

THE MYTH OF INTERNATIONAL DELEGATION

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February 9, 2007

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

Optimal solutions to some international problems, however, require more than simply an exchange of promises. They require a delegation of authority to some entity that, at least in an idealized context, is able to make decisions to maximize the total gains enjoyed by the parties to the agreement or, perhaps, to address distributional issues among states. A well-functioning international body could, for example, take into account the interests of all states in making a decision and select the course of action that provides the greatest overall benefits. In contrast, if the states themselves have to make a decision and if unanimity is the decision rule, deviations from the status quo take place only if the proposed change represents a Pareto improvement, meaning that every state benefits (or at least is not hurt).²

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

There is, of course, another side to delegation. When power is delegated from domestic authorities to supra-national organizations a variety of problems emerge that will, at least sometimes, make that delegation undesirable. Inevitably, movement to a higher authority takes decisions farther from individual citizens and so reduces democratic control. This is especially true of international delegations because we lack effective democratic

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² The proposed change may include some set of transfers in order to compensate those that would otherwise be made worse off.

institutions and practices at the international level. Delegation also presents principal-agent problems because an international entity may have interests that diverge from those of the states that establish it. There are also concerns about capture of supra-national institutions by interest groups who could influence policy to serve their own narrow set of concerns. Other risks and problems could be enumerated, but the point should be clear: delegation carries costs as well as benefits.

The question of whether there should be delegation to international entities can only be answered by balancing the relevant costs and benefits. As these costs and benefits vary from one issue area to another, one would expect the conclusion about the wisdom of delegation to vary from one issue to another and one would expect thoughtful discussions of the question to involve a careful balancing of these costs and benefits. Some delegations are likely to be worthwhile, while others are likely to be unwise.

These remarks should be not only non-controversial, but also obvious. A similar discourse is familiar in the domestic law context. There are, for example, well-established theories of federalism that offer guidance about what powers and responsibilities should be placed at what level of government.³

Rather than attempting to advance the case for or against a particular instance of delegation this article points out that despite the sometimes uttered concerns about delegation, it is quite difficult to find actual examples of international delegation in which the costs appear larger than the benefits. In fact, when one looks to the existing practices of states, it turns out that examples of non-trivial international delegations are quite rare. Notwithstanding occasional doomsday proclamations of concerned commentators, international organizations are not dictating policy decisions to this or any other country. There are no international bureaucrats secreted away in Geneva or The Hague or Washington drafting regulations or policies that apply to the conduct of sovereign states. What delegation there is tends to be carefully cabined and/or involve highly technical matters. This paper examines some oft-cited examples of international delegation and concludes that this is all a lot of fuss over nothing. Like dragons, delegation can be scary. Like dragons, international delegation is something we need not worry too much about.⁴

Defining International Delegation

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

³ See ROBERT P. INMAN & DANIEL L. RUBINFELD, *Federalism*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS*, v. V, 661 (2000).

⁴ One final point of clarification is appropriate. There is debate within the United States about the appropriate scope of delegation of authority among the various branches of the government. How much power should the President have, for example, to commit the state internationally? These questions, though important, are not the subject of this Essay and are left to one side.

see what examples they have in mind. In this sense we have no choice but to play defense and respond to examples offered by concerned commentators.

The second challenge is definitional. Clarity requires that we choose some definition of “delegation,” but doing so may omit some behavior that is of interest. We have no interest in selecting a definition that is so narrow as to make our claim correct but trivial. On the other hand, a definition that is too broad creates a category that is unnecessarily heterogeneous in which some actions are entirely benign while others are potentially worrisome. Such an approach creates unnecessary confusion.

In our view Bradley and Kelley (BK), the organizers of this symposium, have made the latter mistake.⁵ They define delegation as “a grant of authority by a state to an international body or another state to make decisions or take actions.”⁶ As far as we know, this is the broadest definition of international delegation to be put forth to date. Certainly, all of the alternative definitions cited by BK are narrower than the one they adopt. The definition used by Hawkins, Lake, Nielson and Tierney requires that an agent be authorized to act on behalf of a principal.⁷ This is much more restrictive than the BK requirement that the international body be authorized to “make decisions or take actions.” Abbott, Keohane, Moravcsik, Slaughter, and Snidal require the granting of authority to implement, interpret, and apply rules.⁸ Swaine requires that there be a grant of authority to develop binding rules with legal effect.⁹ Both of these last two definitions emphasize a legal dimension of delegation that is entirely absent from the BK definition. Ku considers an international act to be a delegation if it transfers constitutionally-assigned federal powers to an international organization.¹⁰ This definition involves the surrender of some authority to an international organization.

In contrast to the above, the BK definition encompasses virtually any action by a state that authorizes any international entity to do anything. Thus, for example, the trade and environment committee at the WTO, a body without the ability to create binding rules, staffed by WTO member states, and without any authority over anything that happens at

⁵ Cutis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, Working Paper Prepared for February 2007 Duke Workshop, *The Law and Politics of International Delegation* (draft dated 10/31/06).

⁶ *Id.* at 2.

⁷ Darren Hawkins, David A. Lake, Daniel Nielson & Michael J. Tierney, *States, International Organizations, and Principal-Agent Theory*, in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* (Darren Hawkins, David A. Lake, Daniel Nielson & Michael J. Tierney eds., Cambridge University Press 2006) (“a conditional grant of authority from a principal to an agent that *empowers the latter to act on behalf of the former*”).

⁸ Kenneth W. Abbot, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT’L ORG. 401 (2000) (“that third parties have been granted *authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules*”).

⁹ Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1494 n.3 (2004) (“vesting them with the *authority to develop binding rules*,” and specifying that “the authority so vested *must be capable of some kind of legal effects* on the international or domestic plane: something more than pronouncements or hortatory acts”).

¹⁰ Julian Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 72 (2000) (“*the transfer of constitutionally-assigned federal powers... to an international organization*”).

the WTO, would represent a form of delegation. Indeed, much less important forms of authority would also count. Any entity with the authority to call a meeting, for example, regardless of who the attendees would be, would represent an international delegation. BK state that the Group of Seven summits do not involve an international delegation under their definition because there has been no grant of authority “to the collective or any international body.”¹¹ But if one takes their definition seriously such a summit involves all sorts of delegations. There has been an international delegation by the participants in the summit to the host nation to plan the event and to expend funds on it. There has been a delegation by every state present to every other state present because the very existence of the event grants to each state the authority to speak at the event itself (a form of taking action). There has also been delegation to the Group of Seven as a collective by virtue of the fact that the group can decide, for example, to abandon the meeting or to declare it a failure without the consent of every state.

Other examples abound. By attending the Olympics states have delegated to the International Olympic Committee the ability to allocate medals. And of course the establishment of any international body must entail a delegation because there are surely decisions that that body is entitled to make and funds it is entitled to spend. This is so regardless of the importance of the body, the discretion given to it, or the controls placed on it.

In our view the main difficulty with the BK definition is that it does not distinguish instances in which states surrender some degree of autonomy and authority from many other instances in which they simply engage with the world. Virtually any instance of the latter will inevitably involve something that fits the BK definition.

The definition, for example, does not require that a state possess the authority that it is alleged to have delegated. It is hard to understand the term delegation without the original source possessing the authority in the first place. Bradley and Kelley note that “[s]ome delegations...are not of pre-existing state authority, but of authority created among states,” such as an international adjudicative institution.¹² We agree that the establishment of an international adjudicative institution may qualify as a delegation, in the sense that the sovereign state has delegated authority to the institution to resolve certain disputes. In our view, however, this involves a delegation of authority that the state does, in fact, possess – the authority to accept or reject the jurisdiction of an international tribunal.

