THE MYTH OF INTERNATIONAL DELEGATION

Andrew T. Guzman¹
Boalt Hall School of Law
guzman@law.berkeley.edu

Jennifer Landsidle²
Attorney-Adviser, U.S. Department of State
jenniferlandsidle@hotmail.com

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¹ Professor of Law, Boalt Hall School of Law, University of California, Berkeley.
² Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State. The views expressed in this article are those of the authors and do not necessarily represent the views of the Department of State or the U.S. Government. We are grateful to Karen Alter, Curt Bradley, Larry Helfer, Judith Kelley, and participants at the Law and Politics of International Delegation Workshop held at Duke Law School. Ausra Pumputis provided excellent research assistance.
Abstract

There is a growing and misinformed sense in some quarters that the United States and other countries have engaged (and continue to engage) in delegations to international institution that involve a significant threat to domestic sovereignty. Concerns about such delegations come from academics (John Yoo: “Novel forms of international cooperation increasingly call for the transfer of rulemaking authority to international organizations”), prominent politicians (Bob Barr: “Nary a thought is given when international organizations, like the UN, attempt to enforce their myopic vision of a one-world government upon America, while trumping our Constitution in the process. Moreover, many in our own government willfully or ignorantly cede constitutionally guaranteed rights and freedoms to the international community;” Jesse Helms: “The American people see the UN aspiring to establish itself as the central authority of a new international order of global laws and global government.”); and senior government officials (John Bolton: “For virtually every area of public policy, there is a Globalist proposal, consistent with the overall objective of reducing individual nation-state autonomy, particularly that of the United States”).

In our view the perspective evidenced by the above quotes is almost wholly a myth. But it is a myth that persists and continues to attract attention. This Essay seeks to bring forward a more realistic and accurate view of international institutions and engagement. We demonstrate that meaningful delegations of sovereignty are extremely rare and even when they do exist they are carefully cabined. Decision-making authority in all areas remains firmly in the hands of national governments.
THE MYTH OF INTERNATIONAL DELEGATION

We live in a world of sovereign states and without a supra-national government. One consequence of this reality is that states must find ways to manage their interactions without reliance on some higher coercive power. When faced with problems that affect two or more states, one solution is to cooperate by entering into agreements in which each party makes representations about how it will act. Agreements of this sort, if successful, promote beneficial reliance by states and encourage value-increasing cooperative behavior.

Optimal solutions to some international problems, however, require more than simply an exchange of promises. They require a delegation of authority to some entity that, at least in an idealized context, is able to make decisions to maximize the total gains enjoyed by the parties to the agreement or, perhaps, to address distributional issues among states. A well-functioning international body could, for example, take into account the interests of all states in making a decision and select the course of action that provides the greatest overall benefits. In contrast, if the states themselves have to make a decision and if unanimity is the decision rule, deviations from the status quo take place only if the proposed change represents a Pareto improvement, meaning that every state benefits (or at least is not hurt).¹

This requirement of a Pareto improvement can prevent actions that yield gains greater than the associated loses. To give just one example, there are good reasons to delegate certain questions of international peace and security to a single body, as the United Nations attempts to do with the Security Council. If such a body were able to estimate the extent of a threat and an appropriate response, and if it were able to direct individual states to react appropriately, the ability of the international community to respond to threats would be greatly enhanced. Under a system without a body of this sort there are significant hurdles to a collective response. Every state has an incentive to free ride on the efforts of others to provide security; some states may be critical to the effort, but may stand to gain very little from it themselves and so may refuse to participate; and so on. Absent some delegated authority, the international community will often be unable to respond well to problems.

There is, of course, another side to delegation. When power is delegated from domestic authorities to supra-national organizations a variety of problems emerge that will, at least sometimes, make that delegation undesirable. Inevitably, movement to a higher authority takes decisions farther from individual citizens and so reduces democratic control. This is especially true of international delegations because we lack effective democratic institutions and practices at the international level. Delegation also presents principal-agent problems because an international entity may have interests that diverge from those of the states that establish it. There are also concerns about capture of supra-national institutions by interest groups who could influence policy to serve their own narrow set of interests.

¹ The proposed change may include some set of transfers in order to compensate those that would otherwise be made worse off.
concerns. Other risks and problems could be enumerated, but the point should be clear: delegation carries costs as well as benefits. The question of whether there should be delegation to international entities can only be answered by balancing the relevant costs and benefits on a case by case basis.

When one turns to examine instances of international delegation the thing that leaps out most immediately (at least to us) is how little of it there is. The states of the world have had no shortage of challenges and reasons to cooperate. Yet to date states have delegated legislative or decision-making authority to supra-national entities in extraordinarily few instances. Moreover, in virtually every such instance the delegation is narrowly cabined in terms of its scope, its importance, and its ability to actually influence state conduct.

The modest extent of actual delegation stands in stark contrast to the rhetoric that is sometimes heard on the subject. It is said that international organizations are being granted rulemaking authority over important policy decisions, are leading to a trampling of American Constitutional rights, are seeking to have authority over global governance or become a form of global government, and are doing these things across almost all important areas of public policy.

This sense that states have engaged in large-scale delegations to international institutions of important and impactful decision making across a wide range of policy issues is simply false. It is a myth.

This myth is useful for those arguing against further international engagements or in favor of undermining existing ones. As such, it is important to challenge the myth. It is important to encourage policy makers and other observers to take a clear-eyed view at the actual state of international delegation. It is important to ensure that beneficial international actions are not defeated by an imagined surrender of sovereignty.

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3 “Today, nary a thought is given when international organizations, like the UN, attempt to enforce their myopic vision of a one-world government upon America, while trumping our Constitution in the process. Moreover, many in our own government willfully or ignorantly cede constitutionally guaranteed rights and freedoms to the international community.” Rep. Bob Barr, Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task, 39 Harv. J. Leg. 299, 323-24 (2002).
4 “The American people see the UN aspiring to establish itself as the central authority of a new international order of global laws and global government.” Senator Jesse Helms, Address Before the United Nations Security Council (Jan. 20, 2000).
5 “[F]or virtually every area of public policy, there is a Globalist proposal, consistent with the overall objective of reducing individual nation-state autonomy, particularly that of the United States.” John R. Bolton, Should We Take Global Governance Seriously, 1 Chi. J. int’l L. 205, 220 (2000).
6 Indeed, international engagement is often better described as increasing the ability of a state to exercise its sovereignty. See David Epstein & Sharyn O’Halloran, Sovereignty and Delegation in International Organizations, 70 Law And Contemp. Probs. (forthcoming Jan. 2008) (manuscript at 17) (“Barring coercion or extreme exit costs, though, participation in international organizations is voluntary and therefore should be seen as a natural extension of member states’ rights and an exercise of their sovereignty”); Oona A. Hathaway, International Delegation and State Sovereignty, 70 L. & CONTEMP. PROBS. 36-37, available at http://ssrn.com/abstract=1009600)
When one looks to the existing practices of states, examples of non-trivial international delegations are quite rare. Thus, we instead focus on the actual exercise of delegated authority. Our efforts to find examples that would plausibly cause an observer to think there is a worrisome threat to or infringement of sovereignty have yielded only a few instances of what we judge to be significant delegations, and each of them is best understood as addressing particularized concerns. They do not, either individually or collectively, suggest a general trend toward greater international delegations of legislative or decision-making authority.

The two most conspicuous delegations are those made by the international community to the United Nations Security Council and by European states to the European Union. The European example is, without much doubt, an extreme form of delegation. Indeed, there has been enough delegation to the European level that one could advance the case that Europe no longer represents a group of sovereign states but rather a confederation that itself has many characteristics of statehood. But the European example cannot plausibly be thought to evidence some general trend toward delegation. It arose from a unique set of circumstances following the Second World War and a remarkable series of events since that time. European states have not evidence an appetite for similar delegations beyond Europe and no other group of states has engaged in a similar sort of sovereignty-sharing.

