

# THE CONCEPT OF INTERNATIONAL DELEGATION

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## I

### INTRODUCTION

Most nations today participate in a dense network of international cooperation that requires them to grant authority to international actors. At varying levels this means that the individual state surrenders some autonomy to international bodies or other states by authorizing them to participate in decisionmaking processes and to take actions that affect the state. While some international agreements involve only commitments, in many cases they also include provisions that delegate some authority to a body to make decisions and take actions. The continued growth in international organizations and various standing bodies associated with international agreements suggests that states increasingly find international delegation useful in addressing the challenges associated with their growing interdependence.

Although delegation is often present in international cooperation, there has been little systematic thinking about how delegation differs from other cooperation and how it varies across cooperative ventures. There is little analysis, for example, of what constitutes international delegation and what features of such delegation may be important for understanding its causes, consequences, and legal validity. A better conceptualization of the institutional features of delegation may be useful for understanding how states weigh the benefits and costs in making decisions concerning delegation. It may also be important in addressing the increasing concern with the legitimacy and accountability of global governance institutions.<sup>1</sup>

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1. See generally Daniel Bodanksy, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596 (1999); Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AM. POL. SCI. REV. 29 (2005); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT'L AFF. 405 (2006).

This article defines and clarifies the concept of international delegation from both a legal and a social-science perspective. In this respect, its approach is similar to that of *The Concept of Legalization*, by Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal.<sup>2</sup> Although these authors properly treat international delegation as one component of legalization in international relations, delegation is worth considering separately because it raises unique issues. The factors that affect how one might classify international delegations may also differ from legalization more generally. Indeed, some factors may even weigh in opposite directions—for example, precision indicates a high level of legalization, but it may indicate a low level of delegation.

The article begins by presenting a definition of international delegation as a grant of authority by two or more states to an international body to make decisions or take actions. Next, it describes the types of international bodies to which states may grant authority. Much of the work on international delegation to date has focused on grants of authority to bureaucracies and courts. While we of course include these grants of authority in our analysis, our focus is broader, in that it also includes grants of authority to collective bodies and subgroups of states.

The article then identifies eight types of authority that states may grant: legislative, adjudicative, regulatory, monitoring and enforcement, agenda-setting, research and advice, policy implementation, and redelegation. International bodies will often exercise more than one type of authority, and there will sometimes be uncertainties about whether a particular type of authority falls into a particular category. Distinguishing between the different types of authority is important, however, because many of the existing arguments and theories about delegation may not apply equally across the different types of authority delegated. Failure to appreciate the variety in the types of authority delegated may therefore lead to misleading generalizations.

Next, the article discusses how the extent of an international delegation can vary depending on its legal effect and the degree of independence of the international body. These factors have not yet been systematically explored, although they modify the nature of delegation in significant ways. After developing the typology, the article considers some of the benefits and costs of international delegation in light of this typology. The article concludes with a discussion of some of the questions raised by the typology and its implications for further research.

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2. See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

## II

## A DEFINITION OF INTERNATIONAL DELEGATION

For purposes of the typology developed here, we define international delegation as *a grant of authority by two or more states to an international body to make decisions or take actions*. Several aspects of this definition warrant clarification.

## A. A Grant of Authority

The first part of this definition requires that there be a “grant of authority . . . to make decisions or take actions.” Grants of authority for international delegations are typically contained in the agreement that establishes the international body. The United Nations (UN) Charter, for example, contains various grants of authority to the main UN organs. If an international body acts outside of its grants of authority, it can be said to be acting *ultra vires*. This focus on a “grant of authority” is consistent with definitions of delegation in the political-science literature. Hawkins et al., for example, 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.”<sup>3</sup> Similarly, in *The Concept of Legalization*, the authors define delegation to mean “that third parties have been *granted authority* to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.”<sup>4</sup>

A grant of authority is what distinguishes a delegation from other exercises of authority. A nongovernmental organization, for example, may take actions that are similar to those taken by an international organization created by states, but unless the actions of the nongovernmental organization stem from a grant of authority from states, the actions do not involve an international delegation.

The existence of such a grant of authority is also what distinguishes delegations from mere commitments. Most of the terms of international agreements concern commitments, through which states promise to behave in certain ways and to subject themselves to “scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well.”<sup>5</sup> To take just one example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families spends its first seventy-one articles detailing the nature of these

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3. Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney, *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS 3, 7 (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006) (emphasis added).

4. Abbott et al., *supra* note 2, at 401 (emphasis added).

5. *Id.*

commitments.<sup>6</sup> The following articles of the convention, however, establish a committee whose authority states can accept at varying levels.<sup>7</sup> Thus, whereas commitments and delegations are distinct, delegations often occur in connection with international commitments, including commitments to comply with the decisions or actions of the international body.

Our definition of international delegation does not require that the grant of authority give the international body powers to make decisions or take actions that are formally binding on states under international law.<sup>8</sup> Instead, as with issue area, type of authority, and independence of the international body, the existence of legally binding authority is treated here as a variable that can affect the degree of delegation.<sup>9</sup> Under this approach, an international delegation will exist even when states have granted an international body the authority to issue only nonbinding resolutions, policy proposals, or advisory opinions.

Nevertheless, under this definition some international cooperation will not involve delegations. For example, despite their potential importance, the annual “Group of Seven” or “Group of Eight” summits involve at most a minimal delegation. Leaders from the member countries meet annually to discuss and potentially reach agreements on economic and political issues,<sup>10</sup> but they have not granted any authority to the collective in advance. Similarly, multilateral treaty conferences, at which representatives of states meet to draft and negotiate proposed treaties, do not involve international delegations because there has been no grant of authority to make decisions or take actions on behalf of the states parties. Although treaty conferences may result in the promulgation of a proposed treaty, such a proposal is made only on behalf of the states affirmatively endorsing the treaty, not the collective of states attending the treaty conference.<sup>11</sup>

Finally, unlike definitions of international delegation that focus on a principal-agent model,<sup>12</sup> our definition does not specifically require that the

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6. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, arts. 1–71, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/158 (Dec. 18, 1990).

7. *Id.* at arts. 72–78.

8. Cf. Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494 & n.3 (2004) (defining delegation to international institutions as “vesting them with the authority to develop binding rules,” and noting that “the authority so vested must be capable of some kind of legal effect on the international or domestic plane: something more than mere pronouncements or hortatory acts”).

9. See also Abbott et al., *supra* note 2, at 415–16 (treating the binding nature of the international body’s actions or decisions as a variable).

10. See G8 Information Centre, What is the G8?, [http://www.g7.utoronto.ca/what\\_is\\_g8.html](http://www.g7.utoronto.ca/what_is_g8.html) (last visited Aug. 26, 2007).

11. By contrast, the treaty-drafting work of the United Nation’s International Law Commission can be seen as involving an international delegation. In promulgating the proposed treaties, the Commission is exercising the General Assembly’s authority (which the Assembly redelegate[d] to the Commission) to “encourag[e] the progressive development of international law and its codification.” U.N. Charter art. 13, para. 1(a); International Law Commission, <http://www.un.org/law/ilc/> (last visited Aug. 31, 2007).

12. See HAWKINS ET AL., *supra* note 3.

grant of authority be conditional. Although international delegations typically are conditional,<sup>13</sup> the limits imposed on the exercise of delegated authority and the circumstances under which delegated authority can be revoked will vary. As a result, conditionality is treated here as part of permanence of commitment, a variable that relates to the legal effect of the delegation.

## B. By Two or More States

This article focuses on delegations by two or more states. The definition of international delegation therefore does not cover delegations made by only one state—for example, a delegation by a state to a private contractor. Although such single-state delegations will sometimes be international in the territorial sense, they do not implicate the same interstate cooperation issues implicated by delegations that involve two or more states.

The delegation from states to an international body is typically part of a longer “chain of delegation,”<sup>14</sup> as illustrated in Figure 1. There is also, generally, a prior domestic link within each state, because international delegation is itself the product of delegation within the state, for example, from citizens to a legislative body, or from a legislative body to an executive body. The analysis here does not focus on such domestic delegation, although it recognizes that international delegation raises interesting domestic issues both legally and politically.

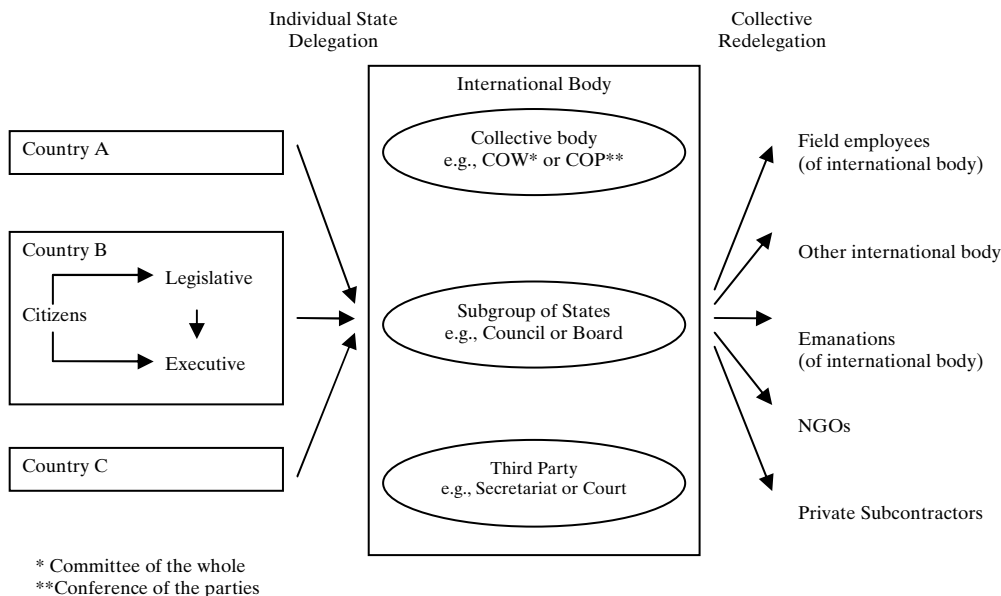
Our definition of international delegation does include redelegation, however, because it also emanates from states, albeit indirectly. After states delegate to international bodies, these bodies often have the power to redelegate that authority to other international bodies or to other actors such as nongovernmental organizations. For example, the UN Secretary-General may delegate authority by appointing working groups or councils to assist his or her work on issues ranging from Internet governance to the protection of civilians in armed conflict. Redelegation is therefore a type of authority that states may grant, and the exercise of this redelegation authority is itself an international delegation.

