

(2/3/06)

## The Concept of International Delegation

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[Prepared for Duke Workshop on Delegating Sovereignty]

In this paper, we seek to define and clarify the concept of international delegation. Our goal is to provide a common vocabulary for this workshop and for legal and political science discussions more generally. We also attempt to identify a variety of characteristics that scholars can use to illuminate inquiries into the causes, consequences, and legal validity and effect of international delegation. Our approach here is similar to the approach in the article, *The Concept of Legalization*, by Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal.<sup>1</sup>

In *The Concept of Legalization*, the authors properly treat international delegation as one component of legalization in international relations. Because their goal was to provide an overview of the concept of legalization, their article was focused on a number of issues in addition to delegation. It is worth considering the concept of international delegation separately, however, because delegation presents unique political science and legal questions. For example, international delegation raises principal-agent questions, and questions of domestic constitutional law, not posed by other aspects of legalization. Furthermore, the factors that affect how one might classify international delegations may be different from the factors relevant to how one classifies legalization. Indeed, it is even possible that factors that weigh in one direction concerning legalization will weigh in the opposite direction concerning delegation. For example, as discussed below, while precision is an indicator of a high level of legalization, it may be an indicator of a low level of delegation.

This paper proceeds in three parts. First, we present and explain a definition of international delegation. Second, we consider how the concept of international delegation relates to the work of political scientists and legal scholars. Third, we discuss different types of delegated authority and outline a variety of factors that can affect the extent of delegation.

### I. Defining International Delegation

Our working definition of international delegation is: *a grant of authority by a state to an entity to make decisions or take actions that bind the state or commit its resources*. Several aspects of this definition warrant clarification.

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<sup>1</sup> See Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 Int'l Org. 401 (2000).

### A. The Exercise of Binding Authority

We use the term *binding* to mean legally binding under international law, in the same sense that treaties and customary international law rules are binding. Binding authority can include authority to make decisions about how to commit the state's resources, as long as the decisions do not require the approval of the state. We are not concerned here with whether or to what extent states are likely to comply with these binding decisions and actions, something that will presumably vary based on a variety of factors that go beyond the issue of delegation.

An important aspect of our definition (which we realize may be controversial and hope to receive feedback on during the workshop) is that it does not cover the delegation of non-binding advisory authority, such as is exercised by the UN General Assembly when it issues resolutions. Although such "soft law" may have important effects on norms and behavior, we treat activities relating to soft law as analytically distinct from delegation of authority, for several reasons.

First, limiting the definition in this way helps keep it reasonably clear and manageable, since the category of soft law is both very large and highly uncertain in its boundaries. It can include, for example, a vast range of non-binding resolutions, coordination standards, policy pronouncements, and recommendations. Second, the sovereignty costs associated with delegations of binding authority will generally be significantly greater than delegations of non-binding authority because of the direct loss of state control over the issue. This qualitative difference makes it worthwhile to study delegations of binding authority as an independent phenomenon. Third, exercises of non-binding authority may sometimes help explain why states eventually move towards legally binding delegation, through, for example, the generation of consensus. As a result, separating the concepts will make it easier to study this sort of causal connection. Finally, because it focuses on legally binding actions and decisions, the definition we propose has an interdisciplinary advantage in that it is likely to achieve the greatest overlap of interest between legal scholars and political scientists.

Moreover, while definitions of international delegation by political scientists do not specifically stress the legal character of authority, most definitions do focus on the granting of "authority." 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."<sup>2</sup> Similarly, in *The Concept of Legalization*, the authors define delegation to mean "that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules."<sup>3</sup> Legal scholars, not surprisingly, are even more apt to stress the legally binding component of delegation. Swaine, for example, defines delegation to international institutions as "vesting them with the authority to develop binding rules," and notes that "the authority so vested must be capable of some kind of legal effects on the international or

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<sup>2</sup> 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., forthcoming Cambridge University Press 2006) (emphasis added).

<sup>3</sup> Abbott *et al.*, *supra* note 1, at 401 (emphasis added).

domestic plane: something more than mere pronouncements or hortatory acts.”<sup>4</sup> Thus, while our definition is not entirely standard, it fits relatively well with other definitions of delegation in the literature.

