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The Concept of International Delegation

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This paper defines and clarifies the concept of international delegation from both a legal and social science perspective. To capture the multilayered nature of international delegation, the paper considers not only grants of authority to bureaucracies, but also to collective bodies, sub-groups of states, and courts. The paper also considers delegation from the perspective of individual states in order to take account of differences in the degree of delegation between states across institutional arrangements. The paper first presents a definition of international delegation and identifies eight types of authority that states may grant. It then presents a framework for assessing variation in the sovereignty cost of particular delegations – that is, the reduction in state autonomy associated with ceding authority to international institutions. The paper argues that the extent of these costs, and thus the level of delegation, depends on four factors – issue area, type of authority, legal effect, and independence of the international body.

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 decision-making processes and take actions that affect the state. Such international delegation is widespread. While some international agreements involve only commitments, in many cases states 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. Indeed, scholars have long studied the many benefits of delegation. Granting authority to an international body often reduces the transaction costs of cooperation, leading to greater efficiency. By combining forces and drawing on broader expertise, delegation can also increase specialization.

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Given the problems of collective action underlying much of international cooperation, the institutionalization of monitoring and enforcement facilitates gains from iterated cooperation when states otherwise would not trust each other to refrain from cheating or free riding. This enables the creation of public goods and the reduction of various negative externalities of individual state actions.¹

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. In other words, while we have significant literature about international cooperation, broadly speaking, we have little analysis of what constitutes international delegation and what features of such delegation may be important for understanding its causes, consequences, and legal validity. Indeed, international delegation is often treated as a single phenomenon, whereas in fact, as we will explain, it may take a wide variety of forms. In addition, while the benefits of international delegation have been extensively studied, there has been relatively little focus on the costs to states associated with these different forms of delegation, even though states presumably will weigh both benefits and costs in making decisions concerning delegation. A better understanding of the institutional features of delegation may also be important in addressing the increasing concern with the legitimacy and accountability of global governance institutions.²

In this paper, we seek to do three things: First, we attempt to define and clarify the concept of international delegation from both a legal and social science perspective. In this respect, our approach is similar to that of *The Concept of Legalization*, by Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal.³ 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.

Second, we consider the various functions that can be delegated to international bodies. Here, we discuss eight types of delegated authority: legislative, adjudicative, regulatory, monitoring and enforcement, agenda-setting, research and advice, policy

¹ For a recent summary of the benefits of delegation, see Darren Hawkins, David A. Lake, Daniel Nielson, & Michael J. Tierney, “States, International Organizations, and Principal-Agent Theory,” in *Delegation and Agency in International Organizations*, at 13-20 (Darren Hawkins, David A. Lake, Daniel Nielson & Michael J. Tierney eds., 2006).

² See, e.g., 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*, Ethics And International Affairs (forthcoming).

³ See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 Int’l Org. 401 (2000).

implementation, and re-delegation. As we explain, 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. In addition, the scope of an international body's authority will sometimes change over time.

Third, we consider the factors that can affect variations in the “sovereignty cost” of particular delegations, by which we mean the reduction in state autonomy associated with ceding authority to international institutions.⁴ We suggest that the costs are determined by the issue area of the delegation, the type of authority delegated, whether the delegation is legally binding, and the independence of the body receiving the delegation. These costs will vary greatly across delegations and across states. The existence of such costs does not imply that international delegations are undesirable, since the benefits of such delegations often will outweigh the costs for a particular state. Nor are the costs necessarily proportional to the influence or benefit of a particular delegation. We conclude by discussing some of the questions that our typology raises and how it may be useful in addressing current debates.

I. A Definition of International Delegation

We define international delegation as *a grant of authority by a state to an international body or another state to make decisions or take actions*. Several aspects of this definition warrant clarification.

A. Grant of Authority

The first part of our definition requires that there be a “grant of authority to make decisions or take actions.” The existence of such a grant of authority is 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.”⁵ The content of most human rights agreements, for example, is primarily such a set of commitments. Thus, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families spends its first 71 articles detailing the nature of these

⁴ See generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 436-37 (2000) (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 sovereignty”); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217, 227 (2000) (defining “sovereignty cost” as “the surrender of national discretion”). But see Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. Int'l Econ. L. 841, 844 (2003) (defining sovereignty narrowly as “supreme or final decisionmaking and control” and arguing on that basis that “sovereignty is affected by international institutions only rarely,” but then defining sovereignty more broadly in arguing that international institutions can enhance sovereignty).

⁵ Abbott et al., *supra* note 3, at 401.

commitments. The following articles of the Convention, however, establish a Committee, whose authority states can accept at varying levels. Thus, while 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.

A grant of authority is also what distinguishes a delegation from other exercises of authority. A non-governmental organization, for example, may take actions that are similar to those taken by an international body, but unless its actions stem from a state grant of authority they do not involve an international delegation. Grants of authority for international delegations are typically contained in the agreement that establishes the international body. The United Nations Charter, for example, contains various grants of authority to the principal 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. For example, Hawkins *et al.* 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.”⁶ 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.”⁷

Our definition does not require that the actions or decisions of the international body be formally binding on states under international law.⁸ Instead, as with issue area, type of authority, and independence of the international body, we treat the existence of legally binding authority as a variable that can affect the degree of delegation.⁹ Under this approach, an international delegation will exist even when states have granted an international body only the authority to issue non-binding resolutions, policy proposals, or advisory opinions.

Nevertheless, some international cooperation will not involve delegations under our definition. 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,¹⁰ but they have not granted in advance any authority to the

⁶ Hawkins et al., *supra* note 1.

⁷ Abbott et al., *supra* note 3, at 401.

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 effects on the international or domestic plane: something more than mere pronouncements or hortatory acts”).

⁹ See also Abbott et al., *supra* note 3, 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?”, at http://www.g7.utoronto.ca/what_is_g8.html.

collective. Similarly, multilateral treaty conferences, at which representatives of states simply 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.

By contrast, the treaty-drafting work of the United Nation's International Law Commission can be seen as involving an international delegation. The Commission, composed of 34 international law experts, promulgates proposed treaties that are not binding on states unless ratified by them, but that can nonetheless be very influential. In promulgating the proposed treaties, the Commission is exercising the General Assembly's authority (which the Assembly re-delegated to the Commission) to "encourage[e] the progressive development of international law and its codification."¹¹

Finally, unlike the definition in Hawkins *et al.*, our definition does not specifically require that the grant of authority be conditional. Although international delegations typically are conditional,¹² the limits that are imposed on the exercise of delegated authority and the circumstances under which delegated authority can be revoked will vary. As a result, we treat conditionality as part of permanence of commitment, a variable that can affect the legal effect of the delegation.