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13. For a discussion of the circumstances under which states are allowed to withdraw from treaties, see generally Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

14. For discussion of chains of delegation, see, for example, Torbjörn Bergman, Wolfgang C. Müller & Kaare Strøm, *Parliamentary Democracy and the Chain of Delegation*, 37 EUR. J. POL. RES. 255, 257–59 (2000). See also Daniel L. Nielson & Michael J. Tierney, *Delegation to International Organizations: Agency Theory and World Bank Environmental Reform*, 57 INT’L ORG. 241 (2003).

Figure 1: Delegation Chain



Although the focus here is on delegation by states, the definition includes grants of authority that would not otherwise be exercised by a state.<sup>15</sup> States often engage in international delegation to address collective-action problems that they cannot address individually. Some delegations, therefore, are not of preexisting state authority, but of authority created among states. An international adjudicative institution, for example, may exercise dispute-resolution authority that could not be exercised by any one state. Nevertheless, the exercise of such authority stems from grants of authority by individual states.

### C. To an International Body

Our definition uses the term “international body” to broadly signify some entity to which states have granted authority to make decisions or take actions. This includes any entity created by states, including a typical bureaucracy, temporary commission, council of states, board of directors, or even conference of parties. The concept of “international body” is therefore broader than that of “international organization,” because international bodies need not have “a concrete and stable organizational structure and a supportive administrative

15. For an example of an approach that excludes such authority, see DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* 28–32 (2005) (focusing on the conferral of sovereign state powers on international organizations). *See also* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 72 (2000) (“An international delegation is the transfer of constitutionally-assigned federal powers . . . to an international organization.”).

apparatus.”<sup>16</sup> Bodies may have these attributes, but they may also exist only temporarily, such as a task-specific commission or an arbitral tribunal. Multiple international bodies may also be nested within any given international organization. For example, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention) establishes the Organization for the Prohibition of Chemical Weapons, which contains a Conference of Parties, a Technical Secretariat, and an Executive Council.<sup>17</sup>

The definition of international delegation here includes grants of authority by states to a collective or subgroup of states, or what some scholars have referred to as a “pooling of sovereignty.”<sup>18</sup> Although our inclusion of pooling arrangements may contrast with some delegation literature, which defines delegation as a grant of authority to “an agent,”<sup>19</sup> it is in line with other delegation literature, including that which speaks of external and internal delegation by Congress, the latter being delegation to standing committees and subcommittees within each of the legislative chambers.<sup>20</sup> Barbara Koremenos also speaks of internal and external delegation and notes, for example, that states sometimes delegate dispute-resolution authority to a subgroup of member states.<sup>21</sup>

The congressional committee analogy may be particularly apt with respect to international delegations. As one commentator notes,

[a]rguably, delegation to congressional committees, composed of a subset of the membership, more closely matches circumstances at the international level than does delegation to large, autonomous bureaucracies, which have fewer analogs among

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16. Kenneth W. Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 J. CONFLICT RES. 3, 4 (1998).

17. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction art. VIII, ¶ B(21)(k), Jan. 13, 1993, 32 I.L.M. 800, 1974 U.N.T.S. 45, available at [http://www.opcw.org/html/db/cwc/eng/cwc\\_frameset.html](http://www.opcw.org/html/db/cwc/eng/cwc_frameset.html) (last visited Nov. 26, 2007) [hereinafter Chemical Weapons Convention].

18. European Union (EU) scholars in particular have labeled delegation to collective bodies as “pooling of sovereignty” rather than delegation, because these delegations do not raise the same principal-agent issues raised by delegations to international bureaucracies. See, e.g., Shirley Williams, *Sovereignty and Accountability in the European Community*, 61 POL. Q. 299, 302 (1990); see also MARK A. POLLACK, *THE ENGINES OF EUROPEAN INTEGRATION: DELEGATION, AGENCY, AND AGENDA SETTING IN THE EU* (2003) (focusing on EU institutions that are separate from the member states and not on the European Council or the Council of Ministers).

19. Hawkins et al., for example, define international delegation as “a conditional grant of authority from a *principal* to an *agent* that empowers the latter to act on behalf of the former.” HAWKINS ET AL., *supra* note 3, at 7. In the same volume, Lisa Martin notes, “In the case of the IMF, I simplify by assuming that the EB [Executive Board], which directly represents member states, is the principal, and that the management and staff (treated as a unitary actor) is the agent.” Lisa Martin, *Distribution, Information, and Delegation to International Organizations: The Case of IMF Conditionality*, in HAWKINS ET AL., *supra* note 3, at 140, 142.

20. D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS* 1–21 (1991).

21. Barbara Koremenos, *Bringing More ‘Precision’ to the Three Dimensions of Legalization* (2005) (unpublished manuscript, on file with author).

international institutions. Similar to these committees, [international organizations] are composed of a subset of states in the international system.<sup>22</sup>

Following this logic, states are considered here to have granted authority to a council or board that may be part of the international body but composed only of a subgroup of member states. This holds even for states that sit on a board or council, since they are still granting the board or council authority to make decisions or take actions. An example is when states act through the UN Security Council. Nonmembers of the Council clearly are delegating authority to the Council to make binding decisions. Council members without a veto are also engaged in international delegation under this definition, because the Council can act even over their objection. Even veto-wielding members are delegating an authorization role to the Council (for example, to approve certain uses of military force), a role that is a type of legislative authority.<sup>23</sup>

Similarly, individual states may grant authority to a conference of parties, which itself is nested within the larger international body and oversees the work of other organs within that body. For example, within the Organization for the Prohibition of Chemical Weapons, the Conference of Parties can make decisions on matters of substance by a two-thirds majority.<sup>24</sup> Its responsibilities include approving draft agreements, provisions, and guidelines developed by the Organization's Preparatory Commission. Additionally, the Conference of Parties oversees enforcement of the Chemical Weapons Convention and has authority to "take the necessary measures to ensure compliance and to redress and remedy any situation which contravenes the provisions of this Convention."<sup>25</sup> In some cases, regular meetings of the parties may be the only "body" created by the delegation. This is the case, for example, in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Landmines Convention).<sup>26</sup>

A private body or a public-private partnership can also be an international body if states have granted some authority to that body. For example, the European Commission has mandated that all European Union (EU) member states follow the standards of the International Accounting Standard Board, an independent, privately funded body that sets international financial reporting standards.<sup>27</sup> Private bodies such as nongovernmental organizations and

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22. Alexander Thompson, *Coercion Through IOs: The Security Council and the Logic of Information Transmission*, 60 INT'L ORG. 1, 6 (2006).

23. See *infra* Part III.

24. Chemical Weapons Convention, *supra* note 17, at art. VIII, ¶ B(18).

25. *Id.* at art. VIII, ¶ B(21)(k); see also *id.* at art. XII, ¶ 4.

26. See generally Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 [hereinafter Landmines Convention], available at [http://untreaty.un.org/English/millennium/law/disarmament/xxvi\\_5E.htm](http://untreaty.un.org/English/millennium/law/disarmament/xxvi_5E.htm) (last visited Jan. 14, 2008).

27. See generally Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002, 2002 O.J. (L 243) 1, available at [http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l\\_243/l\\_24320020911en00010004.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_243/l_24320020911en00010004.pdf) (regulation of the European Parliament and of the Council on the application of international accounting standards); see also Walter Mattli & Tim Bütte,



corporations promulgate the vast majority of standards and codes of conduct;<sup>28</sup> in situations in which they receive their authority from states, there is an international delegation.

Table 1 illustrates some of the different types of international bodies to which states may grant authority.

Table 1: Types of International Bodies

<b>Type of Body</b>		<b>Examples</b>
Collective Bodies	Conference of Parties or Committee or Council of the Whole in which all are members.	Meeting of state parties under the Kyoto Protocol, the International Criminal Court treaty, or the Landmines Convention; the Organization for Security and Cooperation in Europe; the European Council.
Subgroups	Council or board on which not all are members.	World Bank Board of Directors; UN Security Council; UN Human Rights Council.
Third Parties or Agents	External and independent.	International Court of Justice; collective redelegation from one UN agency to another; International Accounting Standards Board.
	Hired staff or bureaucracy.	Secretariats and implementing agencies of various kinds, such as under the World Health Organization and the United Nations Development Program.

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*Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 *LAW & CONTEMP. PROBS.* 225, 227–28, 250–59 (Summer/Autumn 2005).

28. See ANS KOLK & R. VAN TULDER, *INTERNATIONAL CODES OF CONDUCT: TRENDS, SECTORS, ISSUES AND EFFECTIVENESS* (2002).

## III

## TYPES OF DELEGATED AUTHORITY

This Part describes eight types of delegated authority: legislative, adjudicative, regulatory, monitoring and enforcement, agenda-setting, research and advice, policy implementation, and redelegation.<sup>29</sup> International bodies often exercise more than one type of authority. The UN Security Council, for example, has arguably been granted both legislative and enforcement authority.<sup>30</sup> In addition, there are sometimes uncertainties about whether an international body has been granted a particular type of authority,<sup>31</sup> or whether a particular type of authority falls into one or another category. Finally, the scope of an international body's authority will sometimes change over time. This can happen formally, as a result of amendments to the underlying treaty establishing the body, or informally as a result of changes in how the body construes its mandate. It can also happen as a result of changes in the world—for example, when changes in technology make the subject area of a delegation (such as seabed mining or space development) more important.