Moreover, the BK definition does not require some minimum level of influence for the international body or other state. Thus, the establishment of any sort of secretariat or staff within an international organization, assuming that it has some authority to make decisions (e.g., how or when to collect and store country reports), take actions (e.g., publish country reports), or expend resources (e.g., pay the secretariat staff) would be sufficient to earn the label of a delegation. Such a definition ignores the question of whether a state is able to exercise effective control over the international body, whether

¹¹ Bradley & Kelley, *supra* note 4 at 3.

¹² *Id.* at 4.

the international body has authority over questions of import, and whether the authority is cabined or not. The definition also does not consider the state's ability to exit from the relevant regime and thereby deny the international body the power to act in ways that harm the state. In fact, the question of opting out of the relevant regime cannot be included because the definition does not require that the international body actually have any authority over the states.

Bradley and Kelley insist that under their definition, a non-governmental body may take actions that are similar to those taken by an international body, but its actions "will not stem from a state grant of authority and thus will not involve an international delegation."¹³ Thus, for example, there is no international delegation to Amnesty International because it has not received a grant of authority from a state. But if a state has given any money to such an organization (would tax-exempt status qualify?) there is a delegation. Thus when the United States government gives money to the Ford Foundation, it is engaged in an international delegation under the definition, notwithstanding the fact that the Ford Foundation has no authority except the ability to spend those funds.

As this discussion indicates, we find the proposed definition overbroad. At least to the extent we hope to understand why and when states engage in delegation, and the normative consequences of doing so, we are of the view that this definition sweeps in far too much to be useful. A decision to establish an international organization capable of binding states to a course of action in areas of great concern to states (e.g., the Security Council) requires, in our view, a different analysis than a decision to establish a group of international technocrats charged with making non-binding recommendations to states regarding the harmonization of internet governance¹⁴ -- and even this second example is a much more consequential action than the donation of funds in support of an international aid organization.

Any definition is, of course, arbitrary. We do not claim that there is one "true" definition of delegation. Our claim, rather, is that given one's purpose, some definitions are more useful than others. If we wish to speak about international delegation, it seems to us that the term should be applied to some set of actions by states that have features in common. Bradley and Kelly argue that the many issues we discuss above speak to the degree of delegation under their definition. This is fine with us, but we are not persuaded that there is any sensible way in which it is possible to speak of the entire category of delegations at once rather than what might be called "significant" or "meaningful" or "dangerous" delegations, and we certainly are of the view that when working with such a broad definition it is critical to keep in mind that whatever might concern us about delegation likely only applies to a small subset of all actions that fit the definition.

¹³ *Id.* at 2.

¹⁴ *See id.* at 16 (referencing the establishment of the Working Group on Internet Governance (WGIG) by the U.N. Secretary General to "investigate and make proposals for action, as appropriate, on the governance of the Internet by 2005.")

Another potential danger presented by an overbroad definition is that instances of delegation may be deemed “significant” or “substantial” because they are toward the more significant end of the category established by the definition. But, of course, to say that an action is more significant (in the sense of representing a greater threat to sovereignty) than the least significant forms of delegation that qualify under the BK definition is to say very little. With such a broad category a relative analysis risks being misleading.

This is an important point because BK attempt to categorize various forms of delegated authority as having “high,” “low” or “medium” sovereignty costs. Though we agree that a focus on the costs of delegation is appropriate, we are not persuaded that this relative assessment is the best approach. Instead we believe that individual instances of delegation must be examined to determine whether their costs outweigh their benefits.

For discussion to take place there must be agreement on terms and so, though we believe the proposed definition is flawed, we adopt it for the discussion that follows. We emphasize, however, that to the extent one is concerned with some notion of sovereignty costs, most of what fits this definition can be ignored – it is simply not a threat to even the most protective notions of sovereignty. The breadth of this definition requires that when we discuss delegation as a sovereignty concern, we carefully qualify the particular forms of delegation that are of concern.

With that in mind, we now turn to consider various forms of potential delegation and make the case that it is very difficult to identify examples of delegation that raise meaningful sovereignty concerns. Our analysis attempts to address the most often-cited examples of delegation. We borrow the approach used in *The Constitutionality of International Delegations* by Edward T. Swaine,¹⁵ and divide these examples into three general categories: (1) delegations of treaty-amending and/or legislative authority; (2) delegations of decision-making authority; and (3) delegations of adjudicative authority to international courts and tribunals.

Delegations of Treaty-Amending and Legislative Authority

As will be discussed below, there are few, if any, instances in which states have delegated real decision-making authority over important policy matters to international organizations. There is a way in which states have, at least in theory, opened the door for international institutions to amend their rules in such a way as to affect the obligations of states. It is important to notice from the start that this is a sort of delegation once-removed. A typical example is one in which an agreement exists and has some consented-to set of obligations. There is no authority for the organization to adopt new rules without unanimous consent or expectation that it will engage in policy making going forward. There is, however, an amendment provision that could theoretically be used to give the organization or some subset of states the power to change the rules.¹⁶

¹⁵ Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004).

¹⁶ *Id.* at 1506.

Article 36 of the Constitution of the International Labor Organization (ILO), for example, provides that the Constitution may be amended by a two-thirds majority.¹⁷ The existing ILO rules are entirely unobjectionable from a sovereignty perspective. The ILO cannot adopt rules that are binding on states, and it cannot order sanctions or take any action against a state that does not comply with its labor standards. The concern, then, is that the constitution of the organization could be changed by something less than unanimous consent. If the constitution were changed, for example, to state that the ILO had the power to bind ILO member governments as a legal matter, the non-consenting parties could become subject to rules to which they had not consented.

The ILO represents a delegation under the Bradley & Kelley definition, but it is hard to imagine that it would be included on any reasonable list of delegations that threaten sovereignty. To begin with, it seems far fetched to imagine the sort of amendment described above. It would fly in the face of deeply engrained notions of consent in international law and would provoke cries of protest from the non-consenting states. Indeed, we are unable to think of a single example in which an international organization has amended its constitution to grab power in such a manner.

Moreover, if a subset of members sought to make such a change, it is certain that the dissenting members would reconsider their membership in the organization. The ability to exit gives states protection against non-consensual changes to the structure of an organization and dramatically reduces the extent of the delegation.¹⁸ As has been pointed out in other contexts, there is a balance between exit and voice.¹⁹ Conventional international commitments can be changed only with unanimous consent – giving every state considerable voice. If amendments can change the underlying rules, states have the opportunity to exit. The result is that an attempt to use the amendment provisions of an organization in the way described above represents a re-opening of negotiations on the structure of the organization and whatever new structure emerges, no state is committed to it.

More generally, the theoretical possibility of a change to the constitutive terms of an international entity has not presented sovereignty problems in the past and seems quite unlikely to do so in the future. There are strong norms in place preventing such amendments, and the ability to exit gives states considerable protection. To label any provision that allows an international body to change its constitution a troubling delegation seems, to us at least, a considerable exaggeration. Imagine, for example, an

¹⁷ *Id.* at 1504. In addition to a two-thirds majority, passage of an amendment requires the votes of five of the ten Members represented on the Governing Body as members of chief industrial importance. These members include the United States, Germany, Brazil, China, France, India, Italy, Japan, Russia, and the United Kingdom.

