

# THE MYTH OF INTERNATIONAL DELEGATION

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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 (whether formal treaties or less formal soft law) 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.<sup>2</sup>

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 could select the course of action that provides the greatest overall benefits. If the states themselves have to make a decision, on the other hand, and if unanimity is the decisions rule, deviations from the status quo take place only if every state benefits or if it is possible to construct some set of transfers that leaves all states better off. This requirement of a Pareto improving outcome will prevent a variety of 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 (or under the existing system) there are significant hurdles to a collective response of this kind. 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

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<sup>2</sup> The extent to which international cooperation through international law is possible is questioned by some critics. Goldsmith & Posner (2005). One of us has responded to these criticisms in detail, Guzman 2002, 2005a, b). For present purposes there is nothing to be gained by revisiting these debates. Concern about international delegation requires an assumption that international agreements are able to delegate authority and to impact the payoffs of states. Without that assumption international delegation is not possible and the discussion is moot. We assume, therefore, that states are able to delegate authority through international delegation.

refuse to participate; and so on. Absent some delegated authority, the international community will often not be able to respond well to problems.

There is, of course, another side to delegation. When power is delegated from domestic authorities to supra-national ones 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 the democratic control over decisions. This is especially true in our world because we lack democratic institutions and practices at the international level. Delegation also presents principal-agent problems because an international entity may have interests that diverge from those of the states that establish it. There are also concerns about capture of supra-national institutions by interest groups who could influence policy to serve their own narrow set of 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, then, 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.

When one turns to observe the actual conduct of states, however, the debate over delegation takes on a different hue. Though it is not difficult to identify reasons why delegation is likely to be worthwhile in at least some instances, it turns out that examples of true international delegations are hard to find. 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 the often-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, delegation is something we should not worry too much about.

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 so are left to one side.

## **Defining International Delegation**

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

The second challenge is definitional. Clarity requires that we choose some definition of “delegation,” but doing so inevitably omits some behavior that may be of interest. We have no interest in selecting a definition that is so narrow as to make our claim correct but trivial. Our response here is to adopt a definition provided by Professors Bradley and Kelley, under which an 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.*<sup>3</sup>

Further clarification of this definition is useful, and we again follow Bradley and Kelley. We take the term “bind” to mean “legally binding under international law, in the same sense that treaties and customary international law rules are binding.”<sup>4</sup> This makes our task more difficult as it prevents us from denying an instance of delegation on the grounds that a state can simply ignore legal obligations. Notice that this discussion also prevents claims that delegation has taken place simply because international political pressure has caused a state to behave in a particular way or consent to a rule.

We also accept that for a state’s relationship with an entity to constitute an international delegation of authority, “that state must lack full formal control over the decisions and actions of the entity,”<sup>5</sup> though we also require that the state be a member of that organization. Finally, like Bradley and Kelley, we limit the definition of international delegation to grants of authority *to an entity*, such as the World Trade Organization (WTO) or International Atomic Energy Agency (IAEA).<sup>6</sup>

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

For delegation alarmists, one compelling category of international legislative delegations entail international institutions that can amend their constituting agreements with less-than unanimous consent.<sup>7</sup> Professor Swaine, for example, points to Article 36 of the Constitution of the International Labor Organization (ILO), which provides that the Constitution may be amended by a two-thirds majority.<sup>8</sup> But surely more than this

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<sup>3</sup> See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Edward T. Swaine, *The Constitutionality of International Delegations*, 104 *Colum. L. Rev.* 1492, 1506 (2004).

<sup>8</sup> *Id.* at 1504. Swaine fails to point out that 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.

should be required. An organization that lacks the authority to bind states cannot be said, under the above definition, to be an example of delegation. Providing that entity with the ability to amend its foundational documents could, it is true, open the door to an amendment in which the organization declares that it has the authority to bind states, but that seems unduly far-fetched. We are unable to think of an example in which an organization behaved in such a way, and in any event, this is such a foundational change in the mission of an organization such as the ILO that every member would have to reconsider its membership. States that are not willing to submit themselves to the decisions of such an organization would have ample justification for exiting and would do so.<sup>9</sup> We resist this category of delegations in part because it would turn *any* organization that features voting into a threatening delegation. Thus, for example, an international commission convened to address scandals over judging in Olympics figure skating could, if its decision processes allowed it to change its constitutive terms by vote, declare that it would henceforth issue binding international law rules governing the law of the sea.