It is important to note that, in order for a particular state’s relationship with an entity to constitute an *international* delegation of authority under our definition, that state must lack full formal control over the decisions or actions of the entity.<sup>5</sup> Otherwise, the state cannot be said to have granted authority to the entity. Full formal control means that no binding decision or action can be taken without the affirmative vote or purposeful abstention of the state through a vote. There are, of course a variety of controls that states exercise over entities short of full formal control and, as discussed below, these controls will affect the extent of the delegation.

There will sometimes be disputes over whether an entity has been delegated binding authority. For example, the Human Rights Committee was established to administer the International Covenant on Civil and Political Rights (ICCPR), and was not formally given the authority to make binding decisions. Instead, it was assigned the task of receiving reports submitted by member states concerning their implementation of the ICCPR, making observations concerning such reports, and issuing “such general comments as it may consider appropriate.”<sup>6</sup> Nevertheless, in a general comment issued in 1994, the Committee expressed the view that it had the authority to determine the legal validity of reservations attached by states to their ratification of the ICCPR,<sup>7</sup> a proposition that has been highly controversial.<sup>8</sup>

Unlike some definitions of international delegation, we do not restrict the authority covered by our definition to authority that would otherwise be exercised by the state.<sup>9</sup> 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.

## B. By an Entity

Our definition includes the existence of some entity that exercises authority. In a sense, all international commitments – including all treaty obligations – could be described as a form of delegation. To the extent that there are limitations on revocability, states in these commitments bind themselves in the future and thus delegate decision-making flexibility from the future to the

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<sup>4</sup> Edward T. Swaine, *The Constitutionality of International Delegations*, 104 Colum. L. Rev. 1492, 1494 n.3 (2004).

<sup>5</sup> There may still be a *domestic* delegation of authority under these circumstances, typically to the state’s executive that controls the state’s voting in the international institution.

<sup>6</sup> ICCPR, art. 40.

<sup>7</sup> See General Comment 24, para. 18, at <http://www.unhcr.ch/tbs/doc.nsf/0/69c55b086f72957ec12563ed004ecf7a?Opendocument>.

<sup>8</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 429-37 (2000).

<sup>9</sup> Cf. Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* 18 (2005).

present by locking in commitments of the state.<sup>10</sup> Furthermore, international commitments carry with them international and domestic scrutiny that might not otherwise exist. As the authors note in *The Concept of Legalization*, through international commitments nations subject themselves to “scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well.”<sup>11</sup>

What distinguishes international delegations from mere international commitments is the existence of an entity that has been granted the authority to make decisions or take actions that bind the state or commit its resources. Such delegations often occur in connection with international commitments, including commitments to comply with the decisions or actions of the entity. As discussed below, however, delegations raise political science and legal questions that can be distinguished from the questions that are raised by mere commitments.

As already indicated in the definitions elaborated above, this distinction is consistent with the political science literature. For example, Hawkins *et al.* define delegation being “from a *principal* to an *agent*,”<sup>12</sup> while Abbott *et al.* stress “that third parties have been granted authority.”<sup>13</sup> The legal literature also tends to limit the concept of international delegation to situations involving the conferral of powers on third parties. For example, Swaine focuses on the exercise of “continuing lawmaking authority in an international institution,” and Bradley focuses on the delegation of “decisionmaking and enforcement authority to international actors.”<sup>14</sup>

Although the political science literature often uses the term “agent,” we specifically chose the term “entity” to avoid suggesting that the receiving actor must necessarily be an agent in service of the state as a principal. For some types of delegation, such as adjudicative delegation, neutrality may be expected.<sup>15</sup> At the same time, we also avoid the term “third party,” because this implies a neutrality or separation that may not exist. Some important UN agencies, for example, are expected to act as agents of the UN member states. In other cases, states may themselves be part of the entity vested with authority, as is the case with the UN Security Council. “Entity” is also distinct from the definition of formal organizations, used by Abbott and Snidal, because their definition requires “a concrete and stable organizational structure and a supportive administrative apparatus.”<sup>16</sup> For our purposes, delegation can be to an entity that

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<sup>10</sup> Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *Int'l Org.* Vol. 513 (1997).

<sup>11</sup> Abbott *et al.*, *supra* note 1, at 401.

<sup>12</sup> Hawkins *et al.*, *supra* note 2, at 5.