B. By a State

Our focus is on delegations by individual states to international bodies. This delegation from a state to an international body is typically part of a longer "chain of delegation,"¹³ as illustrated in Figure 1. There is also generally a prior domestic link, 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. We do not focus on such domestic delegation in our analysis, although we recognize that international delegation raises interesting domestic issues both legally and politically.

We do, however, include re-delegation in our definition, because it also emanates from states, albeit indirectly. After states delegate to international bodies, these bodies often have the power to re-delegate that authority to other international bodies or to other actors such as a non-governmental organization. For example, the UN Secretary General

¹¹ See UN Charter, art. 13(1)(a); International Law Commission, at <http://www.un.org/law/ilc/>.

¹² For a discussion of the circumstances under which states are allowed to withdraw from treaties, see Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579 (2005).

¹³ For discussion of chains of delegation, see, for example, the special issue of the European Journal on Political Research, "Parliamentary Democracy and the Chain of Delegation," 37 Eur. J. Polit. Res. (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).

may appoint working groups or councils. Re-delegation is therefore a type of authority that states may grant, and the exercise of this re-delegation authority is itself an international delegation.

FIGURE 1 HERE

Although our focus is on delegation “by a state,” our definition includes grants of authority that would not otherwise be exercised by the state.¹⁴ States often engage in international delegation to address collective action problems that they cannot address individually. Some delegations, therefore, are not of pre-existing 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 or Another State

We use the phrase “international body” to signify broadly some entity to which states have granted authority to make decisions or take actions. This encompasses any entity created by states, including a typical bureaucracy, a temporary commission, a council of states, a board of directors, or even a conference of parties. Another state can also sometimes exercise authority delegated to it from one or more states – for example, Liechtenstein has delegated some foreign relations powers to Switzerland.¹⁵ And sometimes a state will be delegated authority to act as an intermediary to facilitate negotiations between states – as happened, for example, in the Iran hostage crisis when both Iran and the United States had Algeria act as an intermediary.¹⁶

Our definition of international delegation thus includes grants of authority by a state to a collective or sub-group of states, or what some scholars have referred to as “pooling of sovereignty.”¹⁷ This approach contrasts with some delegation literature,

¹⁴ For an example of an approach that excludes such authority, see Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (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.”).

¹⁵ See http://www.liechtenstein.li/en/liechtenstein_main_sites/portal_fuerstentum_liechtenstein/fl-staat-staat/fl-staat-aussenpolitik/fl-staat-aussenpolitik-bilateral/fl-staat-aussenpolitik-bilateral-schweiz.htm.

¹⁶ See Algiers Accords (Jan. 19, 1981), at http://www.parstimes.com/history/algiers_accords.pdf#search=%22Algiers%20declaration%20of%20January%2020%2C%201981%22.

¹⁷ European Union 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 *The Political Quarterly* 299 (1990); see also Mark A.

which defines delegation as exclusively a grant of authority to a third party agent,¹⁸ but it is in line with other delegation literature. For example, Roderick Kiewiet and Matthew McCubbins speak of external and internal delegation by Congress, where the latter is delegation to standing committees and subcommittees within each of the legislative chambers.¹⁹ Barbara Koremenos also speaks of internal and external delegation in the case of dispute resolution, where authority is sometimes delegated to a sub-group of member states.²⁰ As Alexander Thompson notes, “Arguably, delegation to congressional committees, composed of a subset of the membership, more closely matches circumstances at the international level than does delegation to large, independent bureaucracies, which have fewer analogs among international institutions. Similar to these committees, [international organizations] are composed of a subset of states in the international system.”²¹ Following this logic, we consider states to have granted authority to a council or board that may be part of the international body but composed only of a sub-group 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. Non-members of the Council clearly are delegating authority to the Council, as an entity, to make binding decisions. Members of the Council, if they do not have a veto, are also considered under our definition to be engaged in international delegation, because the Council can bind them even over their objection. Even veto-wielding members are delegating an authorization role to the Council (e.g., to approve certain uses of military force), which, as discussed in Part II, is a type of legislative authority.

Similarly, we also consider individual states to have granted some authority to a conference of parties which itself is a part of the international body and may meet regularly not only to oversee the work of the other organs nested within the international body, but also to make decisions and take actions. For example, under the Organization for the Prohibition of Chemical Weapons, the Conference of Parties can, by a two-thirds majority, approve draft agreements, provisions, and guidelines developed by the preparatory commission, and it also oversees enforcement of the convention and has

Pollock, *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).

¹⁸ 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 1, at 1-48, 6. 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 1, at 181-224, 184.

¹⁹ See D. Roderick Kiewiet & Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* (1991).

²⁰ Barbara Koremenos, “Bringing More ‘Precision’ to the Three Dimensions of Legalization” (unpublished manuscript), at <http://www.iir.ubc.ca/colloquium/Koremenos-Paper.pdf>.

²¹ Alexander Thompson, *Coercion Through IOs: The Security Council and the Logic of Information Transmission*, 60 *Int’l Org.* 1, 6 (2006).

authority to “take the necessary measures to ensure compliance,” including referral to the UN Security Council.²² In some cases a conference of 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).

An international body can also be a private body, or a public-private partnership, 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 Boards (IASB), an independent, privately-funded body that sets international financial reporting standards.²³ Private bodies such as non-governmental organizations and corporations promulgate the vast majority of standards and codes of conduct;²⁴ in situations in which they receive their authority from states, there is an international delegation.

The concept of “international body” is broader than that of “international organizations,” used by Abbott and Snidal. An international body need not be “a concrete and stable organizational structure and a supportive administrative apparatus.”²⁵ 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. As noted above, for example, the 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. The term international body is therefore not synonymous with “international organization.”

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

Table 1: Types of international bodies

Type of body	Examples
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²² Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Arti. VIII(A)(21)(j), (k); *id.*, art. XII(4).

²³ See Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards. See also Walter Maatli & Tim Buthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 *Law & Contemp. Probs.* 225 (Summer/Autumn 2005).

²⁴ See Ans Kolk & R. van Tulder, *International Codes of Conduct: Trends, Sectors, Issues and Effectiveness* (2002).

²⁵ Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. Conflict Res.* 3, 4 (1998).