¹⁸ Withdrawal under such conditions would be justified under international law, even if the organization did not explicitly provide for withdrawal. Article 62 of the Vienna Convention states that a state may withdraw in response to a fundamental change in circumstance if the effect of the change is to “radically transform the extent of obligations still to be performed under the treaty.” A change from an organization without rule-making authority to one with such authority would surely qualify.

¹⁹ A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY-RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970); J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L J* 2403 (1991).

international commission convened to address scandals over judging in Olympic figure skating. Even if its decision processes allowed it to change its constitutive terms by vote, we are not worried that the commission will declare itself capable of issuing binding international law rules governing the law of the sea.

Returning to the proffered example of the ILO, it turns out that the organization's Constitution is a rather innocuous document that merely describes the organization and procedures of the institution and which allows withdrawal by its members. Substantive obligations are promulgated through subsequent conventions, which only bind those members who choose to ratify.²⁰

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

All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.²¹

The fundamental rights at issue include: the freedom of association and recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.²²

Before this example is held up as evidence of worrisome delegated authority, however, notice how carefully it is worded and what its legal implications are. The declaration states that members have an obligation "arising from the very fact of membership" to promote these rights "in accordance with the [ILO's] Constitution." Whatever obligations apply, then, are ultimately derived from the ILO's Constitution and the fact of membership. The Fundamental Declaration, then, must be one of two things. First, if the

²⁰ Art. 19.5(e), ILO Constitution. In the event that an ILO convention is adopted by a two-thirds majority, Article 19.5(b) requires all Members to bring the convention before the domestic authorities responsible for ratifying treaties. The obligation on Members ends there.

²¹ ILO Fundamental Declaration, Art. 2, available at: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.

²² Art. 2, ILO Declaration, available at: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT.

Constitution does not provide these obligations the declaration is meaningless and has no legal effect. Second, if the Constitution does provide for these obligations then the declaration simply restates them. In neither case is this an exercise of delegated authority. It is instead a claim about what the Constitution of the ILO requires. Finally, note that there is no authority granted to International Labour Conference (where the declaration was adopted) to engage in interpretations of the Constitution, and so there is no sense in which the declaration represents an official interpretation of the Constitution.²³

Another example that is sometimes cited is the International Monetary Fund (IMF) and its Articles of Agreement.²⁴ Upon examination, however, this example is a red herring. Article 28(a) of the Articles of Agreement permits three-fifths of the members, having eighty-five percent of the voting power, to amend the Articles. Article 28(b), however, carves out three areas where acceptance by all the Members is required: (i) the right to withdraw from the Fund; (ii) the provision that no change in a member's quota shall be made without its consent; and (iii) the provision that no change may be made in the par value of a member's currency except on the proposal of that member.²⁵ Absent these three substantive areas, the Articles of Agreement, much like the ILO Constitution, read like the charter of a country club. Three-fifths of the members may, for example, amend the location of the offices or the number of Executive Directors on the Executive Board, but is the delegation of these administrative decisions really cause for alarm?

The most cited example of international delegation is likely the World Trade Organization (WTO). This organization certainly imposes a large number of burdensome rules on states, but these rules were the product of a negotiated agreement and consented to by all member states. The claim of delegation, therefore, does not speak to the rules themselves but rather to the decision making procedures of the organization. It is certainly true that the text of the WTO Agreement provides for decision-making by majority or supra-majority voting,²⁶ though the most central obligations taken on by states can be changed only by consensus,²⁷ and other changes to the substantive obligations of members take effect only for members that have accepted them.²⁸ More could be said about the WTO decision making process, but for the purposes of this paper the most important point is that there has never been any attempt to use these voting procedures. It is true that in some formal sense those procedures remain, but no state has

²³ The International Court of Justice is charged with interpretation of ILO issues. ILO Constitution, Art. 37.

²⁴ See e.g., Bradley & Kelley, *supra* note 4 at 12; Swaine, *supra* note 12 at 1507.

²⁵ Art. 28, Articles of Agreement. These are the rights to withdraw from the Fund, the provision that no change in a member's quota shall be made without its consent, and the provision that no change may be made in the par value of a member's currency except on the proposal of that member.

²⁶ WTO Agreement, arts. IX, X.

²⁷ WTO Agreement, art. X:2.

²⁸ WTO Agreement, art. X:3. This provision is a little complicated in that after a two-thirds majority approves an amendment that would affect the rights and obligations of members take effect for the members that have accepted them. The Ministerial Conference (a body including all WTO members) has the authority to decide by a three-fourths majority that any such amendment is of such a nature that any member which does not accept it must withdraw from the organization. There is, therefore, a narrow instance in which the decision would be mandatory for continued membership in the organization.

demonstrated an interest in demanding that voting take place. The organization operates instead by consensus. The most reasonable conclusion is that despite the formal voting rules, WTO decisions are, and as far as anybody can tell will continue to be, the product of consensus; giving every state the ability to prevent a rule change.

Another potential source of concern that is sometimes cited is the risk that an agreement or set of agreements might be subject to an unexpected or novel interpretation. This is primarily a question for the discussion of adjudicative delegation that is developed below, but to the extent the theory arises from a source other than an adjudicator it may nevertheless be a concern. The poster child for this concern is the UN Human Rights Committee.²⁹ In 1994, that Committee argued that it had the right to evaluate the acceptability of reservations and to declare a reservation not only void but also severable, binding a signatory to the Covenant as if it had never issued such a reservation.³⁰ Could this represent a delegation to the Human Rights Committee? The answer is clearly “no.”

The simplest reason to conclude that the Committee’s claim should be dismissed is that its assertion, contained in the now-infamous General Comment No. 24, contradicts to rules provided in the Vienna Convention on the Law of Treaties (Vienna Convention). Article 19 of the Vienna Convention provides that a state is not permitted to attach a reservation that “is incompatible with the object and purpose of the treaty.”³¹ Article 20 places the primary (if not exclusive) responsibility for assessing incompatibility with State parties, with no mention of a role for international bodies such as the Human Rights Committee.³² The most preposterous aspect of the interpretation is the notion of severability. Articles 20 and 21 of the Vienna Convention set forth only two potential consequences of reservations and objections to them: either the remainder of the treaty comes into force between the parties in question or the treaty does not come into force at all between those parties.³³ The Legal Adviser for the U.S. State Department accurately described the legal issue as follows:

...the Committee appears to dispense with the established procedures for determining the permissibility of reservations and to divest State Parties of any role in determining the meaning of the Covenant...and of the extent of their treaty obligations...The Committee’s position, while interesting, runs contrary to the Covenant scheme and international law.³⁴

Furthermore, the Human Rights Committee is given no authority that even suggests it is charged with interpretations of this kind. The primary role of the committee is to study

²⁹ Swaine, *supra* note __, at 1511.

³⁰ UN Human Rights Committee, General Comment No. 24.

³¹ Vienna Convention, Art. 19. This phrase is drawn from the ICJ Advisory Opinion *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, 1951 ICJ Reports 15.

³² International Human Rights: Law, Policy, and Process at 679.

³³ *Id.*; Vienna Convention, Arts. 20-21.

³⁴ Letter from Conrad Harper to Francisco José Aguilar-Urbina, Chairman, U.N. Human Rights Committee (Mar. 28-29, 1995).

the reports of parties to the ICCPR and submit reports and comments about those reports to the parties and the Economic and Social Council.³⁵ In addition, the Committee has a limited role in dispute resolution,³⁶ but there is no language that can be interpreted to grant it the authority to act as it did in attempting to create a new rule to govern reservations.