<sup>13</sup> Abbott *et al.*, *supra* note 1, at 401.

<sup>14</sup> Swaine, *supra* note 4, at 1494 & n.3; Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 *Stan. L. Rev.* 1557, 1558 n.2 (2003); *see also* Julian Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 *Minn. L. Rev.* 71, 88 (2000).

<sup>15</sup> Kenneth Abbott & Duncan Snidal, *Why States Act Through Formal International Organizations*, 42 *J. Conflict Res.* 3 (1998). For a recent debate over whether judges on international tribunals should be independent, compare Eric A. Posner & John C. Yoo, *Judicial Independence and International Tribunals*, 93 *Cal. L. Rev.* 1 (2005), with Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 *Cal. L. Rev.* 899 (2005).

<sup>16</sup> Abbott & Snidal, *supra* note 15, at 4.

exists only temporarily, such as a specific arbitral tribunal. Further, not all formal international organizations entail delegation under our definition, since some of them exercise only advisory authority.

Examples of entities within our definition include adjudicatory bodies such as the WTO's Dispute Settlement Body and the International Court of Justice. International monitoring and enforcement agencies, such as the International Atomic Energy Association, also fall within the definition because they can order states to allow inspections and can make binding determinations about state compliance with obligations. Policy implementing organizations such as the World Health Organization and many other UN agencies also qualify if they make decisions on behalf of states about how to expend significant resources. In a few cases, an entity could even be another state, as when a country empowers another state to represent it in international negotiations.

All of the above examples have distinct bureaucracies. Sometimes, however, states act collectively without using a distinct bureaucracy, something that scholars of the European Union have labeled "sovereignty pooling." 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. Even members of the Council, if they do not have a veto, are considered under our definition to be engaged in international delegation, because the Council can bind them even over their objection. For veto members, however, there is not an international delegation under our definition because the Council cannot take actions or make decisions that bind them without their agreement. In other words, veto members have not granted binding authority to the Council.

Finally, there may be several different types and levels of international delegations within a single treaty framework. Thus, for example, the Chemical Weapons Convention establishes a Conference of Parties, a Technical Secretariat, and an Executive Council, just like the UN has both a Security Council and an Assembly. Relatedly, some functions of an international organization may entail international delegations under our definition even if others do not. For example, the Council of the North Atlantic Treaty Organization (NATO) does not entail any delegation, because it only acts under unanimity.<sup>17</sup> Nevertheless, other NATO functions may involve international delegations.

## **II. Relevance of International Delegations to Political Science and Law**

Recent years have seen an increasing interest among both political science and legal scholars to cross over into the domain of the other. Political scientists not only work to explain the form of legal agreements and compliance with them, but they increasingly study other legal features such as reservations, domestic implementing legislation, and ratification procedures. Legal scholars, in turn, have increasingly turned to both the theories and methodologies

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<sup>17</sup> See Consensus Decision-Making at NATO, at <http://www.nato.int/issues/consensus/>. Similarly, the G8 organization does not qualify as an international delegation under our definition because it cannot make decisions or take actions that are binding on the members without their agreement. Moreover, the agreements reached in the G8 summits are not treated as binding and thus would also fail to qualify under the "binding" requirement in our definition.

employed by political scientists to help illuminate how law is made and enforced. The intersection between international relations and law has particularly witnessed fruitful interchanges and collaborations, especially on the issue of compliance. We believe that similar benefits are possible with respect to the topic of international delegation.

Concerning international delegation, legal scholars care about the extent to which national rules concerning the delegation of domestic authority apply to international delegations. When the scope of an international delegation is ambiguous, legal scholars are interested in what interpretive tools national courts should use to evaluate them. For example, should the actions and decisions of international institutions be treated as having direct effect within national legal systems? For scholars of the U.S. legal system in particular, there are a number of constitutional issues implicated by international delegations, such as interference with checks and balances in the domestic system, undermining accountability, erosion of federalism, and undermining of individual rights. Adjudicative delegations may also raise issues of political independence. A good recent example of a case posing many of these questions is the *Medellin* case, in which U.S. courts have had to consider the domestic effects of a decision by the ICJ that relates to U.S. criminal procedure.<sup>18</sup>

For legal scholars, the validity of international delegations may be assessed by references to particular sources of law. For the U.S. legal system, these sources will include the text and structure of the Constitution, potentially relevant judicial precedent (such as precedent discussing domestic delegations of authority), and historical practice. However, the legal materials themselves may refer to functional considerations that require assessments of features like accountability and control – features studied by political scientists. For example, if political science showed that particular delegations diluted Congress's power, that conclusion might be relevant to a legal assessment of those delegations. Similarly, if political scientists showed that some types of delegation were more prone to self-extension of agency authority or that certain states were less prone to accept specific types of delegation, that finding may be relevant for legal scholars engaged in the design of international agreements.

