satisfaction and value enhancement in that context.⁸⁵ One idea is to sidestep the procurement supply chain and to grant purchasing authority to program officers/principals rather than their procurement counterparts/agents.⁸⁶ The former are more likely to focus determinately on customer satisfaction and best value than the latter but, on the negative side, may be preoccupied with program success and overlook its costs.⁸⁷ Another possibility is to give voice to the ultimate program beneficiaries/principals (e.g. veterans receiving medicines from a government contract) in deciding what should be purchased on their behalf (an approach known as “end-user empowerment”).⁸⁸

The cost ingredient enters into considerations of efficiency as well.⁸⁹ In this regard, the principal-agent model shows how parties along the procurement chain aim to reduce their transaction costs and what are the ramifications, for better or for worse, of their

82. See generally *id.* at 68–76 (elaborating on each element of a successful procurement system).

83. See *id.* at 68–69 (“Agency theory explains that because the intermediary may, in fact, badly distort the principal’s ends because of differing interests[.]”).

84. *Id.* at 69.

85. See generally Yukins, *supra* note 51, at 73–76 (explaining the dueling principal interests of customer satisfaction and best value).

86. *Id.* at 74.

87. See *id.* at 74–75 (explaining that by delegating the purchasing authority to program officials, not procurement officials, there is a risk that they will be so focused on the customer satisfaction and best value elements that low costs will be a non-priority).

88. See *id.* at 75 (explaining that the ultimate goal of “end user empowerment” is increasing transparency into the procurement system).

89. See *id.* at 71–72 (“[A procurement system] is efficient when it spends the least amount of resources in the process of purchasing what is needed.”).

maneuvers.⁹⁰ The purchasing officer/agent is particularly motivated to lower her transaction costs and consequently “*underinvest* in any given transaction because the *benefits* of careful purchasing will likely be shifted back to the principal (or, ultimately, the citizen/taxpayer affected by the government action), while the *costs* of careful purchasing will be borne by the agent/purchasing official or those to whom she answers.”⁹¹ The corollary is that “by parsing the procurement process and isolating the roles of the principal and the agent, we can anticipate how a drive for efficiency (for lower transaction costs) can, in practice, undermine the system overall.”⁹²

The procurement machinery in the United States and elsewhere has attracted substantial criticism due to its seemingly overly cumbersome nature and its controllers have been urged to meaningfully streamline the behemoth.⁹³ Agency theory, however, lends support to the notion that extensive oversight mechanisms are appropriate in such multilevel institutional milieu because of concerns about integrity and corruption.⁹⁴ From this standpoint, the numerous and strict constraints imposed by the U.S. procurement law, for instance, are seen as warranted.⁹⁵ On similar grounds, the theory emphasizes the merits of bid protests, free and unencumbered press, and whistleblower protection as *inter alia* low-cost monitoring vehicles.⁹⁶

Forcing principals and agents into a bureaucratic straitjacket may lead to excessive risk avoidance that may “suffocate creativity”⁹⁷ and “stifle innovation.”⁹⁸ By extension, this may “lead to less than optimal outcomes, as there will be reduced willingness to seek out new

90. *Id.*

91. See Yukins, *supra* note 51, at 73.

92. *Id.*

93. See *id.* at 70 (arguing that the U.S. federal procurement system has overly cumbersome anticorruption regimes).

94. *Id.*

95. See *id.* at 70 (“Agency theory suggest[s] that [the] additional [anticorruption] constraints are necessary because as the chain of authority stretches from principal to agent to subagent, the risk that the procurement actions will be diverted from the principal’s goals rises dramatically, and so there must be special legal controls to dampen the corrupt conflicts of interest that could otherwise arise.”).

96. *Id.* at 71.

97. Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROC. L. REV. 103, 109 (2002).

98. *Id.*

vendors or innovative technologies, or to use novel procurement techniques.”⁹⁹ Indeed, such caution, when exercised by agents, may arguably constitute “a conflict of interest because it means that the procurement process will be diverted from its optimal outcomes.”¹⁰⁰ The principal-agent model helps to pinpoint the opposing forces at work and underscores the need for achieving the right balance.¹⁰¹

Transparency features prominently in procurement-related discourse and policy.¹⁰² As such, the deliberations and initiatives undertaken tend to revolve around the availability of information relating to contract opportunities and awards, with different scenarios assessed from the perspectives of pivotal stakeholders such as competing contractors, the press, or the taxpayers.¹⁰³ Empirically underpinned agency theory may add further value in this respect by addressing the issue from a new and unexplored angle such as, for instance, in terms of whether “the principal can ensure better outcomes from an agent if the agent is afforded more information on the agent’s own performance.”¹⁰⁴

In light of the above account, it is apparent that the principal-agent model may serve as a highly effective analytical tool not for merely diagnosing conflicts of interests in situations involving delegated authority, but also for devising conflict-of-interest rules.¹⁰⁵ In the specific case of the public procurement system, but not exclusively so, there has been a discernible tightening of such rules over time.¹⁰⁶ Agency theory provides partial support for the policy path followed, yet it suggests that an “overshooting” may have taken place and that there is considerable scope for reliance on a mix of monitoring and

99. Yukins, *supra* note 51, at 77.

100. *Id.*

101. *Id.*

102. *See id.* at 69 (defining transparency in procurement as “primarily the publicizing of information on contract opportunities and awards.”).

103. *Id.*

104. *Id.*

105. *See* Yukins, *supra* note 51, at 79–82 (noting that the point of conflict-of-interest sanctions is to guide agents’ conduct in line with that of the “governing principal”).

106. *See id.* at 80–82 (explaining that agency theory helps to explain why conflict-of-interest rules have been tightened precisely because conflicts inherent to a given agent are “at the heart” of agency theory).

incentives for this purpose, striking a better balance between compliance and enterprise as a result.¹⁰⁷

On the face of it, the principal-agent model should be equally effective in shedding light on the structural dynamics observed in the judicial sphere.¹⁰⁸ George Tracey and Albert Yoon make it abundantly clear that drawing an analogy between these two institutional settings is an analytically and practically viable undertaking.¹⁰⁹ According to them, in the United States, for instance, “[I]ike Congress, the Supreme Court must delegate a great deal of its work, in this case to lower courts rather than to agencies.”¹¹⁰ And, “[s]ince the Supreme Court is formally at the apex of the judicial pyramid, the Court’s decisions can be conceptualized as a principal directing (or attempting to direct) its agents, the lower courts.”¹¹¹ Yet, “[t]he Supreme Court has limited resources to monitor the actions of the lower federal courts and state courts; therefore, the possibility arises that judges will not comply with Supreme Court preferences.”¹¹² Obviously, “[t]he Court . . . wishes to check these inconsistent rulings, but monitoring and enforcement is costly.”¹¹³

There are some empirically solid research findings broadly consistent with this assessment. Notably, Donald Songer, Jeffrey Segal, and Charles Cameron, employing a technique called “fact

107. See *id.* (discussing the more recent U.S. “shift in emphasis” away from heavy sanctions and toward monitoring measures, such as “mandatory corporate self-disclosure” and suggesting that this shift has been effective).

108. See Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions* 38 AM. J. POL. SCI. 673, 673 (1994) (suggesting that the interplay between appeals courts and the U.S. Supreme Court is a microcosm of the principal-agent model; i.e., a study of the degree to which appeals courts follow decisions handed down by the U.S. Supreme Court in comparison to appeals courts following their own decisions, as well as the level of control the Supreme Court in enforcing its precedents at the lower levels).

109. Tracey E. George & Albert H. Yoon, *The Federal Court System: A Principal-Agent Perspective*, 47 ST. LOUIS U. L.J. 819, 819 (2003) (“Since the Supreme Court is formally at the apex of the judicial pyramid, the Court’s decisions can be conceptualized as a principal directing (or attempting to direct) its agents, the lower courts . . . The Court obviously wishes to check these inconsistent rulings, but monitoring and enforcement is costly.”).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

pattern analysis” to examine Supreme court-circuit court interactions, have established¹¹⁴ that “courts of appeals are highly responsive to the changing search and seizure policies of the Supreme Court”¹¹⁵ but that, at the same time, “the strong independent effect of the ideologies of the judges gives evidence that judges do find opportunities to ‘shirk’ to satisfy their own policy interests.”¹¹⁶ To complicate matters, they have also produced “strong evidence [indicating] that litigants play an active role in monitoring by the courts.”¹¹⁷ Similar findings have been reported elsewhere.¹¹⁸

Such behaviorally oriented studies place a heavy emphasis on the ideological dimension of the decisional calculus relied upon within the judicial hierarchy.¹¹⁹ Conservative judges are thus supposed to favor outcomes sought by the government in criminal cases, while their liberal counterparts are supposed to lean in the direction of outcomes pursued by civil rights plaintiffs.¹²⁰ To the extent that the law is a relevant component of the behavioral equation, it is merely in the

114. See Songer et al., *supra* note 108, at 673 (applying fact pattern analysis of actual case decisions and comparison between circuit court decisions versus Supreme Court decisions to the overall framework of a principal-agent analysis).

115. *Id.*

116. *Id.*

117. See *id.* at 673, 675 (suggesting that the likelihood of an appeal increases the more circuit judges “follow their own preferences” rather than Supreme Court precedents, and that the likelihood of these appeals by litigants is itself a strong “monitoring” factor taken into consideration by circuit court judges).

118. See, e.g., Charles M. Cameron et al., *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court’s Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 101 (2000) (coming to a similar conclusion that likely appeals can deter policy decisions by using a “game theoretic model” applied to Burger Court decisions); Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 L. & SOC’Y REV. 143, 144 (2003) (suggesting that the Supreme Court needs to make decisions “strategically” in order to “maximize its supervisory control” over policy-driven decisions at lower court levels); Stefanie A. Lindquist et al., *Supreme Court Auditing of the US Courts of Appeal: An Organizational Perspective*, 17 J. PUB. ADMIN. RSCH. & THEORY 607, 608, 614, n.6 (2007) (suggesting that the threat of a circuit court reversal is a “compelling mechanism” keeping the majority of lower courts from deviating from higher court precedents).

119. But see Kim, *supra* note 67, at 537–38 (noting that Judge Richard Posner suggested that the identify of a federal appellate judge’s principal is “a matter of some uncertainty” and further suggesting that there is not a “contract relationship” between the U.S. Supreme Court and lower federal court appointees).

120. *Id.* at 536.

instrumental sense of the term—”as a means of mediating the inevitable conflict between upper and lower courts over policy outcomes.”¹²¹

The overall theoretical framework invoked and these particular elements thereof, however, do not neatly correspond with judicial realities.¹²² Importantly, the Supreme Court is materially constrained in its capacity to fine-tune the incentives of district and circuit courts, and lower courts in general.¹²³ Nor is there a direct relationship between the judicial organ at the apex of hierarchy and those occupying levels below it, injecting a degree of uncertainty into the proposition that the latter are duty-bound to scrupulously follow the path charted by the former.¹²⁴ Indeed, it might plausibly be claimed that “federal judges could appropriately be viewed as agents of their appointing President, Congress, or the public.”¹²⁵

Perhaps most significantly, from a normative as well as a behavioral standpoint, the preoccupation with conflicts of interest along the judicial hierarchy obscures the substantial cooperative ingredient of the relational dynamics.¹²⁶ Without doubt, ideational divergences do impinge to some extent on judges’ decisions at all levels, but instead of being solely regarded as “a signal or command to lower courts, the law should be understood as the joint product of the Supreme Court and lower courts.”¹²⁷ The corollary presumably is that that “the interaction between the Supreme Court and lower federal courts might be more productively modeled as a type of mixed-motive coordination game rather than a traditional principal-agent relationship.”¹²⁸

Due to its microeconomic origins, agency theory may underscore

121. *Id.*

122. *But see id.* at 535–38 (noting that the “lack of an exact fit alone does not mean the model cannot be useful” because theoretical models can provide insights if applied to “new contexts”).

123. *Id.* at 537.

124. *Id.*

125. *See Kim, supra* note 67, at 537.

126. *See id.* at 537–38 (noting in particular that the preoccupation with analysis of conflict-of-interest and policy decisions in judicial decision making can effectively ignore not only the cooperation between levels of legal body, but also the role of the law itself).

127. *See id.* at 538.

128. *Id.*

competition/conflict and marginalize collective endeavor/cooperation, other than in a limited fashion.¹²⁹ This “bias” has been partially addressed in the business literature, where the concept of cooptition (synchronized cooperation and competition)¹³⁰ has gained currency but, as illustrated above, it is not being widely stretched across issue areas.¹³¹ Given this backdrop, there may also be a tendency to see competition/conflict where none exists.¹³² While the idea is shrouded in controversy,¹³³ the non-delegation doctrine, a principle of constitutional and administrative law which maintains that legislative bodies cannot delegate their powers to executive agencies or private entities,¹³⁴ is a hypothetical example of the limits of the notion of delegated authority/principal-agent model.

There may also be scope for applying agency theory less mechanically and more creatively than is commonly the case.¹³⁵ Oren Bar-Gill and Cass Sunstein, for instance, have shown that illuminating insights may be generated by turning the principal-agent model

129. See Mehrdad Vahabi, *Political Economy of Conflict*, 122 L'ÉCONOMIE DES CONFLICTS [THE ECONOMY OF CONFLICTS] 135, 135, 161, 163 (2012), <https://www.jstor.org/stable/43859951> (noting that political and economic theories have difficulty balancing the nuances of competition/conflict versus collective endeavor/cooperation).

130. See Paavo Ritala, *Cooptition Strategy—When Is It Successful? Empirical Evidence on Innovation and Market Performance*, 23 BRIT. J. MANAGEMENT 307, 307 (2012) (noting that the theory of cooptition, though dating back several decades, has only recently gained more widespread acceptance).

131. See *id.* at 308–09 (discussing theories of competition, cooptition, and game theory strategies in limited, “knowledge-intensive sectors”).

132. See *id.* at 312 (noting that firms often “perceive their rivals and competitive dynamics differently” depending on whether they are looking inwards at their own industry, or outward towards another).

133. See Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 380–81, 421 (2017) (noting that different schools of legal scholarly thought disagree intensely “over what role the nondelegation doctrine ought to play in today’s legal system”).

134. See *id.* at 423 (noting that federal constitutional cases involving the nondelegation doctrine were all concerned with “the extent to which legislatures could delegate power to other entities.”).

135. See Yf Reykers & Derek Beach, *Process-Tracing as a Tool to Analyze Discretion*, in THE PRINCIPAL AGENT MODEL AND THE EUROPEAN UNION 255, 268 (Tom Delreux & Johan Adriaensen eds., 2017) (noting the importance in creatively tackling the application problem by “gaming through a wide range of potential empirical fingerprints” that might have been left behind at each step of a causal mechanism’s process).

upside-down, so to speak.¹³⁶ Specifically, they have explored, where appropriate, the regulator-regulatee relationship by looking at the former as the principal and the latter (i.e. the public) as the agent, rather than the other way around.¹³⁷ This has allowed them to examine the regulatory regime in an unconventional and fruitful manner and offer some valuable analytical and practical observations.¹³⁸

Without detracting from the considerable merits of agency theory as a tool for dissecting legal phenomena, it is reasonable to highlight the need for devoting additional thought to concept extension¹³⁹ and intension,¹⁴⁰ greater flexibility, and multidimensional models that, besides a cause and an effect, encompass *inter alia* context,¹⁴¹ feedback loops,¹⁴² and intervening/mediating (both mutually reinforcing and mutually antagonistic) variables.¹⁴³ Richard Waterman and Kenneth Meier have provided a number of useful ideas in this respect.¹⁴⁴ Notably, they have suggested that the unitary actor and dyadic relationship (one principal-one agent) assumption be relaxed¹⁴⁵

136. See Oren Bar-Gill & Cass R. Sunstein, *Regulation as Delegation*, 7 J. LEGAL ANALYSIS 1, 1 (2015) (explaining that this so-called upside-down shift is done by changing the focus “from personal decisions” and looking at them through the lens of “public goods problems”).

137. See *id.* at 3 (suggesting that this regulatory approach depends on the way interest align between the individual-principal and agent).

138. See *id.* (suggesting that this model helps to identify “features of the analysis that might otherwise be ignored.”).

139. See GARY GOERTZ, *SOCIAL SCIENCE CONCEPTS: A USER’S GUIDE* 69–94 (2006) (defining concept extension as “empirical coverage” of a concept).

140. See *id.* (defining concept intension as “the concept itself”).

141. See DAVID W. BRITT, *A CONCEPTUAL INTRODUCTION TO MODELING: QUALITATIVE AND QUANTITATIVE PERSPECTIVES* 111–31 (1997) (noting that “the context within which action occurs is essential for understanding social life” and suggesting that context can be difficult to see, for example, water is difficult to “see and appreciate” to a fish because the fish is thoroughly encompassed by the water).

142. See *id.* at 94–110 (defining feedback loops as “a closed sequence of causes and effects”).

143. See *id.* at 84–90 (noting that both intervening and mediating variables have to be related to the two original concepts in the analysis and that their existence must either be affected by or have an effect on those concepts).

144. See Richard W. Waterman & Kenneth J. Meier, *Principal-Agent Models: An Expansion?*, 8 J. PUB. ADMIN. RSCH. & THEORY 173, 175 (1998) (suggesting that there will inevitably be costs “involved in monitoring an agent[,]” and therefore public and private concerns effectively behave like intervening variables).

145. *Id.* at 181.

and that both goal conflict and information asymmetry be treated as variables rather than constants.¹⁴⁶ This is by no means an exhaustive list, but it effectively brings to the fore the proposition that, insofar as the law is concerned, the principal-agent model is a key component of the theoretical repertoire, and yet that it should be resorted to in a discriminating and at the same time versatile fashion.¹⁴⁷

IV. THE PRINCIPAL-AGENT MODEL AND INTERNATIONAL ORGANIZATION: CONVERGENCE OR DIVERGENCE?

The global arena is populated by an assortment of players with different identities who are broadly classified into two categories—“States” and “non-State actors.”¹⁴⁸ While unlike in their basic structural-functional attributes, both are generally expected to share three essential features: (1) An “autonomous capacity to determine their own purposes and interests,”¹⁴⁹ (2) “the capability to mobilize human and material resources to achieve these purposes and interests,”¹⁵⁰ and (3) “[t]heir actions should be significant enough to influence the [S]tate-to-[S]tate or the behavior of other non-[S]tate actors in the global system.”¹⁵¹

Relatively speaking, States constitute a homogeneous set in that, as “persons of international law,” they possess common formal characteristics such “a permanent population, a defined territory, a

146. See *id.* at 181–85 (noting that both goal conflict and information asymmetry are “clearly continuous variables” and that they are dichotomized in order to “simply the presentation.”).