The second important example is the UN Security Council.\textsuperscript{7} We address this example of delegation later in the paper but for the moment it is enough to point out this delegation was made sixty years ago and has remained essentially unchanged since that time. It strains the imagination to think that although we have not seen a cascade of delegations in the intervening six decades the Security Council signals there will be more such delegations in the future.

Notwithstanding occasional doomsday proclamations of concerned commentators,\textsuperscript{8} international organizations are not dictating policy decisions to this or any other country. There are no international bureaucrats secreted away in Geneva or The Hague or Washington drafting regulations or policies that apply to the conduct of sovereign states. With very rare exceptions, what delegation there is tends to be highly constrained and/or

\textsuperscript{7} Though even the extent of effective delegation in this case is debated. See Alexander Thompson, Screening Power: International Organizations as Informative Agents, in Delegation and Agency in International Organizations, (D. Hawkins, D. Lake, D. Nielson and M. Tierney, eds) (2006).
\textsuperscript{8} See Herbert W. Titus, Senior Legal Adviser, The Liberty Committee, available at http://www.thelibertycommittee.org/hr1146analysis.htm (stating that the United States should follow the advice of George Washington, “who cautioned his countrymen to ‘steer clear of permanent alliances with any portion of the foreign world,’ lest the nation’s security and liberties be compromised by endless and overriding international commitments.”); Jeremy A. Rabkin, Why Sovereignty Matters, 34 (1998) (“Global governance, then, does not threaten to replace the American government, but it does threaten to distract and confuse, and ultimately, to weaken it.”).
involve highly technical matters. Like dragons, delegation can be scary. Like dragons, international delegation is something we need not worry too much about.9

**Defining International Delegation**

This Essay faces a couple of fundamental challenges. The first is that it is difficult to demonstrate a negative. It is difficult to show that there is virtually no delegation of substantive legislative or decision-making authority because one can always be accused of overlooking some example. We address this problem by considering what strike us as the most important examples of delegation and by turning to the writings of those who are concerned about delegation to see what examples they have in mind.

The second challenge is definitional. Clarity requires that we choose some definition of “delegation,” but doing so may omit some behavior that is of interest. The problem is made more difficult by the fact that there is no consensus definition available. There are, however, several proposed definitions in the literature, and so we begin with those.

Hawkins, Lake, Nielson and Tierney define delegation as “a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former.”10 The key element of this definition for our purposes is that the agent is entitled to act on behalf of the state. An alternative definition, proposed by Abbott, Keohane, Moravcsik, Slaughter, and Snidal requires a grant of authority to implement, interpret, and apply rules.11 Ku suggests a narrower definition under which a delegation takes place only if constitutionally-assigned federal powers are transferred to an international organization.12 Perhaps the definition most focused on international law is Swaine’s requirement that there be a grant of authority to develop binding rules with legal effect.13 The broadest definition of which we are aware is offered by Bradley and Kelley who define delegation as “a grant of authority by two or more states to an international body or another state to make decisions or take actions.”14

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9 One final point of clarification is appropriate. There is debate within the United States about the appropriate scope of delegation of authority among the various branches of the government. How much power should the President have, for example, to commit the state internationally? These questions, though important, are not the subject of this Essay and are left to one side.
11 Kenneth W. Abbot, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, The Concept of Legalization, 54 INT’L ORG. 401 (2000) (“that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules”).
13 Edward T. Swaine, The Constitutionality of International Delegations, 104 COLUM. L. REV. 1492, 1494 n.3 (2004) (“vesting them with the authority to develop binding rules,” and specifying that “the authority so vested must be capable of some kind of legal effects on the international or domestic plane: something more than pronouncements or hortatory acts”).
Any definition is, of course, arbitrary. Neither we nor anybody else can claim that there is one “true” definition of delegation. The definition matters, however, because it frames our thinking about the concept of delegation. A definition is more useful if it applies to some set of actions by states that have features in common. We are of the view, for example, that the Bradley and Kelley definition is too broad to generate a useful category. If you adopt a definition of delegation this broad, virtually any action by a state that authorizes any international entity to do anything will constitute a “delegation.” Thus, for example, the trade and environment committee at the WTO, a body without the ability to create binding rules, staffed by WTO member states, and without any authority over anything that happens at the WTO, would represent a form of delegation. Indeed, much less important forms of authority would also count. Any entity with the authority to call a meeting, for example, regardless of who the attendees would be, would represent an international delegation.\(^\text{15}\) By attending the Olympics states have delegated to the International Olympic Committee the ability to allocate medals. And of course the establishment of any international body must entail a delegation because there are surely decisions that that body is entitled to make and funds it is entitled to spend. This is so regardless of the importance of the body, the discretion given to it, or the controls placed on it.

A definition of delegation should distinguish instances in which states surrender some degree of autonomy and authority from many other instances in which they simply engage with the world. Under the broad definition from Bradley and Kelley virtually any instance of the latter will inevitably involve something that fits the definition.\(^\text{16}\) We are of the view that a decision to establish an international organization capable of binding states to a course of action in areas of great concern to states (e.g., the Security Council) requires a different analysis than a decision to establish a group of international technocrats charged with making non-binding recommendations to states regarding the harmonization of internet governance\(^\text{17}\) -- and even this second example is a much more consequential action than the donation of funds in support of an international aid organization.

\(^{15}\) Bradley and Kelley state that Group of Seven summits do not involve an international delegation under their definition because there has been no grant of authority “to the collective or any international body. But if one takes their definition seriously such a summit involves all sorts of delegations. There has been an international delegation by the participants in the summit to the host nation to plan the event and to expend funds on it. There has been a delegation by every state present to every other state present because the very existence of the event grants to each state the authority to speak at the event itself (a form of taking action). There has also been delegation to the Group of Seven as a collective by virtue of the fact that the group can decide, for example, to abandon the meeting or to declare it a failure without the consent of every state. Bradley & Kelley, supra note 14 at 3.

\(^{16}\) Other problems with this broad definition include that the definition does not requires that a state possess the authority that it is alleged to have delegated. We find it difficult to understand the term delegation without the original source possessing the relevant authority in the first place. Id. at 12.

\(^{17}\) See id. at 16 (referencing the establishment of the Working Group on Internet Governance (WGIG) by the U.N. Secretary General to “investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005.”)
We have detailed our concerns with the broad definition of Bradley and Kelley because we intend to use it. We do so not because we think it the best possible definition but rather because we want to be clear that our claim is not simply semantic. We could select a definition sufficiently narrow as to make our claim correct but trivial. Though this might be a sensible rhetorical strategy (though we doubt it), it would do nothing to advance our understanding of the subject matter. We do not wish to exclude certain actions that might be thought to be problematic or to surrender some substantial degree of state sovereignty or to, in some other way, be some form of significant assignment of authority to an international body.

By adopting the Bradley and Kelley definition in this way, we must also adopt language to qualify the degree of delegation. Clearly some forms (including those mentioned above) of delegation are inconsequential in the sense that there is no possibility of an unforeseen cost to the state. Leaving the question of how to decorate the interior of the WTO building in the hands of the institution, for example, fall into this category. Other delegations are, of course, highly consequential. The enormous amount of delegation made by the member states of the European Union, for example, would fit this category.

Another potential danger presented by an overbroad definition is that instances of delegation may be deemed “significant” or “substantial” because they are toward the more significant end of the category established by the definition. But, of course, to say that an action is more significant (in the sense of representing a greater threat to sovereignty) than the least significant forms of delegation that qualify under the definition is to say very little. With such a broad category a relative analysis risks being misleading. The definition itself, then, implies that a relative assessment is impractical and we must instead examine a given instance of delegation individually to determine whether it has significant costs in terms of lost sovereignty or autonomy. 18

Put another way, the selection of this definition implies that to the extent that one is concerned with some notion of sovereignty costs, much of what fits under the definition can be ignored – it is simply not a threat to even the most protective notions of sovereignty. The breadth of this definition requires that when we discuss delegation as a sovereignty concern, we carefully qualify the particular forms of delegation that are of concern.