Collective bodies	Conference of Parties/Committee of the whole/Council where all are members	Meeting of state parties under the Kyoto protocol, the ICC treaty, or the Landmines Convention. The Organization for Security and Cooperation in Europe. The European Union council
Sub-groups	Council or board where not all are members	World Bank Board of Governors UN Security Council UN Human Rights Council
Third parties/Agents	External and independent	International Court of Justice, collective re-delegation from one UN agency to another, International Accounting Standards Board.
	Hired staff/bureaucracy	Secretariats and implementing agencies of various kinds such as under the WHO, the UN, and the UNDP

II. Types of International Delegations

Here we identify eight types of delegated authority: legislative, adjudicative, regulatory, monitoring and enforcement, agenda-setting, research and advice, policy implementation, and re-delegation.²⁶ 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.²⁷ In addition, there are sometimes uncertainties about whether an international body has been granted a particular type of authority,²⁸ or whether a particular type of authority falls into one or another category, and authority may in fact fall into more than one 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

²⁶ 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.

²⁷ See UN Charter, art. 25 (“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.*, art. 39 (“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.”).

²⁸ For example, there was some uncertainty surrounding the Security Council's authority to establish international criminal tribunals for former Yugoslavia and Rwanda. See *Prosecutor v. Tadic*, International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber Case No. IT-94-AR72 – Decision on Interlocutory Appeal on Jurisdiction, October 2, 1995, *reprinted in* 35 I.L.M. 32 (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).

A legislative delegation grants authority to create or amend treaties (not including regulatory schedules or annexes attached to the treaties, which we classify 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 85% 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 regulations and 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 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. The Security Council, however, has the authority to authorize states to use non-defensive force and thereby render what would have been illegal conduct into legal conduct. Similarly, the WTO's Dispute Settlement Body can authorize prevailing parties to issue trade sanctions that would otherwise violate the General Agreement on Tariffs and Trade.

B. Adjudicative Delegation

Adjudicative delegation grants authority to make a decision about a controversy or dispute. Although we use the term adjudicative, we do not mean to imply that the decision must be binding. Many agreements provide for informal mediation, non-binding arbitration, or advisory opinions. States do, however, often delegate binding adjudicative authority to permanent or ad hoc courts or issue-specific arbitral bodies (such as the Iran-U.S. Claims Tribunal and the NAFTA Chapter 11 and Chapter 19 arbitrations). In addition, they also 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.²⁹

Adjudicative authority, whether it is granted to courts, tribunals, or ad hoc internal bodies, may cover inter-state 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. The ICJ, for example, has binding dispute resolution authority only with

²⁹ Barbara Koremenos, "An Economic Analysis of *International Rulemaking*" (unpublished manuscript).

respect to disputes between states. By contrast, the European Court of Human Rights (ECHR) can adjudicate disputes between private parties and states.³⁰ International criminal tribunals (such as the ICC) exercise yet another form of adjudicative authority, addressing disputes between the international community and individuals.

International adjudication can overlap with, and even directly interact with, domestic adjudication. Nations in the EU, for example, are often required to seek preliminary rulings from the European Court of Justice concerning EU law and to apply those rulings in cases before them. As noted above, 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.³¹ A few years ago, a Chapter 11 NAFTA arbitration panel considered whether a state trial's court's civil adjudication in the United States violated U.S. treaty obligations under NAFTA.³²

C. Monitoring and Enforcement Delegation

Monitoring and enforcement delegation grants authority to take measures to monitor or enforce compliance with state commitments.³³ Monitoring authority can range from voluntary reporting obligations 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).³⁴ Some monitoring authority only enables the body to collect and distribute the information, while other bodies have the authority to determine and declare whether a state is in compliance.³⁵ 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, 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 CIA detention centers in

³⁰ Keohane et al. usefully distinguish between traditional interstate dispute resolution between states conceived as unitary actors, and transnational dispute resolution, which are open to individuals and groups in civil society. See Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter. *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int'l Org. 457, 457-58 (2000).

³¹ See *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006).

³² See *The Loewen Group Inc. v. United States*, at <http://www.state.gov/s/l/c3755.htm>. See generally Ernest Young, *Institutional Settlement in a Globalizing Judicial System*, 54 Duke L.J. 1143 (2005).

³³ See Abbott & Snidal, *supra* note 25, at 27.

³⁴ See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, art. 8.

³⁵ See Robert L. Brown, *Nonproliferation through Delegation* ch. 4 (unpublished dissertation thesis).

member states.³⁶ Soon thereafter, the Secretary General of the Council of Europe, Terry Davis, acting under Article 52 of the European Convention on Human Rights,³⁷ sent a questionnaire to the 45 States Parties to this convention. After the Secretary General released his report, the Venice Commission published its opinion on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners.³⁸ 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 ILO governing body may refer complaints about non-compliance by member states to a Commission of Inquiry,³⁹ 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.”⁴⁰

Enforcement authority can rely on the peer pressure that results from investigations, monitoring, and reporting. However, bodies may also have the power to authorize individual state economic retaliation (as with the World Trade Organization), or to use of coordinated economic, trade, or even military sanctions (as is sometimes the case with the UN Security Council). Some monitoring and enforcement involves police-type authority that allows intrusions on the territory of a state. In the course of enforcement actions, states may also allow foreign or international officials to direct national troops.

D. Regulatory Delegation

A regulatory delegation grants authority to create administrative rules to implement, fill gaps in, or interpret preexisting international obligations. We include in this category the authority to amend regulatory annexes and schedules attached to treaties, although it may sometimes be unclear whether such amendments are legislative or regulatory. Like legislative authority, regulatory authority affects international obligations and therefore raises important legal considerations. For example, the WTO has the power to adopt binding interpretations of the various WTO trade agreements by a three-fourths vote.⁴¹ Other organizations have the authority to amend their regulatory annexes and schedules.

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

³⁶ <http://www.coe.int/T/E/Com/Files/Events/2006-cia/>.

³⁷ Article 52 of the ECHR states that “The Secretary General of the Council of Europe may, under Article 52 of the European Convention on Human Rights, 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.”

³⁸ Opinion no. 363/2005, available at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp).

³⁹ ILO Convention, art. 26(2).

⁴⁰ *Id.*, art. 26(3).

⁴¹ *See* Agreement Establishing the World Trade Organization, art. IX(2).

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.⁴² Regulatory delegations also may raise questions for legal scholars about the extent to which international administrative law should be similar to domestic administrative law.⁴³ In addition, such delegations may be of interest to political scientists studying the circumstances under which international institutions stray from their original mandates.