147. See *id.* at 197–98 (suggesting, effectively, that the theory provides interesting avenues for research, but it should not be taken as the be-all-end-all of analytical approaches).

148. See Marianna Charountaki, *State and Non-State Interactions in International Relations: An Alternative Theoretical Outlook*, 45 BRIT. J. MIDDLE E. STUD. 528 (2018), <https://doi.org/10.1080/13530194.2018.1430530> (explaining that States are concerned with national interests whereas non-State actors interact in the State’s field; but that this is not to say that non-State actors are the less important party in the interaction, particularly post the Cold War).

149. Hideki Kan, *Actors in World Politics*, GOV’T & POL., <http://www.eolss.net/sample-chapters/c04/e6-32-05-03.pdf>, (last visited Jan. 4, 2021).

150. *Id.*

151. *Id.*

government, and the capacity to enter into relations with other States.”¹⁵² Non-State actors form a residual and thus more heterogeneous category that consists of “all the entities different from [S]tates.”¹⁵³ It encompasses “individuals (individuals in international law) as well as entities, the latter spanning a large range of organizations and institutions on the global, regional, sub-regional as well as local levels.”¹⁵⁴ Due to their diversity, “these entities cannot be identified by common sociological features.”¹⁵⁵ This is the varied set where international organizations belong.¹⁵⁶

Sandesh Sivakumaran has introduced a third category—“State-empowered entities,”¹⁵⁷ which are “empowered by States to make and shape international law.”¹⁵⁸ They do not qualify as States but, by virtue of their empowerment by the latter, they may not readily be classified as non-State actors either (e.g. International Committee of the Red Cross).¹⁵⁹ This suggests that, for certain purposes, such entities should be considered a distinct category and handled accordingly for analytical purposes.¹⁶⁰ This need not universally be the case, however,

152. Convention on Rights and Duties of States, art. 1, adopted Dec. 26, 1933, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934); see Derek Wong, *Sovereignty Sunk? The Position of ‘Sinking States’ in International Law*, 14 MELB. J. INT’L L. 347 (2013) (discussing the centrality of States as actors in international law; and discussing the possibly outdated theory that States will always either be created or succeeded, rather than a possible capacity for extinction).

153. Nicolás C. Santarelli, *Nonstate Actors*, OXFORD BIBLIOGRAPHIES (July 24, 2013) <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0085.xml>.

154. *Non-State Actors*, MAX PLANCK ENCYCLOPEDIAS INT’L L. (2009).

155. *Id.*

156. See *id.* (noting that international organizations and non-State actors have legal capacities, but those capacities are varied and limited by the function of the organization within the overall international legal order).

157. See Sandesh Sivakumaran, *Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law*, 55 COLUM. J. TRANSNAT’L L. 343, 346 (2017) (defining “State-empowered entities” vaguely as a category “between States and non-State actors” within the overall framework).

158. *Id.*

159. See, e.g., *id.* (citing the International Law Commission and the U.N. Human Rights Committee as other such examples).

160. See *id.* (suggesting that it is because State-empowered entities fall somewhere in between States and non-State actors that they deserve their own category).

because the mere fact of being empowered by States may without difficulty be treated as an intervening/mediating variable in many wider institutional contexts.¹⁶¹

Students of international organizations, pivotal non-State actors, had traditionally been skeptical of their capacity to meaningfully engage in any strategic pursuits dismissing, whether explicitly or implicitly, the notion that they “can act.”¹⁶² This is rather puzzling as, after all, “IOs, like all organizations, act every day in a thousand different ways.”¹⁶³ For instance, “[t]he World Trade Organization (WTO) rules on trade disagreements; the North Atlantic Treaty Organization (NATO) makes decisions about military policy; the United Nations Educational, Scientific and Cultural Organization (UNESCO) decrees picturesque towns to be World Heritage Sites.”¹⁶⁴

It is equally puzzling that this stance remains partially intact.¹⁶⁵ Indeed, two mainstream theories of international relations/branches of positive international legal theory, the realist and liberal schools, do not conceive of international organizations as actors at all.¹⁶⁶ Rather, these influential bodies of thought posit that it is States that initiate action, solely employing international organizations as a platform for implementing their agendas.¹⁶⁷ This is clearly the approach embraced by realists and, albeit less emphatically and uniformly so, by their liberal counterparts, who portray international organizations as “loci

161. See Charountaki, *supra* note 148, at 532 (referencing footnote 17, the State’s structure and various interest groups can be intervening variables when viewed from the larger context).

162. See Joel E. Oestreich, *Introduction*, in *INTERNATIONAL ORGANIZATIONS AS SELF-DIRECTED ACTORS: A FRAMEWORK FOR ANALYSIS* 1, 1 (Oestreich ed., 2012) (discussing the history of glossing over the power of international organizations in theories promulgated by traditional Realists and Liberal theorists who essentially assume that international organizations are swept up in a tide of State actors).

163. *Id.*

164. *Id.*

165. See *id.* at 1, 3 (suggesting that the puzzling nature of the proposition comes from the fact that international organizations “act every day in a thousand different ways” and yet, because they do not exist “independently of States,” international organizations are still seen as largely beholden).

166. See *id.* at 1 (explaining that Realism treats international organizations as “meaningless bodies in a world of State actors” and Liberalism treats international organizations as influential only as “loci of social norms and expectations” but not as independent agents in their own right).

167. *Id.*

of social norms and expectations, but not as agents with their own wants and desires, and the ability to act on them.”¹⁶⁸

Viewing international organizations merely as passive instruments of States or alternatively as an embodiment of exogenously determined normative and expectational anchors is analytically problematic in two crucial respects.¹⁶⁹ First, such reductionism deprives these complex entities of any endogenous substance, implying that what transpires within them is, for all intents and purposes, of no material relevance.¹⁷⁰ Second, adopting this perspective has the ineluctable consequence of turning the State-international organization relationship into a one-way street, overlooking the possibility that international organizations may conceivably act contrary to the manner prescribed or even envisioned by the States that create them.¹⁷¹

The idea that international organizations are not solely a State-driven transmission mechanism lacking endogenous dynamics and autonomous impulses is acknowledged in two recent strands of the international relations/positive international legal theory literature—constructivism and the principal-agent model.¹⁷² The former paradigm has its origins in educational psychology or more specifically Jean Piaget’s theory of cognitive development, which delves into how human beings continuously ascribe meaning to phenomena that are the product of the interplay between their beliefs and experiences.¹⁷³

168. See Oestreich, *supra* note 162, at 1-3.

169. See *id.* at 2-4 (suggesting that if we want to truly understand the role of international organizations in international relations, we must develop a more nuanced analysis of their behavior and relationship to State and non-State actors).

170. See *id.* at 2-5 (suggesting instead that international organizations have legitimate importance in the world order and that they individually can affect State behaviors and identities beyond mere coordination of State-desired efforts).

171. See *id.* at 4-6 (noting that although some international organizations are created by the States to serve their own interests, many are actively working contrary to State interests).

172. See *id.* at 5, 8 (defining constructivism as a theory “focused on the bureaucratization of world politics and the ways in which large international organizations are able to use knowledge and expertise, as well as their capacity for organized behavior, to influence State behavior”; and defining the principal-agent model as focused “on contracting arrangements between States and [international organizations].”).

173. See BARRY J. WADSWORTH, *PIAGET’S THEORY OF COGNITIVE*

Constructivists extend this framework by contending that States too are engaged in a ceaseless process of interaction and learning, immersing themselves in intersubjective relationships where perceptions of reality (including those pertaining to interests) are not constant but acquired over time in varying circumstances through encounters with other players in the global arena.¹⁷⁴ This everlasting process entails progressive knowledge accumulation and institutionalization of behavior.¹⁷⁵ In that context, States establish international organizations for the same reason that bureaucratic institutions are set up within the domestic space— “to rationalize the management of a complex world through the creation of organizations and the application of expertise.”¹⁷⁶

Michael Barnett and Martha Finnemore are the most vigorous proponents of the constructivist-like bureaucratization of world politics vision.¹⁷⁷ They contend that international organizations are able to leverage the knowledge and expertise that they obtain, as well as their institutional capabilities, to tangibly influence State behavior.¹⁷⁸ In their depiction of international realities, international

DEVELOPMENT: AN INTRODUCTION FOR STUDENTS OF PSYCHOLOGY AND EDUCATION 1 (1971) (Piaget was “primarily concerned with describing and explaining in a very systematic way the growth and development of intellectual structures and knowledge.”).

174. See Oestreich, *supra* note 162, at 8 (noting that these interests that are acquired over time by international organizations are attained mostly through the “bureaucratization of world politics”).

175. See *id.* (suggesting that interests “are not given” but rather “developed” over time).

176. *Id.*

177. See Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations* 53 INT’L ORG. 699, 699 (1999) (developing “a constructivist approach rooted in sociological institutionalism to explain both the power of [international organizations] and their propensity for dysfunctional, even pathological, behavior”); MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* 2–3 (2012) (“[International organizations] are bureaucracies. Bureaucracy is a distinctive social form of authority with its own internal logic and behavioral proclivities.”).

178. See Barnett & Finnemore, *supra* note 177, at 713; BARNETT & FINNEMORE, *supra* note 177, at 33 (“[M]any [international organization] elites have as their stated purpose a desire to shape State practices by establishing, articulating, and transmitting norms that define what constitutes acceptable and legitimate State behavior.”).

organizations are not robot-style agents, faithfully executing the wishes of their creators, but instead exhibit the same dysfunctional propensities as any other bureaucratic institutions.¹⁷⁹ The fact of the matter is that “[t]hey are given some power and authority which they are expected to use responsibly, yet they often fail to do so, and the resulting outcome might be quite different from what was expected.”¹⁸⁰

Organizational culture is a vital element of any institutional fabric that is supposed to play a decisive role in disrupting the flow of power and authority from States/architects to international organizations/engineers.¹⁸¹ The validity of this argument has been illustrated in a number of different institutional environments, notably in regard to the *modus operandi* and reform of the World Bank¹⁸² and with respect to the implementation and enforcement of human rights norms.¹⁸³ The lesson apparently is that international organizations tend to have their own bureaucratic (equivalent to corporate) culture that functions as a semi-autonomous filtering and steering mechanism.¹⁸⁴

179. See Barnett & Finnemore, *supra* note 177, at 699, 715, 717–18 (explaining [international organization] dysfunction is rarely investigated because “the theoretical apparatus” used by orthodox scholars “provides few grounds for expecting undesirable [international organization] behavior”); BARNETT & FINNEMORE, *supra* note 177, at 35, 37–38 (deriving two theories for [international organization] dysfunction, where one focuses on external influence and the other focuses on the internal cultural environment).

180. See Oestreich, *supra* note 162, at 1, 8.

181. Catherine Weaver & Ralf J. Leiteritz, “Our Poverty is a World Full of Dreams:” *Reforming the World Bank*, 11 GLOB. GOVERNANCE 369, 369–70 (2005) (defining organizational culture as “the ideologies, norms, and routines governing the expectations and behavior of the bureaucratic staff”) (emphasis removed); JOEL E. OESTREICH, POWER AND PRINCIPLE: HUMAN RIGHTS PROGRAMMING IN INTERNATIONAL ORGANIZATIONS 106–07 (2007) (describing organizational culture one of many possible “constraint[s] on the implementation of social development policies”).

182. See, e.g., Weaver & Leiteritz, *supra* note 181, at 369–70 (discussing how institutional culture affects change within the World Bank).

183. See OESTREICH, *supra* note 181, at 106–07 (describing how “the difficulty of changing [] organizational culture” made it harder to implement gender-focused policies within the World Bank).

184. See *id.* at 186 (“[T]he problem is not actually formulating a policy, nor is it commitment at the top.”); see also Weaver & Leiteritz, *supra* note 181, at 369–70 (noting the “tenacious survival capacity” of the World Bank’s “deeply rooted organizational culture”).

The central constructivist premise that States and non-State actors process stimuli via cognitive apparatuses akin to those witnessed in the course of human development is difficult to reconcile with harsh international (as well as domestic) political realities.¹⁸⁵ Rather, the behavior of players in the global arena seems more consistent with the pattern encapsulated in a “soft” (as distinct from “hard”/RMIU-type which involves unbridled utility maximization) variant of rationality.¹⁸⁶ Its essence is captured by the REMM (Resourceful, Evaluative, and Maximizing) and RREEMM (Resourceful, Restricted, Expecting, Evaluating, and Maximizing) models of man.¹⁸⁷ These two closely related analytical schemes aver that strategic decision-making entails a determined mobilization of resources, forward-looking information gathering, evaluation of competing alternatives, and constrained utility maximization.¹⁸⁸

Its limitations notwithstanding, constructivism provides valuable insights that may fruitfully be incorporated into a theoretical framework that is predominantly, but not exclusively, rationalist in its orientation (i.e. does not suggest that “[h]umans are not evaluators any more than ants, bees, and termites are evaluators [and that they are] conventional and conformist, and that their behavior is [exclusively] determined by the taboos, customs, mores, and traditions of the society in which they were born and raised”).¹⁸⁹ Compared with its constructivist counterpart, the promise of the principal-agent model as a vehicle for dissecting the relationship between States and

185. Roda Mushkat, *Conceptions of Sovereignty and Identity Economics: A Chinese-Based Exploration*, 4 INT’L J. PUB. L. & POL’Y 245, 263 (2014) (“[C]onstructivism alone . . . cannot provide an adequate account of State behavior, in the legal sphere and elsewhere.”).

186. Roda Mushkat, *International Legal Compliance as a Rational Act: Theoretical Extensions and Chinese Realities*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 633, 674 (2012) (explaining that international conduct rules are “prominently” affected by factors like social rationality, but they “are increasingly [oriented] toward the exercise of soft power, rather than its hard counterpart”).

187. *See id.* at 651–52.

188. *See id.* (“The postulates are that the decision-maker’s wants are unlimited, the decision-maker is an evaluator, the decision-maker is a maximizer, and the decision-maker is resourceful.”).

189. *See* Michael C. Jensen & William H. Meckling, *The Nature of Man*, 7 J. APPLIED CORP. FIN. 4, 15 (1994).

international organizations partly stems from its rationalist roots.¹⁹⁰

China's interactions with other States and non-State entities offer ample illustrations of the inherent ambiguities and narrow confines of constructivism and the need to selectively couple it with a more realistic and robust explanatory paradigm.¹⁹¹ Constructivists assert that national identity—in the form of a profound sense of victimhood fueled by the experiences of the “Century of Humiliation” that lasted from the Opium Wars to the Communist Revolution—is the key driver of Chinese foreign policy.¹⁹² Even if partially valid, this claim overlooks several additional manifestation of China's national identity, with potentially different (indeed, opposing) impacts on foreign policy.¹⁹³ More importantly in this context, Chinese leaders have proved adept at manipulating national identity/ perception of victimhood in a utilitarian fashion in pursuit of strategic goals.¹⁹⁴

China's international behavior also evinces that, unless injected with some rationalist substance, the amorphous concept of national culture loses much of its effectiveness as a tool of policy analysis.¹⁹⁵ The point is that it has seldom expressed itself in this socio-political milieu as an elusive, emotion-charged, messy, spontaneous, and unruly force.¹⁹⁶ Rather, it has mostly taken the shape of heuristics/rules-of-thumb consciously developed over time by Chinese

190. See Mushkat, *supra* note 186, at 674 (describing social rationality as a “prominen[t]” factor in the process of devising rules to govern [international organization's] conduct).

191. See *id.* at 664 (“The preoccupation with expressive rationality has been an enduring feature of Chinese international legal behavior in virtually all policy domains—impinging on its compliance with international law in diverse realms of interstate relations.”).

192. See *id.* at 674 (arguing that “social rationality” is a corollary between the victim mentality and subsequent great power mentality in the Chinese history).

193. See *id.* (arguing that “China has been a rule-taker, rule-shaker, and rule-breaker in the global arena”).

194. See *id.* at 673 (stating that scholars have “tentatively suggested that China may derive satisfaction and utility from positive reinforcement received from external sources following acts of compliance and cooperation.”).

195. See *id.* at 673–74 (framing China's management of its international reputation management as rationality-driven process).

196. See Mushkat, *supra* note 186, at 673 (suggesting China's “international adaptation, and the rules governing it, are partly driven by a desire to establish relationships of trust”).

leaders to deal with external opportunities and threats.¹⁹⁷ This attitudinal configuration shows closer similarity to rules formulated for decision-making under uncertainty than anthropological or sociological conceptions of culture and is consequently referred to as “strategic culture.”¹⁹⁸

Greater strategic clarity and focus, grounded in rationalist logic, have made the principal-agent model the preferred analytical instrument for exploring the seemingly unsmooth relationship between States and international organizations.¹⁹⁹ This theoretical approach to issues arising from the latter’s putatively semi-autonomous status rests on the notion of a delegating contract between the two sides.²⁰⁰ States thus establish international organizations to fulfill certain objectives (e.g. addressing collective action problems, bestowing legitimacy, and generating information) and delegate to them the requisite powers to meet these targets.²⁰¹

The corollary is that international organizations are accorded a servant-like role, being “employed” to perform functions that States believe to be beyond their individual capabilities or that would be less

197. *See id.*

198. *See* Andrea Ghiselli, *Revising China’s Strategic Culture: Contemporary Cherry-Picking of Ancient Strategic Thought*, 233 CHINA Q. 166, 166–67 (2018) (defining strategic culture in terms of culture’s role in strategic thinking); Anthony A. Loh, *Deconstructing Cultural Realism*, in CHINA AND THE NEW INTERNATIONAL ORDER 281, 282 (Wang Gungwu & Zheng Yongnian eds., 2008) (presenting arguments “which are critical to understanding what . . . a Chinese tradition of *Realpolitik*” might be) (emphasis in original); HUIYUN FENG, CHINESE STRATEGIC CULTURE AND FOREIGN POLICY DECISION-MAKING: CONFUCIANISM, LEADERSHIP, AND WAR 1 (2007) (examining the Chinese foreign policy from a historical lens “unlike many realist descriptions . . . which focus on material power”); Colin S. Gray, *Strategic Culture as Context: The First Generation of Theory Strikes Back*, 25 REV. INT’L STUD. 49, 49 (1999) (critiquing Johnston’s realist construction of strategic culture); ALASTAIR I. JOHNSTON, CULTURAL REALISM: STRATEGIC CULTURE AND GRAND STRATEGY IN CHINESE HISTORY 1–2 (1995) (describing strategic culture as “consistent and persistent historical patterns in the way particular States . . . think about the use of force for political ends”).