Empirical studies assessing the sovereignty costs of delegations can be misleading if they fail to distinguish different forms of delegation. For example, Professor Koremenos has developed a detailed coding of international agreements with which she is able to identify the frequency with which states have delegated to international bodies under a definition similar to that of Bradley and Kelley. 19 There is a good deal of information in her results,

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18 The term sovereignty costs is itself ambiguous, but we use it here simply to stand in for whatever aspects of a delegation one might be concerned with. This includes a restriction on a state’s choice set, for example, or a surrender of the power to influence the interpretation of a treaty. Because these concerns may include other things we use the term sovereignty costs.

but because the definition of delegation is so broad, it is not possible to draw conclusions about the degree to which important authority has been surrendered to international bodies. After presenting some statistics from her data (more on this below), she states that “delegated bodies are involved in the implementation, revision, and monitoring of the agreement and often have the power to settle disputes and enforce compliance. The actions of delegated bodies in these functions will have real effects on signatory states.”20 While it is certainly true that international organizations and international agreements have real effects (to our knowledge nobody in the debate on delegation disputes that claim), it is less obvious that these effects are a result of a surrender of sovereignty. To begin with, Koremenos’s definition of delegation includes instances in which the organization is able to change its own rules, but only with the unanimous consent of member states. Indeed, her data set does not reveal a single instance (over 97 agreements) in which third parties are given the authority to “mak[e] rules/laws in addition to those stipulated in the agreement.” In seven instances the member states are able to do so, but this may require unanimous consent.21 The tasks of implementing and monitoring the agreement can take place without any authority being granted to the institution beyond the authority to gather date and report to the membership. With respect to dispute resolution the above quote reflects what Koremenos’ data and our own analysis suggest—that there is more delegation in the dispute settlement arena than in the “legislative” arena, an issue that we address more fully below.22

So, while Koremenos’ results contain a good deal of interesting information about the functioning of international agreements, they do not tell us much about the extent to which delegation is problematic. This brings us back to the dominant approach used in this essay, which is to seek out instances of delegation and investigate the extent to which there has been an important turnover of sovereignty. If delegation truly is problematic as practiced, one would expect to find no shortage of concrete examples in which that is the case, and we have been unable to do so.

Under this broad definition one must also avoid confusion between constraints that are best attributed to international politics and those that result from delegation. To illustrate, states engage in various forms of debate on the floor of the United Nations General Assembly. The issues discussed are often important to states and the choices available to

20 Koremenos, supra note 19, at 5.
21 Later in the article we discuss why even when amendment is possible without unanimous consent there may not be a significant delegation. Koremenos does find that a number of agreement create entities capable of making decisions based on a majority of votes case (her data also indicate that most, though not all such institutions have a one-country, one-vote rule). But because she has not qualified her definition of delegation, there is no way to know what decisions these bodies are permitted to take. These bodies could be entrusted, for example, with decisions over minor administrative issues such as the dates on which country reports are due or might be bodies charged with the administration of the organization. Koremenos, supra note 19, at 5-6.
22 One additional weakness to Koremenos’ approach is that it cannot easily identify the degree of delegation by looking at the treaty text by itself. As Helfer points out, “analyses restricted to formal treaty provisions can also fall prey to the converse error—incorrectly identifying modest delegations as consequential.” Laurence R. Helfer, Monitoring Compliance with Un-ratified Treaties: The ILO Experience 20 (Vanderbilt U. Law Sch. Pub. Law & Legal Theory Working Paper Group, Paper No. 07-14, 2007).
states as well as the costs and benefits of those choices are impacted by the behavior of other states. This reality does not result from the fact that there has been a delegation to the General Assembly (in the sense that it is given funding and is authorized to make decisions about its own operation) but rather is an unavailable feature of international politics. That politics is in part played out in the General Assembly does not imply that it is the delegation to the General Assembly that constrains states. Those costs would exist even if there were no delegation. A state could withdraw from the United Nations all together and still suffer criticism from the floor of the General Assembly. This point is important because under this broad definition of delegation virtually any place in which international relations take place will represent a form of delegation. Anytime states consent to meet and give authority to make some form of decision (e.g., the room in which the meeting takes place) to an international body there is a delegation. It is only when the constraints on state action (whether political, legal, or something else) are a product of the delegation that the delegation becomes an issue.23

With that in mind, we now turn to consider various forms of potential delegation and make the case that it is very difficult to identify examples of delegation of legislative or decision-making authority24 that raise meaningful sovereignty concerns. In addition, although delegations of adjudicatory authority are real, such delegations are carefully constrained. Our analysis attempts to address the most often-cited examples of delegation.

**Delegations of Treaty-Amending and Legislative Authority**

As discussed below, there are few, if any, instances in which states have delegated real decision-making authority over important policy matters to international organizations. There is, however, a sense in which states have, at least in theory, opened the door for international institutions to amend their rules in such a way as to affect the obligations of states. It is important to notice from the start that this is a sort of delegation once-removed. A typical example is one in which an agreement exists and has some consented-to set of obligations. There is no authority for the organization to adopt new rules without unanimous consent and there is no expectation that it will engage in policy making going forward. There is, however, an amendment provision that could theoretically be used to give the organization or some subset of states the power to change the rules.25

One such example is the International Labor Organization (ILO). Although its founding fathers explicitly rejected delegating substantial legislative authority to the organization, Article 36 of the Constitution of the International Labor Organization (ILO), provides that the Constitution may be amended by a two-thirds majority.26 The existing ILO rules

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23 It is surely the case that the distinction between politics that are the result of delegation and politics that are not will be difficult to identify in many instances. The key point, however, is not so make how one would make this distinction in close cases but rather that it must not be ignored it in easy ones.


25 *Id.* at 1506.

26 *Id.* at 1504. In addition to a two-thirds majority, passage of an amendment requires the votes of five of the ten Members represented on the Governing Body as members of chief industrial importance. These
are entirely unobjectionable from a sovereignty perspective, so the potential of amendment poses the only plausible threat of a worrisome delegation. While the ILO does monitor government and private sector conduct, it cannot adopt rules that are binding on states, and it cannot order sanctions or take any action against a state that does not comply with its labor standards. The concern, then, is that the constitution of the organization could be changed by something less than unanimous consent. If the constitution were changed, for example, to state that the ILO had the power to bind ILO member governments as a legal matter, the non-consenting parties could become subject to rules to which they had not consented. The ILO represents a delegation under the Bradley & Kelley definition, but it stretches credibility to think that it represents a meaningful threat to sovereignty. To begin with, it seems far fetched to imagine the sort of amendment described above. It would fly in the face of deeply engrained notions of consent in international law and would provoke cries of protest from the non-consenting states. Indeed, we are unable to think of a single example in which an international organization has amended its constitution to grab power in such a manner.

Moreover, if a subset of members sought to make such a change, it is certain that the dissenting members would reconsider their membership in the organization. The ability to exit gives states protection against non-consensual changes to the structure of an organization and dramatically reduces the extent of the delegation. As has been pointed out in other contexts, there is a balance between exit and voice. Conventional international commitments can be changed only with unanimous consent – giving every state considerable voice. If amendments can change the underlying rules, states have the opportunity to exit. The result is that an attempt to use the amendment provisions of an organization in the way described above represents a re-opening of negotiations on the structure of the organization and whatever new structure emerges, no state is committed to it.

More generally, the theoretical possibility of a change to the constitutive terms of an international entity has not presented sovereignty problems in the past and seems quite unlikely to do so in the future. There are strong norms in place preventing such amendments, and the ability to exit gives states considerable protection. To label any provision that allows an international body to change its constitution a troubling delegation seems, to us at least, a considerable exaggeration. Imagine, for example, an international commission convened to address scandals over judging in Olympic figure skating. Even if its decision processes allowed it to change its constitutive terms by vote,
we are not worried that the commission will declare itself capable of issuing binding international law rules governing the law of the sea.