⁴² See Curtis A. Bradley, *Constitutional Process, Accountability, and Unratified Treaty Amendments* (draft workshop paper).

⁴³ See generally Symposium, *The Emergence of Global Administrative Law*, 68 *Law & Contemp. Probs.* 1-377 (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).

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.⁴⁴

Formal agenda-setting power depends on several institutional features such as who may propose an initiative, the voting rules, and the rules governing amendments.⁴⁵ For example, an international body may have the right of initiative, as is the case with the European Commission, which has the sole right to initiate legislation in the European Union. 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 (ILO) are required to bring conventions adopted by the Organization before their domestic authorities “for the enactment of legislation or other action.”⁴⁶ The ILO 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.⁴⁷ 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. We therefore do not include informal agenda-setting power 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

⁴⁴ 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 19.

⁴⁵ Pollack, *supra* note 44, at 121.

⁴⁶ ILO Constitution, art. 19(5)(b).

⁴⁷ For an excellent discussion and literature review of formal versus informal agenda setting power, see Pollack, *supra* note 44.

a group of eminent experts as is often done within the UN. He also established a Working Group on Internet Governance (WGIG) to investigate and make proposals for action, as appropriate, on the governance of Internet by 2005.⁴⁸ 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 and to solicit information on best practices from member states and then to "submit a 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."⁴⁹

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. Advisory bodies may even become formal and permanent intergovernmental organizations. For example, in 1988 the World Meteorological Organization and the United Nations 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."⁵⁰

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 often is created to optimize the provision of public goods where 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 of other authorities. Nevertheless, delegating policy implementation can be politically

⁴⁸ See National Telecommunications and Information Administration, http://www.ntia.doc.gov/ntiahome/domainname/USDNSprinciples_06302005.htm. The working group's report recommended the creation of a Global Internet Council (GIC) consisting of governments and involved stakeholders to take over the U.S. oversight role of ICANN, as well as several other international bodies to 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 (IGF)," a body that came out of the WGIG. See <http://www.un.org/News/Press/docs/2006/sgsm10366.doc.htm>.

⁴⁹ General Assembly Resolution 58/185, In-depth study on all forms of violence against women, section (d), available at <http://www.peacewomen.org/un/genass/GAResVAW04.pdf>.

⁵⁰ Principles Governing IPCC Work, available at <http://www.ipcc.ch/about/princ.pdf>.

contentious as has been evident with the United States concern that United Nations agencies could end up disbursing U.S. taxpayer money for various types of birth control. For political scientists, policy implementation also raises issues of defection and free-riding, as well as effectiveness.

H. Re-delegation

The authority of re-delegation 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 sub-contracting with various non-government organizations or even private for-profit organizations. Re-delegation may also entail the creation of new bodies that emanate from the original international body, such as the IPCC or the WGIG as discussed above.

Some forms of authority may be more frequently re-delegated than others. Implementation delegation is the most common, while re-delegation of legislative and regulatory authority is rare. One example of re-delegation of regulatory authority is the decision by the European Commission, discussed earlier, to delegate standard setting to the International Accounting Standards Board, a private body. Re-delegation is not confined to issues of particular substance and may occur even in sensitive areas, as illustrated by the re-delegation of peace-keeping activities by the UN to regional organizations or specific member states.

III. Variations in Sovereignty Costs

In deciding whether to delegate authority to international institutions, states will weigh the benefits against the costs. As noted earlier, theory on international cooperation has been productive in terms of articulating its benefits, including the reduction of transaction costs, the institutionalization of monitoring and commitments that help bring about gains from iterated cooperation, and the ability to solve basic coordination and collaboration problems.⁵¹ Much less attention has been placed on analyzing variations in costs, including in particular variations in the extent to which international delegations involve a surrender of state autonomy. Understanding costs, however, is important for legal scholars who consider the constitutionality or implications of a given delegation, for political scientists who want to explain the patterns of state delegation, and for decision-makers who seek input into the design of a delegation. Our goal is therefore to think more systematically about what these costs are, and how they vary across institutions, among states, and over time.⁵²

⁵¹ See *supra* ___.

⁵² See generally Oona A. Hathaway, *The Cost of Commitment*, 55 *Stan. L. Rev.* 1821 (2003).

We use the term “sovereignty costs” to refer to reductions in state autonomy. International delegations tend to reduce state autonomy because they transfer some of the state’s decision-making authority to other actors.⁵³ This does not imply that delegation is *a priori* wrong or undesirable. While it is possible that the delegation of authority to an international body may make some states worse off than if that delegation had never occurred, the fact that delegation permeates international cooperation suggests that states by and large find it highly beneficial. The benefits of international delegation may often outweigh whatever sovereignty costs are involved.

Further, the idea of inviolable sovereignty is a myth.⁵⁴ Not only has sovereignty been violated historically, but in practical terms governments are also often unable to achieve their policy objectives unilaterally. The increasingly dense system of international norms – for example, with respect to humanitarian intervention – also infringes on traditional notions of sovereignty.

In any event, there is nothing unusual about states voluntarily incurring sovereignty costs. Some surrender of autonomy is, in fact, an inherent aspect of cooperation. All treaty commitments limit sovereignty to one degree or another, if sovereignty is defined as complete freedom of action. Moreover, making international commitments can be seen as an *exercise* of international legal sovereignty, not merely as a limit on sovereignty. Indeed, one of the legal attributes of sovereignty is the capacity to engage in foreign relations, including the capacity to conclude binding international agreements.⁵⁵

Finally, sometimes delegation can increase a state’s policy options and thereby actually enhance sovereignty.⁵⁶ Thus, a compromise of sovereignty along one dimension may increase it along another dimension. For example, one of the main reasons states delegate is to increase what Stephen Krasner has termed “interdependence sovereignty,” which is the ability to control movements of goods, persons, pollutants, ideas, and diseases across borders.⁵⁷ Controlling such cross-border movements in turn enhances the ability of the state to control domestic activity.⁵⁸

⁵³ For similar uses of the term “sovereignty costs,” see Andrew Moravcsik, *The Effect of International Monetary Fund Agreements on Foreign Direct Investment Inflows*, 54 *Int’l Org.* 217 (2000); Nathan M. Jensen, *2004 Crisis, Conditions, and Capital: The Effects of International Monetary Fund Agreements on Foreign Direct Investment Inflows*, 48 *Journal of Conflict Resolution* 194 (2004); Zachary Elkins, Andrew T. Guzman & Beth Simmons, “Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000” (May 16, 2006), at <http://repositories.cdlib.org/bple/alacde/29>.