199. *See* Oestreich, *supra* note 162, at 5–7 (analyzing [international organizations] as actors in a principal-agent context).

200. *See id.* at 5 (“The principal-agent approach to [international organization’s] independence begins with the notion of a delegating contract between States and [international organizations].”).

201. *Id.* at 6.

effective and more costly to undertake without properly institutionalized coordinating machinery.²⁰² Such delegation of authority proceeds along contractual lines, with States designated as principals and international organizations as their agents.²⁰³ The latter's task is to pursue the interests of the former in a way indicated in the initial contract, and subject to revision in succeeding versions of that contract.²⁰⁴

In practice, the interests of States/principals and international organizations/agents often diverge.²⁰⁵ The latter are "engaged" to satisfy the goals articulated by the former but end up endeavoring to realize their own agenda or that of their members.²⁰⁶ A crucial ingredient of the structural blueprint for an international organization is thus an array of monitoring devices and incentives designed to closely align the interests of the agent/institution with those of its principals/States.²⁰⁷ If this is achievable and adequately attained, the contractual relationship might be managed in a mutually beneficial manner.²⁰⁸ On the other hand, where that is not the case, agents could possibly take advantage of any "slack" in the system to tilt the scales in their favor.²⁰⁹

Agents/international organizations and their members are

202. See *id.* (noting that States delegate [international organizations] "certain powers necessary for them to perform their function effectively").

203. See Darren G. Hawkins et al., *Delegation under Anarchy: States, International Organizations, and Principal-Agent Theory*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* 3, 6–9, 12, 25, 31 (Darren G. Hawkins et al., eds., 2006) (discussing the balance of power between power-granting principals and power-receiving agents, which exists in terms of conditions set between the two parties).

204. See *id.* at 9, 12 (discussing the role of contractual obligations both initially and as revised by the principal).

205. See *id.* at 8 ("Agents receive conditional grants of authority from a principal, but this defining characteristic does not imply that agents always do what principals want.").

206. See Oestreich, *supra* note 162, at 6 ("[I]t is assumed that [agents] will actually act in their own self-interest, or . . . the self-interest of the individuals" in their organization.).

207. See *id.* ("Principals should build into the relationship adequate means for overseeing the actions of the agent.").

208. See *id.* ("If the interests of the agents and principals are aligned, then presumably the relationship can be carried out to mutual satisfaction.").

209. See *id.* (discussing oversight slack and its effect on self-interested agents).

particularly adept at exploiting asymmetric information to their advantage in pursuing concrete objectives such as budgetary expansion, career advancement, organizational autonomy and growth, and unencumbered agenda setting.²¹⁰ Principals/States are not entirely oblivious to the underlying tension between the centripetal and centrifugal forces at work and try to introduce control mechanisms to ensure compliance with institutional mission.²¹¹ A degree of slack, however, is unavoidable because organizational monitoring and incentive vehicles consume significant resources and a balance needs to be struck between bureaucratic conformity and initiative.²¹²

Moreover, the presence of slack does not negate the primary benefits of delegation that, on the whole, produces superior outcomes to unilateralism and, frequently, international cooperation that does not involve delegation (i.e. non-delegation).²¹³ Above all, delegation in general, including by States to international organizations, is believed to yield substantial gains stemming from division of labor and specialization.²¹⁴ Both are a ubiquitous feature of delegation.²¹⁵ Division of labor constitutes its essence and specialization underlies its *raison d'être*—“[r]ather than performing an act itself, the principal delegates authority to a *specialized agent* with the expertise, time, political ability, or resources to perform a task.”²¹⁶

Additionally, delegation by principals/States to agents/international organizations produces a range of positive spillover effects.²¹⁷ Three were briefly identified previously (addressing collective action problems, bestowing legitimacy, and generating information).²¹⁸ Their

210. *See id.* at 6–7.

211. *See id.* at 7 (“Smart principals make decisions to delegate even when they know that delegation is not perfect, although they will do so carefully and after designing the delegation contract as best they can.”).

212. *See* Oestreich, *supra* note 162, at 7 (stating that principals are incentivized to delegate even knowing “some agency slack is inevitable”).

213. *See* Hawkins et al., *supra* note 203, at 10–20 (discussing the purposes and benefits of delegation in the principal-agent context).

214. *See id.* at 13–15 (analyzing potential benefits of delegation).

215. *See id.* (focusing on specialization regarding labor as a key benefit of delegation).

216. *See id.* at 13.

217. *See id.* at 32 (discussing “functional spillover [and] political spillover” as contributors to an agent’s ability to influence a principal).

218. *See* Oestreich, *supra* note 162, at 6 (“States create [international

favorable impact is reinforced by the role that delegation plays in helping to handle policy externalities,²¹⁹ ironing out disputes,²²⁰ and occasioning a stability-enhancing (whether or not equitable) policy bias/lock-in (whereby the policy winners who wish to sustain their position of strength well into the future proceed to solidify it via a policy bias/lock-in; e.g. permanent membership of the United Nations Security Council being exclusively granted to the major victors of the Second World War).²²¹

As indicated, to realize these benefits on a meaningful scale, States need to devise strategies for minimizing (as distinct from eliminating) agency conflict or slack, which is not a straightforward proposition.²²² Success in institutionalizing international cooperation through workable delegation hinges on the heterogeneity of States' preferences.²²³ The greater the heterogeneity, the less likely are States to delegate authority to an international organization and, if they do, the less likely is the delegation to progress smoothly.²²⁴ The outcome of delegation in such circumstances also depends on rules formulated to aggregate national preferences into coherent policies and to maintain control over potentially non-compliant agents.²²⁵ Obviously, the greater the number of States required to endorse a course of action, the greater the resistance to delegation and the greater the agent autonomy.²²⁶ Given the high heterogeneity of States' preferences and

organizations] to serve certain purposes- providing information, solving collective action problems, conferring legitimacy, etc.”).

219. See Hawkins et al., *supra* note 203, at 15–16 (discussing policy externalities as a factor motivating delegation).

220. See *id.* at 17–18 (discussing dispute resolution as a factor motivating delegation).

221. See *id.* at 19–20 (discussing policy bias as a factor motivating delegation) (emphasis removed).

222. See *id.* at 20–21 (outlining strategies to minimize slack and conflict in principal-agent contexts).

223. See *id.* at 21 (“[T]he greater the preference heterogeneity of States the more likely [its] members will prefer the status quo to the proposed outcome.”).

224. See *id.* (explaining that preference heterogeneity decreases the likelihood that States “will be able to delegate to an [international organization]”).

225. See Hawkins et al., *supra* note 203, at 21–23 (outlining the importance of institutional rule-setting, power, and delegation in regard to principals maintaining control over agents).

226. See *id.* at 21 (“Generally, the greater the number of States required to approve an action, the greater the autonomy of an agent.”).

the ever-expanding membership of international organizations in today's "global society," the implication is that there is considerable scope for agency conflict or slack, whatever constraints principals/States impose on their agents/international organizations.²²⁷

Considerable number of studies, both qualitative and quantitative in their orientation, lend empirical support to these analytical claims.²²⁸ Three are noteworthy because they attest to the breadth and versatility of the principal-agent model, focusing on diverse institutions such the International Monetary Fund (IMF),²²⁹ NATO,²³⁰ and the EU.²³¹ Ayse Kaya and Mike Reay have employed quantitative techniques such as content analysis and vector autoregression to trace the evolution of IMF operational philosophy known as the "Washington Consensus," an approach also embraced by the World Bank, with a heavy emphasis on policy prescriptions revolving around economic liberalization, deregulation, and privatization.²³²

They have identified a pattern akin to "fragmented change," whereby certain facets of an overarching policy paradigm shift at different points in time and via different organizational (mostly

227. See *id.* at 22 (discussing how power balance in multi-State coalitions affects individual State behavior).

228. Tom Delreux & Johan Adriaensen, *Introduction: Use and Limitations of the Principal-Agent Model in Studying the European Union*, in *THE PRINCIPAL AGENT MODEL AND THE EUROPEAN UNION* 1, 2 (Tom Delreux & Johan Adriaensen eds., 2017) ("[D]elegation and control are highly political [and] their study touches upon the essence of European politics."); see Ayse Kaya & Mike Reay, *How did the Washington Consensus Move Within the IMF? Fragmented Change from the 1980s to the Aftermath of the 2008 Crisis*, 26 *REV. INT'L POL. ECON.* 384, 384 (2019) (analyzing the Washington Consensus to better understand "how ideas and institutions change"); Robert W. Ruachhaus, *Principal-Agent Problems in Humanitarian Intervention: Moral Hazards, Adverse Selection, and the Commitment Dilemma*, 53 *INT'L STUD. Q.* 871 (2009) (examining how consequences of humanitarian intervention can reduce or undermine conflict management efforts).

229. See Kaya & Reay, *supra* note 228, at 384 (examining how the Washington Consensus evolved in relation to the IMF).

230. See Ruachhaus, *supra* note 228, at 871 (discussing the effect of prospective NATO intervention in Kosovo).

231. See Delreux & Adriaensen, *supra* note 228, at 1–3 (discussing the importance of delegation in the EU member-State context).

232. Kaya & Reay, *supra* note 228, at 384.

internal) channels.²³³ Thus, some market-driven ideas (notably trade liberalization, deregulation, and foreign investment) came to the fore in the early 1980s, others (particularly structural reform and fiscal discipline) gained currency later in the decade, and still more (specifically privatization and central bank independence) rose to prominence in the 1990s.²³⁴ These market-driven policies were gradually over-layered with socially oriented programs.²³⁵ It is significant that virtually the entire process was propelled by internal agents and their “outside partners,” with hardly any contribution by the Board of Governors representing all member States.²³⁶ The lack of accountability in such institutional settings is deemed partly responsible for the backlash against globalization that has ensued.²³⁷

Robert Ruachhaus has fruitfully applied the principal-agent model to NATO humanitarian intervention (in fact, to such action by any party).²³⁸ Agency theory pertains to this type of situations, in which “a third party (principal) provides a security guarantee (contract) to a domestic minority (agent) who wants protection from genocide, civil war, or other bad outcomes.”²³⁹ The initiative is inspired by noble intentions and may bring relief to the party-at-risk, even if belatedly and incompletely.²⁴⁰ At the same time, however, it often has unintended consequences which are inconsistent with the high-minded mission and which perversely consist of harm inflicted on other vulnerable parties.²⁴¹

233. See *id.* at 386 (advancing the notion of “*fragmented change* – in which selective attributes of an overarching policy paradigm shift, slowly or quickly, at different [times], and via different internal institutional routes.”) (emphasis in original).

234. See *id.*

235. *Id.*

236. See *id.* at 389–90 (discussing the effect of external influence on IMF policy in the context of internal IMF Board conflicts).

237. See IAN BREMMER, *US VS. THEM: THE FAILURE OF GLOBALISM* 8–11 (2018) (discussing the relationship between institutional growth and accountability, and global instances of populist nationalism).

238. See Ruachhaus, *supra* note 228, at 871 (evaluating “the utility of moral hazard theory and a second type of principal-agent problem known as adverse selection.”).

239. See *id.* at 872.

240. See *id.* at 882 (“One cannot conclude from either case studies or principal-agent theory that intervention is generally harmful.”).

241. See *id.* at 871 (presenting evidence that humanitarian intervention can

Asymmetric information between the principal and agent is thought to be the root cause of this distortion.²⁴² The reason is that it is the source of moral hazard and adverse selection (in microeconomics, scholars distinguish between two kinds of principal-agent problems, “those resulting from *hidden actions*, and those resulting from *hidden information* [. . .] [h]idden action is what generates moral hazard; hidden information, in contrast, is associated with *adverse selection*”).²⁴³ Inadequately informed principals such as NATO, handicapped when choosing and overseeing a not fully familiar and readily controllable party in need of protection, may lack the ability and/or the will to restrain an agent (normally an ethnic minority that is behaving poorly), but agency theory suggests that better monitoring and incentive system may mitigate the difficulties posed by asymmetric information and reduce the social costs of humanitarian intervention.²⁴⁴

Tom Delreux and Johan Adriaensen have productively used the principal-agent model to shed light on the interplay between centripetal and centrifugal forces within the EU.²⁴⁵ This supranational entity is an ideal choice for such analytical examination because delegation is “at the very heart of the European integration process.”²⁴⁶ For seven decades now, national governments in Europe have delegated increasingly more rule-making powers to a succession of progressively more tightly integrated supranational entities in order to constructively address collective action problems and enjoy the advantages brought by delegation.²⁴⁷ Yet simultaneously, they have also opted to maintain meaningful control over European policies and politics.²⁴⁸

Given this duality, “it does not come as a surprise that scholars are

produce unintended consequences in the context of potential explanatory theories).

242. *See id.* at 873 (distinguishing information asymmetry and preference difference as key difficulties that produce issues in principal-agent relationships).

243. *Id.* at 827.

244. *See* Ruachhaus, *supra* note 228, at 880 (stating that for moral hazard, the most direct way to avoid the principal-agent problem is with improved monitoring).

245. *See generally* Delreux & Adriaensen, *supra* note 228, at 3–4.

246. *Id.* at 1.

247. *See id.* (stating that the EU expected delegation to be beneficial).

248. *See id.* (citing control over the EU budget as an example).

interested in questions on the design of delegation and control.”²⁴⁹ *Ergo*, agency theory “has become a popular analytical framework to study such political processes.”²⁵⁰ It is evident that this conceptual tool furnishes valuable insights into “the reasons, modalities, and consequences of ‘principals’ (e.g. member [S]tates) delegating powers to agents’ (e.g. EU or its institutions).”²⁵¹ Further, agency theory may potentially enhance the understanding of the intricate “divisions of power within the EU”²⁵² and improve the quality of “normative debates about the evaluation of . . . [its] institutional structure.”²⁵³

The EU has proved a highly fertile ground for research inspired by agency theory.²⁵⁴ Besides reaffirming its overall validity, the empirical inquiries undertaken in this context have paved the way for a welcome shift from system-wide macro-delegation to micro-delegation in specific policy areas²⁵⁵ and from a heavy concern with internal explanatory variables for delegation and discretion to a stronger focus on the environment in which the agent operates (i.e. external variables).²⁵⁶ In the process, the agent has become more visible as a significant but not properly configured party to a two-way relationship, effectively putting paid to the contention that scholars investigating the structural-functional attributes of international organizations are preoccupied with principals, offering “a remarkably thin view of agent behavior.”²⁵⁷

Agency theory has encountered growing challenges in the EU milieu.²⁵⁸ Notably, it has become increasingly apparent that the

249. *Id.* at 2.

250. *Id.*

251. *See* Delreux & Adriaensen, *supra* note 228, at 1-2.

252. *Id.*

253. *Id.*

254. *See id.* (suggesting that “scholarship on the EU will become a breeding ground for innovative research on using the principal-agent model for the wider discipline.”).

255. *Id.* at 8.

256. *Id.* at 9.

257. Darren G. Hawkins & Wade Jacoby, *How Agents Matter, in* DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 199, 199 (Darren G. Hawkins et al. 2006).

258. *See* Delreux & Adriaensen, *supra* note 228, at 12–13 (noting two types of challenges, the non-hierarchical mode of governance and the exclusive focus on dyadic relationships).

hierarchical approach to social interactions, a salient characteristic of the principal-agent model, no longer comports with EU realities.²⁵⁹ Organizational hierarchies have not been consigned to oblivion, but they have been complemented with relatively flat policy networks, leading to the emergence of heterarchical modes of governance.²⁶⁰ Within such systems there is less scope for multilayered conflict and more space for forging “cooperative, egalitarian, and reciprocal relations.”²⁶¹

By the same token, the EU institutional landscape has undergone substantial differentiation which has blurred its dyadic (principal versus agent) layout.²⁶² A multitude of public and private actors have burst onto the scene,²⁶³ rendering the mapping out of the organizational architecture rather difficult.²⁶⁴ Students of international relations/positive international legal theory have gone to some lengths to confront these challenges²⁶⁵ but have recognized that, as matters stand, gaps remain and that agency theory alone may never provide a complete answer to all the questions pertaining to the relationship between States and international organizations.²⁶⁶ The lesson is that the principal-agent model is a many-sided yet not unrestricted heuristic which should be “appl[ied] liberally but handle[d] with care.”²⁶⁷

From a conceptual perspective, the most serious challenge to agency theory in the international institutional domain has come not

259. *See id.* at 13 (noting that horizontal, non-hierarchical relations are now common).

260. *See id.* at 13 (stating networks do not completely replace hierarchical relationships).

261. *Id.*

262. *See id.* at 12 (asserting that the “two constitutive elements of a principal-agent relationship—hierarchy and the dyad—are under pressure in contemporary politics”).

263. *Id.* at 13.

264. *See* Delreux & Adriaensen, *supra* note 228, at 13 (stating this multitude of actors makes it more and more difficult to grasp political processes using a dyadic perspective).

265. *See generally id.* at 14–16 (suggesting different ways to maximize the utility of the principal-agent model).

266. *See id.* at 22 (noting that principal-agent analyses have insufficiently addressed the challenges brought by critics).