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

Delegation of Decision-Making Authority

The above are examples of institutions or actions that are sometimes said to constitute delegation but that upon examination simply do not. We turn now to a different category of agreements and commitments. There are instances in which states have, indeed, delegated authority to outside bodies. This style of delegation could, potentially, yield outcomes that are costly and undesirable. But of course such delegations require the consent of states and the actual instances of delegation that we have been able to identify are all of a highly technical and specific character. They are severely limited in scope and present no serious threat to the interests of states. These examples are ones where the gains from delegation seem large and the costs seem tiny.

It appears to be the case that arms control and environmental agreements are more prone to this sort of delegation than other agreements, presumably because they often involve highly technical regulations.³⁷ Typically, a qualified majority is permitted to adopt amendments to the body of the treaty, but those amendments will only bind the parties ratifying them.³⁸ A handful of agreements allow modifications to their technical annexes under a so-called "tacit acceptance procedure," which does not require ratification by a state party for the amendment to become binding.³⁹ States are, however, given a period within which to object, in which case the party is not bound by the amendment. This ability to object prevents a state from being bound to rules that it disagrees with and fails to constitute a delegation that should trouble us (or, under a narrower definition, fails to constitute a delegation at all).

Some small number of agreements goes further and do not give individual states the ability to exempt themselves from these technical decisions. The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) encourages consensus, but provides that, as a last resort, a two-thirds majority may vote to adjust the limits on the production and consumption of substances specified in the annexes as depleting

³⁵ ICCPR, art. 40:4.

³⁶ ICCPR, arts. 41, 42.

³⁷ CRS Report, *Treaties and Other International Agreements...* at 195.

³⁸ Swaine *supra* note __ at 1512; *see* fn 70 for list.

³⁹ *Id.*

atmospheric ozone.⁴⁰ Though this represents a delegation, the provision applies only to adjustments to controls on specifically enumerated and previously addressed chemicals that the parties expected to be eliminated.⁴¹ The actual delegation of authority, then, is only with respect to the pace at which certain chemicals are to be eliminated.⁴² Several international organizations issue non-binding standards that have gained influence under the WTO system. The Codex Alimentarius Commission is an international organization created by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) to develop non-binding food standards and codes of practice in order to protect consumers and ensure fair trade practices in food trade.⁴³ Although these standards are not binding on their own, the TBT and SPS Agreements encourage their adoption by Member states by granting presumptive validity to food safety standards set by the Commission.⁴⁴ Similarly, the SPS Agreement recognizes the International Office of Epizootics as issuing acceptable international standards, guidelines and recommendations for animal health and zoonoses, and the Secretariat of the International Plant Protection Convention for international standards in plant health.⁴⁵ So here we have a real delegation in that these international entities are able to indirectly influence the rules under the SPS and TBT Agreements. The scope of this ability to influence rules, however, is extraordinarily narrow and, in any event, the rules in question serve only a default rules which allow for deviation under appropriate circumstances.

Another example that is sometimes cited is the International Atomic Energy Agency's Model Additional Protocol. Article 16(b) provides that a majority of the IAEA Board of Governors may (after consultation with experts) amend the activities, equipment, and material covered by the annexes without ratification by the state parties.⁴⁶ Prior to the adoption of this Protocol, each state had a veto over such decisions. One credible view of this Protocol is that it has only a negligible impact because it does not eliminate the national security exception contained in the IAEA's Safeguards Agreement.⁴⁷ This exception gives states the ability to legally avoid any amendments of consequence. Furthermore, the ability to amend is limited to the activities listed in Annex I and the material specified in Annex II. Under Article II, States are required to provide the Agency with a declaration containing a description of the scale of operations for each location engaged in the activities specified in Annex I and "the identity, quantity, location

⁴⁰ Montreal Protocol, Art. 2.9(c).

⁴¹ Controls over new chemicals apply only to parties that ratify the relevant amendment.

⁴² Montreal Protocol, art. 2.9.

⁴³ See http://www.codexalimentarius.net/web/index_en.jsp (last visited December 31, 2006).

⁴⁴ Agreement on the Application of Sanitary or Phytosanitary Measures, Apr. 15, 1994, art. 3.2, 3.4, Annex A(3)(a) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1381, reprinted in III COMPILATION OF INTERNATIONAL LAWS 273 (FDLI 1996); Agreement on Technical Barriers to Trade, Apr. 15, 1994, art. 2.5, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1427, reprinted in III COMPILATION OF INTERNATIONAL LAWS 281 (FDLI 1996).

⁴⁵ SPS Agreement, *supra* note __, Annex A(3)(b)-(c).

⁴⁶ Additional Protocol, Art. 16(b).

⁴⁷ Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States, art. 1.

of intended use in the receiving State and date or... expected date of export” of the specified equipment and non-nuclear material listed in Annex II.⁴⁸

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

Similarly, the Organization for the Prohibition of Chemical Weapons (OPCW) is charged with the implementation of the Chemical Weapons Convention (CWC). Under the CWC, each State Party undertakes to destroy chemical weapons it owns or possesses (or any located in any place under its jurisdiction or control).⁴⁹ The OPCW is comprised of three organs: the Conference of States Parties, the Executive Council and the Technical Secretariat. These organs ensure compliance with the CWC by engaging in fact-finding and legal evaluations and reacting to deal with violations.⁵⁰ The most problematic situation, for our purposes, is one in which a State Party is suspected of non-compliance. In that context State Parties are encouraged to “first make every effort to clarify and resolve” the matter “through exchange of information and consultations among themselves,”⁵¹ but a State Party may also request an on-site challenge inspection.⁵² Ultimately, the Conference of Parties has the authority to decide how to redress a violation.⁵³

Although delegation to the OPCW is real, the constraints on sovereignty under the CWC regime are “not without limit and are, indeed, relative.”⁵⁴ First and foremost, no State party has yet asked for an intervention of the OPCW in obtaining a clarification from another State Party, and no State Party has requested a challenge inspection.⁵⁵ Second, there are two types of authority granted. The first is a form of quasi-adjudicative authority in that the Conference of the Parties ultimately can determine what to do about non-compliance. This category of delegation is addressed in the next section of the paper. The other potential delegation is the right to carry out an inspection. That is, the parties to the Convention have delegated the decision about whether an inspection is to take place. This too is a real delegation, but it is also very limited. The only risk generated by this aspect of the delegation is the risk of an inspection to promote

⁴⁸ Model Protocol Additional to the Agreement(s) Between States(s) and the Agency for the Application for Safeguards (Corrected), Art. II(a)(iv), II(a)(ix).

⁴⁹ Chemical Weapons Convention, art. I.2.

⁵⁰ MIKE NISHIMURA, *Constraints on Sovereignty in the Chemical Weapons Convention from the Perspective of International Law*, in SOVEREIGNTY AND THE GLOBAL COMMUNITY 61 (Howard A. Hensel, Ed., Aldershot: Ashgate Publishing, 2004).

⁵¹ Art. IX.2.

⁵² Art. IX.8.

⁵³ Nishimura, *supra* note __ at 62.

⁵⁴ *Id.* at 70.