## A. Legislative Delegation

A legislative delegation grants authority to create or amend treaties (not including regulatory schedules or annexes attached to the treaties, which are classified below under regulatory delegation) or issue-binding directives. For example, in the International Monetary Fund (IMF), some amendments can take effect over objections—as long as eighty-five percent of total voting power favors the amendment. Similarly, the UN Charter can be amended for all parties based on the vote and ratification of two-thirds of the parties (including the five veto members of the Security Council). The UN Security Council can issue binding resolutions relating to peace and security, and EU institutions can issue directives binding on EU countries. Legislative delegation, although relatively rare, is important to legal scholars, because it may disturb the constitutionally mandated distribution of authority in some countries or even

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29. This list is not exhaustive. It omits some types of delegation, such as when states allow other states or bodies to represent them, either for diplomatic reasons, or, as in the EU, when states allow the trade commissioner to negotiate on their behalf.

30. See U.N. Charter art. 25, para. 1 (“The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”); *id.* at art. 39, para. 1 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”).

31. For example, there was some uncertainty surrounding the Security Council's authority to establish international criminal tribunals for the former Yugoslavia and for Rwanda. See *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Oct. 2, 1995), reprinted in 35 I.L.M. 32, 32–34 (1996). Similarly, there has been significant controversy over whether the committee that was established to monitor compliance with the International Covenant on Civil and Political Rights has the authority to determine the validity of state reservations to the Covenant. In a general comment issued in 1994, the committee claimed that it had this authority, a claim that was challenged by several states, including the United States. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 429–37 (2000).

warrant constitutional amendments, as has been the case with several European countries during the course of European integration with the EU. Political scientists also care about the delegation of legislative authority because its legal implications raise questions about when and why states will make such delegation and with what effects.

Legislative delegations typically encompass the authority to *mandate* state compliance with certain requirements, but they can also encompass the authority to *authorize* state conduct. Under the UN Charter, for example, states are prohibited from using military force against other states except in self-defense.<sup>32</sup> The Security Council, however, has the authority to authorize states to use nondefensive force and thereby render what would have been illegal conduct into legal conduct.<sup>33</sup>

## B. Adjudicative Delegation

Adjudicative delegation grants authority to make a decision about a controversy or dispute. The term adjudicative does not mean that the decision must be binding. Many agreements provide for informal mediation, nonbinding arbitration, or advisory opinions. States do, however, often delegate binding adjudicative authority to permanent or ad hoc courts, or to issue-specific arbitral bodies (such as the Iran–U.S. Claims Tribunal and the North American Free Trade Agreement (NAFTA) Chapter 11 and Chapter 19 arbitrations). In addition, states commonly delegate internally to the member states of a given agreement by providing procedures for resolution of compliance issues or other disagreements relating to the agreement.<sup>34</sup>

Adjudicative authority, whether it is granted to courts, tribunals, or ad hoc internal bodies, may cover interstate disputes, disputes between a state and an international organization, disputes between institutions within an international organization, disputes between private parties and states, or disputes between private parties and international organizations.<sup>35</sup> The International Court of Justice (ICJ), for example, has binding dispute-resolution authority only with respect to disputes between states. By contrast, the European Court of Human Rights can adjudicate disputes between private parties and states.<sup>36</sup> International criminal tribunals (such as the International Criminal Court) exercise yet another form of adjudicative authority, addressing disputes between the international community and individuals.

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32. See U.N. Charter arts. 2(4), 51.

33. See UN Charter art. 42.

34. See Barbara Koremenos, An Economic Analysis of International Rulemaking (unpublished manuscript, on file with author).

35. See Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37 (Winter 2008).

36. Keohane et al. usefully distinguish between traditional interstate dispute resolution, in which states are conceived as unitary actors, and transnational dispute resolution, which is open to individuals and groups in civil society. See Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 457–58 (2000).

International adjudication can overlap with, and even directly interact with, domestic adjudication. National courts in the EU, for example, are often required to seek preliminary rulings from the European Court of Justice (ECJ) concerning EU law and to apply those rulings in cases before them. The ICJ has issued a series of decisions relevant to U.S. criminal adjudication, and the U.S. Supreme Court recently had to consider what weight to give to those decisions.<sup>37</sup> Furthermore, several years ago a Chapter 11 NAFTA arbitration panel considered whether a state trial court's civil adjudication in the United States violated U.S. treaty obligations under NAFTA.<sup>38</sup>

### C. Monitoring and Enforcement Delegation

Monitoring and enforcement delegation grants authority to take measures to monitor or enforce compliance with state commitments.<sup>39</sup> Although different in nature, monitoring and enforcement are both designed to induce compliance with international obligations. Monitoring authority can range from voluntary reporting standards to mandatory on-site inspections, and can be carried out either by a standing body (such as the International Atomic Energy Association or the Organization for the Prohibition of Chemical Weapons) or on an ad hoc basis (as under the Landmines Convention).<sup>40</sup> Some monitoring authority enables the body only to collect and distribute the information, while other bodies have the authority to determine and declare whether a state is in compliance. Classic examples of monitoring delegations are the many human rights and environmental treaties that create bodies to which member states become obligated to submit regular reports.

As part of monitoring and enforcement delegation, states may also grant authority to an international body to launch investigations into the conduct of individual member states. For example, in 2005 the Council of Europe Parliamentary Assembly opened an investigation into allegations about the existence of secret Central Intelligence Agency (CIA) detention centers in member states.<sup>41</sup> Soon thereafter, the Secretary General of the Council of Europe, Terry Davis, acting under Article 52 of the European Convention on Human Rights,<sup>42</sup> sent a questionnaire to the forty-five states parties to this

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37. See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2682–88 (2006) (giving only “respectful consideration” to an ICJ decision).

38. See U.S. Department of State, *The Loewen Group, Inc. v. United States*, <http://www.state.gov/s/l/c3755.htm> (last visited Aug. 28, 2007). See generally Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143 (2005) (discussing the *Loewen* case).

39. See Abbott & Snidal, *supra* note 16, at 27 (discussing various methods of enforcement used by international organizations).

40. See Landmines Convention, *supra* note 26, at art. VIII.

41. Council of Europe, *Alleged Secret Detentions in Council of Europe Member States*, <http://www.coe.int/T/E/Com/Files/Events/2006-cia/> (last visited Aug. 28, 2007).

42. Article 52 of the European Convention on Human Rights states that the Secretary General of the Council of Europe may request “any High Contracting Party . . . [to] furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention.” Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4,

convention. After the Secretary General released his report, the European Commission for Democracy through Law (the Council of Europe's advisory body on constitutional matters) published its opinion on the international legal obligations of Council of Europe member states concerning secret detention facilities and interstate transport of prisoners.<sup>43</sup> Many treaties hold similar provisions that allow the launch of investigations, and states are often legally obligated to cooperate with such investigations. For example, the International Labour Organization governing body may refer complaints about noncompliance by member states to a Commission of Inquiry,<sup>44</sup> and member states have agreed to "place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint."<sup>45</sup>

There is a wide range of enforcement authority. Often, the enforcement authority of international bodies is "soft" in that it involves primarily the mobilization of peer pressure to induce state compliance.<sup>46</sup> This is true, for example, of most human rights monitoring bodies. In practice, this has also been the case for the International Court of Justice; although the Security Council can in theory enforce decisions of the Court, it has never done so.<sup>47</sup> Sometimes, enforcement may take the more tangible form of a withdrawal of voting power, membership, or institutional benefits. Members of the UN, for example, can lose voting rights in the General Assembly if they fail to pay dues.<sup>48</sup>

Some international bodies can exercise "strong" forms of enforcement. The Security Council can use coordinated economic, trade, or even military sanctions. The International Criminal Court has the authority to imprison individuals who commit certain types of international crimes. Some monitoring and enforcement involves police-type authority that allows intrusions on the territory of a state. This is the case, for example, under the Chemical Weapons Convention.<sup>49</sup> The enforcement authority of an international body can be

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1950, E.T.S. 5, 213 U.N.T.S. 221 (formerly art. 57, amended by Protocol No. 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 11, 1994 (Nov. 1, 1998), E.T.S. 155, *reprinted in* 33 I.L.M. 960 (1994)).

43. Council of Europe—Venice Commission, Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detentions Facilities and Inter-State Transport of Prisoners, 66th plen. sess., CDL-AD(2006)009 (Mar. 17–18, 2006), *available at* [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf).

44. International Labour Organization, Constitution art. 26, ¶¶ 2–3, *available at* <http://www.ilo.org/ilolex/english/constq.htm> (last visited Feb. 4, 2008).

45. *Id.* at art. 27.

46. The political-science literature discusses, for example, social influence and shaming. *See, e.g.*, Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487, 499–501 (2001).

47. *See generally* SHABTAI ROSENNE & Yael RONEN, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005* (2006).

48. *See* U.N. Charter art. 19.

49. *See* Chemical Weapons Convention, *supra* note 17, at Annex on Implementation and Verification.

substantially enhanced if its orders or decisions have direct domestic effect, as is the case, for example, with the decisions of the European Court of Justice.<sup>50</sup>

#### D. Regulatory Delegation

A regulatory delegation grants authority to create administrative rules to implement, fill gaps in, or interpret preexisting international obligations. Like legislative authority, regulatory authority affects international obligations and therefore raises important legal considerations. For example, the World Trade Organization (WTO) has the power to adopt binding interpretations of the various WTO trade agreements by a three-fourths vote.<sup>51</sup> Other organizations have the authority to amend their regulatory annexes and schedules.<sup>52</sup>

As can be the case in domestic law, there may be uncertainties associated with the distinction between legislative and regulatory delegations. When does regulation become so extensive or removed from the original treaty that it amounts to legislation? This can matter to domestic law, which may require a particular domestic process for new treaty commitments. Regulatory delegations also may raise questions for legal scholars about the extent to which domestic administrative-law concepts should be applied to the international arena.<sup>53</sup> In addition, such delegations may be of interest to political scientists studying the circumstances under which international institutions stray from their original mandates.