Political scientists are more interested in causal explanations for delegation, their structure, and their effects on state behavior. They study variation in delegation across issue areas, and the mechanisms that principals use to control their agents. They are interested in what functions are delegated, the forms and levels of delegation chosen by states, how delegation influences state behavior, and how delegation may interact with domestic politics. Domestic political scientists inquire especially about the extent to which delegations reflect majority preferences, how particular domestic interest groups influence particular mechanisms of delegation, and how international delegations may redistribute authority – for example, between the legislature and the executive. International relations scholars are interested in whether and how delegation improves international cooperation, the accountability of international entities, why some states delegate more than others, and how various types of international delegation influence the international system and the behavior of states.

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<sup>18</sup> See *Medellin v. Dretke*, 125 S. Ct. 2088 (2005). The *Medellin* case is currently being considered by the Texas Court of Criminal Appeals.

Political scientists typically address these questions through systematic empirical assessment of outcomes in terms of behavior. However, a full political assessment of the features of international delegations may need to take account of the legal environments in which these delegations occur. Similarly, the domestic effect of international delegations will depend on legal provisions governing the relationship between domestic and international law. There is therefore rich potential for gain from dialogue between legal scholars and political scientists.

### III. A Typology of International Delegations

With the above issues in mind, it is possible to identify a variety of features of delegations that may be relevant when attempting to classify them. Our typology distinguishes delegation by type and degree, where degree is a function of scope, substance, autonomy, and permanence. 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.<sup>19</sup> Our typology is very sketchy at this point, and we are looking forward to feedback on it at the workshop.

#### A. Types of Authority

The focus here is not on the issue-specific substance of delegation, but on the type of authority that is being delegated. This matters to political scientists because the type of authority that states choose to delegate may have different causes and consequences for state behavior, and it matters to legal scholars because different types of authority may raise varying concerns about legal validity and effect. For example, authority to implement may raise fewer legal concerns than authority to legislate. We distinguish five types of delegation: legislative, regulatory, adjudicative, implementation, and enforcement authority.

##### 1. Legislative Delegation

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 resolutions. For example, in the IMF, some amendments can take effect over objections – as long as 85% of total voting power favors the amendment. Similar, 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). 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.

##### 2. Regulatory Delegation

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<sup>19</sup> David Epstein & Sharyn O'Halloran, *Delegating Powers: A Transaction Cost Politics Approach to Policy Making Under Separate Powers* (1999).

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-fourth's vote.<sup>20</sup> 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 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.<sup>21</sup>

### 3. Adjudicative Delegation

Adjudicative delegation grants dispute resolution authority. Examples of entities that have been granted this authority include the ICJ, the European Court of Justice, and the WTO Dispute Resolution Body. Ad hoc or issue-specific arbitral bodies (such as the Iran-U.S. Claims Tribunal and the NAFTA Chapter 11 and Chapter 19 arbitrations) are also examples. This dispute resolution authority may cover inter-state disputes or, as in the case of the European Court of Human Rights (ECHR), disputes between private parties and states. International criminal tribunals cover disputes between the international community and individuals. This type of delegation is important to legal scholars because of its potential overlap with the exercise of domestic judicial authority. Political scientists are interested in the particular principal-agent and enforcement issues implicated by this type of delegation and in whether this type of delegation has the intended effects.

### 4. Implementation Delegation

Implementation delegation grants authority to expend resources to carry out agreed-upon programs and projects. The World Bank, the IMF, the World Health Organization and many other UN agencies have such authority. 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. Implementation delegation 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 expenditure authority than of other authorities. For political scientists, however, implementation can raise issues of defection and free-riding, as well as effectiveness.