267. *Id.* at 10.

within but without the rationalist sphere and has entailed what amounts to its partial repudiation rather than mere refinement.²⁶⁸ Specifically, Karen Alter, the leading authority on international judicial behavior who has conducted extensive research on the subject, concluded that delegation to international courts possesses features that are not accurately captured by the principal-agent model and that as a result the relationship between the delegator and delegate in such settings should be expressed in different terms.²⁶⁹

According to Alter, the aim of delegation to international courts is to create an organizational platform devoid of political machinations where law and its strict interpretation reign supreme.²⁷⁰ If this aspiration is fulfilled in practice, which she postulates to be the case, delegators'/States' discretion is given away and the delegates/judges are free to operate as they see professionally fit.²⁷¹ This freedom cannot really be materially curtailed via recontracting (i.e. amending the contract/redefining nature of delegation), thus calling into question Paul Stephan's argument that "[k]nowing that they can be replaced, the members of [an international] tribunal have an incentive not to do anything that will upset the countries with nominating authority."²⁷²

Alter builds her thesis on Giandomenico Majone's distinction between two types of delegation—one to realize efficiency gains and the other to bolster the credibility of the principal as well as political decision-making.²⁷³ Where the former prevails, the intention is to

268. Karen J. Alter, *Agents or Trustees? International Courts in Their Political Context*, 14 EUR. J. INT'L RELS. 33, 54–55 (2018) (challenging the epistemology of the principal-agent theory; and providing a theoretical explanation for Trustee independence).

269. *See id.* at 55 (noting that a different type of politics is at play when States delegate authority to international courts).

270. *See generally* Karen J. Alter, *Delegating to International Courts and the Limits of Re-contracting Political Power*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS) 312, 312–38 (Darren G. Hawkins et al. eds., 2006) (commenting on salary protections and for-cause removal protections that allow for judicial independence).

271. *See id.* at 312 (“Principals [intentionally] allow judges to be fired only for egregious acts unbecoming to their office, and judicial salaries are protected.”).

272. Paul B. Stephan, *Courts, Tribunals, and Legal Unification the Agency Problem*, 3 CHI. J. INT'L L. 333, 337 (2002).

273. Giandomenico Majone, *Two Logics of Delegation Agency and Fiduciary*

minimize transaction costs; the agents are thus selected on the basis of their propensity to comply and the delegation contract is designed to maximize the principal's control over them.²⁷⁴ Alter contrasts this with what she describes as "fiduciary delegation," or delegation to trustees, where the purpose is "to convince some third party that [its] interests are being protected."²⁷⁵ In such credibility-boosting delegation, "the best strategy is to delegate to Agents whose values visibly and systematically differ from [those] of the Principal, to make these Agents highly independent and to refrain from meddling"²⁷⁶ since "an Agent bound to follow the directions of the delegating politician could not possibly enhance the commitment."²⁷⁷

Majone incisively illustrates how different delegation logics lead to fundamentally different contract design choices²⁷⁸ (e.g., for trustees, endeavoring to ensure that they are duly shielded from political pressure).²⁷⁹ Alter ventures further by asserting that the difference between agents and trustees extends beyond contract design.²⁸⁰ In her view, "[t]he reason certain Agents are chosen, the expectations in delegation, the actual powers given to the Agents, and the Agent's constituency are different in delegation to Trustees, so that the simple fact of delegation may not result in the author of the contract having privileged influence over the agent."²⁸¹

Alter puts forward credible and illuminating but excessively formalistic and restrictive observations. The sharp dichotomy between agent and fiduciary is overstated as, in reality, the dividing line tends to become somewhat blurred.²⁸² Manfred Elsig and Mark Pollack's

Relations in EU Governance, 2 EUR. UNION POL. 103, 103 (2001).

274. See Alter, *supra* note 268, at 38 (rejecting principal-agent analysis).

275. *Id.*

276. *Id.* at 39.

277. Majone, *supra* note 273, at 110.

278. See *id.* at 103–04.

279. Alter, *supra* note 268, at 39.

280. *Id.*

281. *Id.*

282. See Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L RELS. 391, 392 (2014) (claiming that international courts act not as agents but as trustees who operate beyond the influence of the principals that appointed them).

empirical exploration of judicial appointments to the Appellate Body of the World Trade Organization (WTO) over a decade-and-a-half is particularly telling in this respect.²⁸³ The two have painted a picture of “an Appellate Body appointment process that, far from representing a pure search for expertise, is deeply politicized and offers member-[S]tate principals opportunities to influence Appellate Body members *ex ante* and possibly *ex post*.”²⁸⁴ Indeed, this pattern has become increasingly pronounced over time.²⁸⁵

The findings do not lend unqualified support to the principal-agent model nor do they decisively undermine the fiduciary-centered alternative.²⁸⁶ As indicated previously, delegation by States to international organizations is a complex phenomenon which needs to be dissected accordingly.²⁸⁷ This means jettisoning mono-causal accounts and opting for multifaceted explanatory schemes which, *inter alia*, incorporate context, feedback loops, and intervening/mediating variables.²⁸⁸ The balance between agent-like impulses and their fiduciary (or some other constructivist) counterparts may turn out to be situation-dependent, but there is no compelling reason to dethrone agency theory as the dominant paradigm when it comes to examining delegation via international institutional channels, provided that its inherent limitations and the fact that it remains “work-in-progress” are duly acknowledged.²⁸⁹ WHO handling of the incipient coronavirus threat may shed further light on this issue.

V. ANATOMY OF COVID-19 OUTBREAK

Broadly speaking, standards of healthcare have dramatically

283. *See generally id.*

284. *Id.* at 391.

285. *Id.*

286. *See id.* at 410 (stating that the findings are limited to the authors’ study of a relatively brief experience of judicial nomination in a single international court).

287. *See* Delreux & Adriaensen, *supra* note 228, at 14 (noting that mapping any decision-making process is complex).

288. *See id.* (explaining that while principal-agent theory cannot explain all EU politics, it may be useful in mapping principal-agent relations, studying the politics of delegation and studying the politics of discretion).

289. *Cf.* Alter, *supra* note 268, at 38 (noting that the principal-agent theory is intuitively compelling in the EU context).

improved since the Industrial Revolution but neither to a point of eradicating physical and psychological ailments nor uniformly across the globe.²⁹⁰ Many types of disease, illness, and sickness continue to plague humans (as well as other mammals).²⁹¹ In fact, progress on that front has been marked by shortfalls and uneven evolution.²⁹² While there are many bright spots (e.g. in the field of organ transplantation),²⁹³ there is still no cure for the common cold²⁹⁴ and several dreaded diseases are staging a worrisome comeback.²⁹⁵ At any specific juncture, one may discern signs of (primarily) revolution, (secondarily) stagnation, and even (at least selectively and temporarily) regression.²⁹⁶

It should be noted that this is an area where scientific discourse is characterized by a surprising degree of conceptual fuzziness.²⁹⁷ Interrelated notions such as disease, illness, and sickness have evolved into a loosely configured network.²⁹⁸ Consequently, they are often used arbitrarily and interchangeably (this is also true for terms such as

290. See generally INSTITUTE OF MEDICINE, *THE FUTURE OF PUBLIC HEALTH* 56–72 (1988) (discussing modern improvements in healthcare alongside existing challenges in modern medicine).

291. See Anna-Henrikje Seidlein & Sabine Salloch, *Illness and Disease: An Empirical-Ethical Viewpoint*, BMC MED ETHICS (2019), <https://bmcomedethics.biomedcentral.com/articles/10.1186/s12910-018-0341-y> (discussing the distinction between disease, illness, and sickness).

292. See Carolyn L. Wiener & Anselm L. Strauss, *Introduction to the Fifth Edition*, in *WHERE MEDICINE FAILS* 1, 3 (Carolyn L. Wiener & Anselm L. Strauss eds., 1997) (discussing inequities in American healthcare delivery, including disparate access to healthcare and inappropriate distribution of resources).

293. See generally *Living-Donor Transplant*, MAYO CLINIC, <https://www.mayoclinic.org/tests-procedures/living-donor-transplant/about/pac-20384787> (last visited Sept. 30, 2020).

294. Angus Chen, *Why Haven't We Cured the Common Cold Yet?*, SCI. AMERICAN (Sept. 4, 2018), <https://www.scientificamerican.com/article/why-havent-we-cured-the-common-cold-yet/>.

295. See Naveed Saleh, *10 Dreaded Diseases Back from the Brink*, MDLIX (Feb. 7, 2019), <https://www.mdlinx.com/article/10-dreaded-diseases-back-from-the-brink/lfc-3380> (syphilis, measles, plague, scarlet fever, mumps, gonorrhea, chlamydia, whooping cough (pertussis), tuberculosis, and gout).

296. See, e.g., Chen, *supra* note 294 (discussing the discovery of rhinoviruses that cause the common cold, the biotechnology industry's failure to create a vaccine, and the unlikelihood of future advances due to societal challenges).

297. See generally Seidlein & Salloch, *supra* note 291.

298. See *id.*

disability, injury, and malady, among many similar yet less familiar examples).²⁹⁹ The opacity is not confined to informal communication and busy professional practice, manifesting itself in the scientific realm where these three concepts still lack a “standard, normative meaning.”³⁰⁰

Andrew Twaddle, responsible for introducing that much ruminated over triad, has defined disease as “physiological malfunction [. . .] independent of subjective experience and social conventions.”³⁰¹ As Suzanne Fleischman has pointed out, this controversially “removes the patient from the pathology.”³⁰² By contrast, according to Twaddle, illness alludes to “subjectively interpreted undesirable state of health.”³⁰³ Sickness, he suggests, is yet another dimension of ailment, broadly conceived, showing as “social identity [. . .] defined by others with reference to the social activity of that individual.”³⁰⁴

The corollary is that it is desirable to tread carefully in this vaguely delineated territory.³⁰⁵ The extent to which analytical precision is called for, however, clearly depends on circumstances.³⁰⁶ In this context, it seems to be sufficient to recognize the multifaceted nature of the phenomenon that is under scrutiny and the ambiguity which it continues to engender, without endeavoring to firmly adhere to a path that would fully respect the intricacies and nuances highlighted in the scientific literature.³⁰⁷ The sole pertinent term employed in the remainder of this article is thus disease, which nevertheless is assumed

299. *Id.*

300. *Id.*

301. *Id.* (citing ANDREW C. TWADDLE & LENNART NORDENFELT, DISEASE, ILLNESS AND SICKNESS: THREE CENTRAL CONCEPTS IN THE THEORY OF HEALTH: A DIALOGUE BETWEEN ANDREW TWADDLE & LENNART NORDENFELT 8 (1994)).

302. Suzanne Fleischman, *I am . . . , I have . . . , I suffer from . . . : A Linguistic Reflects on the Language of Illness and Disease*, 20 J. MED. HUMANITIES 3, 7 (1999).

303. ANDREW C. TWADDLE & LENNART NORDENFELT, DISEASE, ILLNESS AND SICKNESS: THREE CENTRAL CONCEPTS IN THE THEORY OF HEALTH: A DIALOGUE BETWEEN ANDREW TWADDLE & LENNART NORDENFELT 10 (1994).

304. *Id.* at 11.

305. See Seidlein & Salloch, *supra* note 291 (stating that such vague concepts can be a “bridge or barrier” between medical perspectives).

306. See *id.* at 3 (noting that patients’ views on their own circumstances are taken into account to define illness).

307. See *id.* at 2 (discussing the multifaceted nature of the debate surrounding disease, illness, and sickness).

to have psychological and sociological manifestations rather than merely those of the physiological variety.³⁰⁸

The latter, prevalent and pernicious in the healthcare segment covered here, are the product of some malfunction of body mechanisms. After all, “[t]he human body is a complex machine performing a multitude of functions every day.”³⁰⁹ The implication is that, like any type of machine, “it can malfunction, possibly as the result of inherent genetic error, and infection or as a consequence of lifestyle choices, occupations or environmental exposure to harmful agents.”³¹⁰ Such disturbance, in turn, may have far-reaching psychological and sociological ramifications, although the relationship may potentially be circular.³¹¹

A key distinction in the healthcare sphere is that between infectious and non-infectious diseases (also known as communicable/CDs and non-communicable diseases/NCDs).³¹² The former “can be transmitted from one person to another”³¹³ (e.g., common cold), whereas the latter “cannot be spread through person-to-person contact”³¹⁴ (e.g., cardiovascular disease). Infectious diseases are caused by contagious “pathogenic micro-organisms such as bacteria, viruses, fungi [and] parasites.”³¹⁵ This type of pathogens are absent in non-infectious diseases which are triggered by “factors such as genetics, malnutrition, environment and lifestyle.”³¹⁶

Historically, infectious diseases accounted for most of the deaths in

308. *Id.* (citing TWADDLE & NORDENFELT, *supra* note 303, at 8.).

309. *Health & Social Care: Physiological Disorders*, CAMBRIDGE TECHNICALS, <https://ocr.org.uk/Images/139876-physiological-disorders.pdf>, (last visited on Sept. 30, 2020).

310. *Id.*

311. *See generally* Seidlein & Salloch, *supra* note 291, at 5.

312. *See What is the Difference between an Infectious and Non-Infectious Disease?*, CHILD FUND AUSTRALIA, (June 24, 2020), <https://www.childfund.org.au/stories/what-is-the-difference-between-an-infectious-and-non-infectious-disease/>; Erica Cirino, *Most Common Noncommunicable Diseases*, HEALTHLINE, (June 13, 2018), <https://www.healthline.com/health/non-communicable-diseases-list>.

313. CHILD FUND AUSTRALIA, *supra* note 312.

314. *Id.*

315. *Id.*

316. *Id.*

the world, and this remains the case in some developing regions.³¹⁷ Due to advances in pharmacological and pharmaceutical science, notably the development of antibiotics and vaccination programs, this is no longer true for developed regions and even parts of the developing world.³¹⁸ Non-infectious diseases are currently the leading cause of death overall, but infectious diseases continue to be a significant source of loss of life and wreak havoc on people's physical, psychological, and socio-economic well-being³¹⁹ (e.g. the Centers for Disease Control and Prevention/CDC estimate that in the United States alone "influenza has resulted in between 9 million-45 million illnesses, between 140,000-hospitalizations and between 12,000-61,000 deaths annually since 2010."³²⁰

Infectious diseases vary in their scope. When they affect an unexpectedly large number of people, they are deemed an outbreak.³²¹ This may be confined to one country or spread over a number of countries—that is, constitute either an epidemic or a pandemic.³²² While the dichotomy between these two forms of infectious disease has purely politico-geographic underpinnings, and conceptualizing and modeling a pandemic is not inherently different from conceptualizing and modeling an epidemic,³²³ the former is a multi-

317. *Infectious & Non-Infectious Diseases*, LCSNC, (Nov. 18, 2015), <https://www.lcsnc.org/cms/lib010/NC01911169/Centricity/Domain/850/Viruses%20and%20Bacteria%20Review.pdf>.

318. *Id.*

319. See Andrew P. Dobson & E. Robin Carper, *Infectious Diseases and Human Population History*, 46 *BIOSCIENCE* 115, 124 (1996) (highlighting the disproportionate impact of infectious diseases in poorer "inner-city populations"); see also Elaine Larson, *Social and Economic Impact of Infectious Diseases-United States*, at 31–31, *CLIN. PERFORM. QUAL. HEALTHCARE*, (1997) (estimating the economic costs of infectious disease in the United States). See generally Kristine M. Smith et al., *Infectious Disease and Economics: The Case for Considering Multi-Sectoral Impacts*, 7 *ONE HEALTH* 1, 1–5 (2019) (detailing the severe economic impact of zoonotic disease outbreaks).

320. *Disease Burden of Influenza*, CDC <https://www.cdc.gov/flu/about/burden/index.html> (last visited Oct. 5, 2020).

321. *Pandemics*, WEBMD, <https://www.webmd.com/cold-and-flu/what-are-epidemics-pandemics-outbreaks#1> (last visited Dec. 10, 2020).

322. See *id.*; CDC, *PRINCIPLES OF EPIDEMIOLOGY IN PUBLIC HEALTH PRACTICE* 72 (3rd ed. 2012).

323. See *How to Model a Pandemic*, EARTHSKY (Apr. 1, 2020), <https://earthsky.org/human-world/how-to-model-a-pandemic> (explaining the role of

country concern and thus has much wider managerial, policy, and scientific implications.³²⁴

Humankind has experienced numerous pandemics, some more crippling and less tractable than others.³²⁵ In the contemporary era, encompassing the 20th and 21st Centuries, the 1918 Spanish Flu, first reported in Madrid, proved particularly devastating.³²⁶ It initially surfaced in Europe, the United States, and parts of Asia, eventually engulfing the entire world.³²⁷ No effective preventive, mitigating, and remedial measures were available at the time allowing this killer flu strain to claim approximately 50 million lives,³²⁸ inflict enormous damage on a global economy rising from the ashes of the First World War,³²⁹ and produce extraordinarily harmful social reverberations that persisted well after it receded.³³⁰

At the turn of the 21st Century, it was broadly thought that serious worldwide pandemics were a thing of the past, with outbreaks confined to the periphery of developing regions, sparing developed ones blessed with cutting-edge medical technologies and robust healthcare infrastructure.³³¹ This belief was shattered in the wake of

mathematical epidemiology in combatting pandemics including COVID-19).

324. See Esther Versluis et al., *Multilevel Regulation of Complex Policy Problems: Uncertainty and the Swine Flu Pandemic*, 5 EUR. POL'Y ANALYSIS 80, 85 (2019) (analyzing the multifaceted challenges to the international response to the H1N1 pandemic).

325. See generally *Pandemics that Changed History*, HISTORY (Apr. 1, 2020), <https://www.history.com/topics/middle-ages/pandemics-timeline> (Updated Dec. 21, 2020) (providing an overview of pandemics throughout history).

326. See *id.* (recounting the death toll of 50 million worldwide, unavailability of vaccines, and scarcity of body storage in the United States among other consequences of the pandemic).