Returning to the example of the ILO, it turns out that the organization’s Constitution is a rather innocuous document that merely describes the organization and procedures of the institution and which allows withdrawal by its members. Substantive obligations are promulgated through subsequent conventions, which only bind those members who choose to ratify.  

There is one instance in which an ILO action has arguably taken the form of committing members to a substantive rule without their consent. The ILO Declaration on Fundamental Principles and Rights at Work provides a set of basic labor rights that are said to be binding on all members, whether or not they have consented to relevant ILO Conventions. Though the Fundamental Declaration was not adopted by consensus (though it did enjoy the support of a large majority), it purports to bind states that have not consented and so, if this is correct as a legal matter, it represents an example of action based on delegated authority. The language of the Fundamental Declaration is as follows:

All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.

The fundamental rights at issue include: the freedom of association and recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.

Before this example is held up as evidence of worrisome delegated authority, however, notice how carefully it is worded and what its legal implications are. The declaration states that members have an obligation “arising from the very fact of membership” to promote these rights “in accordance with the [ILO’s] Constitution.” Whatever obligations apply, then, are ultimately derived from the ILO’s Constitution and the fact of membership. The Fundamental Declaration, then, must be one of two things. First, if the Constitution does not provide these obligations the declaration is meaningless and has no legal effect. Second, if the Constitution does provide for these obligations then the

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29 Art. 19.5(e), ILO Constitution. In the event that an ILO convention is adopted by a two-thirds majority, Article 19.5(b) requires all Members to bring the convention before the domestic authorities responsible for ratifying treaties. The obligation on Members ends there.


declaration simply restates them. In neither case is this an exercise of delegated authority. It is instead a claim about what the Constitution of the ILO requires. Finally, note that there is no authority granted to International Labour Conference (where the declaration was adopted) to engage in interpretations of the Constitution, and so there is no sense in which the declaration represents an official interpretation of the Constitution. None of this is to deny that this or other declarations might have political implications. When international organizations are established they become part of the landscape and can alter political costs and benefits, often in ways that cannot be predicted with confidence. But there is a large difference between this and a surrender of autonomy to an international body.

Another example that is sometimes cited is the International Monetary Fund (IMF) and its Articles of Agreement. Upon examination, however, this example is a red herring. Article 28(a) of the Articles of Agreement permits three-fifths of the members, having eighty-five percent of the voting power, to amend the Articles. Article 28(b), however, carves out three areas where acceptance by all the Members is required: (i) the right to withdraw from the Fund; (ii) the provision that no change in a member’s quota shall be made without its consent; and (iii) the provision that no change may be made in the par value of a member’s currency except on the proposal of that member. Absent these three substantive areas, the Articles of Agreement, much like the ILO Constitution, read like the charter of a country club. Three-fifths of the members may, for example, amend the location of the offices or the number of Executive Directors on the Executive Board, but is the delegation of these administrative decisions really cause for alarm?

The most cited example of international delegation is likely the World Trade Organization (WTO). This organization certainly imposes a large number of burdensome rules on states, but these rules were the product of a negotiated agreement and consented to by all member states. The claim of delegation, therefore, does not speak to the rules themselves but rather to the decision making procedures of the organization. It is certainly true that the text of the WTO Agreement provides for decision-making by majority or supra-majority voting, though the most central obligations taken on by states can be changed only by consensus, and other changes to the substantive

32 The International Court of Justice is charged with interpretation of ILO issues. ILO Constitution, Art. 37.
33 In fact, as Helfer points out, the Declaration’s monitoring mechanisms- which have reinforced the finding that investment is attracted, not repelled by, adherence to core labor standards- help to convince governments that compliance with international labor rules is both individually and collectively rational. Thus, the ILO provides valuable information to states and non-state actors which enhances the benefits of compliance with international rules without incurring the higher sovereignty costs of formally binding states to unconsented to legal obligations. Helfer, supra note 21 at 24.
34 See e.g., Bradley & Kelley, supra note 14 at 12; Swaine, supra note 13 at 1507.
35 Art. 28, Articles of Agreement. These are the rights to withdraw from the Fund, the provision that no change in a member’s quota shall be made without its consent, and the provision that no change may be made in the par value of a member’s currency except on the proposal of that member.
37 WTO Agreement, arts. IX, X.
38 WTO Agreement, art. X:2.
obligations of members take effect only for members that have accepted them. More could be said about the WTO decision making process, but for the purposes of this paper the most important point is that there has never been any attempt to use these voting procedures. It is true that in some formal sense those procedures remain, but no state has demonstrated an interest in demanding that voting take place. The organization operates instead by consensus. The most reasonable conclusion is that despite the formal voting rules, WTO decisions are, and as far as anybody can tell will continue to be, the product of consensus; giving every state the ability to prevent a rule change.

Another potential source of concern that is sometimes cited is the risk that an agreement or set of agreements might be subject to an unexpected or novel interpretation. This is primarily a question for the discussion of adjudicative delegation that is developed below, but to the extent the theory arises from a source other than an adjudicator it may nevertheless be a concern. The poster child for this concern is the UN Human Rights Committee. In 1994, that Committee argued that it had the right to evaluate the acceptability of reservations and to declare a reservation not only void but also severable, binding a signatory to the Covenant as if it had never issued such a reservation. Could this represent a delegation to the Human Rights Committee? The answer is clearly “no.”

The simplest reason to conclude that the Committee’s claim should be dismissed is that its assertion, contained in the now-infamous General Comment No. 24, contradicts to rules provided in the Vienna Convention on the Law of Treaties (Vienna Convention). Article 19 of the Vienna Convention provides that a state is not permitted to attach a reservation that “is incompatible with the object and purpose of the treaty.” Article 20 places the primary (if not exclusive) responsibility for assessing incompatibility with State parties, with no mention of a role for international bodies such as the Human Rights Committee. The most preposterous aspect of the interpretation is the notion of severability. Articles 20 and 21 of the Vienna Convention set forth only two potential consequences of reservations and objections to them: either the remainder of the treaty comes into force between the parties in question or the treaty does not come into force at all between those parties. The Legal Adviser for the U.S. State Department accurately described the legal issue as follows:

…the Committee appears to dispense with the established procedures for determining the permissibility of

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39 WTO Agreement, art. X:3. This provision is a little complicated in that after a two-thirds majority approves an amendment that would affect the rights and obligations of members take effect for the members that have accepted them. The Ministerial Conference (a body including all WTO members) has the authority to decide by a three-fourths majority that any such amendment is of such a nature that any member which does not accept it must withdraw from the organization. There is, therefore, a narrow instance in which the decision would be mandatory for continued membership in the organization.
40 Swaine, supra note 13, at 1511.
41 UN Human Rights Committee, General Comment No. 24.
44 Id.; Vienna Convention, Arts. 20-21.
reservations and to divest State Parties of any role in determining the meaning of the Covenant…and of the extent of their treaty obligations…The Committee’s position, while interesting, runs contrary to the Covenant scheme and international law.\textsuperscript{45}

Furthermore, the Human Rights Committee is given no authority that even suggests it is charged with interpretations of this kind. The primary role of the committee is to study the reports of parties to the ICCPR and submit reports and comments about those reports to the parties and the Economic and Social Council.\textsuperscript{46} In addition, the Committee has a limited role in dispute resolution,\textsuperscript{47} but there is no language that can be interpreted to grant it the authority to act as it did in attempting to create a new rule to govern reservations.

The only conclusion that one can reach is that the Committee’s claim is clearly false and that no such interpretation is possible. International law simply does not support the assertion made. It follows that there is no sense in which the Committee has affected the obligations of states and there has been no exercise of delegated authority.

**Delegation of Decision-Making Authority**

We turn now to a different category of agreements and commitments. There are instances in which states have, indeed, delegated authority to outside bodies. It is also the form of delegation that springs to mind most readily when the subject of delegation comes up. The specter of governments yielding control over policy making at the UN or the WTO or elsewhere raises concern for good reason. It turns out, however, that the actual instances of delegation that we have been able to identify (or that have been pointed out to us by others) are all of a highly technical and specific character. They are severely limited in scope and present no serious threat to the interests of states. These examples are ones where the gains from delegation seem large and the costs seem tiny.