⁵⁵ *Id.* (as of May 2003).

compliance with the agreed upon rules of the convention. Once again this seems like a delegation in which the costs are small and the benefits (in the form of greater compliance) are large. Finally, the CWC contains a withdrawal clause that recognizes the security interests at stake for the States Parties. If and when a State “decides that extraordinary events, related to the subject-matter of [the] Convention, have jeopardized the supreme interests of its country,” it may withdraw from the regime, although it is required to provide notice including a statement of such events.⁵⁶

Another example of true delegation – perhaps the most important – is the United Nation’s Security Council. It is clear that the Security Council can issue decisions that are legally binding on Members of the United Nations⁵⁷ and represents a delegation of consequence by all UN members other than the five veto-wielding permanent members. The desirability and relevance of the Security Council can and have been debated. For our purposes it is enough to note that this body is unique for many reasons, and no serious person could hold it out as an indicator of future delegations.

Delegations to International Courts and Tribunals

Up to this point we have discussed delegations of rule-making authority to international entities. Rather than delegate explicit decision-making power to such entities, states at times delegate some form of adjudicative power to tribunals. To the extent that international tribunals generate legally binding interpretations of existing rules of international law, this represents a clear delegation. Indeed, it is really only in the world of international tribunals that we perceive meaningful international delegation. Even here, however, there are considerable protections in place to limit the effective power of tribunals and it would be difficult to make the case that any of them have costs larger than the attendant benefits.

Before turning to the tribunals themselves, however, two further definitional issues must be settled. Even the BK definition requires a consensual delegation by a state. This leads to the conclusion that some tribunals – especially the criminal tribunals established in Rwanda, Yugoslavia, and Sierra Leone in the 1990s do not meet our definition.⁵⁸

Second, agreements to arbitrate that are made after a dispute arises (i.e., consensual arbitration) will not be considered here. Among other things, when the decision is sent to an arbitrator the parties are able to limit the resulting ruling to the narrow issues in

⁵⁶ Article XVI.2. Although States Parties are required to provide some statement, “in reality, almost any statement made by the withdrawing State will be accepted as a valid notice of withdrawal, for the clause gives very little clue, if any, as to the criterion for validity of this notice.” Nishimura, *supra* note __ at 72.

⁵⁷ See UN Charter, art. 25. TO cite just one example, Security Council Resolution 1373, which compels all nations – not just SC members – to take specific actions against financing terrorist activities.

⁵⁸ Although Rwanda recognized the need for international assistance after the horrors of the 1994 genocide ravaged its own judicial system, the Rwandan government ultimately objected to the creation of the ICTR. Occupying a rotating seat on the Security Council at the time, Rwanda cast the only opposing vote against Resolution 955, which established the ICTR. See S.C. Res. 955, U.N. SCOR, 49th Session, U.N. Doc. S/RES/955 (1994).

dispute. There is no serious risk that the interests of a state will be compromised in such a context.

Though there has been some discussion of the “proliferation” of international courts and tribunals in recent years,⁵⁹ a careful review of these tribunals, their case loads, and their charges reveals that delegation to quasi-judicial bodies has been extremely modest. Through a combination of limits on jurisdiction, cabined discretion, and disciplinary actions such as non-compliance and withdrawal, states have placed tight limits on the authority of these institutions. The typical charge to international tribunals (where one exists at all) is simply to resolve disputes between states. This mandate discourages ambitious rulings, rule setting, and policy-making from the bench. Moreover, tribunals do not issue rules that generate formal legal precedent; instead, the tribunal’s decision is limited to the parties in the particular case.⁶⁰ Perhaps most importantly, existing tribunals are consistently restrained and cautious. They are well aware that “judicial activism” is likely to lead to non-compliance, withdrawal, or both.

Nobody could doubt that the very existence of an international tribunal authorized to deliver a binding ruling is a form of delegation. This is inherent in the act of submitting to the jurisdiction of a tribunal. Of course, such delegation is not done without reason. Even the most skeptical commentators on international tribunals recognize that important gains can be achieved by states as a result.⁶¹ For states involved in treaty disputes, a tribunal can help to resolve conflicts by discovering/revealing information about the meaning of the agreement and the nature of the allegedly infringing action.⁶² For states in other sorts of disputes, tribunals can discover facts, develop new rules or apply existing rules to new unanticipated circumstances.⁶³ At the absolute minimum credible tribunals allow states to enter into agreements more readily and, therefore, to resolve cooperative problems more effectively. Just as private parties gain from the existence of a court system ready to enforce their contracts, states benefit from the existence of competent tribunals. The real mystery is not why we observe delegation by states to these tribunals, but rather why it is done so rarely and so cautiously.

To truly understand the extent of the delegation to a tribunal requires that the particulars of each case be examined. It is only on a case-by-case basis that we can get a real sense of the degree to which states have compromised their sovereignty in exchange for an improved system of dispute resolution. It is, of course, not possible to survey every existing international tribunal. The number of such tribunals is small enough, however, that it is possible to look at the major ones in the system. Other tribunals exist but tend to have very limited jurisdiction and/or very few cases.⁶⁴

⁵⁹ See e.g., http://www.pict-pcti.org/research/systemic_issues.html.

⁶⁰ In public international law, past decisions may be persuasive, but not binding. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 1-29 (6th ed. 2003).

⁶¹ Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 14 (2005).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ We have elected to examine the International Court of Justice (ICJ) (92 judgments in contentious cases), the International Tribunal for the Law of the Sea (13 judgments as of 2004), the European Court of Human

The International Court of Justice

The International Court of Justice (ICJ) is “the principal judicial organ of the United Nations.”⁶⁵ The court’s dual role is “to settle in accordance with international law the legal disputes submitted to it by States, and to give advisory opinions on legal questions referred to it by duly authorized international organs and agencies.”⁶⁶ Only the former is relevant to a discussion of international delegations.

An examination of the Statute of the Court demonstrates that the jurisdiction of the Court and its decision-making process are constrained in a number of significant ways. Most importantly, the Court is only competent to entertain disputes between States that have accepted its jurisdiction. A State may accept jurisdiction in one of three ways. First, after a dispute arises, the disputing States may make a special agreement between them to submit the dispute to the Court.⁶⁷ However, as discussed above, dispute resolution agreements made after a dispute arises do not implicate the sorts of delegation concerns at issue here. As Eric Posner points out, the ICJ in such special agreement cases is “just a glorified arbitration panel.”⁶⁸

Second, States may include a jurisdictional clause in a treaty referring a dispute over its interpretation or application to the Court.⁶⁹ Although the inclusion of such a provision would constitute an international delegation, the use of such provisions is in serious decline.⁷⁰ Strikingly, the U.S. has not used this type of clause since the early 1970s.⁷¹ Moreover, as discussed at greater length below, when faced with an adverse judgment or

Rights (4,145 judgments as of 2003), the Inter-American Court of Human Rights (104 judgments as of 2003), and the World Trade Organization Appellate Body (59 appellate rulings, 115 panel reports as of 2003). Karen J. Alter, *Private Litigants and the New International Courts*, *Comparative Political Studies*, Vol. 39, No. 1 (February 2006), 26-7. Various other European courts, including the European Court of Justice, the Benelux Court, the European Court of First Instance, the European Free Trade Area Court, and the Economic Court of the Commonwealth of Independent States could be considered, but all of them are products of the highly integrated European system. These examples may be important because they may give a sense of the degree of integration that is required before meaningful delegation actually takes place. We omit them because they are unique to the European context and our goal here is to make more general claims about delegation. Put differently, we do not believe that these courts tell us a great deal about delegation outside of Europe, except perhaps that it is quite minimal. Due to their relatively small case loads or a lack of data, we do not discuss the Judicial Tribunal for Organization of Arab Petroleum-Exporting Countries (2 cases as of 1999); the Central American Court of Justice (30 rulings as of 2004); the Court of Justice for the Common Market of Eastern and Southern Africa (3 judgments as of 2003); the Common Court of Justice and Arbitration for the Organization for the Harmonization of Corporate Law in Africa (4 opinions, 27 rulings as of 2002); the International Criminal Court; and the Caribbean Court of Justice (5 as of 2006). *Id.* As discussed above, the ICTY, ICTR and the International Criminal Tribunal for Sierra Leone do not meet our definition of delegation.