327. *Id.*

328. *Id.*

329. See THOMAS A. GARRETT, *ECONOMIC EFFECTS OF THE 1918 INFLUENZA PANDEMIC* 7 (2007) (emphasizing the combined, devastating impact of the influenza outbreak in the aftermath of World War I).

330. See *How Epidemics Shape Society*, HUB (Apr. 9, 2020), <https://hub.jhu.edu/2020/04/09/alexandre-white-how-pandemics-shape-society/> (describing how practices of social distancing and quarantining result in responses that oppress minority and marginalized groups).

331. See *How the 4 Biggest Outbreaks Since the Start of this Century Shattered Some Long-Standing Myths*, WHO (Sept. 1, 2015), <https://www.who.int/news/item/01-09-2015-how-the-4-biggest-outbreaks-since-the-start-of-this-century-shattered-some-long-standing-myths>.

the 2003 arrival in Asia of severe acute respiratory syndrome (SARS), which spread most easily in highly-equipped hospitals and wrought greatest mayhem in affluent urban areas.³³² The 2009 H1N1 influenza pandemic that followed had milder clinical manifestations, but it tellingly demonstrated how rapidly an infectious disease may reach every corner of the world.³³³

The 2012 eruption of the Middle East respiratory syndrome (MERS) exposed yet another crack in the prevailing wisdom regarding the nature of pandemics in the contemporary era.³³⁴ Like SARS, it turned out to be a predominantly regional phenomenon, and principally confined to a developing region to boot.³³⁵ Yet, the afflicted area was an atypical low-density one, evincing that a modern pandemic may originate anywhere or that “[c]amels in an arid desert setting can also breed surprises.”³³⁶ The 2014 return of the EBOLA virus to a supposedly distant and isolated part of West Africa and the subsequent extension of its tentacles, to a point whereby it became a United National Security Council concern, dramatically signaled that highly disruptive global pandemics are here to stay.³³⁷

The 2019/20 outbreak of COVID-19/ SARS-CoV-2 has extinguished any remaining illusions with respect to the mutability, proliferation, range, resilience, and severity of present-day epidemics.³³⁸ While scientific knowledge pertaining to its

332. *Id.*

333. *Id.*

334. *Id.*

335. See *About MERS*, CDC, <https://www.cdc.gov/coronavirus/mers/about/index.html> (last updated Aug. 2, 2019) (explaining that all MERS cases are linked to the Arabian Peninsula); see also Jacob Kushner, *Why Camels Are Worrying Coronavirus Hunters*, BBC (Jan. 25, 2021) <https://www.bbc.com/future/article/20210122-the-coronavirus-10-times-more-deadly-than-covid>, (providing an overview of the transmission of MERS from camels to people since the 2012 outbreak due to the increased use of camels in herding).

336. See WHO, *supra* note 331.

337. See *id.*

338. See David Cyranoski, *Profile of a Killer: The Complex Biology Powering the Coronavirus Pandemic*, NATURE (May 4, 2020), <https://www.nature.com/articles/d41586-020-01315-7> (describing the danger coronavirus SARS-CoV-2 poses due to its ability to mutate, spread easily, and attack a variety of human cells).

characteristics is still accumulating, a general profile of this extremely aggressive virus has emerged.³³⁹ Researchers have thus determined that it “has evolved an array of adaptations that make it much more lethal than the other coronaviruses humanity has met so far.”³⁴⁰ And, unlike its close relatives, COVID-19 “can readily attack human cells at multiple points, with the lungs and throat being the main target.”³⁴¹ Once it has penetrated the body, COVID-19 “makes use of a diverse arsenal of dangerous molecules.”³⁴² There is reason to believe that this deadly virus has been hiding out in nature for decades³⁴³ and has developed the capacity to exploit the body’s defense mechanisms as well as to fend off internally and externally engineered counterattacks.³⁴⁴

The full socio-economic impact of COVID-19 is difficult to estimate at this juncture because such assessment requires peering into the proverbial crystal ball in the face of great uncertainty. Nevertheless, it is apparent that the heavy toll inflicted on individuals, groups, and communities has few parallels in modern history.³⁴⁵ As the staff of the United Nations’ Framework for the Immediate Response to the COVID-19 Crisis have observed “[t]he COVID-19 pandemic is far more than a health crisis: It is affecting societies and economies at their core.”³⁴⁶ To make matters worse, much of the colossal damage may prove to be long-lasting.³⁴⁷

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. See also Aislinn Antrim, *Research Suggest COVID-19 Exploits Body’s Defense Mechanisms*, PHARMACY TIMES (Apr. 28, 2020), <https://www.pharmacytimes.com/news/research-suggests-covid-19-exploits-bodys-defense-mechanism>, (explaining how SARS-CoV-2 uses the body’s ACE2 receptor with assistance from the TMPRSS2 enzyme, exploiting one of the primary biological defenses against viral infections).

345. See *Socio-Economic Impact*, UNDP, <https://www.undp.org/content/undp/en/home/coronavirus/socio-economic-impact-of-covid-19.html> (last visited Feb. 6, 2021) (emphasizing the impact of COVID-19 on societies, economies, and vulnerable groups along with the currently unpredictable trajectories for development).

346. *Id.*

347. See WORLD ECONOMIC FORUM [WEF], COVID-19 OUTLOOK A PRELIMINARY MAPPING AND ITS IMPLICATIONS 9 (2020) (underlining that in addition

As indicated, the path forward is clouded.³⁴⁸ A number of scenarios have been painted, none of them genuinely optimistic.³⁴⁹ Even if—as Tedros Adhanom Ghebreyesus, the WHO Director-General, hopes (but does not necessarily expects)—COVID-19 will be brought firmly under control by late 2022,³⁵⁰ the total costs—health-related and socio-economic (including environmental and political); short-term, medium-term, and long-term—will be massive.³⁵¹ Any lessons that may be derived from what has transpired at various stages of the pandemic’s unfolding may therefore have considerable value.³⁵² The focus here is on the foot-dragging, lack of transparency, mismanagement of crucial information, and reluctance to cooperate fully with “outsiders” witnessed when evidence of SARS-CoV-2 began to emerge in China.³⁵³

It is now thought that the first COVID-19 case was detected on November 17, 2019.³⁵⁴ According to Chinese authorities, the person in question was one of 226 people who contracted the virus in late 2019 and who came under medical surveillance.³⁵⁵ No meaningful attempts were made to act on this information via formal or informal channels until a Wuhan-based 34-year-old ophthalmologist, posted a message on WeChat on December 30, 2019, alerting fellow professionals to

to public health consequences, the pandemic could have lasting effects on people and societies through reduced social cohesion and high unemployment).

348. See Cyranoski, *supra* note 338, at 9 (contrasting the viewpoints of researchers who believe that COVID-19 will weaken over time and those who alternatively believe COVID-19 will maintain its same pathogenicity).

349. See *id.* (detailing how even those who predict that the virus will weaken believe it will continue spreading in the human population forever).

350. See *Coronavirus Pandemic Could Be Over Within Two Years – WHO Head*, BBC (Aug. 22, 2020), <https://www.bbc.com/news/world-53870798> (expressing hopes that like the Great Influenza, the coronavirus will last less than two years).

351. See WEF, *supra* note 347, at 9 (discussing the range of economic concerns as a result of the pandemic and implications for sustainability).

352. See *id.* at 10 (encouraging the continued collaboration between the public and private sectors following the COVID-19 pandemic).

353. See Helen Davidson, *First Covid-19 Case Happened in November, China Government Records Show – Report*, GUARDIAN (Mar. 13, 2020), <https://www.theguardian.com/world/2020/mar/13/first-covid-19-case-happened-in-november-china-government-records-show-report> (recounting inaccurate information provided to the World Health Organization by the Chinese government).

354. *Id.*

355. *Id.*

symptoms of a new virus being exhibited by patients in his hospital.³⁵⁶ Dr Li, who succumbed to the disease five weeks later,³⁵⁷ was harshly reprimanded by the local police for “making false comments” that severely disturbed the social order, violating in the process the People’s Republic of China (PRC) Law on Penalties for Administration of Public Security.³⁵⁸ A high-level investigation into the mishandling of Dr Li’s exercise of an elementary civic duty, concluded in late March, culminated in a softly worded recommendation that the reprimand be withdrawn.³⁵⁹ Not content with a display of underwhelming restraint, the investigative team proceeded to excoriate those resorting to anti-establishment labels such as “awakener” and “hero” to portray Dr Li’s low-key expressions of concern.³⁶⁰

Interestingly, within 24 hours of this professionally motivated gentle signaling that a serious health hazard may have surfaced, the Wuhan Municipal Health Commission acknowledged, albeit in an understated fashion, the emergence of a cluster of cases of viral pneumonia of unknown origin in Hubei Province.³⁶¹ Ten days later, the Chinese scientific community also started taking tentative steps to come to grips with this unfamiliar threat, when the gene sequencing data of SARS-CoV-2 was posted on Virological.org by researchers

356. See *COVID-19 Timeline*, OT&P HEALTHCARE, <https://www.otandp.com/covid-19-timeline> (last visited Dec. 19, 2020) (listing Li Wenliang’s WeChat message as the beginning of the COVID-19 timeline).

357. Andrew Green, *Li Wenliang*, LANCET (Feb. 18, 2020), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(20\)30382-2/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(20)30382-2/fulltext)

358. Laney Zhang, *FALQs: Spreading Rumors and Police Reprimand Under Chinese Law*, LIBR. CONG. (Mar. 2, 2020), <https://blogs.loc.gov/law/2020/03/falqs-spreading-rumors-and-police-reprimand-under-chinese-law/>.

359. Brenda Goh, *‘Is That It?’: Chinese Report into Death of Doctor Who Raised Coronavirus Alarm Underwhelms*, REUTERS (Mar. 19, 2020), <https://www.reuters.com/article/us-health-coronavirus-china-doctor/is-that-it-chinese-report-into-death-of-doctor-who-raised-coronavirus-alarm-underwhelms-idUSKBN2162RQ>.

360. *Id.*

361. See *Archived: WHO Timeline - COVID-19*, WHO (Apr. 27, 2020), <https://www.who.int/news/item/27-04-2020-who-timeline-covid-19>, (dating the report of the cluster of pneumonia cases as the day following Dr. Li’s message, December 31, 2019).

from Shanghai's Fudan University.³⁶² Little was done at the national and provincial level until late January, however, to raise public awareness of the nature of the threat and the risks it poses, even though they were mostly appreciated at that juncture.³⁶³

Indeed, there is evidence that the Chinese authorities deliberately withheld information containing SARS-CoV-2 genome sequence test results for as long as two weeks, confirming only on January 20, 2020, the existence of human-to-human transmission and moving to impose an hermetic lockdown on Wuhan three days later.³⁶⁴ The surge in local cases, rising disquiet and countermeasures taken in neighboring countries and territories (including Hong Kong), mounting international pressure, and heightened social panic may have brought about the turnaround.³⁶⁵ Still, the veil of uncertainty was merely partially lifted, with key features of the situation and operational positioning remaining undisclosed.³⁶⁶ Notably, the figures pertaining to the number of cases and deaths continued to arouse skepticism.³⁶⁷

The responsibility for the distortion and suppression of vital information, as well as the counterproductive and ultimately

362. See *COVID-19 Timeline*, *supra* note 356.

363. See Oiwan Lam, *China Censors Report About How Authorities Hid Coronavirus Genome Sequence Test Results for 14 Days*, H.K. FREE PRESS (Mar. 7, 2020), <https://hongkongfp.com/2020/03/07/china-censors-report-authorities-hid-coronavirus-genome-sequence-test-results-14-days/> (highlighting the fact that Beijing only acknowledged human-to-human transmission on January 20, 2020).

364. *Id.*

365. See generally *Coronavirus: A Timeline of the Outbreak Related to the Deadly Sars – September 2020*, S. CHINA MORNING POST (Jan. 21, 2020), <https://www.scmp.com/yp/discover/news/global/article/3071167/coronavirus-timeline-outbreak-related-deadly-sars-september> (summarizing the rising international panic, mistrust of the Chinese government, and the extensive countermeasures taken by foreign governments to control the worsening spread of COVID-19).

366. See James Kyngé, Sun Yu, & Tom Hancock, *Coronavirus: The Cost of China's Public Health Cover-Up*, FIN. TIMES (Feb. 6, 2020), <https://www.ft.com/content/fa83463a-4737-11ea-aeb3-955839e06441> (discussing the Chinese government's widespread suppression of information regarding the virus).

367. See *id.* (recounting how the official count of coronavirus cases did not rise despite surging infection rates). See generally *Coronavirus: Why China's Claims of Success Raise Eyebrows*, BBC (Apr. 7, 2020), <https://www.bbc.com/news/world-asia-china-52194356> (providing an overview of the general mistrust of the metrics provided by the Chinese government for both GDP and coronavirus data).

destabilizing action pursued in the process, was squarely placed on the shoulders of a handful of municipal and provincial administrators, none of whom paid a heavy price, personal or professional, for her/his missteps.³⁶⁸ While Wuhan City and Hubei Province officials doubtless are directly to blame for the utter mismanagement of the outbreak of COVID-19, this was not an exclusively subnational experience.³⁶⁹ The country's top-leaders, who were subsequently depicted as being at the forefront of the battle to contain the pandemic,³⁷⁰ were aware of the incipient crisis by the end of the first week of January but opted to remain in a passive mode.³⁷¹

The attention-diverting and energy-sapping propaganda campaign that followed was clearly spearheaded by strategists at the apex of the political pyramid.³⁷² It consisted of persistent and systematic attempts

368. See *Coronavirus: Senior Chinese Officials 'Removed' As Death Toll Hits 1,000*, BBC (Feb. 11, 2020), <https://www.bbc.com/news/world-asia-china-51453848> (highlighting the fact that "removal" from office can simply constitute a demotion and mentioning that other punishments assessed to officials included "a serious intra-Party warning" and a "serious administrative demerit"); *Wuhan Officials Punished for Failing to Report Suspected Case That Led to Patient's Death*, GLOB. TIMES (Feb. 16, 2020), <https://www.globaltimes.cn/content/1179742.shtml> (listing punishments assessed to four administrative officials as including criticism, warnings and "a reshuffle"); see also *China Penalizes Derelict Officials in Coronavirus Fight*, XINHUANET (Feb. 5, 2020), http://www.xinhuanet.com/english/2020-02/05/c_138755872.htm (identifying government officials in Hubei Province and Wuhan as "unqualified and derelict officials").

369. See Shanshan Wang & James Griffiths, *Xi Jinping Says He Knew About the Virus Outbreak in Early January*, CNN (Feb. 15, 2020), https://edition.cnn.com/asia/live-news/coronavirus-outbreak-02-16-20-intl-hnk/h_73978cf29de20883108a0d9d0b045e71 (acknowledging that Xi Jinping had known about COVID-19 as Wuhan officials downplayed the virus' danger).

370. See *President Xi Leads China's War Against COVID-19*, CHINADAILY (Mar. 6, 2020), <https://www.chinadailyhk.com/article/123491> (praising President Xi for taking "command of China's war against the COVID-19 epidemic").

371. See Wang et al., *supra* note 369 (highlighting that President Xi ordered measures to prevent and control COVID-19 on January 7th); see also Hilton Yip, *Make No Mistake, This is Xi Jinping's Coronavirus*, H.K. FREE PRESS (Mar. 8, 2020), <https://hongkongfp.com/2020/03/08/make-no-mistake-xi-jinpings-coronavirus/> (asserting that the Chinese authorities' concealment of COVID-19 in the initial weeks of the outbreak exacerbated the virus' spread).

372. See Yip, *supra* note 371 (citing a compilation of States writing to congratulate President Xi and Chinese leadership's response to the virus that was recently published as a book).

to shift from defense to offense, endeavoring to exonerate China of any wrongdoing and framing others for being at fault for triggering this chain of profoundly costly events.³⁷³ Among the more extravagant claims officially made was the contention that SARS-CoV-2 originated neither from a Wuhan wet market nor from a People's Liberation Army (PLA) laboratory in the city but was brought to the country by American participants in the Military World Games, held in Wuhan in October 2019.³⁷⁴

While confronting the COVID-19 challenge, particularly in the early stages of the process, China went to great lengths to keep outsiders at an arm's length.³⁷⁵ Calls for an international investigation into the origins of the pandemic were resisted and, when provisionally accommodated, resistance gave way to stalling.³⁷⁶ Access to crucial information and key locations was either denied or not granted, with the Wuhan area, the epicenter of the crisis, made virtually beyond reach.³⁷⁷ Any constructive American involvement was ruled out on the

373. See Laura Rosenberger, *China's Coronavirus Information Offensive: Beijing is Using New Methods to Spin the Coronavirus Pandemic to its Advantage*, FOREIGN AFFAIRS (Apr. 22, 2020), <https://www.foreignaffairs.com/articles/china/2020-04-22/chinas-coronavirus-information-offensive>; see also James Palmer, *Chinese Officials Can't Help Lying About the Wuhan Virus*, FOREIGN POL'Y (Feb. 3, 2020), <https://foreignpolicy.com/2020/02/03/wuhan-coronavirus-coverup-lies-chinese-officials-xi-jinping/> (citing the Chinese government's pledge to be more transparent with the WHO and instruction of a whistleblower hotline through WeChat); Denny Roy, *Did COVID-19 Really Give China a Strategic Advantage?*, DIPLOMAT (July 22, 2020), <https://thediplomat.com/2020/07/did-covid-19-really-give-china-a-strategic-advantage/> (citing Chinese government propaganda attempts to praise China's response while highlighting the United States' failures).

374. Henry Austin & Alexander Smith, *Coronavirus: Chinese Official Suggests U.S. Army is to Blame for Outbreak*, NBC NEWS (Mar. 13, 2020), <https://www.nbcnews.com/news/world/coronavirus-chinese-official-suggests-u-s-army-blame-outbreak-n1157826>.

375. See Mercy A. Kuo, *Investigating China: COVID-19 and the CCP*, DIPLOMAT (May 19, 2020), <https://thediplomat.com/2020/05/investigating-china-covid-19-and-the-ccp/> (citing the reluctance of local and national authorities to report the initial outbreak, acknowledge the resulting deaths in Wuhan, or share uncensored information with the international community).