#### E. Agenda-Setting

The delegation of agenda-setting authority allows an international body to formally set or control the legislative agenda of an international body or of member states. Formal agenda-setting power refers to “the ability of a given actor to initiate policy proposals for consideration among a group of legislators” and includes the ability of actors to keep certain items off the agenda.<sup>54</sup>

Formal agenda-setting power depends on several institutional features such as who may propose an initiative, the voting rules, and the rules governing amendments.<sup>55</sup> For example, an international body may have the right of

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50. See KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW 17–20 (2001).

51. See Marrakesh Agreement Establishing the World Trade Organization art. IX(2), Apr. 15, 1994, 33 I.L.M. 1125, 1867 U.N.T.S. 154 (“The decision to adopt an interpretation shall be taken by three-fourths majority of the Members.”).

52. See generally Frederic L. Kirgis, Jr., *Specialized Law-Making Processes*, in 1 UNITED NATIONS LEGAL ORDER 124–35 (Oscar Schachter & Christopher C. Joyner eds., 1995).

53. See generally Symposium, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1 (Summer/Autumn 2005); Symposium, *Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1–278 (2006); Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006).

54. Mark Pollack, *Delegation, Agency and Agenda Setting in the European Community*, 51 INT’L ORG. 99, 104 (1997). On formal agenda-setting power within the United States, see also Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979), and KIEWIET & MCCUBBINS, *supra* note 20.

55. Pollack, *supra* note 54, at 121.

initiative, as is the case with the European Commission, which has the sole right to initiate legislation in the EU. The actions of an international body may also obligate states to consider certain issues on their domestic legislative agenda. For example, members of the International Labour Organization are required to bring conventions adopted by the Organization before their domestic authorities “for the enactment of legislation or other action.”<sup>56</sup> The Organization also controls what treaties get proposed under the convention.

This formal or procedural agenda-setting power is distinct from what has been labeled substantive or informal agenda-setting power.<sup>57</sup> Informal agenda-setting power is the general ability of many different types of actors to influence the substantive agenda of an international body or the international community more broadly by bringing attention to a particular issue in a way that may indirectly influence the formal agenda. Informal agenda-setting power may be the consequence of other forms of delegation, but it is not itself deliberately granted, so it is not included here under the concept of delegation.

#### F. Research and Advice

A grant of research and advice authority permits an international body to gather information about a topic and possibly to issue recommendations, opinions, or interpretations. Research and advice is by definition not binding, although the reports and findings of the international body may by mandate be entitled to discussion in a designated forum.

Sometimes research and advice delegations are temporary and ad hoc. For example, during the recent efforts to reform the UN, the UN Secretary-General appointed a group of eminent experts, as is often done within the UN.<sup>58</sup> He also established a Working Group on Internet Governance to investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005.<sup>59</sup> Other recent advisory delegations include the Advisory Committee for the Secretary-General’s in-depth study on violence against women. The mandate instructs the committee to conduct an in-depth study on the types, incidences, causes and consequences of violence against women globally; to solicit information on best practices from member states; and then to “submit a

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56. ILO Constitution, *supra* note 44, at art. 19, ¶ 5(b). See Laurence R. Helfer, *Monitoring Compliance with Unratified Treaties: The ILO Experience*, 71 LAW & CONTEMP. PROBS. 200 (Winter 2008).

57. For an excellent discussion and literature review of formal versus informal agenda-setting power, see Pollack, *supra* note 54, at 121–28.

58. See Reform at the United Nations, <http://www.un.org/reform/> (last visited Jan. 15, 2008).

59. See National Telecommunications and Information Administration, <http://www.ntia.doc.gov/> (last visited Jan. 29, 2008). The working group’s report recommended the creation of a Global Internet Council consisting of governments and involved stakeholders to take over the U.S. oversight role of the Internet Corporation for Assigned Names and Numbers, and recommended that several other international bodies manage the Internet. However, right before the report came out, the United States stated that it wished to maintain its sole authorizing role. Subsequently, the Secretary-General established a small Secretariat in Geneva to assist in the convening of “the Internet Governance Forum,” a body that came out of the working group. See Internet Governance Forum, <http://www.intgovforum.org/> (last visited Jan. 15, 2007).

report . . . to the General Assembly at its sixtieth session[,] . . . including action-oriented recommendations, for consideration by States, encompassing, inter alia, effective remedies and prevention and rehabilitation measures.”<sup>60</sup> The Organization for Economic Cooperation and Development also serves extensive research functions through, for example, its Directorate for Science, Technology, and Industry.

Advisory delegations may also be long-term. For example, the Secretary-General may create standing advisory bodies such as the Council of Development Advisers, proposed in his March 21, 2005, speech to the General Assembly.<sup>61</sup> Advisory bodies may even become formal and permanent intergovernmental organizations. For example, in 1988 the World Meteorological Organization and the UN Environment Programme established the Intergovernmental Panel on Climate Change (IPCC). The IPCC does not itself conduct research, but it assesses existing research and issues reports that include “options for adaptation and mitigation.”<sup>62</sup>

### G. Policy Implementation

States often grant international bodies authority to implement policies. The World Bank, the IMF, the World Health Organization, and many other UN agencies have authority to expend and allocate resources to carry out agreed-upon programs and projects, including internal administrative tasks. Like other forms of policy implementation, the delegation of spending power (including lending power) entails opportunity costs in terms of what other policies the state might have been able to autonomously create. From the perspective of political science, this category of delegation is important, because it is often created to optimize the provision of public goods when states benefit from the pooling of resources. Delegating policy implementation poses fewer issues for legal scholars because it does not involve the creation of legally binding rules or decisions and because there tend to be fewer domestic restraints on the delegation of implementation authority than on that of other authorities. Nevertheless, delegating policy implementation can be politically contentious, as has been evident with the United States’ concern that UN agencies could end up disbursing U.S. taxpayer money for activities that promote abortions. For political scientists, policy implementation also raises issues of defection and free-riding, as well as effectiveness.

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60. In-Depth Study on All Forms of Violence Against Women, G.A. Res. 185, ¶ (d), U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/185 (Mar. 18, 2004).

61. See Secretary-General Statement to the General Assembly (Mar. 21, 2005), <http://www.un.org/largerfreedom/sg-statement.html> (last visited Jan. 15, 2008).

62. Intergovernmental Panel on Climate Change, Principles Governing IPCC Work (1998), available at <http://www.ipcc.ch/pdf/ipcc-principles/ipcc-principles.pdf>.



## H. Redelegation

The authority of redelegation permits the international body to further delegate authority to another entity. For international delegations, the other entity may be an international organization or a private body such as a nongovernmental organization. The World Health Organization and other UN implementing agencies, for example, often delegate various in-country tasks by subcontracting with various nongovernmental organizations or even with private, for-profit organizations. Redelegation may also entail the creation of new bodies that emanate from the original international body, such as the IPCC or the Working Group on Internet Governance.

Some forms of authority may be more frequently redelegated than others. Implementation delegation is the most common, while redelegation of legislative and regulatory authority is rare. One example of redelegating regulatory authority is the decision by the European Commission, as noted above, to delegate standard-setting to the International Accounting Standards Board, a private body.<sup>63</sup> Redelegation is not confined to issues of particular substance and may occur even in sensitive areas, as illustrated by the UN's redelegation of peace-keeping activities to regional organizations such as NATO or specific member states.<sup>64</sup>

## IV

### EXTENT OF DELEGATION

We discussed above the types of international bodies that may be granted authority, and some of the types of authority that may be granted to these bodies. This Part discusses how the extent of a grant of authority can vary depending on its legal effect and the degree of independence of the international body.

#### A. Legal Effect

An important feature of delegation is its legal effect. Just as a higher degree of obligation correlates with a higher level of legalization,<sup>65</sup> delegations that allow international bodies to create binding legal obligations are more extensive than similar delegations of only advisory or agenda-setting authority. This is so because the presence of such legal obligations can implicate additional domestic and international constraints. In addition, a delegation is greater still if the international body has the authority to create binding obligations that have domestic legal effect (as is the case, for example, with the European Court of Justice), because the international body then has the benefit of domestic enforcement machinery. Sometimes the domestic validity of delegations can be

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63. See text accompanying note 27.

64. See, e.g., S.C. Res. 1244, Annex 2(4) (June 10, 1999) (authorizing NATO to deploy forces in Kosovo to maintain security).

65. See Abbott et al., *supra* note 2, at 408–12.

affected by their legal status. For example, in a recent decision, the U.S. Court of Appeals for the D.C. Circuit construed a delegation as nonbinding in order to avoid what it perceived to be constitutional concerns.<sup>66</sup>

An emphasis on legal effect does not mean that nonbinding delegation is insignificant. As research on the concept of “soft law” has illustrated,<sup>67</sup> such delegation may circumscribe policy autonomy by creating international or domestic pressure on governments. Consider, for example, the committee established to monitor compliance with the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. The committee is charged with receiving reports from the states’ parties concerning their efforts to comply with the Convention and with making “such general comments on the report[s] as it may consider appropriate.”<sup>68</sup> These comments often receive substantial attention, as when the committee issued a comment in May 2006 calling on the United States to close down the Guantanamo Bay detention facility used to house detainees in the war on terrorism.<sup>69</sup> Similarly, the 2004 advisory opinion of the International Court of Justice concerning the legality of Israel’s separation barrier in occupied Palestinian territory involved a significant exercise of authority, even though it was not legally binding.<sup>70</sup> Nonbinding standards and codes of conduct can also be important. For example, the Organization for Economic Cooperation and Development has issued guidelines for activities by multinational enterprises,<sup>71</sup> and the Codex Alimentarius Commission, established in the 1960s by the World Health Organization and the UN’s Food and Agriculture Organization, promulgates international food standards.<sup>72</sup>

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66. See *NRDC v. EPA*, 464 F.3d 1, 8–9 (D.C. Cir. 2006).