⁶⁵ <http://www.icj-cij.org/icjwww/igeneralinformation/inotice.pdf>.

⁶⁶ *Id.*

⁶⁷ ICJ Statute of the Court, Art. 36(1).

⁶⁸ Eric A. Posner, *The Decline of the International Court of Justice*, John M. Olin Law & Economics Working Paper No. 233 (2d Series), Public Law and Legal Theory Working Paper No. 81, University of Chicago Law School, December 2004, <http://www.law.uchicago.edu/Lawecon/index.html>, 9-10.

⁶⁹ Art. 36(1).

⁷⁰ Posner, *supra* note __ at 9.

⁷¹ *Id.*

the threat of one, states may withdraw from the jurisdictional clause, just as the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations (VCCR) after an unfavorable ruling in the *Avena* case.

Third, a State may make a declaration accepting the compulsory jurisdiction of the Court over certain legal disputes with other States that have made similar declarations.⁷² The covered legal disputes may include: the interpretation of a treaty; any question of international law; “the existence of any fact which, if established, would constitute a breach of an international obligation”; or the nature or extent of the reparation to be made for the breach of an international obligation.⁷³

Of the three types of ICJ jurisdiction, compulsory jurisdiction would seem the most alarming from a delegation standpoint. At first glance, filing a declaration of compulsory jurisdiction would seem to grant the ICJ general jurisdiction over a wide variety of possible inter-state disputes. However, such fears are clearly over-blown. First of all, out of 192 current UN members,⁷⁴ only 67 states or 35 percent presently have declarations in force.⁷⁵ This percentage appears to be in continuous decline; in 1950, 60 percent of UN members were subject to compulsory jurisdiction.⁷⁶ Today, no permanent member of the Security Council remains subject to compulsory jurisdiction except the United Kingdom.⁷⁷

Second, the number of states subject to compulsory jurisdiction belies the number of cases successfully filed under the optional protocol. From 1961-1987, the Court only relied on the optional protocol twice as the basis for its jurisdiction, in the *Nuclear Tests Case*⁷⁸ and *Military and Paramilitary Activities in and against Nicaragua*.⁷⁹ In both of these cases, the respondents, France and the United States respectively, refused to participate in the proceedings. In the *Nuclear Tests Case*, France refused to participate from the start; the United States withdrew after participating in the initial stages of the case with Nicaragua.⁸⁰

The negligible usage of the optional protocol as a basis for ICJ jurisdiction may be due, at least in part, to states’ use of reservations to severely limit the scope of their consent to compulsory jurisdiction.⁸¹ States may restrict the scope of such jurisdiction by imposing conditions of reciprocity on such declarations, excluding certain categories of dispute, or limiting the declaration for a certain time.⁸² For example, Honduras’ reservation

⁷² Art. 36(2).

⁷³ *Id.*

⁷⁴ <http://www.un.org/Overview/growth.htm>.

⁷⁵ <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm>.

⁷⁶ Posner *supra* note __ at 8.

⁷⁷ Posner, *supra* note __ at 3.

⁷⁸ *Nuclear Tests (Austl. v. Fr.; NZ v. Fr.)*, 1974 ICJ REP. 253 and 457 (Judgments of Dec. 20).

⁷⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26), reprinted in 24 ILM 59 (1985).

⁸⁰ Gary L. Scott and Craig L. Carr, *The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause*, 81 AMER. J. INT’L L. 57 (1987), fn49.

⁸¹ *Id.*

⁸² Art. 36(3); *see also* <http://www.icj-cij.org/icjwww/igeneralinformation/inotice.pdf>.

precludes compulsory jurisdiction over disputes relating to armed conflicts, territorial questions, and airspace,⁸³ three of the primary types of cases historically adjudicated by the ICJ.⁸⁴

Finally, especially in recent years, states have disciplined the jurisdictional arm of the World Court through non-compliance and/or outright withdrawal. Although he admits that compliance is difficult to quantify, according to Posner's calculations, the compliance rate was much higher in the ICJ's first twenty years than it has been in its last twenty years.⁸⁵ Certainly, the Nicaragua case, the Iran Hostages case, and the VCCR cases stand out as high-profile examples of non-compliance. In addition, when faced with an adverse decision by the ICJ or the threat of some future adverse decision, some states have elected to simply withdraw from its jurisdiction. Since its founding, 13 states have withdrawn their submission of jurisdiction to the ICJ or allowed their declarations to expire.⁸⁶ The United States has withdrawn from ICJ jurisdiction twice: it withdrew consent for compulsory jurisdiction during the Nicaragua case discussed above and, a year after the ICJ found against the United States in the Avena case, the United States announced its withdrawal from the Optional Protocol to the VCCR. Similarly, in March 2002, Australia withdrew its consent to ICJ jurisdiction over maritime disputes in anticipation of East Timor gaining statehood and bringing a boundary claim against Australia in the World Court.⁸⁷

For all the fanfare surrounding the ICJ, in 60 years of operations, the Court has only delivered 92 judgments in contentious cases.⁸⁸ Of these judgments, only a handful have been issued in compulsory jurisdiction cases and even less have been met with compliance. In light of this record, the notion that the ICJ enjoys an effective grant of general authority seems far-fetched.

The International Tribunal for the Law of the Sea

The International Tribunal for the Law of the Sea (ITLOS) is the judicial body established by the United Nations Convention on the Law of the Sea (UNCLOS).⁸⁹ Under Part XI of the UNCLOS, States are obligated to settle disputes concerning the interpretation or application of the Convention by peaceful means,⁹⁰ and are free to choose *any* peaceful means.⁹¹ If the parties to the dispute have agreed to submit such

⁸³ <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasicdeclarations.htm>.

⁸⁴ Posner, *supra* note __ at 3. As of 2004, the most common types of case adjudicated were border disputes (33 times); use of force (22 times); aerial incident (14 times); and property (14 times).

⁸⁵ *Id.* at 11.

⁸⁶ Eight states withdrew their declarations after becoming respondents in proceedings before the Court. INTERNATIONAL COURT OF JUSTICE, THE INTERNATIONAL COURT OF JUSTICE 21 (5th ed. 2004). The following states allowed their declarations to expire or were withdrawn or terminated: Bolivia, Brazil, China, Colombia, El Salvador, France, Guatemala, Iran, Israel, South Africa, Thailand, Turkey, and the United States. I.C.J. Yearbook 2002-2003 No. 57 International Court of Justice 127 fn.1 (2003).

⁸⁷ At the same time, Australia withdrew consent to ITLOS jurisdiction.

⁸⁸ <http://www.icj-cij.org/icjwww/igeneralinformation/inotice.pdf> (last visited October 2006).

⁸⁹ http://www.itlos.org/start2_en.html.