376. See *Coronavirus: China Rejects Call for Probe Into Origins of Disease*, BBC (Apr. 24, 2020), <https://www.bbc.com/news/world-asia-china-52420536> (explaining the Chinese government's argument that allowing international investigators would divert focus from fighting COVID-19).

377. See Jeremy Page & Natasha Khan, *On the Ground in Wuhan, Signs of China Stalling Probe of Coronavirus Origins*, WSJ (May 12, 2020),

grounds that the United States was not an impartial observer but intent on turning this painful episode to its geopolitical advantage.³⁷⁸ Cooperation with the WHO was also incomplete and predominantly on Chinese terms.³⁷⁹

This behavioral pattern is not without recent precedent.³⁸⁰ The handling of the 2003 SARS pandemic displayed similar early-stage disorganization, poor accountability and transparency, rejection of outside participation, and strategically inspired political maneuvering.³⁸¹ Both incidents compellingly demonstrate that the regime places its stability and survival above all else, although its problem management may in fact prove to be detrimental to the fulfillment of these overarching goals.³⁸² The preoccupation with

<https://www.wsj.com/articles/china-stalls-global-search-for-coronavirus-origins-wuhan-markets-investigation-11589300842> (detailing Chinese officials' reluctance in permitting international officials from accessing the Huanan market, in Wuhan, China).

378. See K.J.M. Varma, *China Rejects Donald Trump's Demand to Allow U.S. Team to Probe Coronavirus*, MINT (Apr. 20, 2020), <https://www.livemint.com/news/world/china-rejects-donald-trump-s-demand-to-allow-us-team-to-wuhan-to-probe-coronavirus-11587383543120.html> (presenting China's argument that it is a victim and not a culprit and that the U.S. was not held accountable for either the 2008 financial crisis or the 2009 breakout of H1N1 influenza); see also Renee DiResta, *For China, the 'U.S.A. Virus' Is a Geopolitical Ploy*, ATLANTIC (Apr. 11, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/chinas-covid-19-conspiracy-theories/609772/> (describing the information war between the U.S. and China on COVID-19's origin as significant political brinkmanship).

379. See Christian Shepherd et al., *Failure by WHO Team to Visit Wuhan Sparks Concerns over Virus Probe*, FIN. TIMES (Aug. 26, 2020), <https://www.ft.com/content/f9dea077-66fb-4734-9d1d-076dc93568e1> (observing the two-person WHO team tasked with investigating the coronavirus origins failed to even visit Wuhan, the Chinese city where the first cases were detected).

380. See Kelly-Leigh Cooper, *China Coronavirus: The Lessons Learned from the S.A.R.S. Outbreak*, BBC (Jan. 24, 2020), <https://www.bbc.com/news/world-asia-china-51221394> (noting the Chinese government's evasiveness regarding the 2003 SARS outbreak).

381. See Yanzhong Huang, *The SARS Epidemic and its Aftermath in China: A Political Perspective*, in *LEARNING FROM S.A.R.S.: PREPARING FOR THE NEXT DISEASE OUTBREAK* 116, 120–21, 123–25, 129 (Knobler et al. eds., 2004), https://www.ncbi.nlm.nih.gov/books/NBK92462/pdf/Bookshelf_NBK92462.pdf (outlining deficiencies with the handling of the SARS outbreak to include a government-controlled media prohibition on reporting on the WHO's first global warning about SARS).

382. See Mercy A. Kuo, *Investigating China: COVID-19 and the CCP*,

keeping a tight rein on society and the tendency to shut doors to outsiders become particularly pronounced at times of militarily or physically induced stress because “[t]hroughout Chinese history, epidemic, war, and natural disasters, including famine, had been seen as signs indicating the loss of the Mandate of Heaven that inexorably led to the downfall of many dynasties.”³⁸³

The COVID-19 experience in China offers three lessons for scholars exploring the performance of international organizations from a principal-agent angle. First, the heavy emphasis on the agent as the source of collective action failures³⁸⁴ is misplaced as the responsibility may well lie with a principal or a group of principals. Second, it is insufficient to merely recognize that principals’ (or, for that matter, agents’) objectives may vary or be time inconsistent.³⁸⁵ The reason is that this specific case abundantly evinces that the delegation by a State to an international organization may in practice be conditional, or contingent on some critical—albeit possibly ill-defined from a contractual perspective—national goals not being undermined.³⁸⁶

Third, as a byproduct of clinging to the “unitary actor hypothesis”,³⁸⁷ in the economic analysis of international law,

DIPLOMAT (May 19, 2020), <https://thediplomat.com/2020/05/investigating-china-covid-19-and-the-ccp/> (asserting that politics and health are inextricably linked because improving people’s health is a central tool used by the Chinese Communist Party to establish political legitimacy).

383. *Id.*

384. See Adam Kamradt-Scott, *WHO’s to Blame? The World Health Organization and the 2014 Ebola Outbreak in West Africa*, 37 *THIRD WORLD Q.* 401, 407–10, 412 (2016) (arguing several fundamental structural factors contribute to WHO issues which trace back to its principal-agent relationship with member States).

385. See Daniel L. Nelson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Reform*, 57 *INT’L ORG.* 241, 245, 256, 262 (2003) (observing significant institutional reforms and intervention by member governments take place if and only if an international organization stray from its principals’ objectives).

386. See Erica R. Gould, *Money Talks: Supplementary Financiers and International Monetary Fund Conditionality*, 57 *INT’L ORGS.* 551, 553, 558 (2003) (demonstrating supplementary financiers are able and willing to influence the terms of International Monetary Fund agreements).

387. See Valerie M. Hudson, *Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations*, 1 *FOREIGN POL’Y ANALYSIS* 1, 2 (describing

principals' and agents' preferences, which are often fluid and indeterminate, loom excessively large but their structures, which are typically resilient and graspable, are inappropriately relegated to the periphery.³⁸⁸ The point is that, appearances to the contrary, the Chinese politico-bureaucratic system is splintered to such an extent that it has been labeled as "fragmented authoritarianism."³⁸⁹ Within this ideologically rigid but loosely connected network, actors cannot freely exercise either exit or voice and place a high premium on the remaining option of loyalty, distorting and suppressing any signs of malfunctioning which are perceived as politically destabilizing and threatening.³⁹⁰ Such structural flaws may have materially contributed to a key principal's communication, diagnostic, prognostic, and relationship failures in the momentous coronavirus crisis.³⁹¹

the "unitary actor hypothesis" as the international relations theory that a decision-making unit can be approximated as a unitary rational actor).

388. See Erin R. Graham, *International Organizations as Collective Agents: Fragmentation and the Limits of Principal Control at the World Health Organization*, 20 EUR. J. INT'L RELS. 366, 368–69 (2014) (explaining that an international organization's structural matters including design, leadership, culture, and expertise significantly impact its behavior).

389. See Andrew Mertha & Kjeld Erik Brødsgaard, *Introduction*, in CHINESE POLITICS AS FRAGMENTED AUTHORITARIANISM: EARTHQUAKES, ENERGY, AND ENVIRONMENT 1, 2–4 (Kjeld Erik Brødsgaard ed., 2017) [hereinafter CHINESE POLITICS] (utilizing "fragmented authoritarianism" to describe the framework for understanding policymaking and implementation in China where power is easily manipulated by self-interested institutional actors).

390. See Francis Fukuyama, *Reflections on Chinese Governance*, 1 J. CHINESE GOVERNANCE 379, 386–87 (2016) (attributing the high levels of corruption in China to the fact that officials are only accountable to senior leadership of the CCP, rather than their citizen victims).

391. See Li Yuan, *Coronavirus Crisis Shows China's Governance Failure*, N.Y. TIMES (Feb. 14, 2020), <https://www.nytimes.com/2020/02/04/business/china-coronavirus-government.html> (outlining China's failures as a result of an opaque bureaucratic system where officials are fearful to anger their superiors); see also Zeynep Tufekci, *How the Coronavirus Revealed Authoritarianism's Fatal Flaw*, ATLANTIC (Feb. 22, 2020), <https://www.theatlantic.com/technology/archive/2020/02/coronavirus-and-blindness-authoritarianism/606922/> (referencing authoritarian blindness as a significant problem with China's top-down administration).

VI. THE WHO'S RESPONSE TO THE COVID-19 CHALLENGE: TIPTOEING OR GLIDING THROUGH A HALF-OPEN DOOR?

The fast-expanding literature on new and reemerging infectious diseases lays a heavy emphasis on their global dimensions and the overwhelming need for credible international cooperation in combating them.³⁹² The United States Centers for Disease Control and Prevention defines these ailments as “diseases of infectious origin whose incidence in humans has increased within the past two decades or threatens to increase in the near future.”³⁹³ The WHO has affirmed that such health hazards “represent a global threat that will require a coordinated, global response.”³⁹⁴ The threat is patently global because a readily transmissible infectious disease may emerge anywhere on the planet and spread instantaneously to other parts of the world through trade and travel.³⁹⁵

392. See Eduardo Lazcano-Ponce et al., *The Contribution of International Agencies to the Control of Communicable Diseases*, 36 ARCH. MED. RSCH. 731, 734 (2005) (outlining how globalization has had repercussions on international health and why cooperation among countries is vital given this global backdrop); see also David P. Fidler, *Globalization, International Law, and Emerging Infectious Diseases*, 2 EMERGING INFECTIOUS DISEASES 77, 77–78 (1996) (emphasizing the global nature of new and reemerging infectious diseases); Jessie Huang & Deepesh Vendoti, *The Fight Against Infectious Diseases: Considerations for Public Health Systems and International Cooperation*, OBSERVER RSCH. FOUND. OCCASIONAL PAPER (Aug. 1, 2019), <https://www.orfonline.org/research/the-fight-against-infectious-diseases-considerations-for-public-health-systems-and-international-cooperation-53965/> (reiterating the need for global efforts to contain and eradicate diseases following the 2018 and 2019 Ebola outbreaks in the Democratic Republic of the Congo).

393. *Addressing Emerging Infectious Disease Threats: A Prevention Strategy for the United States*, CDC, at 2 (Apr. 15, 1994), <https://www.cdc.gov/mmwr/PDF/rr/rr4305.pdf> [hereinafter CDC REPORT].

394. *Communicable Disease Prevention and Control: New, Emerging, and Re-Emerging Infectious Diseases*, WHO, at 2 (Feb. 22, 1995), https://apps.who.int/iris/bitstream/handle/10665/177496/WHA48_15_eng.pdf?sequence=1&isAllowed=y [hereinafter WHO REPORT].

395. See Eduardo Lazcano-Ponce et al., *The Contribution of International Agencies to the Control of Communicable Diseases*, 36 ARCH. MED. RES. 731, 734 (2005) (noting globalization's many repercussions on international health, including dissemination of infectious diseases and greater reach for bioterrorism); see also Fidler, *supra* note 392, at 77–78 (Globalization has affected public health by (1) shrinking the world through technological and economic interdependence; (2)

COVID-19, more than any other recent pandemic, has categorically highlighted the wide geographic manifestations of emerging and reemerging infectious diseases and the utmost necessity of resolutely pursuing international collaboration when devising and implementing strategies to contain them.³⁹⁶ The scientific view is that, at a minimum, this should entail duly coordinated joint efforts to scale up medical capacity for treatment and testing; to develop and deploy safe and workable vaccines; to maintain surveillance to detect reemergence of the virus; and to consistently provide strong support for developing countries.³⁹⁷ Beyond that, concrete steps should be taken to collectively calibrate fiscal, monetary, and trade policies, as well as bolster preparedness for future pandemics and related risks.³⁹⁸

Interestingly, like its predecessors, notably SARS,³⁹⁹ the COVID-19 debacle has also prompted a normatively and practically driven examination of its implications for international law in general⁴⁰⁰ and

intensifying economic competition by developing a global market; and (3) encouraging public health programs to “go global.”); Huang & Vendoti, *supra* note 392 (arguing that global efforts are needed to contain and eradicate Ebola).

396. See Norihiro Kokudo & Haruhito Sugiyama, *Call for International Cooperation and Collaboration to Effectively Tackle the COVID-19 Pandemic*, 2 GLOB. HEALTH MED. 60, 61 (2020) (stating that international cooperation and coordination are essential to tackling the COVID-19 pandemic). *But see* John West, *C.O.V.I.D.-19 a Grim Reminder that International Cooperation Needs to Step Up. Now*, UNRAVEL, (Apr. 06, 2020), <https://unravel.ink/covid-19-a-grim-reminder-that-international-cooperation-needs-to-step-up-now-2/> (claiming that the COVID-19 crisis had accelerated unfortunate trends in international relations including a rise in nationalism in many countries and a growing contest for global power between China and the U.S.).

397. See Aida Caldera & Shashwat Koirala, *Eight Priorities to Strengthen International Cooperation Against C.O.V.I.D.-19*, VOX E.U., (June 30, 2020), <https://voxeu.org/article/eight-priorities-strengthen-international-cooperation-against-covid-19> (highlighting priorities to strengthen international cooperation against COVID-19 including scaling up treatment and testing along with vaccine development and deployment).

398. *Id.*

399. See generally Lazcano-Ponce et al., *supra* note 392, at 733 (severe acute respiratory syndrome or “SARS” is an atypical pneumonia that originated in the Guangdong province of China in 2002); Fidler, *supra* note 392, at 77–78 (explaining how globalization has affected public health); Huang & Vendoti, *supra* note 392 (asserting that the SARS outbreak provoked fear in the global community).

400. See Francisco-Jose Quintana & Justina Uriburu, *Modest International Law: COVID-19, International Legal Responses, and Depoliticization*, 114 AM. J. INT’L L. 687, 687–88 (2020) (analyzing international legal scholars’ contributions and

in specific areas in particular.⁴⁰¹ Two concerns have loomed particularly large in the ongoing inquiry into gaps in the international legal façade and possible remedies thereto: (a) Nature and limits of State responsibility, in light of China's seemingly obstructive actions, and (b) the broadly observed, albeit in authoritarian settings more than others, extension of executive authority and the concomitant displacement of human rights on the domestic front, a trend falling within the purview of international law.⁴⁰²

Overall, this is a multifaceted agenda that cannot be fruitfully addressed by a single body. Indeed, a decentralized approach may conceivably yield greater benefits than a centralized one, because it is impractical to accommodate so many diverse issues within an overarching framework.⁴⁰³ Moreover, in confronting an existential challenge such as that posed by COVID-19, the various components of the policy agenda cannot be considered equal, in terms of the immediate attention called for.⁴⁰⁴ Without doubt, the health side of the picture should be accorded the highest priority and the WHO is the institutional vehicle that has been created to serve as an international platform for fulfilling this purpose.⁴⁰⁵

responses to the COVID-19 pandemic).

401. See Pieter Bekker, *International Law in Times of Crisis: COVID19 and Foreign Investments*, LEXOLOGY, (May 4, 2020), <https://www.lexology.com/library/detail.aspx?g=c8c46035-4e4f-4f9f-8f16-66b23b5942a0> (discussing international law safeguards for foreign investments and the economy).

402. See Quintana & Uriburu, *supra* note 400, at 687–88 (framing the responses and causes of the COVID-19 outbreak through the lens of State responsibility and China's failure to comply with obligations).

403. See Brigit Toebes, *International Health Law: An Emerging Field of Public International Law*, 55 INDIAN J. INT'L L. 299, 323 (2015) (arguing the protection and promotion of health involves a multi-stakeholder approach and a shared responsibility).

404. See Golam Rasul, *A Framework for Improving Policy Priorities in Managing COVID-19 Challenges in Developing Countries*, 8 FRONTIERS PUB. HEALTH 1, 2, 4 (2020) (suggesting leadership is critically important for addressing a health crisis in order to coordinate actions among many stakeholders).

405. See JAVED SIDDIQI, WORLD HEALTH AND WORLD POLITICS: THE WORLD HEALTH ORGANIZATION AND THE U.N. SYSTEM 194, 196 (1995) (“The contemporary WHO concept of primary healthcare, which emphasizes the establishment of efficient general health services that meet at least the basic minimum health requirements of a country's inhabitants. Virtually every program of the WHO has been altered to fit the overall goals of primary health-care.”); see also

Ad-hoc and systematic intergovernmental attempts to manage health problems within and across borders date back to the Industrial Revolution, which heightened elite awareness of the physical and psychological impact of large-scale production and surging international trade volumes.⁴⁰⁶ The search for a viable international institutional apparatus began shortly thereafter but did not bear fruit until the early 20th Century, and merely partially so because the entities established then typically had a narrowly focused mission, a limited organizational capacity, and a fragile international foundation.⁴⁰⁷ An institutional configuration basically commensurate with the needs of a complex and dynamic, yet fractured and vulnerable, global community only emerged following the creation of the WHO, the United Nations Children's Fund (UNICEF), and the International Labor Organization (ILO) in the late 1940s.⁴⁰⁸

As matters stand, the WHO has a sweeping vision reflecting its

KELLEY LEE, *THE WORLD HEALTH ORGANIZATION (WHO) 1*, 99–100 (2009) (noting that the WHO has had opportunities “to assert its leadership and re-establish itself as the world’s health organization” especially when “public health has never been higher on the policy agendas of world leaders”); MARCOS CUETO ET AL., *THE WORLD HEALTH ORGANIZATION: A HISTORY 1* (2019) (suggesting the creation of the WHO in 1948 merged four functions into a single organization: centralized epidemiological surveillance, campaigns against epidemics, disease control, and health system reform).

406. See generally SIDIQI, *supra* note 405, at 193 (identifying international health organizations from 1851 through present day); LEE, *supra* note 405, at 1–2 (describing the history of modern public health and the growth of international health cooperation in the early nineteenth century); CUETO ET AL., *supra* note 405, at 6 (outlining the formation of institutionalized international health in the nineteenth and twentieth centuries).

407. See SIDIQI, *supra* note 405, at 193 (explaining what little attention was paid to public health as a whole in the early 1900s focused on the diseases which caused the most social, political, and economic havoc); see also LEE, *supra* note 405, at 2, 4–6 (referencing the overlap and rivalry between separate international health organizations in the 1900s); CUETO ET AL., *supra* note 405, at 6 (identifying the Pan American Sanitary Bureau, the League of Nations Health Organization, and other entities which came to prominence following cholera pandemics of the 1850s).