67. See Abbott et al., *supra* note 2.

68. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 19, ¶¶ 1, 3, opened for signature Dec. 10, 1984, available at [http://www.unhchr.ch/html/menu3/b/h\\_cat39.htm](http://www.unhchr.ch/html/menu3/b/h_cat39.htm) (last visited Nov. 9, 2007).

69. See Committee Against Torture, *Consideration of Reports Submitted by State Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture*, ¶ 22, UN Doc. CAT/C/USA/CO/2 (May 18, 2006), available at <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf> (“State party [the United States] should cease to detain any person at Guantanamo Bay and close this detention facility . . . .”); Tim Golden, *U.S. Should Close Prison in Cuba, U.N. Panel Says*, N.Y. TIMES, May 20, 2006, at A1.

70. See International Court of Justice, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (July 9, 2004), available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (last visited Aug. 30, 2007).

71. See Organization for Economic Cooperation and Development, *Guidelines for Multinational Enterprises*, [http://www.oecd.org/departement/0,2688,en\\_2649\\_34889\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,2688,en_2649_34889_1_1_1_1_1,00.html) (last visited Aug. 30, 2007).

72. See Food and Agricultural Organization, *The Codex System: FAO, WHO and the Codex Alimentarius Commission*, <http://www.fao.org/docrep/W9114E/W9114e04.htm#TopOfPage> (last visited Aug. 30, 2007). The WTO Agreement on Sanitary and Phytosanitary Measures makes presumptive rules out of these nonbinding guidelines. If a state wants to adopt regulations that are higher than the Codex, it must produce scientific evidence showing that the regulation is necessary to protect against a risk. This can be difficult to do with low-level risks, as the EU learned when it lost the beef-hormones case on precisely this issue. See Tim Büthe, *The Globalization of Health and Safety Standards: Delegation of Regulatory Authority*

Even when the decisions or actions of an international body are legally binding, their effect will depend on the type of enforcement authority associated with the delegation. Thus, the delegation to the UN Security Council entails a high legal effect because the Council not only can issue binding resolutions but also can enforce these resolutions through a wide range of multilateral sanctions, including the use of force. Similarly, the legal effect of the delegation to the International Criminal Court is high because it can enforce its criminal judgments directly through the strong sanction of imprisonment. The legal effect of WTO decisions, while significant, is somewhat lower, in that these decisions are subject to enforcement only through the threat of sanctions by the prevailing party, which will vary in any given case. Lower still is the legal effect of delegation to the International Court of Justice. Although ICJ decisions in contentious cases are legally binding, the ICJ has no direct means of enforcing the decisions. Prevailing parties can seek enforcement of ICJ decisions through the Security Council, but such efforts are subject to veto, and the Security Council has never in fact enforced an ICJ decision. Nor, unlike European Court of Justice decisions, are ICJ decisions typically considered directly enforceable in domestic courts.<sup>73</sup>

Figure 2 illustrates how the components of legal effect can vary based on whether the output of the international body is legally binding and whether the legal obligation is enforceable. Table 2 illustrates how the total legal effect results from a combination of these two factors.

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*in the SPS-Agreement of the 1994 Agreement Establishing the World Trade Organization*, 71 LAW & CONTEMP. PROBS. 219 (Winter 2008).

<sup>73</sup> See generally A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT'L L. 877 (2000).



Figure 3 illustrates the attributes that affect independence:

Figure 3: Attributes Affecting Independence

	←	→
	<b>Low</b>	<b>High</b>
<b>Precision</b>	Specific and exhaustively defined mandate.	Vague mandate.
<b>Oversight</b>	Extensive oversight, regular reporting requirements, tight control over resource and staff.	Little oversight, no reporting requirements.
<b>Rules and Procedures</b>	Consent-based decisionmaking; procedures ensure no decisions taken without input from all members.	State does not need to be included or informed of decisionmaking and actions.
<b>Financial Control Mechanisms</b>	Funding voluntary or the body is highly dependent on additional voluntary contributions.	Independent sources of funding, or funding is nested in larger, fairly fixed organizational resources that hinder individual targeting of financial restrictions.
<b>Permanence</b>	Instant exit permitted. Renegotiation very easy.	Exit either disallowed or highly infeasible. Renegotiation impossible or very difficult.

One factor that affects the independence of the international body is the precision of the grant. Unlike legalization, delegation does not necessarily correlate with a higher degree of precision. Indeed, other things being equal, a more precise delegation will be more constrained, presenting less room for agency slack or diverging interpretations among member states. Thus, one reason the delegation to the UN Security Council is so extensive is that it can be triggered by the Council's determination that there has been a "threat to the peace," which is a broad and imprecise standard. Of course, for a particular delegation, the subject matter of the delegation may be a more significant factor

than precision. For example, the authority of the International Criminal Court is defined relatively precisely, but it nevertheless involves a high level of delegation, in part because of the subject matter. In some cases precision may actually increase the delegation, such as where a formulation adds exclusivity to an international body's mandate.

States can also limit independence through formal oversight mechanisms: institutional checks and balances, such as requirements for approval by the state parties; voting rules; and the ability to hire and fire the entity's staff. As the literature on the U.S. Congress has demonstrated, rules and procedures can serve as powerful constraints on the use of authority, but they can also result in the allocation of power to less-than-obvious bodies, which may be able to use gatekeeping procedures and rules to veto actions or force their consideration.<sup>75</sup> Given the multilayered nature of the bodies nested within a given delegation, the oversight mechanisms therefore become crucial to the actual impact of any grant of authority.<sup>76</sup> A delegation that *prima facie* appears to be in a core issue area, such as security, may in reality be so severely circumscribed by oversight mechanisms that discretion is minimal. The international body's independence therefore depends on the larger institutional structure, the rules and procedures of decisionmaking, and the voice that any given state retains in the body. Indeed, some of the more interesting work on international delegation in the future may consider exactly the impact of these complex institutional designs.

For adjudicative delegations, the body's independence will be affected by the jurisdiction of the tribunal as well as by the rules and procedures for the appointment and tenure of judges and staff and the extent of state control over the salaries and resources.<sup>77</sup> As noted, precision generally reduces the level of independence. Keohane and others point out that "the greater the uncertainty concerning the proper interpretation or norm in a given case, the more potential legal independence it possesses."<sup>78</sup> Tribunals will have the highest independence if they have general compulsory jurisdiction, but they will have less independence when there is a requirement of separate state consent to have the particular subject matter of the dispute resolved by the tribunal. Independence is also lower if the jurisdiction of the international tribunal is subject to a requirement of exhausting local remedies, or (as is the case for the International Criminal Court) to a principle of "complementarity" whereby national courts can displace the international tribunal's jurisdiction. *Ad hoc* arbitration often involves a low level of independence since there is a

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75. See, e.g., Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J. L. ECON. & ORG. 243 (2002).

76. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

77. See Keohane et al., *supra* note 36, at 460; see also Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 7 (2005); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

78. Keohane et al., *supra* note 36, at 461.

requirement of state consent on a case-by-case basis, and since some of the judges will typically be selected by the states involved.

For other types of delegated authority, the independence of a given international body depends on the rules and nested relationships among the different decisionmaking and implementation bodies. As Figure 1 and Table 1 illustrate, in addition to delegating simultaneously to different bodies within the larger framework, an international agreement may also grant different types of authority to the different bodies, and each grant of authority may be subject to different levels of control by the state. A state's ability to control delegation to a secretariat, for example, is modified by the authority granted to a council or conference of parties that oversees the secretariat, and by the rules and procedures that guide a state's ability to influence decisions by these other bodies. The overall independence of an international body such as the World Health Organization therefore depends ultimately on how much control the highest decision organ has over other bodies in the organization and how autonomous that decision organ is from the member states.

Independence varies not only among different types of international delegations, but also among countries with respect to the same body, since different countries may have a different ability to control the body. In institutions such as the World Bank, for example, some countries such as the United States have strong controls while others have weak ones. This may be due to different allocation of votes, or to different representation on various bodies, or, less formally, to different levels of geopolitical power or financial contributions through which states may exert other forms of control throughout the delegation chain.

If a state is itself a member of a decision organ of an international body, this membership decreases the body's independence, but it does not eliminate it. For example, under the Landmines Convention, the meeting of states' parties can "authorize a fact-finding mission and decide on its mandate by a majority of States' Parties present and voting."<sup>79</sup> The requested state, subject to some limitations, has to grant access to all areas and installations under its control.<sup>80</sup> As discussed earlier, states may not be able to control bodies even when they hold veto power or when consensus is required. This is especially true if the body's affirmative consent is needed, as is the case with the UN Security Council with respect to some uses of military force. If the decisionmaking body consists of a subgroup of member states, the body clearly is more autonomous vis-à-vis the excluded states. The most autonomous bodies are the classic bureaucracies of the UN secretariat or the IMF fund management in which states are not members, although the majority of these have oversight bodies controlled by states. As pointed out by principal-agent theory, such control is diluted by informational asymmetries, which enable shirking or professional biases.

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79. Landmines Convention, *supra* note 26, at art. VIII, ¶ 8.

80. *Id.* ¶ 14.