It appears to be the case that arms control and environmental agreements are more prone to this sort of delegation than other agreements, presumably because they often involve highly technical regulations.\textsuperscript{48} Typically, a qualified majority is permitted to adopt amendments to the body of the treaty, but those amendments will only bind the parties ratifying them.\textsuperscript{49} Some agreements allow modifications to their technical annexes under a so-called “tacit acceptance procedure,” which does not require ratification by a state party for the amendment to become binding.\textsuperscript{50} However, states are usually given a period within which to object, in which case the party is not bound by the amendment. This

\textsuperscript{45} Letter from Conrad Harper to Francisco José Aguilar-Urbina, Chairman, U.N. Human Rights Committee (Mar. 28-29, 1995).
\textsuperscript{46} ICCPR, art. 40:4.
\textsuperscript{47} ICCPR, arts. 41, 42.
\textsuperscript{48} CRS Report, Treaties and Other International Agreements… at 195.
\textsuperscript{49} Swaine \textit{supra} note \textsuperscript{70} at 1512; see fn 70 for list.
\textsuperscript{50} Id.; see also Curis A. Bradley, \textit{Constitutional Process, Accountability, and Unratified Treaty Amendments} (draft workshop paper).
ability to object prevents a state from being bound to rules that it disagrees with and fails to constitute a delegation that should trouble us (or, under a narrower definition, fails to constitute a delegation at all).

Some small number of agreements go further and do not give individual states the ability to exempt themselves from these technical decisions. The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) encourages consensus, but provides that, as a last resort, a two-thirds majority may vote to adjust the limits on the production and consumption of substances specified in the annexes as depleting atmospheric ozone.\footnote{Montreal Protocol, Art. 2.9(c).} Though this represents a delegation, the provision applies only to adjustments to controls on specifically enumerated and previously addressed chemicals that the parties expected to be eliminated\footnote{Controls over new chemicals apply only to parties that ratify the relevant amendment.} The actual delegation of authority, then, is only with respect to the pace at which certain chemicals are to be eliminated.\footnote{Montreal Protocol, art. 2.9.}

Several international organizations issue non-binding standards that have gained influence under the WTO system. The Codex Alimentarius Commission is an international organization created by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) to develop non-binding food standards and codes of practice in order to protect consumers and ensure fair trade practices in food trade.\footnote{See \url{http://www.codexalimentarius.net/web/index_en.jsp} (last visited December 31, 2006).} Although these standards are not binding on their own, the TBT and SPS Agreements encourage their adoption by Member states by granting presumptive validity to food safety standards set by the Commission.\footnote{Agreement on the Application of Sanitary or Phytosanitary Measures, Apr. 15, 1994, art. 3.2, 3.4, Annex A(3)(a) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1381, reprinted in III COMPILATION OF INTERNATIONAL LAWS 273 (FDLI 1996); Agreement on Technical Barriers to Trade, Apr. 15, 1994, art. 2.5, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1427, reprinted in III COMPILATION OF INTERNATIONAL LAWS 281 (FDLI 1996).} Similarly, the SPS Agreement recognizes the International Office of Epizootics as issuing acceptable international standards, guidelines and recommendations for animal health and zoonoses, and the Secretariat of the International Plant Protection Convention for international standards in plant health.\footnote{SPS Agreement, supra note __, Annex A(3)(b)-(c).}

So here we have a real delegation in that these international entities are able to indirectly influence the rules under the SPS and TBT Agreements. The scope of this ability to influence rules, however, is extraordinarily narrow and, in any event, the rules in question serve only a default rules which allow for deviation under appropriate circumstances.

Another example that is sometimes cited is the International Atomic Energy Agency’s Model Additional Protocol. Article 16(b) provides that a majority of the IAEA Board of Governors may (after consultation with experts) amend the activities, equipment, and material covered by the annexes without ratification by the state parties.\footnote{Additional Protocol, Art. 16(b).} Prior to the adoption of this Protocol, each state had a veto over such decisions. One credible view of this Protocol is that it has only a negligible impact because it does not eliminate the
national security exception contained in the IAEA’s Safeguards Agreement.\textsuperscript{58} This exception gives states the ability to legally avoid any amendments of consequence. Furthermore, the ability to amend is limited to the activities listed in Annex I and the material specified in Annex II. Under Article II, States are required to provide the Agency with a declaration containing a description of the scale of operations for each location engaged in the activities specified in Annex I and “the identity, quantity, location of intended use in the receiving State and date or… expected date of export” of the specified equipment and non-nuclear material listed in Annex II.\textsuperscript{59}

To be clear, if one dismisses the national security exception, we judge this example to represent a non-trivial delegation of authority, in contrast to the other examples discussed up to this point. We nevertheless suggest that there is no cause for alarm. This is an instance in which some delegated rule-making seems highly desirable in the sense that a consensus-based approach to regulating nuclear activity and preventing violations of the Non-Proliferation Treaty has obvious and severe problems. So although there is a real delegation, it is highly cabined and subject to a national security exception.

Similarly, the Organization for the Prohibition of Chemical Weapons (OPCW) is charged with the implementation of the Chemical Weapons Convention (CWC). Under the CWC, each State Party undertakes to destroy chemical weapons it owns or possesses (or any located in any place under its jurisdiction or control).\textsuperscript{60} The OPCW is comprised of three organs: the Conference of States Parties, the Executive Council and the Technical Secretariat. These organs ensure compliance with the CWC by engaging in fact-finding and legal evaluations and reacting to deal with violations.\textsuperscript{61} The most problematic situation, for our purposes, is one in which a State Party is suspected of non-compliance.\textsuperscript{62} In that context State Parties are encouraged to “first make every effort to clarify and resolve” the matter “through exchange of information and consultations among themselves.”\textsuperscript{63} However, a State Party may also request the Technical Secretariat order an on-site challenge inspection.\textsuperscript{64} In such a case, the challenged State would be obligated to permit an inspection team access to the pertinent facilities, or “requested perimeter,” as soon as possible but no later than 108 hours after the team arrived at the “point of entry.”\textsuperscript{65} Inspection teams are always guided by the principle of conducting

\begin{itemize}
\item \textsuperscript{58} Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States, art. 1.
\item \textsuperscript{59} Model Protocol Additional to the Agreement(s) Between States(s) and the Agency for the Application for Safeguards (Corrected), Art. II(a)(iv), II(a)(ix).
\item \textsuperscript{60} Chemical Weapons Convention, art. I.2.
\item \textsuperscript{62} Although the CWC does not specify which obligations are subject to challenge inspections, non-compliance with fundamental obligations implying “a damage for object and purpose of the Convention” would probably justify the use of a challenge inspection. \textit{Id.} at 61-2.
\item \textsuperscript{63} Art. IX.2.
\item \textsuperscript{64} Art. IX.8.
\item \textsuperscript{65} Verification Annex, Part X.C.38-39.
\end{itemize}
inspections “in the least intrusive manner possible, consistent with the effective and
timely accomplishment of its mission.”

The inspection team will render a report of its findings, and the Executive Council will
determine whether the facts indicate a situation of non-compliance. In a case of non-
compliance, the Council will bring the matter to the attention of the Conference of States
Parties, which is ultimately responsible for deciding the measure of redress. The
Conference may decide to restrict or suspend the offending State Party’s rights and
privileges under the CWC until it conforms with its obligations. In cases where serious
damage to the object and the purpose of the CWC may result, the Conference may
recommend collective measures “in conformity with international law” or, in cases of
particular gravity, bring the issue to the attention of the UN General Assembly and
Security Council.