408. See SIDIQI, *supra* note 405, at 193–94 (noting the WHO inherited an emphasis from its predecessor organizations on epidemiological reporting and the practice of offering expert medical advice to countries that sought it); see also David P. Fidler, *The Challenges of Global Health Governance* 4 (May 24, 2010) (Council on Foreign Rels., Working Paper) <https://www.cfr.org/report/challenges-global-health-governance> (explaining the WHO, established in 1948, defined health broadly and viewed health as central to human dignity).

aspiration to play a leading role in paving the way for an environment where every person may enjoy a healthy and productive life, including ready access to basic health services; where health needs and healthcare are placed at the center of the global agenda; and where fruitful cooperation with countries and partners is sustained on an ongoing basis.⁴⁰⁹ In more concrete terms, the WHO's present goal is "to ensure that a billion more people have universal health coverage, to protect a billion more people from health emergencies, and [to] provide a further billion people with better health and well-being."⁴¹⁰

In its quest for universal health coverage, the WHO focuses on primary healthcare in order to improve access to good-quality essential services; implements measures to tap sources of funding and furnish financial protection; endeavors to facilitate access to essential medicines and health products; offers training to health workers and professional advice regarding labor policies; lends support to efforts to encourage people's participation in the formulation and execution of national health policies; and takes steps to enhance the effectiveness health data, information, and monitoring systems.⁴¹¹

In contending with health emergencies, the WHO seeks to identify, mitigate, and manage health risks; to prevent them from escalating and develop tools for dealing with outbreaks; to spot and react to pressing health emergencies; and to support smooth delivery of vital health services in challenging situations.⁴¹² And in its pursuit of better health and well-being, the WHO aims to determine the social determinants of these outcomes; to encourage intersectoral approaches to health problems; and to bring about an attitudinal constellation conducive to according a high priority to health across the entire policy spectrum.⁴¹³

In the process of addressing these broad and wide-ranging objectives, the WHO pays a close attention to human capital formation

409. See *Vision Statement by WHO Director-General*, WHO, <https://www.who.int/director-general/vision> [hereinafter *Vision Statement*] (adopting a science-led, innovation-based approach that is result-oriented and fosters inclusive partnerships).

410. *What We Do*, WHO, <https://www.who.int/about/what-we-do>.

411. *Id.*

412. *Id.*

413. *Id.*

(“thick” version)⁴¹⁴ during all stages of the life cycle.⁴¹⁵ This extends to the daily performance of specific tasks geared toward the prevention of non-communicable diseases; ongoing promotion of various manifestations of mental health; minimizing the adverse consequences of climate change in developing countries; lessening antimicrobial resistance; and curtailing the spread of high-impact communicable diseases and ideally eradicating them altogether.⁴¹⁶

The WHO’s aspirational, expansive, and focused mission reflects its status as the international community’s foremost intergovernmental health body, entrusted with substantial powers to tackle global health challenges.⁴¹⁷ Its standing is further buttressed by virtue of being the United Nations’ first specialized agency and operating on a scale unmatched by the majority of its counterparts.⁴¹⁸ In 1946, when the WHO’s Constitution was signed by 61 States, the document was acclaimed by the United States Surgeon General as the “magna carta of world health,” “a great ideological victory,” and “an international declaration of the rights of man to health.”⁴¹⁹ No other similar institutional entity is equally suited for serving as a platform for realizing “the highest possible level of health,” according to the

414. See Benjamin F. Jones, *The Human Capital Stock: A Generalized Approach*, 104 AM. ECON. REV. 3752, 3771 (2014) (explaining human capital accounting uses the assumption that the productivity advantage of human capital is inferred by comparing productivity of those with more human capital versus those with less); see also Benjamin F. Jones, *The Well-Being of Nations: The Role of Human and Social Capital*, at 20, OECD, <http://www.oecd.org/site/worldforum/33703702.pdf> (noting human capital formation takes place in formal education programs, informal interactions with others, and through self-reflection).

415. See *What We Do*, *supra* note 410 (reiterating the WHO’s practice of addressing human capital).

416. *Id.*

417. See Allyn L. Taylor, *Global Governance, International Health Law and W.H.O.: Looking Towards the Future*, 80 WHO BULLETIN 975, 977–78 (2002), <https://apps.who.int/iris/bitstream/handle/10665/71663/80%2812%29975-980.pdf?sequence=1&isAllowed=y> (arguing a large role for the WHO is essential for implementing health law because of its leadership in coordinating codification and its ability to actively participate in treaty efforts).

418. See JEREMY YUDE, *CONTEMPORARY GLOBAL HEALTH GOVERNANCE ACTORS* 78–79 (2018) (explaining the WHO’s key roles in current global health governance as leader, facilitator, and information disseminator are an extension of its legitimacy and near-universal membership).

419. Thomas Parran & Frank G. Boudreau, *The World Health Organization: Cornerstone of Peace*, 36 AM. J. PUB. HEALTH 1267, 1267, 1269, 1271–72 (1946).

WHO's Constitution,⁴²⁰ which endows this "premier global health leader"⁴²¹ with far-reaching normative authority⁴²² to carry out its three-dimensional role as an inspirational leader, consensus builder, and information disseminator.⁴²³

Unfortunately, fulfilling this lofty vision, embodying fiduciary-like expectations, has proved to be an elusive pursuit.⁴²⁴ The performance shortfall has largely been attributed to common organizational pathologies.⁴²⁵ Bureaucratic rigidities have thus been invoked to account for the slow response by WHO to the Thai government's request to provide ready access to essential medicines.⁴²⁶ Additionally, institutional inertia has been identified as the factor responsible, *inter alia*, for the lack of vigorous support for the Commission on Social Determinants of Health and related initiatives.⁴²⁷ These fundamental

420. See WHO, CONSTITUTION OF THE WORLD HEALTH ORGANIZATION, at 2 (July 22, 1946) https://www.who.int/governance/eb/who_constitution_en.pdf [hereinafter WHO CONST.] (identifying the WHO's objective as attaining the highest possible level of health for all peoples).

421. See LAWRENCE O. GOSTIN, GLOBAL HEALTH LAW 104 (2014) (arguing the WHO's constitution unmistakably establishes it as the premier global health leader).

422. See Lawrence O. Gostin et al., *The Normative Authority of the World Health Organization*, 129 PUB. HEALTH 854, 855 (2015) (discussing the extensive normative powers within Article 2 of the WHO's constitution).

423. See YOUDE, *supra* note 418, at 78–79 (stating the WHO's key roles include being a normative leader, facilitator, and information disseminator).

424. See SIDDIQI, *supra* note 405, at 200–01, 206, 211 (highlighting issues with the WHO's effectiveness in eradicating malaria due to negative politics despite organizational efforts focused on decentralization and universal membership); see also LEE, *supra* note 405, at 99–100, 106, 127 (discussing the contentious times faced by the WHO beginning in the 1990s as a result of political, economic, and ideological forces at play); CUETO ET AL., *supra* note 405, at 320, 339 (arguing the WHO's very legitimacy as an international health agency was questioned in the twenty-first century due to its lack of flexibility and the proliferation of non-State actors, the relative disempowerment of Nation States, and the growing hegemony of global caretaker organizations such as the IMF and WTO).

425. See Suwit Wibulpolprasert & Mushtaque Chowdhury, *World Health Organization: Overhaul or Dismantle?*, 106 AM. J. PUB. HEALTH 1910, 1910 (2016) (referencing poor leadership and a lack of leverage when negotiating with powerful actors such as the WTO as significant challenges).

426. See *id.* (suggesting the WHO's stultifying bureaucratic structure is due to risk averse bureaucrats who enjoy lucrative benefit packages).

427. See *id.* (citing a woman-focused development program which improved child mortality rates initiated by the WHO that will fade away without coordinated action and a concerted effort to rally other actors).

deficiencies amply manifested themselves during the H1N1 pandemic, when innate bureaucratic caution prompted the WHO to overplay the risks and propel States to unnecessarily spend vast amounts of money on vaccines, and the Ebola crisis, which featured costly foot-dragging and timidity by the WHO.⁴²⁸ Poor financial transparency has resulted in further complications, impeding progress on key fronts.⁴²⁹

Such malperformance has not gone unnoticed and has not been without adverse consequences.⁴³⁰ Notably, the WHO's shortcomings have led to an erosion of its status as a global health leader and the emergence of serious competitors/complementors such as the World Bank, the Global Fund, properly resourced development agencies, private foundations, and other fast-growing global health partnership programs.⁴³¹ This, coupled with the inevitable loss of reputational capital, has diminished the leverage that the WHO has been able to employ as a major actor in the global arena and its capacity to engage in productive exchanges with powerful players like the WTO.⁴³²

The COVID-19 outbreak and its reverberations have paved the way for the WHO's return into the epicenter of the global health arena as a would-be strategically positioned pacesetter, coordinator, and information disseminator.⁴³³ Once more, however, the exigencies that have materialized have exposed its weaknesses, external as well as internal, as a fiduciary-cum-agent.⁴³⁴ Importantly, the WHO failed the

428. *See id.* at 1910–11 (accusing the WHO of overplaying the danger of the H1N1 pandemic to member States who spent billions of dollars on unused vaccines).

429. *See id.* at 1911 (proposing the WHO's lack of transparency is related to its dependence on donors and practice of toeing the line of donors' interests rather than following its own agenda).

430. *See id.* at 1910–11 (identifying competitors such as the World Bank, the Global Fund, and the World Trade Organization).

431. *See* Wibulpolprasert & Chowdhury, *supra* note 425, at 1911.

432. *Id.*

433. *See* Bonnie Jenkins & Bruce Jones, *Reopening the World: The W.H.O., International Institutions, and the C.O.V.I.D.-19 Response*, BROOKINGS (June 16, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/06/16/reopening-the-world-the-who-international-institutions-and-the-covid-19-response/>

(describing the WHO's pivotal operational role in the world's COVID-19 response due to its practice of coordinating scientific work and distributing information to member countries that lack an equivalent to the U.S. CDC).

434. *See id.* (associating the WHO's coordination struggles regarding COVID-19 to its status as a scientific monitoring and advisory body rather than an operational one).

test of being adequately prepared and duly equip its stakeholders for a devastating pandemic—a high-priority task for the institution.⁴³⁵ It recklessly turned a blind eye to disquieting signs that symptoms of a new infectious disease were detected in Wuhan in late 2019 and merrily went along with Chinese reassurances that there was no cause for concern.⁴³⁶

The primary reason for this remarkable display of nonchalance in the face of what has turned out to be a massive shock to the global health and socio-economic regimes was external or political rather than internal or structural.⁴³⁷ Specifically, the warnings originated from a “reliable but awkward source.”⁴³⁸ This happened to be Taiwan, a veritable model to other members of the international community in terms of its highly effective response to and handling of the COVID-19 threat.⁴³⁹ Despite boasting a robust preventive and remedial healthcare system, Taiwan is locked out of the WHO at China’s insistence and any indications of potential distress with cross-border implications it may furnish ineluctably fall on deaf WHO ears.⁴⁴⁰

It should be noted that the WHO’s adherence to the Chinese line extended beyond the initial signal interpretation phase of coming to

435. See generally Lawrence Freedman, *How The World Health Organization’s Failure to Challenge China over Coronavirus Cost Us Dearly*, NEW STATESMAN (Apr. 5, 2020), <https://www.newstatesman.com/world/asia/2020/04/how-world-health-organisation-s-failure-challenge-china-over-coronavirus-cost-us> (last visited Sept. 30, 2020) (highlighting the cost to Japan due to the postponement of the 2020 Tokyo Olympics; and leveling blame towards the WHO for failing to adequately prepare for one of the organization’s top priorities).

436. *Id.* (criticizing the WHO’s endorsement of the Chinese reassurances that no evidence of human-to-human transmission because governments around the world took note of that endorsement).

437. *Id.* (paraphrasing Mr. Taro Aso, the Japanese Deputy Prime Minister’s, criticism of external Chinese influences on the WHO).

438. *Id.* (highlighting the Taiwanese advance warning to the WHO regarding the spread of the novel coronavirus, in addition to Taiwan’s successes in limiting the spread of the virus despite being the island off the coast of China and not being recognized as a distinct political entity at the insistence of China).

439. *Id.* (discussing Taiwan’s success in limiting the spread of coronavirus, resulting in only 363 cases and 5 deaths, in an island country with a population of 24 million).

440. *Id.* (noting that China’s insistence on nonrecognition of Taiwan as a distinct political entity has resulted in Taiwan’s success not being recognized on the WHO website).

grips with the unfolding crisis in Wuhan.⁴⁴¹ Official reassurances emanating from Beijing continued to be willingly embraced as the situation escalated and the picture became less cloudy.⁴⁴² Perhaps most disturbingly, on January 14th, 2020, the WHO affirmed China's contention, based on its "preliminary investigation," that although this might be another manifestation of animal-to-human transmission of a viral infection, periodically encountered in Chinese wet markets, where trading in wild animals regularly takes place, there was no compelling evidence of human-to-human transmission.⁴⁴³ This was a stance known to be unfounded by those closely engaged in monitoring the emerging threat and endeavoring to devise strategies to deal with it.⁴⁴⁴

A week later, on January 22nd, the WHO's emergency committee was convened via a teleconference to determine whether the "novel coronavirus 2019" qualified as a "Public Health Emergency of International Concern" (PHEIC), the highest possible level of distress short of a pandemic.⁴⁴⁵ Diverse views were expressed by the participants, who concluded that it did not amount to such.⁴⁴⁶ A day later, the Chinese authorities appeared to change their tone and began to move decisively to contain the Wuhan crisis.⁴⁴⁷ The emergency committee could not overlook this seeming turnabout and reconvened on the same day to reassess the situation in light of the change in policy climate as well as the growing signs (even if understated) indicative of the scale of the problem and its spread across national borders.⁴⁴⁸ Still, as Beijing's posture remained shrouded in some uncertainty, the WHO, uneasy about rocking the proverbial boat, opted for an "intermediate level of alert" rather than a PHEIC.⁴⁴⁹

441. See Freedman, *supra* note 435 (while ignoring Taiwan's warning regarding the threat of COVID-19 to the global community).

442. *Id.*

443. *Id.*

444. *Id.*

445. *Id.*

446. *Id.*

447. *Id.*

448. See Freedman, *supra* note 435 (The WHO emergency committee met on January 23, 2020 to review the spread of the virus not only in China, but also in Japan, South Korea, and Thailand.).

449. *Id.* (because the committee found the extent of human-to-human transmission unclear).

At that point, alarm bells started ringing in other countries.⁴⁵⁰ United States intelligence agencies cautioned President Donald Trump that, notwithstanding reassurances from his Chinese counterpart, China was downplaying the gravity of the situation.⁴⁵¹ In parallel, major airlines proceeded to contemplate measures to ban flights from Wuhan.⁴⁵² Yet, when first Italy (after coming across infected travelers from the city) and then the United States actually took this step, the WHO Director-General's response, in the face of evidence that the epidemic turned into a pandemic, was that this might "have the effect of increasing fear and stigma, with little public health benefit."⁴⁵³

Laggardly and lamely, he and his staff began to overcome their inhibitions and try to get a grip on the harsh realities confronting them.⁴⁵⁴ A public health emergency was thus declared on January 30th.⁴⁵⁵ Be that as it may, the WHO was still reluctant to up the ante, with the Director-General insisting that offhandedly using the term pandemic would serve no good purpose and merely amplify "unnecessary fear and stigma, [and] paralyz[e] systems."⁴⁵⁶ Moreover, it might also "signal that we can no longer contain the virus, which is not true."⁴⁵⁷ Needless to say, the caution exhibited stemmed from a reluctance to antagonize China, the main country concerned about stigma at that juncture.⁴⁵⁸

On February 22nd, a team of WHO experts was allowed to visit Wuhan in order to gather vital information regarding the nature and potential magnitude of the threat faced.⁴⁵⁹ This culminated, a week later, in the publication of a factually based report that gave impetus to stepped-up efforts to implement emergency preparations throughout the world.⁴⁶⁰ Even at that late stage, the team members deemed it appropriate to go to great lengths to praise China for its

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *See* Freedman, *supra* note 435.

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. *Id.*

scientific cooperation and conveyed their unease about unduly overstressing the severity of COVID-19 and raising the prospect of a “second wave” (the less provocative term “resurgence” was employed instead).⁴⁶¹

It should be noted that, for all intents and purposes, Wuhan has subsequently receded from the WHO agenda.⁴⁶² Significantly, its two-person team charged with the task of investigating the origins of the pandemic completed in the summer of 2020 a three-week long, exploratory visit to China without spending any time in the city and without indicating that this pattern was likely be reversed in the future.⁴⁶³ The hesitancy has prompted a senior United States official to observe that “[a]ny chance of finding a smoking gun is now gone”⁴⁶⁴ and a member of the Australian House of Representatives to point out that “[t]he international community is right to have concerns about the rigor and independence of the WHO’s early response to this pandemic, and its seeming wish to avoid offending China.”⁴⁶⁵

Equally puzzling, from this perspective, was the WHO decision to give its blessing (offer “understanding and support,” according to a Chinese official) to China’s experimental and controversial program to administer coronavirus vaccines to a very large number of candidates under an emergency use scheme endorsed by the government, before their efficacy and safety was fully demonstrated by clinical trials.⁴⁶⁶ Paradoxically, this coincided with the United States Food and Drug (FDA) move in the opposite direction, entailing the tightening of requirements for its approval of coronavirus vaccines, which was made in a difficult political climate featuring intense pressures from the Trump administration to accelerate the

461. *Id.*

462. See generally John Letzing, *At Ground Zero of The Global Pandemic, Life Goes On*, WORLD ECON. F. (Oct. 21, 2020), <https://www.weforum.org/agenda/2020/10/wuhan-ground-zero-of-the-global-pandemic-life-goes-on/> (reporting that Wuhan has relatively returned to normal).