A very common type of control mechanism is the ability of states to withhold funding or other resources from an international body. An obvious example is the staffing of peacekeeping missions. Whereas the UN Security Council may use its delegated authority to mandate military action, such mandates cannot be implemented without troop commitments, which by tradition are ad hoc and therefore highly vulnerable to the preferences of individual states. Even mandatory contributions to international organizations may be withheld, as the United Nations experienced in the 1990s when the United States refused to pay its dues until the organization reformed. Although their monetary impact is lower, even small states can send effective protest signals by withholding funding. Conversely, states can also enhance their delegation by providing international bodies with additional voluntary contributions of money, staff, or other resources. In addition to individual state funding decisions, states can collectively reduce the level of contributions if they want to abrogate the power of runaway bodies. In other cases, states may want to fund international bodies in advance so as to place limits on their own ability to interfere with the body's decisionmaking power. One such case is the Iran–U.S. Claims Tribunal, in which the two states allocated funds to allow the tribunal to function as independently as possible.<sup>81</sup>

A final factor affecting the independence of an international body is the permanence of the delegation. Permanence refers to how easy it is for a state to extricate itself from the delegation or from select provisions. This factor encompasses both the duration of the delegation (for example, the Kyoto Protocol sets a target only for a certain period, and ad hoc arbitral tribunals may exist only for one case);<sup>82</sup> how easy it is for a state to renegotiate the terms of the delegation; and the ability to exit, which varies in terms of the amount of notice required and other conditions in the agreement.<sup>83</sup> Renegotiation, although legally possible, may be complicated by the rules and procedures of the delegation, as well as by the relative power relationships between states. If all states agree that a delegation has gone awry, renegotiation is obviously much easier than if a state finds over time that it has become a preference outlier. Exit may also be complicated by the degree to which a state's participation in the delegation is embedded in other arrangements. Thus, although exit may be feasible legally, in practice it may be difficult. This would presumably be the case with withdrawal from the Euro, which is embedded in the monetary policy of the EU, and for withdrawal from the European Court of Human Rights, which is embedded in Council of Europe membership. Indeed, since participation in most international organizations is not *à la carte*, it presents states with a set of tradeoffs that may make exit undesirable even if states are displeased with particular institutional features. By contrast, exit is easier for

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81. See Iran-United States Claims Tribunal, <http://www.iusct.org/> (last visited Jan. 15, 2008).

82. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 37 I.L.M. 22, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

83. See Helfer, *supra* note 13.



stand-alone delegations that are not embedded in other commitments or membership—such as the dispute-resolution protocol to the Vienna Convention on Consular Relations, from which the United States withdrew in 2005.<sup>84</sup>

## V

### BENEFITS AND COSTS OF INTERNATIONAL DELEGATION

In deciding whether to delegate authority to international institutions, states will weigh the benefits against the costs. In this Part, the nature of the benefits and costs associated with different types of delegation are considered, as are various factors that may influence the levels of these different categories of benefits and costs.

#### A. Benefits of Delegation

Scholars have made significant progress in identifying the benefits of international cooperation.<sup>85</sup> Many of these benefits derive more specifically from the international delegation inherent in much of this cooperation.<sup>86</sup> First, states can benefit from the specialization that may develop when they delegate to bodies that can gather complex knowledge and generate expertise from the execution of repeated tasks.<sup>87</sup> The benefits of such expertise are particularly apparent in bodies like the WHO, which by its vast collection of state knowledge is invaluable in developing emergency strategies for fighting the spread of viruses such as the recent and deadly bird-flu strain.<sup>88</sup> Similarly, the international police organization Interpol facilitates pooling of knowledge about drugs, human trafficking, and other crimes.<sup>89</sup> The level of expertise that this organization can attain is thus greater than what any one state could create alone.

In international cooperation, it is often the act of delegation that enhances the credibility of international commitments and thus facilitates international cooperation. When the core of an international agreement rests on a set of behavioral commitments that states may have incentives to evade, delegating authority to bodies that can monitor and perhaps enforce the commitments reduces incentives to renege on these commitments. This is the role of many

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84. See Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.

85. See, e.g., ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1992); LISA L. MARTIN, *COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS* (1992).

86. For a recent summary of the benefits of delegation, see HAWKINS ET AL., *supra* note 3, at 13–20. See also Oona Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115 (Winter 2008).

87. See HAWKINS ET AL., *supra* note 3, at 13–15.

88. See World Health Organization, *Avian Influenza*, [http://www.who.int/csr/disease/avian\\_influenza/en/](http://www.who.int/csr/disease/avian_influenza/en/) (last visited Jan. 15, 2008).

89. See generally Interpol, *Interpol's Core Four Functions*, <http://www.interpol.int/Public/icpo/about.asp> (last visited Nov. 9, 2007).

oversight committees created in areas such as human rights and arms control. Such monitoring enables states to commit more credibly to cooperation and therefore overcome classic time-inconsistency problems.

Delegation also can be used for the resolution of disputes, which in turn allows states to continue cooperation. This is naturally the objective of direct delegation of dispute-resolution authority, but it may also be a more indirect benefit of other forms of delegation. For example, collective bodies can be a useful forum for resolving disputes among states by allowing discussion and resolution according to preset rules, and specialized agencies can provide information that may be useful in addressing disputes. In many agreements, the “Collective of the Whole” or the “Conference of the Parties” serves such a function.

In addition, it is often some form of delegation that reduces transaction costs of interstate cooperation. When states are unable to work out all the details of their cooperative agreements, they benefit from delegating authority to bodies that can coordinate solutions and make running policy decisions so that states do not have to continually renegotiate. This benefit is evident with specialized bodies such as the International Maritime Organization and in the area of food standards, in which delegation facilitates detailed but necessary regulation.

Finally, delegation can enhance the ability of states to control movements of goods, persons, pollutants, ideas, and diseases across their borders. This is what Stephen Krasner has labeled “interdependence sovereignty.”<sup>90</sup> Controlling such cross-border movements in turn enhances the ability of states to control domestic activity.<sup>91</sup>

The different types of delegated authority carry these benefits to varying degrees. Adjudicative delegation can generate many of them. It creates gains from specialization, enhances credibility by assisting in the monitoring and enforcement of agreements, and inherently can resolve disputes, enabling continued cooperation. The decisions of adjudicative institutions may also help solve future coordination dilemmas and reduce transaction costs by assisting states in the implementation of their agreements because they provide guidance on the interpretation and expectations of the agreements.

Regulatory authority likewise provides gains from specialization. This specialization is valuable because it helps states coordinate policies by filling in the many gaps in their existing agreements. States also benefit from delegating legislative and agenda-setting authority to collective bodies because this allows them a forum for negotiating solutions that can extend the scope or duration of their cooperation. Granting monitoring and enforcement authority naturally benefits states by providing those functions and thus enhancing the credibility of their commitments, but it also generates specialization in the body that may

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90. STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* 12 (1999).

91. See Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 857–62 (2003).

further facilitate these tasks. States benefit from delegating policy-implementation authority and research-and-advice authority because these engender specialization and help states to collectively implement policies or pool their knowledge.

The benefits of delegation also vary with the issue area. Although it is difficult for states to cooperate on some issue areas, such as security, criminal adjudication, and international trade, the benefits can be proportionately large if states can do so. Nevertheless, it does not follow that areas that are less sensitive in terms of state sovereignty necessarily provide lower benefits from delegation. Indeed, delegating authority to regulate and implement policies on air-traffic rules or postal cooperation, while relatively uncontroversial, can yield significant social benefits for states and their citizens. Moreover, because the costs of these delegations are fairly low, the net benefits can be particularly large.

The benefits from delegation do not, however, necessarily depend on whether the delegation is legally binding. That is, delegation is not by definition more beneficial because it is legally binding, although that might be the case in some instances. Making a delegation legally binding may be particularly unnecessary when states do not have an incentive to evade their commitments or otherwise escape their obligations. Moreover, it is possible that states may be more likely to rely on delegation when it is not legally binding. Thus, the benefits of nonbinding dispute resolution could actually be greater than that of binding dispute-resolution authority, if states would be more likely to use it. Nonbinding regulatory authority might also yield common policies more easily, and states might be more willing to accept and implement such regulation. Overall, the usefulness of legally binding delegation depends on the structure of the underlying cooperation problem.<sup>92</sup> It is therefore not possible to generalize that benefits from delegation by definition are greater for legally binding delegation.

## B. Costs

International delegations can also impose various costs on states. Because a delegation by definition entails a grant of authority, an international delegation can lead to reductions in state autonomy through displacement of its decisionmaking or control.<sup>93</sup> Some scholars have referred to these reductions in autonomy as “sovereignty costs.”<sup>94</sup> The term can be misleading, however,

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92. See generally Arthur Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299 (1982) (discussing the nature, development, changes, and breakdown of regimes).

93. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 436–38 (2000); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 227 (2000).

94. See, e.g., Abbott & Snidal, *supra* note 93, at 436–37 (discussing the concept of “sovereignty costs” and noting that these costs can “range from simple differences in outcome on particular issues, to loss of authority over decision making in an issue-area, to more fundamental encroachments on state

because international delegations can also be seen as an exercise of sovereignty, since one of the recognized legal attributes of sovereignty is the capacity to engage in foreign relations, including the capacity to conclude binding international agreements that entail delegation.<sup>95</sup> Moreover, as discussed above, international delegations can enhance the ability of a state to control its borders, which is an attribute of sovereignty.<sup>96</sup>

In addition to autonomy costs, international delegations may require the state to compromise its preferred policy outcome.<sup>97</sup> This compromise is required both because the state will need to coordinate with other states that may have different preferred policy outcomes, and, as elaborated by principal-agent theory, because there may be divergence between the state's preferences and those of the staff of the international institution.<sup>98</sup>

International delegations also increase the costs of noncompliance with international commitments. Indeed, that is also one of their goals. International delegations can serve as focal points for the imposition of collective sanctions, whether they are reputational, economic, or military. The WTO, for example, sets up a formal mechanism through which retaliatory sanctions can be imposed.<sup>99</sup> Research has shown that international sanctions are more effective when conducted through an international organization.<sup>100</sup>

Finally, international delegations can impose opportunity costs in terms of the use of resources. By contributing financial resources to an organization, or dedicating personnel to staff or interact with the organization, a state forfeits the opportunity to use those resources for other purposes. The organization may also be inefficient in its use of the resources, with the result that an activity may cost more when accomplished through a delegation.