⁹⁰ UNCLOS, Art. 279

⁹¹ UNCLOS, Art. 280.

disputes to a regional body for resolution, that choice will take precedence unless the parties otherwise agree.⁹² Only if and when the parties fail to reach a settlement by other means do the dispute resolution mechanisms envisioned under the UNCLOS become relevant. At that point, the parties may select one of three possible mechanisms: ITLOS, the ICJ, or an ad-hoc arbitral tribunal. Under Article 287, State Parties may choose a preferred mechanism in advance. If no such declaration is made or if the two parties to the dispute have not elected the same mechanism, the ad-hoc arbitral tribunal is the default unless the parties otherwise agree.⁹³

As of October 2006, there are 150 States Parties to the UNCLOS but only 36 states have chosen a dispute resolution mechanism under Article 287.⁹⁴ Of these 36 states, only 10 have elected the ITLOS as their first choice dispute resolution mechanism; an additional 13 have chosen ITLOS as a tie for their first choices.⁹⁵ Nevertheless, that means that only 23 out of 150 State Parties or fifteen percent have elected to use the ITLOS.⁹⁶

What is more, in the more than ten years since the UNCLOS entered into force, the Tribunal has heard only thirteen claims.⁹⁷ Of these, only two were brought on the merits and the Tribunal issued a judgment in only one, *M/V Saiga (No.2)*.⁹⁸ To date, the jurisdiction of ITLOS has been almost exclusively limited to “incidental proceedings,” including claims for provisional measures and for the prompt release of arrested vessels.⁹⁹ All of the above has led some to question whether the cost of maintaining the Tribunal is justified.¹⁰⁰ Meanwhile, Tribunal presidents and the U.N General Assembly seem slightly desperate as they try to encourage more states to use Article 287.¹⁰¹

In only one category of disputes must all State Parties use the same dispute settlement mechanism. All State Parties are obligated to use the Seabed Disputes Chamber of the

⁹² UNCLOS, Art. 282.

⁹³ UNCLOS, Art. 287(3), (5). Arbitrations are conducted in accordance with Annex VII.

⁹⁴ http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm (last visited October 2006).

⁹⁵ *Id.*

⁹⁶ These countries include: Argentina, Australia, Austria, Belgium, Canada, Cape Verde, Chile, Croatia, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Mexico, Oman, Portugal, Spain, Tunisia, Tanzania, and Uruguay. *See id.*

⁹⁷ http://www.itlos.org/start2_en.html.

⁹⁸ *M/V Saiga (No. 2) (St. Vincent v. Guinea)*, 120 I.L.R. 143 (Int'l Trib.L. of the Sea 1999), available at http://www.itlos.org/cgi-bin/cases/case_detail.pl?id=2&lang=en; Jilliaine Seymour, *The International Tribunal for the Law of the Sea: A Great Mistake?* 13 IND. J. GLOBAL LEGAL STUD. 1 (2006), 2.

⁹⁹ *Id.*

¹⁰⁰ *See e.g.* Seymour, *supra* note __; R Churchill and V Lowe *The Law of the Sea* (2 ed, Manchester University Press, Manchester, 1999) 453-459; A Odede "The Basic Structure of the Dispute Settlement Part of the Law of the Sea Convention" (1982) 11 *Ocean Dev and Int'l Law* 125; M Gaertner "The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critiques and Alternatives to the International Tribunal for the Law of the Sea" (1982) 19 *San Diego L Rev* 577; J W Kindt "Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea" (1989) *Vand J of Transnat'l L* 1097; J K Gamble "The 1982 UN Convention on the Law of the Sea: Binding Dispute Settlement?" (1991) 9 *BUInt'l LJ* 39; T Treves "Dispute Settlement Clauses in the Law of the Sea. Convention and their Impact on the Protection of the Marine Environment: Some Observations" (1999) 8 *RECIEL* 6..

¹⁰¹ Seymour, *supra* note __ at 12.

ITLOS to resolve disputes related to activities in the International Seabed Area. However, the Seabed Disputes Chamber's jurisdiction is explicitly limited by Article 189 of the UNCLOS. Under that provision, the Seabed Disputes Chamber has no jurisdiction with regard to the exercise by the International Seabed Authority ("the Authority") of its discretionary powers.¹⁰² It may not pronounce itself on the question of whether any rule, regulations and procedures of the Authority are in conformity with the UNCLOS, nor declare invalid any such rules, regulations and procedures.¹⁰³ Its jurisdiction is "confined to deciding claims that the application of any rules, regulations and procedures of the Authority in individual cases would be in conflict with the contractual obligations of the parties to the dispute or their obligations under this Convention, claims concerning excess of jurisdiction or misuse of power, and to claims for damages to be paid or other remedy to be given to the party concerned for the failure of the other party to comply with its contractual obligations or its obligations under this Convention."¹⁰⁴ In this manner, the Seabed Disputes Chamber is explicitly limited from making policy; its one and only function is to resolve isolated disputes.

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

The WTO Appellate Body

In 1995, the World Trade Organization (WTO) Appellate Body (AB) was established under Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The AB is a permanent body whose seven members serve four year terms.¹⁰⁵ Its mandate is to hear appeals from panel cases.¹⁰⁶ AB decisions are, in practical terms, binding. Technically, the Dispute Settlement Body (DSB) must adopt an AB report in order for it to become binding on the parties. However, AB reports will be adopted unless there is consensus to block its adoption.¹⁰⁷ Consensus is unlikely, and has never happened, because the prevailing party can always be counted on to vote in favor of adopting the report.¹⁰⁸

The practical inability of Member States to block the adoption of an AB decision was an important constitutional shift from the General Agreement on Tariffs and Trade (GATT) system. GATT panels were ad-hoc, and decisions were only adopted if there was consensus for adoption. The shift to a permanent judicial body whose decisions become

¹⁰² UNCLOS, Art. 189.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm.

¹⁰⁶ DSU, Art. 17.

¹⁰⁷ DSU, Art. 17.14.

¹⁰⁸ Steinberg, *supra* note __ at 263.

binding automatically unless all Members agree to the contrary has fed the growing unease over the AB's potential power to engage in activist, judicial lawmaking.¹⁰⁹

When compared to the international tribunals discussed so far, the AB is quite influential. In contrast to the modest number of judgments produced by the ICJ and ITLOS, the AB has issued 78 reports in its 11 year history.¹¹⁰ Arguably, its constitutional space is also less restrained than that of the ICJ and ITLOS. Under DSU Article 3.2, the AB is charged with clarifying the existing provisions of the covered WTO agreements "in accordance with customary rules of interpretation of public international law."¹¹¹ The DSU goes on to caution that the AB "cannot add to or diminish the rights and obligations provided in covered agreements."¹¹² In other words, the AB cannot engage in rulemaking. And while there is a spectrum of public international law doctrines regarding the interpretation of rules, ranging from restrained to highly deferential, the AB has not shown itself to be an especially activist body.