463. See, e.g., Shepherd et al., *supra* note 379.

464. *Id.*

465. *Id.*

466. E.g., Nectar Gan, *China Says it Got WHO Support for Coronavirus Vaccine Emergency Use*, CNN (Sept. 26, 2020), <https://edition.cnn.com/2020/09/25/asia/china-vaccine-who-intl/index.html>.

process.⁴⁶⁷

The WHO's propensity to refrain, at an enormous cost to its multiple stakeholders, including the Chinese people, from seriously provoking the powers that be in Beijing⁴⁶⁸ holds five lessons for researchers examining the performance of international organizations from an agency theory standpoint. First, it is apparent that, at least in certain crucial circumstances, the tension between pressures emanating from fiduciary status and its agent counterpart is decisively resolved in favor of the latter.⁴⁶⁹ Where appropriate, *ceteris paribus*, this lends empirical support to agency theory over competing paradigms.⁴⁷⁰

It would be tempting to argue that this is tantamount to belaboring the obvious because the WHO lacks meaningful independence and is a mere pawn in the "games" its principals "play."⁴⁷¹ Such an

467. E.g., Laurie McGinley & Carolyn Y. Johnson, *FDA Poised To Announce Tougher Standards for a COVID-19 Vaccine that Makes it Unlikely One will be Cleared by Election Day*, WP (Sept. 22, 2020), <https://www.washingtonpost.com/health/2020/09/22/fda-covid-vaccine-approval-standard/> (reporting that the USFDA was to issue a guidance on new standards for an emergency authorization of COVID vaccines to boost transparency and public trust in the vaccines).

468. See Zeynep Tufekci, *The WHO Should Not Be a Plaything for Great Powers*, ATLANTIC, <https://www.theatlantic.com/health/archive/2020/04/why-world-health-organization-failed/610063/> (last visited Sept. 30, 2020) (opining on a hypothetical scenario in which the WHO "did its job fully and properly" so that effective policies could be deployed globally; and comparing that scenario to the reality of the WHO supporting China's official positions including its "transparent coverups").

469. See *id.* ("The WHO failed because it is not designed to be independent. Instead, it's subject to the whims of the nations that fund it and choose its leader.").

470. See Stephen Buranyi, *The WHO V. Coronavirus: Why it Can't Handle the Pandemic*, GUARDIAN (Apr. 10, 2020), <https://www.theguardian.com/news/2020/apr/10/world-health-organization-who-v-coronavirus-why-it-cant-handle-pandemic> (reporting on the influence China had on the bloc of African and Asian countries in the WHO during the WHO Director-General election process in July 2017).

471. See Tufekci, *supra* note 468 (emphasizing that the success of Hong Kong and Taiwan in containing and preventing the spread of the coronavirus was because they understood China's influence over the WHO and ignored, defied, and contradicted WHO's guidance on the novel coronavirus); see also Buranyi, *supra* note 470 (quoting several observers of Dr. Tedros's work as the WHO Director-General, his good relationship with China, and the risk to the WHO's credibility that relationship poses).

interpretation of what has transpired in these specific circumstances, however, would not dovetail with the bigger picture. As Nitzan Chorev has cogently demonstrated, the WHO is capable, within limits, to autonomously pursue its immanent and transcendent goals.⁴⁷² Based on extensive documentary perusal and key informants interviews, stretching over two lengthy periods with distinct characteristics, he has inferred that the WHO is adept at identifying “adaptive strategies available to international bureaucracies that enable them to respond to external demands in a way that satisfies the member [S]tates while protecting the organization’s material and core principles.”⁴⁷³

Second, the corollary is that the principal-agent model does not accord sufficient attention to contextual variables such as State power and intervening/mediating variable such as regime type.⁴⁷⁴ Clearly, China is not just another WHO principal but one with considerable leverage over the institution.⁴⁷⁵ By the same token, its political system possesses marked authoritarian traits that have grown increasingly pronounced in the past decade or so.⁴⁷⁶ The combination of superior resource endowments and an autocratic mixture of offensive and defensive opportunism is a tall barrier for an agent to overcome, no matter how ideationally motivated.

Another intervening/mediating variable missing from the agency theory framework is leadership style. William Bradford has developed and successfully applied a conceptual scheme for explaining the

472. See NITSAN CHOREV, *THE WORLD HEALTH ORGANIZATION BETWEEN NORTH AND SOUTH* vii–viii (2012) (highlighting the WHO secretariat’s ability to reframe demands of member States to fit the WHO’s institutional culture).

473. See *id.* at viii.

474. See *id.* at 12 (“Constructivist and principal-agent theories of international relations have contributed greatly to our understanding of international organizations as agents. Thus far, however, those theories have paid little attention to the question of how dependent organizations can protect their agendas, deflect criticism, and avoid compliance with the demands of powerful States.”).

475. See generally Buranyi, *supra* note 470 (reporting on the Taiwanese claims that the WHO ignored its early reports of human-to-human transmission of coronavirus that have fueled arguments over the extent of Chinese influence over WHO).

476. See CARL MINZNER, *END OF AN ERA: HOW CHINA’S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 164 (2018) (positing what form of authoritarianism the Chinese government between either *Hard Authoritarianism* or *Soft Authoritarianism*) (emphasis in original).

relationship between decision-makers' personality attributes and compliance with international humanitarian law (which falls within the ambit of "high politics").⁴⁷⁷ The leadership style which reflects these attributes, in turn, may impinge on policy outcomes.⁴⁷⁸ There is reason to believe that the WHO's maneuvers in delicate Chinese territory during the COVID-19 crisis were to a certain (unquantifiable) extent the product of the current Director-General's problem-solving approach⁴⁷⁹ and that another leader (e.g. Gro Harlem Brundtland, one of his predecessors) would have conceivably handled the challenge somewhat differently.⁴⁸⁰

Fourth, it is unproductive to dissect principal-agent dynamics in isolation, without reference to the whole governance regime in which it is embedded. Fluid preferences on both sides are not the sole determinant of the nature of the relationship.⁴⁸¹ There are some structural factors stemming from the fundamental properties of the

477. See William R. Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, 36 ARIZ. ST. L.J. 1243, 1285–86 (2005) ("People, and not abstractions such as organizations, cultures, interest groups, States, or systems, decide whether or not to comply with law, and even if individual preferences, attitudes, or values are derived from these entities there determinants of behavior constitute personality-based, individual-level variables that may account for much of the systematic variance in compliance as between decisionmakers and, in turn, as between the States on behalf of which they decide.").

478. See Petia Paramova & Herbert Blumberg, *Cross-Cultural Variation in Political Leadership Styles*, 13 EUR. J. PSYCHOLOGY 749, 751 (2017) (analyzing the cross-cultural differences in political leadership by using a multifactor leadership questionnaire); Junyan Jiang & Zhaotian Luo, *Leadership Styles and Political Survival of Chinese Communist Party Elites* (Feb. 5, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3329665 (highlighting the role leadership styles and behaviors plays in politics and political systems).

479. See Salvatore Babones, *Yes, Blame WHO for its Disastrous Coronavirus Response*, FOREIGN POL'Y (May 27, 2020), <https://foreignpolicy.com/2020/05/27/who-health-china-coronavirus-tedros/> (noting the Chinese support for Dr. Tedros during the WHO Director-General election and Dr. Tedros's public support and endorsement on how China handled the crisis).

480. See CHOREV, *supra* note 472, at 164–65 (concluding that Gro Harlem Brundtland, the former WHO Director-General's, "systematic attempt to return WHO to its leadership role" was successful).

481. See Jiang & Luo, *supra* note 478, at 1 (positing that a politician's choice of leadership style is "a function of broader institutional variables, such as regime types. . .").

governance regime⁴⁸² which should not be overlooked in this context. It would be inappropriate to assume that they might simply be incorporated into the principals' and agents' preference bundles, even though their presence constitutes a source of opportunities and constraints when it comes to converting preferences into action.⁴⁸³

The limitations of the much-vaunted WHO constitution lend substance to this observation.⁴⁸⁴ The truth of the matter is that this document may be regarded as more of a platform for expressing political aspirations prevailing at the time of its drafting and promulgation than as a genuinely operational vehicle.⁴⁸⁵ It is apparent that the constitutional architects behind it were averse to the notion of delegating to the WHO the powers necessary for fulfilling the grand vision embodied in the Preamble.⁴⁸⁶ In a nutshell, the WHO was born and remains within the confines of the State-dominated Westphalian international governance regime where delegated authority may adroitly be exercised by international institutions and their members, yet it is not formally granted on a behaviorally impactful scale.⁴⁸⁷

482. See Roda Mushkat, *Exploring International Environmental Governance Regimes: The Asian Way*, 34 WIS. INT'L L.J. 585, 614–15 (2017) (explaining that internal governance regimes are a collection of principles, norms, rules, and decision-making/operating procedures that can be found at the regional and global level of cross-border activity).

483. See *id.* at 606 (explaining the rational approaches of international regime evolution should be replaced by a method of analysis that accounts for the distribution of knowledge as it relates to the identities, preferences, and perceived options of State actors).

484. See Eric A. Posner, *The Limits of the World Health Organization*, LAWFARE (Apr. 21, 2020), <https://www.lawfareblog.com/limits-world-health-organization> (observing that the WHO's reliance on funding and political cooperation from countries can result in it being manipulated, as it was at the start of the COVID crisis).

485. See Alan Hamlin, *Constitutions, Politics, and Identity*, in CONSTITUTIONAL MYTHOLOGIES: NEW PERSPECTIVES ON CONTROLLING THE STATE 39, 40 (Alain Marciano ed., 2011) (explaining an expressive reading of Constitutional Political Economy (CPE) that is more identity based, than instrumental because the political constitution makes a statement about the political community it relates to).

486. See generally Obijiofor Aginam, *Mission (Im)possible? The WHO as a 'Norm Entrepreneur' in Global Health Governance*, in LAW AND GLOBAL HEALTH: CURRENT LEGAL ISSUES 559, 560–61 (Michael Freeman, Sarah Hawkes, & Belinda Bennett eds., 2014) (analyzing the expansive treaty-making power of Article 19 of the WHO Constitution).

487. See *id.* at 564 (analyzing the challenges Nation-States face in the post-

Given the devastation wrought by COVID-19, the odds of re-contracting may have increased, but in all likelihood merely marginally so.⁴⁸⁸

Fifth, it might be desirable, for both analytical and practical reasons, to embrace Bar-Gil's and Sunstein's idea of turning the principal-agent model upside-down and reversing the roles of delegator/regulator and delegatee/regulatee.⁴⁸⁹ Letting States and the WHO switch positions in such a hypothetical scenario allows the introduction of the twin concepts of "regulatory cartelization" and "regulatory capture,"⁴⁹⁰ setting the stage for a redirection of agency theory-inspired inquiry toward empirical realities featuring the *ex ante* (cartelization) and *ex post* (capture) control of the delegator/regulator by the delegatee/regulatee. This seems to be a reasonably accurate depiction of the WHO's ultra-cautious treading in Chinese territory and its consequent inability to rise to the challenge posed by the pernicious pandemic that has spread in one form or another from Wuhan to the rest of the world.

VII. CONCLUSION

International organizations of various shapes populate the global arena addressing multiple issues that cannot effectively be dealt with by individual States or in less institutionalized international settings.⁴⁹¹ These organizations often fail to live up to the expectations of their

Westphalian governance architecture to govern global health issues that spread beyond geo-political boundaries).

488. See *If You've Been Exposed to the Coronavirus*, HARV. MED. SCH. (Mar. 2020), <https://www.health.harvard.edu/diseases-and-conditions/if-youve-been-exposed-to-the-coronavirus> (introducing several new studies which suggested that the immune system would be able to react quickly and strongly if re-exposed to the COVID-19 virus).

489. See Bar-Gill, *supra* note 136, at 2 ("A different set of regulatory problems — public goods problems — can be conceptualized as a reverse delegation, with the government as principal and the individuals as agents.").

490. Miron Mushkat & Roda Mushkat, *The Political Economy of Regulating Tobacco in a "Laissez Faire Heaven."* *The Hong Kong Model*, 26 TUL. J. INT'L & COMP. L. 277, 324 (2018).

491. See Andrew Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999 (2013) (asserting that States create international organizations to enhance international cooperation to achieve objectives an individual State cannot achieve on its own).

stakeholders, however defined, but malperformance by domestic policy apparatuses is no less common.⁴⁹² Moreover, relative failure should not be equated with absolute failure, the implication being that international organizations at least partially serve the interests of their constituents, again however defined.⁴⁹³ Indeed, an exercise in rudimentary counterfactual thinking would amply demonstrate that dismantling or even significantly shrinking (as distinct from reforming) them might be a costly proposition.⁴⁹⁴

Given their ubiquity and functional relevance, international organizations have been subjected to close academic scrutiny.⁴⁹⁵ Particularly careful attention has been accorded to their intricate relationship with States, heavily relying on agency theory in the process.⁴⁹⁶ Conceiving of States as principals and international organizations as agents has proved to be a productive investigative strategy overall, generating an array of useful analytical and policy-oriented insights.⁴⁹⁷ As matters stand, no other competing paradigm can be said to be as explicit, precise, rigorous, and widely applicable.⁴⁹⁸

492. See JOSH BIVENS, *FAILURE BY DESIGN: THE STORY BEHIND AMERICA'S BROKEN ECONOMY* 95 (2011) (claiming that economic policies have pressured American working families, causing stress to American's and harming the economy broadly).

493. JAMES D. FRY, BRYANE MICHAEL, & NATASHA PUSHKARNA, *THE VALUES OF INTERNATIONAL ORGANIZATIONS* (forthcoming 2021); see Guzman, *supra* note 491, at 1025 (asserting that international organizations have had a positive impact despite the lack of control the States that created the institutions have when international organizations act contrary to the interests of such States).

494. FRY, MICHAEL, & PUSHKARNA, *supra* note 493; see Guzman, *supra* note 491, at 1025 (arguing that international organizations should be given greater authority and States should rely on them more despite the risks of the international organization acting contrary to individual State interests).

495. FRY, MICHAEL, & PUSHKARNA, *supra* note 493; e.g., CHOREV, *supra* note 472, at 12 (analyzing the principal-agent theory and applying its framework to the structure of the WHO as an international organization).

496. See Bar-Gill, *supra* note 136, at 2 (analyzing the principal-agent theory as a framework for considering the relationship between government and individuals); see also FRY, MICHAEL, & PUSHKARNA, *supra* note 493.

497. FRY, MICHAEL, & PUSHKARNA, *supra* note 493; see, e.g., Bar-Gill, *supra* note 136, at 2 (claiming that the principal-agent theory helps to frame discussions that would be too abstract to analyze).

498. FRY, MICHAEL, & PUSHKARNA, *supra* note 493; see Bar-Gill *supra* note 136, at 2 (highlighting that principal-agent theory and behavioral principal-agent theory

Proponents of agency theory like to invoke the Frankenstein conundrum to convey its essence and highlight its solid factual underpinnings.⁴⁹⁹ In the classic novel and its cinematic adaptations, the notorious Doctor Frankenstein creates a living creature hoping that this would help him to elude death.⁵⁰⁰ Unexpectedly, the monster defies his creator, killing several people and making the doctor regret his bold decision and its unfortunate consequences.⁵⁰¹ The story furnishes a vivid backdrop for introducing the logic and merits of the principal-agent model because, when States set up an international organization, “they create something with a life of its own.”⁵⁰² In taking this step, they face the risk of the “institution becoming a monster and acting contrary to their interests.”⁵⁰³ States have gone to considerable lengths to ensure that the monster is firmly “caged.”⁵⁰⁴

This is an incisive and telling account, but the WHO COVID-19 experience suggests that it is overly mechanical and narrow.⁵⁰⁵ Because pertinent contextual variables, feedback loops, and intervening/mediating variables are omitted, the doctor/principal, the monster/agent, and the space between them have vital behavioral layers removed and are reduced to one-dimensional entities.⁵⁰⁶ The corollary is that agency theory, unless enhanced or reinforced with complementary building-blocks, may in certain situations inadequately explain outcomes of the State-international organization dynamics.⁵⁰⁷ It follows that, in such circumstances, it may exhibit low

can help to identify the proper scope of regulation, by focusing on personal decisions made by an individual accounting for deficits of information and of rationality to explain regulatory intervention).

499. See Guzman, *supra* note 491, at 999 (observing that international organizations, which are the creation of States, can act against a State’s interests).

500. See generally *id.* at 999.

501. *E.g., id.* at 1000.

502. See *id.*

503. See *id.* at 1002.

504. See *id.* at 1014.

505. Cf. Freedman, *supra* note 435 (inferring that the WHO’s failure in preventing the COVID-19 pandemic, despite it being a top priority, is the result of China’s influence over the previous and current WHO director-general).

506. See Bar-Gill, *supra* note 136, at 2 (asserting that principal-agent theory can be applied in political science as a framework for understanding the assistance the government, the agent, provides to individuals, the principal).

507. See Guzman, *supra* note 491, at 1025 (observing that the net impact of international organizations is a positive despite the inherent “Frankenstein

predictive validity.⁵⁰⁸

An unflagging portrayal of States as doctors and international organizations as monsters may prove equally unproductive and may impede institutional reform to boot. States are doubtless capable of acting in a monster-like fashion, inflicting enormous damage on societies both at home and beyond their borders. Where this is the case, the fault of international organizations may lie not in stubborn manifestations of defiance. Rather, it may stem from not skillfully exploiting whatever room for maneuver they enjoy to assert themselves as agents and chart a course consistent with their non-partisan mission and their fiduciary-type responsibilities. Turning the principal-agent model upside-down is a viable analytical device for bringing this notion into sharp focus.

problem”).

508. See generally Wei-Ling Lin & Grace Yo, *Predictive Validity*, in ENCYCLOPEDIA OF QUALITY OF LIFE AND WELL-BEING RESEARCH, 5020, 5020 (Alex C. Michalos ed., 2014), https://link.springer.com/referenceworkentry/10.1007%2F978-94-007-0753-5_2241 (explaining that predictive validity is “commonly interpreted as correlation between a test and the relevant criteria” and that “in predictive validity, the scores on a scale applied earlier are meant to predict scores on some later measure.”).