### 5. Enforcement Delegation

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<sup>20</sup> See Agreement Establishing the World Trade Organization, art. IX(2).

<sup>21</sup> See Curtis A. Bradley, *Unratified Treaty Amendments and Constitutional Process* (draft workshop paper).

Enforcement delegation grants authority to take measures to monitor or enforce compliance with state commitments.<sup>22</sup> For example, the Chemical Weapons Convention delegates inspections authority to international monitors. Enforcement authority raises questions for legal scholars because of its use of non-domestic actors to carry out domestic functions, and because of its potential impact on individual liberties. Political scientists may, for example, be interested in the choices among different types of enforcement options and their effectiveness.

## B. Degree of Delegation

In this section, we describe four factors that can affect the extent of an international delegation: scope of authority, substance of authority, autonomy of the entity, and permanence of commitment.<sup>23</sup>

### 1. Scope of Authority

The scope of authority delegated to the international agent is of interest both to political scientists, because it may, for example, explain variation in delegation across issues and among nations, and to legal scholars, because it may influence the process and accountability of the delegation, and in turn its possible validity within different countries. The scope of authority entails a variety of features, including range of issue areas and precision of the mandate. The WTO, for example, has a broad range of issue areas. For adjudication, an important factor relating to scope of authority concerns whether the tribunal can hear claims by, or operate against, individuals. This is the case, for example, with the International Criminal Court but not with the ICJ.

### 2. Substance of Authority

Another factor affecting the extent of delegation is the substance of the authority granted to the entity. For historical, cultural, and functional reasons, some subject matters will be viewed by states as more closely related to their sovereignty than other issues. One consideration is how much the subject matter of the delegation overlaps, or conflicts, with traditional exercises of domestic authority. Delegations that concern subjects that have traditionally been regulated by the state, such as criminal law and punishment, family relationships, and religious freedom, entail higher sovereignty costs and thus will be more extensive than delegations relating more directly to interstate relations. Similarly, when an entity's decisions or actions have direct effect in the state's domestic legal system, as is the case for members of the EU with the decisions of the European Court of Justice, the delegation is more extensive. This is also the case if the adjudicative body can review domestic law, as with the NAFTA arbitration panels' review of the application of domestic law concerning anti-dumping and countervailing duties.

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<sup>22</sup> See Abbott & Snidal, *supra* note 15, at 27.

<sup>23</sup> Our approach 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 Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 *Int'l Org.* 761 (2001).

### 3. Autonomy of the Entity

The level of delegation will also be affected by the degree to which the entity receiving the delegated authority is autonomous from the state. Autonomy can be limited by mechanisms such as national oversight, requirements for approval by the principal, and the ability to influence the hiring and firing of the entity's staff.

Autonomy varies not only among different cases of international delegation, but also among countries with respect to the same entity, as different countries may have a different ability to control an entity. In institutions such as the World Bank, for example, some countries such as the United States have strong controls while others have very little. Some states may also have used reservations or refrained from ratifying protocols and amendments such that they have in fact delegated less authority than other states. A classic example is whether states have accepted the compulsory jurisdiction of the ICJ.

For adjudicative delegations, the autonomy will be affected by the jurisdiction of the tribunal. Tribunals will have the highest autonomy if they have general compulsory jurisdiction, but will have less autonomy where there is a requirement of separate state consent to have the particular subject matter of the dispute resolved by the tribunal. Autonomy 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. The autonomy of adjudicative institutions will also be affected by the process for appointing and reappointing the judges, the extent of state control over their salaries, and by the length of their appointment. Ad hoc arbitration often involves a low level of autonomy, 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.

### 4. Permanence of Commitment

Permanence refers to how easy it is for a state to extricate itself from the delegation. 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), and the ability to exit, which varies in terms of the amount of notice required and other conditions in the agreement.<sup>24</sup> Exit may also be complicated by how embedded participation in the delegation is 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.

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We have suggested in this paper a definition and typology of international delegation that we hope will be useful to both political scientists and legal scholars. We look forward to your thoughts at the workshop about the various distinctions we have attempted to draw.

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<sup>24</sup> See Laurence R. Helfer, *Exiting Treaties*, 91 Va. L. Rev. 1579 (2005).