It is also worth noting that despite the formal power of the AB, it operates within a political context. Its discretion is cabined by a variety of mechanisms, including the selection of AB members; the threat to rewrite the DSU; criticism of decisions by member states; defiance and non-compliance; and unilateral exit.¹¹³ Thus even though the AB has been granted significant authority and discretion, the political realities at the WTO have kept it in check and prevented the WTO from fundamentally altering the rights and obligations members.¹¹⁴

Inter-American Court of Human Rights

The Inter-American Court of Human Rights (IACHR) was created under the American Convention on Human Rights, which was adopted in 1969 but was not ratified by the requisite number of members of the Organization of American States (OAS) for over ten years, so did not come into force until 1978. The IACHR has issued 155 "decisions and

¹⁰⁹ See, e.g. Claude E. Barfield, *FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION* (2001); Kal Raustiala, *Sovereignty and Multilateralism*, 1 *CHI. J. INT'L L.* 401 (2000) (expressing concern that the WTO dispute settlement system is simultaneously generative and insular); Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 *LAW & POL'Y INT'L BUS.* 109 (2002); John Ragosta, Navin Joneja, & Mikhail Zeldovich, *WTO Dispute Settlement: The System Is Flawed and Must Be Fixed*, 37 *INT'L LAW* 697, 748-50 (2003). Senator Max Baucus stated that WTO panels are "making up rules that the US never negotiated, that Congress never approved, and I suspect, that Congress would never approve." US DSU Proposal Receives Mixed Reactions, *BRIDGES WKLY. TRADE NEWS DIG.*, Dec. 20, 2002, at <<http://www.ictsd.org/weekly/02-12-20/wtoinbrief.htm>> [hereinafter Baucus Statement.]

¹¹⁰ http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm#footnote, last visited October 24, 2006.

¹¹¹ DSU, Art. 2.3.

¹¹² *Id.*

¹¹³ Steinberg, *supra* note __ 260.

¹¹⁴ Steinberg, *supra* note __ 275 (stating that the political constraint on the AB "should dampen concerns that judicial lawmaking at the WTO has become so expansive as to undermine the sovereignty of powerful states, create a serious democratic deficit for their citizens, or catalyze catastrophic withdrawal of their political support for the WTO.").

judgments,” however this count includes multiple decisions in each case (often a decision regarding preliminary objections, sometimes another on compensatory damages).¹¹⁵

Unlike the European Court of Human Rights (ECHR) discussed below, OAS Members do not implicitly consent to the jurisdiction of the Court by ratifying the American Convention. Instead, each nation must make a separate declaration to the Secretary General of the OAS giving consent “either unconditionally or on condition of reciprocity, for a specific period or for specific cases.”¹¹⁶ To date 21 countries have submitted to the contentious jurisdiction of the Court.¹¹⁷ The United States, Canada, and most English-speaking Caribbean states have elected not to join either the Convention or the Court.

Those states that have submitted to the Court’s jurisdiction have made a delegation: decisions by the Court are binding. This delegation is tempered, however, by the lack of direct individual access to the Court; individuals must file complaints with the Inter-American Commission on Human Rights which may decide, in turn, to submit the case to the Court on their behalf.¹¹⁸ Such indirect access slows the process considerably, undoubtedly increasing the cost to applicants.

The IACHR is also severely under-funded and understaffed. The Court’s 2006 budget was a paltry \$1,391,300.00.¹¹⁹ Only seven judges work for the Court, and these judges only sit part-time.¹²⁰

Finally, the IACHR has had trouble securing compliance with its decisions.¹²¹ As Posner and Yoo observe, the IACHR often orders two types of remedies in a case: 1) the trial and punishment of offenders along with changes in domestic law; and 2) monetary compensation for the victim/s. According to their analysis, “while it appears states routinely ignore the requirement that they punish offenders or change their laws, they have often paid financial compensation.” In fact, Posner and Yoo found only one case in the history of the Court in which a nation has fully complied with an IACHR decision.¹²²

European Court of Human Rights

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

¹¹⁵ <http://www.corteidh.or.cr/casos.cfm>.

¹¹⁶ <http://www.pict-pecti.org/courts/IACHR.html>.

¹¹⁷ These countries are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. http://www.oas.org/key_issues/eng/KeyIssue_Detail.asp?kis_sec=2.

¹¹⁸ <http://www.pict-pecti.org/courts/IACHR.html>.

¹¹⁹ 2006 Annual Report, <http://www.corteidh.or.cr/informes.cfm>.

¹²⁰ <http://www.pict-pecti.org/courts/IACHR.html>.

¹²¹ Posner & Yoo, *supra* note __ at 41.

¹²² *Id.* at 43. Posner and Yoo note that even in this case, the Honduran Disappeared Persons case, Honduras did not pay the award until eight years after the Court rendered its judgment.

The European Court of Human Rights (ECHR) adjudicates cases brought by Contracting States or individuals alleging a violation of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights.¹²³ Pursuant to Article 46 of the Convention, Contracting States “undertake to abide by the final judgment of the Court in any case to which they are parties.”¹²⁴

In contrast to the IACHR, the number of judges on the ECHR increases equal to the number of member states to the Convention, currently forty-five.¹²⁵ The job is full-time.¹²⁶ The current annual budget of the ECHR is 44,189,000 euros,¹²⁷ or \$55,483,048.53.¹²⁸

Probably the most important difference between the ECHR and other regional human rights tribunals is the fact that, after domestic remedies have been exhausted, any state party, individual, group, or NGO may bring a suit alleging a human rights violation against one of the member states.¹²⁹ Originally, a member state could elect not to submit to ECHR jurisdiction in cases brought by non-states, but, in 1998, jurisdiction was made compulsory for all complaints.¹³⁰

The number of applications filed with the ECHR annually is entirely unmatched. In 2005, a staggering 45,500 applications were filed.¹³¹ In the same year, the ECHR issued a whopping 958 final judgments and disposed of an additional 27,600 applications.¹³² Although Posner and Yoo find it difficult to corroborate the assertion,¹³³ the ECHR has a reputation for enjoying a high level of compliance.¹³⁴

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

¹²³ Convention, Art. 19.

¹²⁴ *Id.*, Art. 46(1).

¹²⁵ http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/InformationdocumentontheCourt_September2006_.pdf.

¹²⁶ *Id.*

¹²⁷ <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Budget/Budget/>.

¹²⁸ Converted on October 24, 2006.

¹²⁹ European Convention, arts. 34, 35(1).

¹³⁰ Art. 34.

¹³¹ http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/InformationdocumentontheCourt_September2006_.pdf.

¹³² *Id.*

¹³³ Posner and Yoo, *supra* note __ at 65-66.

¹³⁴ <http://www.pict-pecti.org/courts/ECHR.html> (“Unlike in the cases of many other fora, compliance with the ECHR’s judgments is common, exerting a deep influence on the laws and social realities of member States.”).

Conclusion

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

This article has the modest goal of reminding us that the puzzling thing about the delegation we observe in the world today is that there is so little of it. States have consistently refrained from handing over significant authority to international bodies. Almost without exception an examination of specific examples of delegation reveals that states have retained considerable control. This is done in myriad ways. To begin with the most powerful form of authority – the authority to legislate – is almost never delegated by states. Where some form of decision making authority is granted it is typically an exceedingly narrow authority over highly technical matters. The most significant forms of delegation in place today tend to be adjudicatory. The WTO AB, for example, clearly has the authority to interpret the WTO Agreements, and this power to interpret gives it a non-trivial amount of discretion and influence. But we also observe several aspects of this delegation that reduce the extent to which states have surrendered authority. First, the AB is limited in its jurisdiction to the WTO Agreements. These agreements are certainly not narrow technical details, but the constraint is nevertheless significant. Secondly, the AB is politically constrained. It has repeatedly demonstrated its reluctance to engage in creative interpretations and prefers to try to stick close to the text of the agreements. This mode of interpretation is encouraged by the rules governing disputes.¹³⁵ Finally, the AB is limited in its ability to generate compliance with its rulings. It can authorize the imposition of trade sanctions, but only by the complaining state, and only up to an amount equal to the harm caused by the legal violation. Member states, then, have the option to ignore such rulings when they are too burdensome.

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

¹³⁵ “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” WTO Dispute Settlement Understanding, art. 3.2.