⁵⁴ See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (1999); David A. Lake, *The New Sovereignty in International Relations*, 5 *Int’l Stud. Rev.* 303 (2003).

⁵⁵ See Restatement (Third) of the Foreign Relations Law of the United States § 201 (1987). This is part of what Stephen Krasner refers to as “international legal sovereignty.” See Krasner, *supra* note 28, at 14-20.

⁵⁶ See Abbott & Snidal, *supra* note 4, at 439.

⁵⁷ See Krasner, *supra* note 28, at 12.

⁵⁸ See Raustiala, *supra* note 4, at 857-60.

Sovereignty costs vary greatly. Some grants of authority are narrow, on peripheral issues, or provide only for non-intrusive activities, while others are broad or central to the core values or functions of the state, or allow international bodies to undertake activities that can intrude considerably on the traditional prerogatives of the state. These costs can also 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. In the late 1960s, the United States agreed in a treaty to allow the ICJ to have jurisdiction over Vienna Convention disputes.⁵⁹ Most of the Vienna Convention concerns inter-state issues such as the scope of consular immunity. One of the provisions in the Convention, however, concerns an arguable right of foreign nationals to receive certain types of notice when they are arrested in a party country.⁶⁰ 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.⁶¹ This development substantially increased the sovereignty cost of the arrangement for the United States, and eventually the United States withdrew from the jurisdictional treaty.⁶²

Moreover, sovereignty costs will vary among states. Some states may enter reservations or invest fewer resources in an organization. States with strong internal mechanisms for implementing international obligations may also find that in practice such obligations entail higher sovereignty costs than for states without such mechanisms.⁶³ Perhaps most importantly, the opportunity cost of delegation varies between states, since, in practice, states do not have equally broad ranges of policy options available. By delegating to the International Atomic Energy Agency (IAEA), 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 or have interests in developing nuclear weapons, however, in reality this delegation is much costlier for Iran. Similarly, the International Criminal Court poses lower sovereignty costs for states that, unlike the United States, do not regularly engage in significant military operations.⁶⁴ Sovereignty costs can also vary between states because some states may have refrained from ratifying protocols or optional provisions such that they have in

⁵⁹ See Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes.

⁶⁰ See Vienna Convention on Consular Relations, art. 36.

⁶¹ See Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 ICJ Rep. 248 (Apr. 9); LaGrand Case (F.R.G. v. U.S.), 2001 ICJ Rep. 466 (June 27); Case Concerning Avena and other Mexican Nationals (Mexico v. United States of America), 2004 ICJ Rep. 12 (Mar. 31).

⁶² See Charles Lane, *U.S. Quits Pact Used in Capital Cases*, Wash. Post, Mar. 10, 2005, at A01.

⁶³ See Abbott & Snidal, *supra* note 4, at 428.

⁶⁴ See Jack L. Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. Chi. L. Rev. 89 (2003).

fact delegated less authority than other states. A classic example is whether states have accepted the compulsory jurisdiction of the ICJ.⁶⁵

Keeping the above variation among states in mind, in this Part we consider how sovereignty costs vary with different features of delegations. Just as benefits often outweigh the costs of delegation, the importance or influence of a delegation may also be disproportional to its costs. For example, NATO entails lower sovereignty costs than the UN Security Council, even though at times (perhaps during periods of the Cold War, for example), NATO might have been more geopolitically important than the Council. Our discussion of the variation in sovereignty costs therefore is not intended to be an assessment of the benefits or influence of particular delegations. Rather, the variation in costs reflects only the extent to which the delegation reduces state autonomy. We suggest that costs will vary depending on four factors: issue area, type of delegated authority, legal effect, and independence of the international body.⁶⁶

A. Issue Area

For historical, cultural, and functional reasons, states will tend to perceive some issues as more closely related to their sovereignty than other issues. Sovereignty costs are highest when issues touch on elements of Westphalian sovereignty such as territory or relations between the state and its citizens.⁶⁷ Delegations on security issues are particularly costly because they relate to the preservation of the state.

Another consideration is whether the delegation overlaps or conflicts with traditional exercises of domestic authority. Sovereignty costs 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, thus reducing any sovereignty costs. Indeed, on some common pool resources states may enjoy only sovereignty benefits to the extent that they become entitled to assert authority where no such confirmed right previously existed. In cases of international criminal law, for example, the creation and delegation of authority to international courts may give states some new authority in matters which before were anarchic.

⁶⁵ 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 . . .” ICJ Statute, art. 36(2). Currently, 67 states accept this jurisdiction. See <http://www.icj-cij.org/icjwww/igeneralinformation/inotice.pdf>.

⁶⁶ This approach is similar to that of Epstein and O’Halloran in their treatment of delegation within the United States, where they first identify the powers delegated and then consider various factors that may limit that delegation. See David Epstein & Sharyn O’Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (1999).

⁶⁷ Abbott & Snidal, *supra* note 4, at 437, 440; Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 *Int’l Org.* 761 (2001); see also Krasner, *supra* note 28, at 20-25 (discussing Westphalian sovereignty).

Sovereignty costs also depend 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 sovereignty costs due to slack.⁶⁸

The sovereignty cost depends not only on the subject matter of the delegation, but also on the scope and range of the issue areas involved. The World Trade Organization (WTO), 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 similar 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.⁶⁹ This is true, for example, with the International Criminal Court and the European Court of Human Rights, but not of the ICJ.

Finally, the issue area can be modified by reservations and opt outs. As noted earlier, for example, some states have accepted the compulsory jurisdiction of the ICJ, while others have not. Moreover, of the states that have accepted it, some have qualified their acceptance with significant reservations. Similarly, many treaties contain clauses allowing disputes arising under the treaty to be heard in the ICJ, but some states (such as the United States) often use reservations to opt out of those clauses. States may also use reservations to underlying treaty commitments to define or limit the obligations that can be applied against them by an international body.

B. Type of Authority

The different types of delegations identified in Part II displace what Krasner calls “domestic authority structures” to different degrees.⁷⁰ Figure 2 presents a ranking of these different types of authority if the independence of the international body, the legal effect, and the issue area of the delegation were all held constant. As shown, if these factors were equal, adjudicative, legislative, and police-type enforcement and monitoring authority carry the greatest sovereignty costs because they displace the strongest central authority structures: police, legislatures, and courts.⁷¹ With adjudicative and legislative

⁶⁸ Abbott & Snidal, *supra* note 4, at 440-441.