Although delegation to the OPCW is real, the constraints on sovereignty under the CWC
regime are “not without limit and are, indeed, relative.” First and foremost, no State
party has asked yet for an intervention of the OPCW in obtaining a clarification from
another State Party, and no State Party has requested a challenge inspection. Second,
there are two types of authority granted. The first is a form of quasi-adjudicative
authority in that the Conference of the Parties ultimately can determine what to do about
non-compliance. This category of delegation is addressed in the next section of the
paper. The other potential delegation is the right to carry out an inspection. That is, the
parties to the Convention have delegated the decision about whether an inspection is to
take place. This too is a real delegation, but it is very limited. The only risk generated by
this aspect of the delegation is the risk of an inspection to promote compliance with the
agreed upon rules of the convention. Finally, the CWC contains a withdrawal clause that
recognizes the security interests at stake for the States Parties. If and when a State
“decides that extraordinary events, related to the subject-matter of [the] Convention, have
jeopardized the supreme interests of its country,” it may withdraw from the regime,
although it is required to provide notice including a statement of such events.

Another example of true delegation – perhaps the most important – is the United Nation’s
Security Council. It is clear that the Security Council can issue decisions that are legally
binding on Members of the United Nations and represents a delegation of consequence
by all UN members other than the five veto-wielding permanent members. The veto
rights of the permanent members make it difficult for the Security Council to act and,

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66 Id. Part X.C.45.
67 Nishimura, supra note ___ at 62.
68 Art. XII.2.
69 Art. XII.3-4.
70 Id. at 70.
71 Id. (as of May 2003).
72 Article XVI.2. Although States Parties are required to provide some statement, “in reality, almost any
statement made by the withdrawing State will be accepted as a valid notice of withdrawal, for the clause
gives very little clue, if any, as to the criterion for validity of this notice.” Nishimura, supra note ___ at 72.
73 See UN Charter, art. 25. TO cite just one example, Security Council Resolution 1373, which compels all
nations – not just SC members – to take specific actions against financing terrorist activities.
therefore, constrain the extent of the delegation, but it remains true that with the exception of the permanent members there has been a real and important delegation. As such, it represents one of the rare exceptions to our general claim that delegations are rare and narrowly cabined. This exception would trouble us more if it seemed like it might signal a widespread increase in delegation by states to international bodies. It of course does not. The Security Council came about under unique circumstances and the sixty years since its creation have offered no evidence that it represents the start of a trend toward greater delegation.

**Delegations to International Courts and Tribunals**

The focus of this paper has been delegations of rule-making authority to international entities. Rather than delegate explicit decision-making power to such entities, states at times delegate some form of adjudicative power to tribunals. To the extent that international tribunals generate legally binding interpretations of existing rules of international law, this represents a clear delegation. Indeed, it is really only in the world of international tribunals that we perceive meaningful international delegation. Within the context of a few of these tribunals we could understand concerns about whether they entail excessive sovereignty costs.

Even here, however, there are considerable protections in place to limit the effective power of tribunals. A careful review of these tribunals, their case loads, and their charges reveals that delegation to quasi-judicial bodies has been modest.

Although there has been some discussion of the “proliferation” of international courts and tribunals in recent years, often referenced as an obvious fact, through a combination of limits on jurisdiction, cabined discretion, and disciplinary actions such as non-compliance and withdrawal, states have placed tight limits on the authority of these institutions. The typical charge to international tribunals (where one exists at all) is simply to resolve disputes between states. This mandate discourages ambitious rulings, rule setting, and policy-making from the bench. Moreover, tribunals do not issue rules that generate formal legal precedent; instead, the tribunal’s decision is limited to the parties in the

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74 One of us has written about precisely such sovereignty costs at the WTO, though without concluding that they exceed the associated benefits. Andrew T. Guzman, *Global Governance and the WTO*, 45 Harv. Int'l L.J. 303 (2004).

particular case.\textsuperscript{76} Perhaps most importantly, existing tribunals are consistently restrained and cautious. They are well aware that “judicial activism” is likely to lead to non-compliance, withdrawal, or both. Professor Alter, for example, has commented that most of the rulings are exactly what states hoped for when they delegated authority to ICs.”\textsuperscript{77}

In addition, of course, such delegation – when it occurs – is not done without reason. Even the most skeptical commentators on international tribunals recognize that important gains can be achieved by states as a result.\textsuperscript{78} For states involved in treaty disputes, a tribunal can help to resolve conflicts by discovering/revealing information about the meaning of the agreement and the nature of the allegedly infringing action.\textsuperscript{79} For states in other sorts of disputes, tribunals can discover facts, develop new rules or apply existing rules to new unanticipated circumstances.\textsuperscript{80} At the absolute minimum credible tribunals allow states to enter into agreements more readily and, therefore, to resolve cooperative problems more effectively. Just as private parties gain from the existence of a court system ready to enforce their contracts, states benefit from the existence of competent tribunals. The real mystery is not why we observe delegation by states to these tribunals, but rather why it is done so rarely and so cautiously.

The important constraints placed on international tribunals are best illustrated by examining some of the most often-cited examples of delegations of adjudicatory authority.

\textit{The International Court of Justice}

As “the principal judicial organ of the United Nations,”\textsuperscript{81} the International Court of Justice (ICJ) has a dual role “to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.”\textsuperscript{82} Only the former is relevant to a discussion of international delegations.

An examination of the Statute of the Court demonstrates that the jurisdiction of the Court and its decision-making process are constrained in a number of significant ways. Most importantly, the Court is only competent to entertain disputes between States that have accepted its jurisdiction. A State may accept jurisdiction in one of three ways. First, after a dispute arises, the disputing States may make a special agreement between them to

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\textsuperscript{76} In public international law, past decisions may be persuasive, but not binding. See IAN BROWNlie, \textit{PRINCIPLES OF PUBLIC INTERNATIONAL LAW} 1-29 (6th ed. 2003).


\textsuperscript{79} Id.

\textsuperscript{80} Id.

\textsuperscript{81} Id.

\textsuperscript{82} Id.
submit the dispute to the Court. However, as discussed above, dispute resolution agreements made after a dispute arises do not implicate the sorts of delegation concerns at issue here. As Eric Posner points out, the ICJ in such special agreement cases is “just a glorified arbitration panel.”

Second, States may include a jurisdictional clause in a treaty referring a dispute over its interpretation or application to the Court. Although the inclusion of such a provision would constitute an international delegation, the use of such provisions is in serious decline. Strikingly, the U.S. has not used this type of clause since the early 1970s. Moreover, as discussed at greater length below, when faced with an adverse judgment or the threat of one, states may withdraw from the jurisdictional clause, just as the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations (VCCR) after an unfavorable ruling in the Avena case.

Third, a State may make a declaration accepting the compulsory jurisdiction of the Court over certain legal disputes with other States that have made similar declarations. The covered legal disputes may include: the interpretation of a treaty; any question of international law; “the existence of any fact which, if established, would constitute a breach of an international obligation”; or the nature of extent of the reparation to be made for the breach of an international obligation.

Of the three types of ICJ jurisdiction, compulsory jurisdiction would seem the most alarming from a delegation standpoint. At first glance, filing a declaration of compulsory jurisdiction would seem to grant the ICJ general jurisdiction over a wide variety of possible inter-state disputes. However, such fears are clearly over-blown. First of all, out of 192 current UN members, only 67 states or 35 percent presently have declarations in force. This percentage appears to be in continuous decline; in 1950, 60 percent of UN members were subject to compulsory jurisdiction. Today, no permanent member of the Security Council remains subject to compulsory jurisdiction except the United Kingdom.

Second, the number of states subject to compulsory jurisdiction belies the number of cases successfully filed under the optional protocol. From 1961-1987, the Court only relied on the optional protocol twice as the basis for its jurisdiction, in the Nuclear Tests

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83 ICJ Statute of the Court, Art. 36(1).
85 Art. 36(1).
86 Posner, supra note __ at 9.
87 Id.
88 Art. 36(2).
89 Id.
92 Posner supra note __ at 8.
93 Posner, supra note __ at 3.
Case and Military and Paramilitary Activities in and against Nicaragua. In both of these cases, the respondents, France and the United States respectively, refused to participate in the proceedings. In the Nuclear Tests Case, France refused to participate from the start; the United States withdrew after participating in the initial stages of the case with Nicaragua.