The extent to which a state incurs any of these costs will vary with the type of delegated authority. Several of the different types of delegations may produce shifts in decisionmaking authority, and, relatedly, potential compromises of policy preferences. This is likely to be greatest for legislative authority that is binding and not subject to individual state ratification, and for adjudicative authority that is enforceable through direct effects in the domestic legal system of a state. Some types of monitoring and enforcement delegation,

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sovereignty"); Moravcsik, *supra* note 93, at 227 (defining "sovereignty cost" as "the surrender of national discretion").

95. See Restatement (Third) of the Foreign Relations Law of the United States § 201 (1987) ("[A] state is an entity that has a defined territory and a permanent population . . . and that engages in, or has the capacity to engage in, formal relations with other such entities."). This is part of what Stephen Krasner refers to as "international legal sovereignty." See KRASNER, *supra* note 90, at 14–20.

96. See *supra* Part V.A.

97. See David A. Lake & Mathew D. McCubbins, *The Logic of Delegation to International Organizations*, in HAWKINS ET AL., *supra* note 3, at 341, 366; David Epstein & Sharyn O'Halloran, *Sovereignty and Delegation in International Organizations*, 71 LAW & CONTEMP. PROBS. 77 (Winter 2008).

98. See Lake & McCubbins, *supra* note 97.

99. See World Trade Organization, Understanding the WTO: Settling Disputes, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Jan. 18, 2008).

100. See generally MARTIN, *supra* note 85.

particularly if they involve physical intrusion in the territory of the state, may also reduce state autonomy. On a lesser level, there may also be shifts in decisionmaking power when states delegate regulatory authority, especially if the regulatory decisions take effect without ratification. The delegation of agenda-setting power may also influence decisionmaking processes when the international body can obligate states to consider certain legislation. This is the case when, for example, the International Labour Organization can create new treaties that member states must consider.<sup>101</sup> Even if they do not shift formal decisionmaking powers, legislative, regulatory, adjudicative, and agenda-setting authority may allow international bodies to bring attention to issues and thus influence domestic decisionmaking indirectly. This is also the case when states appoint bodies to provide advice and research, because these bodies thus obtain a platform from which to influence debates.

Costs of noncompliance are a byproduct of the delegation of decisionmaking powers. Such costs have long been studied by political scientists who note that such noncompliance may carry not only direct costs such as fines or expulsion from organizations, but also bring indirect costs to the state through the possible damage to its reputation as a credible cooperation partner. These costs are most likely to occur when the state has delegated legislative, adjudicative, or regulatory authority. However, delegating monitoring and enforcement authority may also result in noncompliance costs, mostly of a reputational nature if the state fails to provide the required information or cooperate with international monitoring authorities.

Opportunity costs of expended resources occur in some minimal form in connection with all delegation that entails any kind of administrative apparatus. These administrative costs aside, the most significant resource opportunity costs are usually associated with implementation authority or with the types of authority that may, in themselves, incur expensive administrative costs, such as adjudicative authority or research-and-advice authority. For example, ad hoc tribunals may be expensive to operate, as may international research facilities such as the European Organization for Nuclear Research.

The level of each of these opportunity costs depends on the factors that also determine the extent of the delegation. First, the costs will intensify with the independence of the international body and the legal effect of the delegation. Independent bodies are harder to control, and this makes it more difficult for the state to assure that the body's policies align with state preferences. The greater the legal effect of a delegation, the costlier it will also be for states in terms of either reputational costs flowing from noncompliance, or foregone policy options flowing from reduced decisionmaking powers.

In addition, the magnitude of the costs will vary depending on the issue area of the delegation. For historical, cultural, and functional reasons, states will tend to perceive some issues as more closely related to their sovereignty than other

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101. See Helfer, *supra* note 56.

issues. The costs of delegation are highest when issues touch on elements of Westphalian sovereignty such as territory or relations between a state and its citizens.<sup>102</sup> Delegations on security issues are particularly costly because they relate to the preservation of the state. Thus, delegations of military-command authority (such as allowing foreign or international officials to direct national troops) entail relatively high costs because such a delegation relates closely to national security and the protection of a state's citizens.

A related consideration is whether the delegation overlaps or conflicts with traditional exercises of domestic authority. The costs of delegation are higher for subjects that have traditionally been regulated by the state, such as criminal law and punishment, family relationships, and religious freedom. In contrast, delegations on issues relating to international waters, the arctic regions, or outer space refer to common-pool resources and thus imply less of a restriction on traditional national prerogatives, reducing any costs. Indeed, on some common-pool resources, states may enjoy benefits only to the extent that they become entitled to assert authority where no such confirmed right previously existed.

Similarly, the delegation costs also depend on the scope and range of the issue areas involved. The World Trade Organization, for example, has a broad range of issue areas because it addresses virtually all trade issues, not just isolated sectors. The delegation to the World Health Organization is of similarly broad scope, while the delegation in the Montreal Protocol is narrowly focused on ozone-depleting pollutants. For adjudication, an important factor relating to scope of authority concerns not only the type of cases that fall within the jurisdiction of the court, but also whether the tribunal can hear claims by, or operate against, individuals.<sup>103</sup> This is true, for example, with the International Criminal Court and the European Court of Human Rights, but not of the ICJ. Other things being equal, broader delegations entail higher potential costs.

The costs of different types of delegation will also vary among states. Some states may invest fewer resources in an organization, thus clearly reducing their opportunity costs of resources. States with strong internal mechanisms for implementing international obligations may also find that, in practice, such obligations entail higher noncompliance costs than for states without such mechanisms.<sup>104</sup> The costs of a delegation can also vary between states because some states may have refrained from ratifying protocols or optional provisions such that they have in fact delegated less authority than other states. A classic example is whether states have accepted the compulsory jurisdiction of the ICJ.<sup>105</sup>

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102. Abbott & Snidal, *supra* note 93, at 437, 440; *see also* KRASNER, *supra* note 90, at 20–25 (discussing Westphalian sovereignty).

103. For more on access, *see* Keohane et al., *supra* note 36.

104. *See* Abbott & Snidal, *supra* note 93, at 428.

105. States' parties to the ICJ Statute "may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court . . ." Statute of the International Court of Justice art. 36, ¶ 2, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993, *available at* <http://www.icj-cij.org/documents/index.php?>

The most important variation in the costs that different states may incur from delegation, however, depends on what a state's preferences and policies would have been in the absence of the delegation. In practice, states do not have equally broad ranges of available policy options. By delegating to the International Atomic Energy Agency, the Dominican Republic may in theory accept the same restrictions on development of nuclear weapons as Iran. Since the Dominican Republic would not be capable of or have interests in developing nuclear weapons, however, in reality this delegation is much costlier for Iran. Similarly, the International Criminal Court poses lower real costs for states that, unlike the United States, do not regularly engage in significant military operations.<sup>106</sup>

The policy costs depend further on the configuration of preferences among states on any given issue. It is costlier to delegate when preferences diverge because the international bodies are more likely to exercise discretion in controversial ways. It is another matter, however, when state preferences are closely aligned, either because all states are facing a similar problem, or because the underlying problem is mostly one of coordination on technical matters. When there are greater preference alignments, it is less likely that a state will be a preference outlier, and the bodies to which states grant authority are likely to have preferences that are more aligned with states as well, thus reducing the expected costs due to slack.<sup>107</sup>

Finally, the different costs of delegation can change over time. A good example is the role of the International Court of Justice in deciding disputes arising under the Vienna Convention on Consular Relations (Vienna Convention). In the late 1960s, the United States agreed in a treaty to allow the ICJ to have jurisdiction over Vienna Convention disputes.<sup>108</sup> Most provisions in the Vienna Convention concern interstate issues such as the scope of consular immunity. One of the provisions in the Convention, however, refers to a right of foreign nationals to receive certain types of notice when they are arrested in a party country.<sup>109</sup> Starting in the late 1990s, the ICJ began relying on this provision to decide cases relating to U.S. criminal procedure in death-penalty cases involving foreign nationals.<sup>110</sup> This development substantially increased the

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p1=4&p2=2&p3=0 (last visited Sept. 2, 2007). Currently, sixty-five states accept this jurisdiction. See International Court of Justice, States Entitled to Appear Before the Court, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=1&sp3=a> (last visited Sept. 2, 2007).

106. See generally Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003).

107. Abbott & Snidal, *supra* note 93, at 440–41.

108. See Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 168, 596 U.N.T.S. 487, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963\\_disputes.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963_disputes.pdf).

109. See Vienna Convention on Consular Relations art. 36, ¶ 1(b), Apr. 24, 1963, T.I.A.S. 6820, 596 U.N.T.S. 261, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/9\\_2\\_1963.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf) (“[S]aid authorities shall inform the person concerned without delay of his rights.”).