⁶⁹ For more on access, see Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter. *Legalized Dispute Resolution: Interstate and Transnational*, 54 Int’l Org. 457 (2000).

⁷⁰ See Krasner, *supra* note 28, at 20.

⁷¹ See also Elkins et al., *supra* note 3.

constitute an additional surrender of authority, so it is only costly to the extent that the new body is more remote and therefore more difficult to control.

Although consistent with the general literature on sovereignty and sovereignty costs, this ranking is naturally a simplification, and it is not based on an empirical study of the actual perceptions of state officials (something that would be a valuable addition to the literature). Further, in reality it is complicated to rank these different types of delegation because the independence of the body, the legal effect, and the issue area always vary considerably among delegations. The delegation of legally binding agenda setting authority, for example, may influence domestic authority structures and constrain policy options more than a grant of non-binding legislative power. Nevertheless, our hope is that this ranking provides some analytic assessment of how the various types of authority might compare in terms of their influence on the domestic authority structures of the state.

C. 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,⁷² delegations that allow international bodies to create binding legal obligations are more extensive than similar delegations of only advisory or agenda-setting authority. Legally binding decisions have a higher sovereignty cost because the presence of an obligation invoke additional domestic and international constraints. In addition, a delegation is even 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). Sometimes the domestic validity of delegations can be affected by their legal effect. For example, in a recent decision, the U.S. Court of Appeals for the D.C. Circuit construed a delegation as non-binding in order to avoid what it perceived to be constitutional concerns.⁷³

An emphasis on legal effect does not mean that non-binding delegation is insignificant. As research on the concept of “soft law” has illustrated,⁷⁴ 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 making “such general comments on the report[s] as it may consider appropriate.”⁷⁵ 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 being

⁷² See Abbott & Snidal, *supra* note 4.

⁷³ See *NRDC v. EPA*, 464 F.3d 1 (D.C. Cir. 2006).

⁷⁴ See Abbott & Snidal, *supra* note 4.

⁷⁵ Convention Against Torture, art. 19(3).

used by the United States to house detainees in the war on terrorism.⁷⁶ 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.⁷⁷ Non-binding 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,⁷⁸ 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.⁷⁹

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 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 ICC 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 they 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 the delegation to the ICJ. 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 the veto, and the Security Council has never in fact enforced an ICJ decision. Nor, unlike ECJ decisions, are ICJ decisions typically considered directly enforceable in domestic courts.⁸⁰

Figure 3 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.

Figure 3: Factors influencing legal effect

⁷⁶ See <http://www.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT.C.USA.CO.2.pdf>; Tim Golden, *U.S. Should Close Prison in Cuba, U.N. Panel Says*, N.Y. Times, May 20, 2006.

⁷⁷ See Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (July 9, 2004), at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

⁷⁸ See http://www.oecd.org/department/0,2688,en_2649_34889_1_1_1_1_1,00.html.

⁷⁹ See <http://www.fao.org/docrep/W9114E/W9114e04.htm#TopOfPage>. The WTO Agreement on Sanitary and Phytosanitary Measures makes presumptive rules out of these non-binding 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 just this issue.

⁸⁰ See A. Mark Weisburd, *International Courts and American Courts*, 21 Mich. J. Int'l L. 877 (2000).

	←	Low	→	High
Obligation		Not legally binding, either on the international plane or domestically		Legally binding, both on the international plane and domestically
Enforceability		Depends on voluntary compliance		Strong, direct sanctions, such as the use of force, criminal punishment, or direct national court application

Table 2: Combined legal effect as a function of obligation and enforceability

		Enforceability	
		High	Low
Obligation	High	High legal effect: Security Council, European Union	Moderate legal effect: Human Rights Council
	Low	Low to moderate legal effect: Non-treaty norms against nuclear proliferation	Low legal effect: Non-treaty norms against use of the death penalty

D. Independence of the International Body⁸¹

Compared with pure commitments, delegation introduces additional sovereignty costs precisely because states surrender some control to other actors.⁸² As principal-agent theory points out, informational asymmetries enable third party agents to shirk or pursue preferences that diverge from the preferences of their principals, and even delegation to a body of the whole or a subgroup of member states necessitates policy compromises.⁸³ As shown in Figure 4, the sovereignty costs for a given state therefore

⁸¹ Our approach here overlaps to some extent with the list of control mechanisms developed in the literature on delegation within the EU, see Mark Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU 99* (2003), and with the international organization design features identified in Koremenos et al., *supra* note 67, as well as with the control mechanisms developed by Epstein & O'Halloran, *supra* note 66, and by John D. Huber & Charles R. Shipan, *Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy* (2002).

⁸² See Abbott & Snidal, *supra* note 4, at 436-38; Moravcsik, *supra* note 4, at 227.

⁸³ See David A. Lake & Mathew D. McCubbins, *The Logic of Delegation to International Organizations*, in Hawkins et al., *supra* note 1, at 341-368, 366, who, unlike us, consider delegation as being only to third parties and treat it separately from pooling, but who, like us, stress that pooling raises analytical issues distinct from principal-agent theory.

depend on the control mechanisms it has over the decision-making body through its representation on the body, the body's rules and procedures, other institutional features such as oversight mechanisms, the permanence of the delegation, and authority over finances. These attributes may be present in any combination. In addition to varying among international bodies, some of them vary as to the same international body based on its relationship with the different states parties.

Figure 4: Factors affecting independence

	← Low	High →
Precision	Specific and exhaustively defined mandate	Vague mandate
Oversight	Extensive oversight, regular reporting requirements, tight control over resource and staff	Little oversight, no reporting requirements
Rules and procedures	Consent-based decision making, procedures ensure no decisions taken without input from all members	State does not need to be included or informed of decision making and actions
Permanence	Instant exit permitted. Renegotiation very easy.	Exit either disallowed or highly infeasible Renegotiation impossible or very difficult
Financial control mechanisms	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

One factor that affects the independence of the body is the precision of the grant. Unlike with legalization, a higher degree of precision does not necessarily correlate with a higher degree of delegation. 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. Precise formulations limit the delegation. Thus, one reason why 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. 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. 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, and thus sovereignty costs, are minimal. The independence therefore depends on the larger institutional structure, the rules and procedures of decision making, 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.⁸⁴ As noted, precision generally reduces the level of independence. As Keohane *et al.* point out, "the greater the uncertainty concerning the proper interpretation or norm in a given case, the more potential legal independence it possesses."⁸⁵ Tribunals will have the highest independence if they have general compulsory jurisdiction, but will have less independence where 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 ICC) 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 requirement of state consent on a case by case basis, and 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 decision making and implementation bodies. As discussed, and as illustrated in Figure 1 and Table 1, any given international agreement may not only delegate simultaneously to different bodies within the larger framework, but it may 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 WHO 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.