The negligible usage of the optional protocol as a basis for ICJ jurisdiction may be due, at least in part, to states’ use of reservations to severely limit the scope of their consent to compulsory jurisdiction. States may restrict the scope of such jurisdiction by imposing conditions of reciprocity on such declarations, excluding certain categories of dispute, or limiting the declaration for a certain time. For example, Honduras’ reservation precludes compulsory jurisdiction over disputes relating to armed conflicts, territorial questions, and airspace, three of the primary types of cases historically adjudicated by the ICJ.

Finally, especially in recent years, states have disciplined the jurisdictional arm of the World Court through non-compliance and/or outright withdrawal. Although he admits that compliance is difficult to quantify, according to Posner’s calculations, the compliance rate was much higher in the ICJ’s first twenty years than it has been in its last twenty years. Certainly, the Nicaragua case, the Iran Hostages case, and the VCCR cases stand out as high-profile examples of non-compliance. In addition, when faced with an adverse decision by the ICJ or the threat of some future adverse decision, some states have elected to simply withdraw from its jurisdiction. Since its founding, 13 states have withdrawn their submission of jurisdiction to the ICJ or allowed their declarations to expire. The United States has withdrawn from ICJ jurisdiction twice: it withdrew consent for compulsory jurisdiction during the Nicaragua case discussed above and, a year after the ICJ found against the United States in the Avena case, the United States announced its withdrawal from the Optional Protocol to the VCCR. Similarly, in March 2002, Australia withdrew its consent to ICJ jurisdiction over maritime disputes in anticipation of East Timor gaining statehood and bringing a boundary claim against Australia in the World Court.

97 Id.
98 Art. 36(3); see also http://www.icj-cij.org/icjwww/igeneralinformation/inotice.pdf.
100 Posner, supra note __ at 3. As of 2004, the most common types of case adjudicated were border disputes (33 times); use of force (22 times); aerial incident (14 times); and property (14 times).
101 Id. at 11.
102 Eight states withdrew their declarations after becoming respondents in proceedings before the Court. INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 21 (5th ed. 2004). The following states allowed their declarations to expire or were withdrawn or terminated: Bolivia, Brazil, China, Colombia, El Salvador, France, Guatemala, Iran, Israel, South Africa, Thailand, Turkey, and the United States. I.C.J. Yearbook 2002-2003 No. 57 International Court of Justice127 fn.1 (2003).
103 At the same time, Australia withdrew consent to ITLOS jurisdiction.
Thus for all the fanfare surrounding the ICJ, in 60 years of operations, the Court has only delivered 92 judgments in contentious cases. Of these judgments, only a handful have been issued in compulsory jurisdiction cases and even less have been met with compliance. In light of this record, the notion that the ICJ enjoys an effective grant of general authority seems far-fetched.

The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea (ITLOS) is the judicial body established by the United Nations Convention on the Law of the Sea (UNCLOS). Under Part XI of the UNCLOS, States are obligated to settle disputes concerning the interpretation or application of the Convention by peaceful means, and are free to choose any peaceful means. If the parties to the dispute have agreed to submit such disputes to a regional body for resolution, that choice will take precedence unless the parties otherwise agree. Only if and when the parties fail to reach a settlement by other means do the dispute resolution mechanisms envisioned under the UNCLOS become relevant. At that point, the parties may select one of three possible mechanisms: ITLOS, the ICJ, or an ad-hoc arbitral tribunal. Under Article 287, State Parties may choose a preferred mechanism in advance. If no such declaration is made or if the two parties to the dispute have not elected the same mechanism, the ad-hoc arbitral tribunal is the default unless the parties otherwise agree.

As of October 2006, there are 150 States Parties to the UNCLOS but only 36 states have chosen a dispute resolution mechanism under Article 287. Of these 36 states, only 10 have elected the ITLOS as their first choice dispute resolution mechanism; an additional 13 have chosen ITLOS as a tie for their first choices. Nevertheless, that means that only 23 out of 150 State Parties or fifteen percent have elected to use the ITLOS.

What is more, in the more than ten years since the UNCLOS entered into force, the Tribunal has heard only thirteen claims. Of these, only two were brought on the merits and the Tribunal issued a judgment in only one, M/V Saiga (No.2). To date, the jurisdiction of ITLOS has been almost exclusively limited to “incidental proceedings,”

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106 UNCLOS, Art. 279.
107 UNCLOS, Art. 280.
108 UNCLOS, Art. 282.
109 UNCLOS, Art. 287(3), (5). Arbitrations are conducted in accordance with Annex VII.
111 Id.
112 These countries include: Argentina, Australia, Austria, Belgium, Canada, Cape Verde, Chile, Croatia, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Mexico, Oman, Portugal, Spain, Tunisia, Tanzania, and Uruguay. See id.
including claims for provisional measures and for the prompt release of arrested vessels.\textsuperscript{115} All of the above has led some to question whether the cost of maintaining the Tribunal is justified.\textsuperscript{116} Meanwhile, Tribunal presidents and the U.N General Assembly seem slightly desperate as they try to encourage more states to use Article 287.\textsuperscript{117}

In only one category of disputes must all State Parties use the same dispute settlement mechanism. All State Parties are obligated to use the Seabed Disputes Chamber of the ITLOS to resolve disputes related to activities in the International Seabed Area. However, the Seabed Disputes Chamber’s jurisdiction is explicitly limited by Article 189 of the UNCLOS. Under that provision, the Seabed Disputes Chamber has no jurisdiction with regard to the exercise by the International Seabed Authority (“the Authority”) of its discretionary powers.\textsuperscript{118} It may not pronounce itself on the question of whether any rule, regulations and procedures of the Authority are in conformity with the UNCLOS, nor declare invalid any such rules, regulations and procedures.\textsuperscript{119} Its jurisdiction is “confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention.”\textsuperscript{120} In this manner, the Seabed Disputes Chamber is explicitly limited from making policy; its one and only function is to resolve isolated disputes.

Ultimately, therefore, although States Parties to the UNCLOS are obligated to resolve their disputes under the UNCLOS by some peaceful means, that delegation is tempered by the freedom of choice that States have to elect a dispute resolution mechanism. As non-permanent bodies, ad-hoc arbitral tribunals pose little danger to state sovereignty, and very few states have elected to delegate authority to the ITLOS, which has only issued two judgments in over ten years and may be on its way to oblivion.

\textit{The WTO Appellate Body}

\textsuperscript{115} Id.
\textsuperscript{117} Seymour, supra note 12.
\textsuperscript{118} UNCLOS, Art. 189.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
In 1995, the World Trade Organization (WTO) Appellate Body (AB) was established under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The AB is a permanent body whose seven members serve four year terms. Its mandate is to hear appeals from panel cases. AB decisions are, in practical terms, binding. Technically, the Dispute Settlement Body (DSB) must adopt an AB report in order for it to become binding on the parties. However, AB reports will be adopted unless there is consensus to block its adoption. Consensus is unlikely, and has never happened, because the prevailing party can always be counted on to vote in favor of adopting the report.

The practical inability of Member States to block the adoption of an AB decision was an important constitutional shift from the General Agreement on Tariffs and Trade (GATT) system. GATT panels were ad-hoc, and decisions were only adopted if there was consensus for adoption. The shift to a permanent judicial body whose decisions become binding automatically unless all Members agree to the contrary has fed the growing unease over the AB’s potential power to engage in activist, judicial lawmaking.

When compared to the international tribunals discussed so far, the AB is quite influential. In contrast to the modest number of judgments produced by the ICJ and ITLOS, the AB has issued 78 reports in its 11 year history. Arguably, its constitutional space is also less restrained than that of the ICJ and ITLOS. Under DSU Article 3.2, the AB is charged with clarifying the existing provisions of the covered WTO agreements “in accordance with customary rules of interpretation of public international law.” The DSU goes on to caution that the AB “cannot add to or diminish the rights and obligations provided in covered agreements.” In other words, the AB cannot engage in rulemaking. And while there is a spectrum of public international law doctrines regarding the interpretation of rules, ranging from restrained to highly deferential, the AB has not shown itself to be an especially activist body.