110. See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248 (Apr. 9); LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. Rep. 466 (June 27); Case Concerning Avena and other Mexican Nationals (Mex. v. U.S.), 2004 ICJ Rep. 12 (Mar. 31).

decision cost of the arrangement for the United States, and eventually the United States withdrew from the jurisdictional treaty.<sup>111</sup>

## VI

### QUESTIONS AND IMPLICATIONS

In addition to providing a common vocabulary, a typology should stimulate thinking, in this case about the nature and consequences of international delegation. The typology presented here raises a number of questions. As an initial matter, the typology reveals the need for additional empirical work concerning the types and incidence of international delegations, and the nature of the relationship between states and international institutions. This article has illustrated the typology with examples, but it has not systematically assessed how frequently states actually delegate the various kinds of authority, or the extent to which states control the independence of the bodies they create. And although the literature on the rational design of international institutions has begun to examine the incidence of various basic features of international organizations,<sup>112</sup> it is not yet known how many international bodies have been granted different types of authority. Barbara Koremenos makes an important first contribution to this question in her article for this issue.<sup>113</sup> Likewise, although there has been some work on the frequency of certain types of control mechanisms, such as the ability of states to exit an agreement,<sup>114</sup> that sort of systematic study is rare. Debates in international relations and law about how much delegation there is and how much it matters are, therefore, largely anecdotal. Hopefully the typology presented here will facilitate additional empirical research, as well as a more precise consideration of the nature of state delegations of authority.

The typology may also aid the study of the extent to which variations in benefits and costs actually explain state behavior with respect to delegations. Although several studies examine why some states may ratify various legal agreements or participate in international cooperation, studies that explain participation in international delegation more specifically are lacking. From a rational-choice perspective, cost-benefit calculations should be important determinants. Thus, one would expect states that anticipate the costs of delegation to outweigh its benefits to refrain from delegating. From a more constructivist perspective, however, one might also expect norms and beliefs to influence delegation decisions. For example, some states may be particularly averse to delegation of dispute-resolution authority, and this may explain their

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111. See *supra* text accompanying note 86. The European Court of Justice and the International Labour Organization present additional examples of how an international institution may expand its authority over time. See ALTER, *supra* note 50; Helfer, *supra* note 56.

112. See, for example, the special issue of International Organizations on this topic, 55 INT'L ORG. 761 (2001).

113. See Barbara Koremenos, *When, What, and Why Do States Choose to Delegate?*, 71 LAW & CONTEMP. PROBS. 151 (Winter 2008).

114. See Helfer, *supra* note 13.



lower participation in some international cooperation. It would also be interesting to explore the extent to which the delegation inherent in any particular international agreement can explain states' decisions to sign and ratify the agreement. Perhaps some states, for various reasons, are more delegation-averse, and perhaps this can explain variation in overall international cooperation.

In addition, just as scholars have argued that soft law may be consequential,<sup>115</sup> this article's inclusion of nonbinding delegation may stimulate thinking about "soft delegation." Whereas the study of soft law has revealed that nonbinding commitments can have powerful repercussions for state behavior, this article suggests that soft delegation—the granting of nonbinding authority to international actors—can be similarly powerful. The actions of many of these international bodies circumscribe states' policy autonomy by creating international or domestic pressure on those governments. This can occur in a variety of ways, including through nonbinding arbitration, committees charged with receiving and commenting on reports from the states parties, and the issuance of advisory legal opinions and nonbinding standards and codes.

The typology also raises questions about the multi-layered nature of delegation. In any given international agreement, states simultaneously delegate different types of authority to different bodies, which enjoy different degrees of independence.<sup>116</sup> Although this is not new, the inclusion here of collectives, or subgroups of states, is not only a more realistic portrayal of delegation, but it also invites more complex theorizing about the locus of power. A narrow focus on third parties tends to limit theorizing to principal-agent approaches that concentrate on the relationship between states and large international bureaucracies. When states delegate authority internationally, however, managing that relationship is only part of their concern. Of equal or greater concern is that decisions and actions will be taken jointly with other states.

This article's broader typology can cast light on how different institutional environments locate power differently within different international organizations, and thus why certain international organizations tend to become associated with particular bodies within their systems. The World Bank, for example, is often associated with its board, and the UN with its Security Council. The degree of overall delegation by any one state to a given international organization is also determined by the interrelationship of the different interacting bodies within the organization. Discussion of international delegation and the accountability and legitimacy of international organizations may also benefit from properly identifying the controls that different bodies exert within organizations.

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115. See Abbott & Snidal, *supra* note 93, at 421.

116. See *supra* Part III.B.

Contrary to prior work on international delegation, which tends to speak of authority as uniform, the typology also draws attention to the fact that states delegate authority of different types. This raises questions about the activities of different bodies with delegated authority. Many of the first questions are descriptive, because scholars have not explored this variety. The descriptive inquiries, however, can then lead to more causal analysis. For example, although states sometimes grant legislative powers in practice, how often do international bodies amend their underlying treaties or issue binding directives? If we do not often see legislative actions, why is this authority included? If we do see legislative actions, why do these come about? Are those decisions driven by powerful states? Do they result from emergent normative discourse? Who governs the formal reshaping of international bodies through legislation, and how does that vary across institutions? Understanding the institutional change is important for studies of global governance and legitimacy and accountability, and they can be aided by inquiries into the uses and controls of different types of authorities.

Equally interesting might be research into the delegation of other types of authority, such as formal agenda-setting power. Although few bodies have the agenda-setting power of the European Commission, many international bodies do exercise meaningful, formal agenda-setting power when, for example, their members are required to bring conventions adopted by the body before their domestic authorities. When and how do some international bodies manage to exercise their agenda-setting power effectively? How is the agenda-setting power of international bodies influenced by institutional features such as who may propose an initiative, the voting rules, and the rules governing amendments? What factors determine the magnitude of the agenda-setting power of international bodies? Does it rise with the complexity of a subject matter or with the divergence in preferences of member states? The exploration of the legal and practical causes and consequences of other types of authority may yield similarly interesting questions.

Another set of questions about types of authority relates to institutional design. Scholars have begun to study why states design international organizations the way they do. This question is hardly complete without considering the different types of authority delegated. What are the relationships between the different types of authority? Do certain types of authority tend to “go together,” or are some types of authority mutually exclusive? Is it, for example, the case that bodies with great regulatory power tend not to have enforcement power? How do the types of authorities vary with the degree of legal obligation inherent in the underlying treaty? Although our typology has grouped them together, what is the relationship between monitoring authority and enforcement authority, and to what extent can

monitoring authority substitute for lack of formal enforcement authority?<sup>117</sup> Do some issue areas tend to be associated with adjudicative authority, while others tend to be associated with monitoring authority? Or can we better understand the types of authority delegated by looking at the underlying structure of the collaboration problem, regardless of issue area? Likely it is a combination thereof, but specifying the types of authority may help us make the connections.

The typology may also have implications for considerations of domestic politics. States are represented in most international institutions solely by executive agents. Nevertheless, these institutions increasingly engage in a variety of legislative and regulatory activities, thus posing questions about their effect on domestic distributions of authority between legislative and executive bodies. In addition, the rise of international adjudicative institutions may affect the authority of domestic courts within their systems. Another structural issue posed by international delegations is their effect on federal systems of government, such as the one in the United States.<sup>118</sup> Questions can also be raised about the connections between international delegations and interest-group politics, and the effects of such delegations on domestic political bargaining. Do certain types of bodies or certain types of delegated authority lend themselves to greater influence by domestic political groups? May international delegations sometimes enhance or decrease the power of domestic actors?<sup>119</sup>

Furthermore, the typology presents a number of issues relating to the legal implications of international delegations. As the typology makes clear, the legal effect of a delegation is a significant factor affecting its cost. The cost is particularly high when there is domestic as well as international legal effect. This consideration may influence how domestic institutions construe the output of international institutions. U.S. courts, for example, may construe international orders and decisions as “non-self-executing” in the U.S. legal system.<sup>120</sup> In addition, as international institutions increasingly handle regulatory duties, questions may be raised about the extent to which domestic legal controls that mirror those governing domestic regulatory entities should be imposed.<sup>121</sup>

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117. For a discussion of international institutions and compliance focusing on monitoring arrangements, see generally Xinyuan Dai, *Information Systems of Treaty Regimes*, 54 *WORLD POL.* 405 (July 2002).

118. See Neil S. Siegel, *International Delegations and the Values of Federalism*, 71 *LAW & CONTEMP. PROBS.* 93 (Winter 2008).

119. See, e.g., Judith L. Goldstein & Richard H. Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 *LAW & CONTEMP. PROBS.* 257 (Winter 2008).

120. See, e.g., *U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (“We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government.”); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (“[The provisions at issue] do not by their terms confer rights upon individual citizens.”). See generally Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *STAN. L. REV.* 1557, 1587–95 (2003).

121. See, e.g., Esty, *supra* note 53; Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 *LAW & CONTEMP. PROBS.* 63 (Summer/Autumn 2005).

By identifying the different types of delegated authority and the various factors influencing the overall level of delegation, the typology may also be helpful in identifying more precisely what types of delegations raise constitutional or other legal concerns. In the United States, these concerns will be translated into doctrinal considerations such as the formal processes for making law and treaties, the nondelegation doctrine, restrictions imposed by the Appointments Clause, limitations on the extent to which adjudicative functions can be delegated to “non-Article III courts,” and federalism restraints. Such concerns may in turn affect the legal controls that the United States places on international delegations—through treaty provisions, reservations, implementing legislation, and other mechanisms.

In exploring these issues, there are obvious opportunities for interaction and collaboration between legal and political-science scholars. A full political assessment of the features of international delegation may need to take account of the legal environments in which these delegations take place. It may be useful to consider, for example, the extent to which domestic or international legal considerations influence the incidence and structure of international delegations, and the extent to which there are legal mechanisms for controlling or terminating a delegation. Social-science assessments of the benefits and costs of international delegation, and their effect on state behavior and the operation of domestic politics, may in turn be relevant to legal considerations of their proper design and validity.

## VII

### CONCLUSION

International delegations are a significant and growing component of international relations, and they implicate a number of important legal and political questions. In the past, analysis of the delegation component of international cooperation has often been limited to the study of international bureaucracies or has simply been subsumed within a broader cooperation framework. As a result, the causes and consequences of international delegation remain understudied. This article has identified various types of international delegations as well as factors that can affect their costs and benefits. We hope that these conceptual distinctions will facilitate additional consideration of the legal and political dynamics of international delegation.