⁸⁴ See Keohane *et al.*, *supra* note 69. See also Eric A. Posner & John C. Yoo, *Judicial Independence and International Adjudication*, 93 Cal. L. Rev. 1 (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).

⁸⁵ Keohane *et al.*, *supra* note 69, at 461.

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. While the UN Security Council may use its delegated authority to mandate military action, this 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 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 run-away bodies. In other cases states may want to fund international bodies in advance exactly to limit their own power to interfere with the decision making power of a body. One such case is the Iran-U.S. Claims Tribunal, where the two states allocated funds to allow the Tribunal to function as independently as possible.

Independence varies not only among different types of international delegation, but also among countries with respect to the same body, as 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 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 decreases the body's independence, but it does not eliminate it. For example, under the Landmines Convention, the meeting of state parties can "authorize a fact-finding mission and decide on its mandate by a majority of States Parties present and voting."⁸⁶ The requested state, subject to some limitations, has to grant access to all areas and installations under its control.⁸⁷ As discussed earlier, states may not even be able to control bodies where they hold veto-power or where 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 decision-making body consists of a sub-group 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 where states are not members, although the majority of these have oversight bodies controlled by states. Naturally, as pointed out by principal-agent theory, such control is diluted by informational asymmetries, which enables shirking or professional biases.

⁸⁶ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, art. 8, para. 8.

⁸⁷ *Id.*, para. 14.

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), 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.⁸⁸ Renegotiation, while legally possible, may be complicated by the rules and procedures of the delegation, as well as the relative power relationships between states. Clearly, if all states agree that a delegation has gone awry, renegotiation is much easier than if a state over time finds 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, while exit may be feasible legally, in practice it may be difficult, such as would presumably be the case with withdrawal from the Euro, which is embedded in the monetary policy of the EU, and withdrawal from the ECHR, which is embedded in Council of Europe membership. Indeed, since participation in most international organizations is not *a 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 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 recently withdrew.

IV. Questions and Implications

A typology should not only provide a common vocabulary, it should also stimulate thinking, in this case about the nature and consequences of international delegation. Our typology 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. While we have illustrated our typology with examples, we have not assessed how much states actually delegate the various kinds of authority, or the extent to which states control the independence of the bodies they create. Nor have we studied the extent to which variations in sovereignty costs actually explain state behavior with respect to delegations. 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, that sort of systematic knowledge is rare. Debates in international relations and law about how much delegation there is and how much it matters therefore are largely anecdotal. Hopefully our typology will facilitate additional empirical research and also a more precise consideration of the nature of state delegations of authority.

⁸⁸ See Helfer, *supra* note 12.

In addition, just as scholars have argued that soft law may be consequential,⁸⁹ our inclusion of non-binding delegation may stimulate thinking about “soft delegation.” Whereas the study of soft law has revealed that non-binding commitments can have powerful repercussions for state behavior, we have suggested that soft delegation, the granting of non-binding authority to international actors, can be similarly powerful. Whether it is non-binding arbitration, committees charged with receiving and commenting on reports from the states parties their compliance efforts, advisory legal opinions, or non-binding standards and codes issued by various bodies, the actions of many of these bodies circumscribe policy autonomy by creating international or domestic pressure on governments.

A related but distinct area of inquiry raised by the typology is the delegation of formal agenda setting power. While 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 typology also raises questions about the multi-layered nature of delegation. As we note, in any given international agreement, states simultaneously delegate different types of authority to different bodies, which enjoy different degrees of independence. While this is not new, our inclusion of collectives or sub-groups of states is not only a more realistic portrayal of delegation, but it invites more complex theorizing about the locus of power. A narrow focus on third parties tends to limit theorizing to principal-agent theory to the relationship between states and large international bureaucracies. However, when states delegate authority internationally, managing such relationship is only part of their concern. Of equal or greater concern is that decisions and actions will be taken jointly with other states. Our 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 get associated with particular bodies within their system. The World Bank, for example, is often associated with its board, the UN with the Security Council, while the UNCHR probably is mostly associated with operational units in the field. 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. As Epstein and O’Halloran explore in their article, game theoretic analysis and the rational choice framework from U.S. congressional politics may prove useful in understanding this more complex notion of international delegation and how different bodies that are nested within institutions. Discussion of international delegation and the accountability and legitimacy of

⁸⁹ See Abbott & Snidal, *supra* note 4.

international organizations may also benefit from properly identifying the controls that different bodies exert within organizations.

Contrary to former 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. For example, while 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.

Another set of questions about types of authority relates to institutional design. A new set of inquiries have begun recently about why states design organizations to look the way they do. This question hardly is 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 delegated vary with the degree of legal obligation inherent in the underlying treaty? What is the relationship between monitoring and enforcement, and to what extent may monitoring authority substitute for lack of formal enforcement authority.⁹⁰ 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 affect on federal systems of government, such as the one in the United States. 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.⁹¹

⁹⁰ Xinyuan Dai, “Information Systems of Treaty Regimes,” *World Politics*, July 2002.

⁹¹ CITES.

Finally, 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 sovereignty 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.⁹² In addition, as international institutions increasingly handle regulatory duties, questions are being raised about the extent to which domestic legal controls should be imposed that mirror those that govern domestic regulatory entities.⁹³ Finally, the greater the displacement of domestic authority structures, the greater the likelihood that international delegations will pose constitutional concerns for some countries. In the United States, these concerns will be translated into legal considerations such as the formal processes for making law and treaties, the non-delegation 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.

Conclusion

Researchers have identified many benefits from international cooperation, and they have identified a variety of situations in which cooperation is particularly fruitful. In deciding whether to cooperate through delegations of authority to international institutions, however, states will weigh not only the benefits but also the costs. Yet there has been little systematic effort to assess variations in the costs associated with different types and degrees of delegation on various issues. Our focus on costs, therefore, is not intended to suggest that delegation is undesirable, but to cast light on the other half of the equation, so that we may better understand the behavior of states and the political and legal nature of international delegation.