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122 DSU, Art. 17.
124 Steinberg, supra note at 263.
127 DSU, Art. 2.3.
128 Id.
129 Indeed, the AB has, on several occasions, embraced the doctrine of judicial economy, thereby limiting the scope of judicial lawmaking. Goldstein & Steinberg, supra note at 26
It is also worth noting that despite the formal power of the AB, it operates within a political context. Its discretion is cabined by a variety of mechanisms, including the selection of AB members; the threat to rewrite the DSU; criticism of decisions by member states; defiance and non-compliance; and unilateral exit. Thus even though the AB has been granted significant authority and discretion, the political realities at the WTO have kept it in check and prevented the WTO from fundamentally altering the rights and obligations members.

Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACHR) was created under the American Convention on Human Rights, which was adopted in 1969 but was not ratified by the requisite number of members of the Organization of American States (OAS) for over ten years, so did not come into force until 1978. The IACHR has issued 155 “decisions and judgments,” however this count includes multiple decisions in each case (often a decision regarding preliminary objections, sometimes another on compensatory damages).

Unlike the European Court of Human Rights (ECHR) discussed below, OAS Members do not implicitly consent to the jurisdiction of the Court by ratifying the American Convention. Instead, each nation must make a separate declaration to the Secretary General of the OAS giving consent “either unconditionally or on condition of reciprocity, for a specific period or for specific cases.” To date 21 countries have submitted to the contentious jurisdiction of the Court. The United States, Canada, and most English-speaking Caribbean states have elected not to join either the Convention or the Court.

Those states that have submitted to the Court’s jurisdiction have made a delegation: decisions by the Court are binding. This delegation is tempered, however, by the lack of direct individual access to the Court; individuals must file complaints with the Inter-American Commission on Human Rights which may decide, in turn, to submit the case to the Court on their behalf. Such indirect access slows the process considerably, undoubtedly increasing the cost to applicants.

The IACHR is also severely under-funded and understaffed. The Court’s 2006 budget was a paltry $1,391,300.00. Only seven judges work for the Court, and these judges only sit part-time.

130 Steinberg, supra note ___ 260.
131 Steinberg, supra note ___ 275 (stating that the political constraint on the AB “should dampen concerns that judicial lawmaking at the WTO has become so expansive as to undermine the sovereignty of powerful states, create a serious democratic deficit for their citizens, or catalyze catastrophic withdrawal of their political support for the WTO.”).
132 http://www.corteidh.or.cr/casos.cfm.
134 These countries are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=2.
Finally, the IACHR has had trouble securing compliance with its decisions. As Posner and Yoo observe, the IACH often orders two types of remedies in a case: 1) the trial and punishment of offenders along with changes in domestic law; and 2) monetary compensation for the victim/s. According to their analysis, “while it appears states routinely ignore the requirement that they punish offenders or change their laws, they have often paid financial compensation.” In fact, Posner and Yoo found only one case in the history of the Court in which a nation has fully complied with an IACHR decision.

European Court of Human Rights

Perhaps the most effective way to demonstrate the modest nature of the delegations states make to other international courts and tribunals is to look at an example of what states do when they truly want to delegate authority to a supranational judicial body.

The European Court of Human Rights (ECHR) adjudicates cases brought by Contracting States or individuals alleging a violation of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights. Pursuant to Article 46 of the Convention, Contracting States “undertake to abide by the final judgment of the Court in any case to which they are parties.”

In contrast to the IACHR, the number of judges on the ECHR increases equal to the number of member states to the Convention, currently forty-five. The job is full-time. The current annual budget of the ECHR is 44,189,000 euros, or $55,483,048.53.

Probably the most important difference between the ECHR and other regional human rights tribunals is the fact that, after domestic remedies have been exhausted, any state party, individual, group, or NGO may bring a suit alleging a human rights violation against one of the member states. Originally, a member state could elect not to submit to ECHR jurisdiction in cases brought by non-states, but, in 1998, jurisdiction was made compulsory for all complaints.

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138 Posnet & Yoo, supra note ___ at 41.
139 Id. at 43. Posner and Yoo note that even in this case, the Honduran Disappeared Persons case, Honduras did not pay the award until eight years after the Court rendered its judgment.
140 European Convention, Art. 19.
141 Id., Art. 46(1).
143 Id.
144 http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Budget/Budget/.
145 Converted on October 24, 2006.
146 European Convention, arts. 34, 35(1).
147 Art. 34.
The number of applications filed with the ECHR annually is entirely unmatched. In 2005, a staggering 45,500 applications were filed.\footnote{148 http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/InformationdocumentontheCourt_September2006_.pdf.} In the same year, the ECHR issued a whopping 958 final judgments and disposed of an additional 27,600 applications.\footnote{149 Id.} Although Posner and Yoo find it difficult to corroborate the assertion,\footnote{150 Posner and Yoo, \textit{supra} note ___ at 65-66.} the ECHR has a reputation for enjoying a high level of compliance.\footnote{151 http://www.pict-pcti.org/courts/ECHR.html (“Unlike in the cases of many other fora, compliance with the ECHR's judgments is common, exerting a deep influence on the laws and social realities of member States.”).}

Clearly, the ECHR is a different breed of international tribunal. Here we see true delegation, the type that contemplates and receives the surrender of certain aspects of state sovereignty. The fact that this kind of delegation only occurs here, in the context of a highly integrated set of states, may suggest some conditions required for real delegation – conditions that exist almost nowhere else.

**Conclusion**

The international community faces a range of important and challenging problems. Some of the most serious – war, poverty, environmental degradation, nuclear proliferation, disease – pose threats that are global in magnitude. Solutions to these problems will require collaboration among states and likely various forms of delegation. This is reason enough to study delegation and to learn why and when states are willing to give up authority to some other body.

This article has the modest goal of reminding us that the puzzling thing about the delegation we observe in the world today is that there is so little of it. States have consistently refrained from handing over significant authority to international bodies. Almost without exception an examination of specific examples of delegation reveals that states have retained considerable control. This is done in myriad ways. To begin with the most powerful form of authority – the authority to legislate – is almost never delegated by states. Where some form of decision making authority is granted it is typically an exceedingly narrow authority over highly technical matters. The most significant forms of delegation in place today tend to be adjudicatory. The WTO AB, for example, clearly has the authority to interpret the WTO Agreements, and this power to interpret gives it a non-trivial amount of discretion and influence. But we also observe several aspects of this delegation that reduce the extent to which states have surrendered authority. First, the AB is limited in its jurisdiction to the WTO Agreements. These agreements are certainly not narrow technical details, but the constraint is nevertheless significant. Secondly, the AB is politically constrained. It has repeatedly demonstrated its reluctance to engage in creative interpretations and prefers to try to stick close to the text of the agreements. This mode of interpretation is encouraged by the rules governing
disputes. Finally, the AB is limited in its ability to generate compliance with its rulings. It can authorize the imposition of trade sanctions, but only by the complaining state, and only up to an amount equal to the harm caused by the legal violation. Member states, then, have the option to ignore such rulings when they are too burdensome.

So the delegation at the WTO is real, and is arguably the high-water mark of international delegation. If this is the greatest delegation we can identify, there is a real mystery about why states have been so protective of their sovereignty on the face of severe international problems that cry out for collective decisions and often for decision making rules that do not demand unanimity before action is taken.

With respect to debates about delegation in both academic and policy circles, the lesson from this essay is that when claims are made about international delegation and how it is or will be a threat to sovereignty, one should ask for examples. Concerns about international delegation are understandable. The specter of international bureaucrats making policy that we will all have to live with while fundamental aspects of sovereignty are trampled is frightening. Fortunately it is, in the end, a myth.

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152 “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” WTO Dispute Settlement Understanding, art. 3.2.