We have framed the costs in terms of sovereignty, because in return for cooperative policies at the interstate level, delegation often limits national discretion.⁹⁴ To understand the sovereignty costs of delegation it is imperative to first articulate the institutional variation in degrees and types of delegation. We have therefore discussed how some grants of authority are narrow, on peripheral issues, or provide only for non-

⁹² See, e.g., *U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). See generally Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *Stan. L. Rev.* 1557, 1587-95 (2003).

⁹³ See, e.g., Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 *Yale Law Journal* 1490 (2006); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 *Law & Contemporary Problems* 63 (2005).

⁹⁴ See *supra* note 53.

intrusive activities, while others are broad or central to the core values or functions of the state, or allow international bodies to undertake activities that can intrude considerably on the traditional prerogatives of the state. Specifically we have suggested that the costs of a delegation are a function of the issue area, the types of authority granted, the legal effect of the delegation, and the independence of the international body.

Our analysis has also stressed that international delegation can vary across states. International delegation to the UN Security Council, to the ICJ, or to the World Bank is not equally costly for all states. The cost varies with the initial influence states had in the formulation of the agreement, which is then often reflected in their voting powers or other mechanisms of control such as which states are allowed to head certain organizations. Furthermore, some states opt out of certain delegations, creating further cost variation.

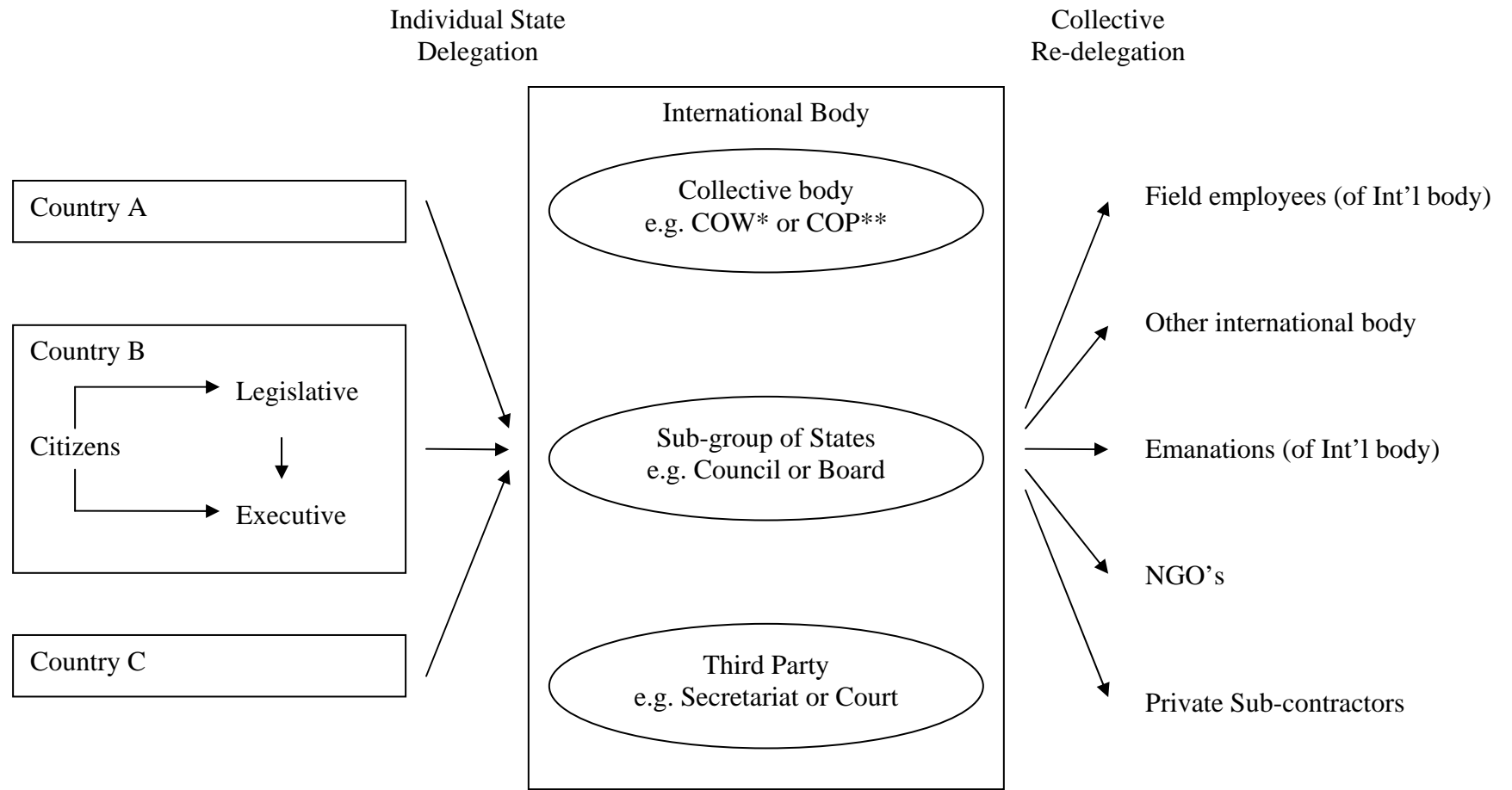
[Additional discussion to be added based on the papers that will be submitted for the rest of the volume.]

Sovereignty costs of delegation*

Examples	Issue Area	Type	Legal Effect	Independence
UN Security Council, European Court of Human Rights, European Court of Justice, ICC	High	High	High	High
ICJ	High	High	Medium	Low to Medium
Chemical Weapons Technical Secretariat	Medium	High	High	High
NAFTA arbitration panels	Medium	High	High	Medium
WTO Dispute Resolution	Medium	High	Medium to High	High
UN General Assembly	High	Low	Low to Medium	High
Council of Europe Parliamentary Assembly	High	Low	Low	High
Landmines Convention meeting of state parties	Medium	High	Medium	Medium
Torture Committee	Medium	Medium	Low	Medium
WHO	Medium	Low	Low	High/Medium
World Bank, IMF	Medium	Low	Low	Medium*
OECD	Medium	Low	Low to Medium	Low
Iran-U.S. Claims Tribunal	Low	High	High	Medium
Montreal Protocol Secretariat	Low	High	Medium	Medium
Codex Alimentarius Commission	Low	High	Low	Medium
ILO	Low	Medium	Medium	Low
Intergovernmental Panel on	Low	Low	Low	High

Climate Change (IPCC), Working Group on Internet Governance (WGIG), Council of Development Advisers				
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* As noted, the costs of delegation may vary among states, as for example in the World Bank and IMF cases where voting weights favor large donors.

Figure 1: Delegation chain

* Committee of the whole **Conference of the parties