As written, the Constitution of the ILO, turns out to be 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.<sup>10</sup>

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.<sup>11</sup>

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> ILO Fundamental Declaration, Art. 2, available at:

[http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=DECLARATIONTEXT](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT).

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.<sup>12</sup>

Before this example is held up as evidence of 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 are ultimately derived from the ILO’s Constitution and the fact of membership. The Fundamental Declaration, then, must be one of two things. First, if the Constitution does not provide these obligations the declaration is meaningless and has no legal effect. Second, if the Constitution does provide for these obligations then the 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 that there is no authority granted to the 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.<sup>13</sup>

Another example that is sometimes cited is the International Monetary Fund (IMF) and its Articles of Agreement. Upon examination, however, this example is a red herring. Article 28(a) of the Articles of Agreement permits three-fifths of the members, having eighty-five percent of the voting power, to amend the Articles. However, 28 (b) 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.<sup>14</sup> 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).<sup>15</sup> 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.

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<sup>12</sup> Art. 2, ILO Declaration, available at:

[http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static\\_jump?var\\_language=EN&var\\_pagename=D ECLARATIONTEXT](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=D ECLARATIONTEXT).

<sup>13</sup> The International Court of Justice is charged with interpretation of ILO issues. ILO Constitution, Art. 37.

<sup>14</sup> Art. 28, Articles of Agreement.

<sup>15</sup> Ernest A. Young, *The Trouble With Global Constitutionalism*, 38 *Tex. J. Int’l L.* 527, 534-35 (2003); Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 *Stan. L. Rev.* 1557, 1573-75 (2003).

It is certainly true that the text of the WTO Agreement provides for decision-making by majority or supra-majority voting,<sup>16</sup> though the most central obligations taken on by states can be changed only by consensus,<sup>17</sup> and other changes to the substantive obligations of members take effect only for members that have accepted them.<sup>18</sup> More could be said about the WTO decision making process, but for the purposes of this discussion paper the most important point is that there has never been any attempt to use these voting procedures. It is true that in some formal sense those procedures remain, but no state has demonstrated an interest in demanding that voting take place. The organization operates instead by consensus. The most reasonable conclusion is that despite the formal voting rules, WTO decisions are, and as far as anybody can tell will continue to be, the product of consensus; giving every state the ability to prevent a rule change.

Another potential source of concern that is sometime 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.<sup>19</sup> 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.<sup>20</sup> 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 the 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.”<sup>21</sup> 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.<sup>22</sup> 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

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<sup>16</sup> WTO Agreement, arts. IX, X.

<sup>17</sup> WTO Agreement, art. X:2.

<sup>18</sup> 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.

<sup>19</sup> Swaine, *supra* note 10, 1511.

<sup>20</sup> UN Human Rights Committee, General Comment No. 24.

<sup>21</sup> 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.

<sup>22</sup> International Human Rights: Law, Policy, and Process at 679.

into force at all between those parties.<sup>23</sup> 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.<sup>24</sup>

Furthermore, the Human Rights Committee is given no authority that even suggests it is charged with interpretations of this kind. The primary role of the committee is to study the reports of parties to the ICCPR and submit reports and comments about those reports to the parties and the Economic and Social Council.<sup>25</sup> In addition, the Committee has a limited role in dispute resolution,<sup>26</sup> 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.

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. We do not dispute that such delegation takes place. These delegations, however, are 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.<sup>27</sup> Typically, a qualified majority is permitted to adopt amendments to the body of the treaty, but those amendments will only bind those parties ratifying them.<sup>28</sup> 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. States are, however, given a

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<sup>23</sup> *Id.*; Vienna Convention, Arts. 20-21.

<sup>24</sup> Letter from Conrad Harper to Francisco José Aguilar-Urbina, Chairman, U.N. Human Rights Committee (Mar. 28-29, 1995).

<sup>25</sup> ICCPR, art. 40:4.

<sup>26</sup> ICCPR, arts. 41, 42.

<sup>27</sup> CRS Report, *Treaties and Other International Agreements...* at 195.

<sup>28</sup> Swaine *supra* note 10 at 1512; *see* fn 70 for list.

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 satisfy our definition of delegation.

Some agreements go further still, and so we consider the particulars of examples that constitute delegations, even if minor. The Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) encourages consensus, but permits that, as a last resort, a two-thirds majority may vote to adjust the limits on the production and consumption of substances specified in the annexes as depleting atmospheric ozone.<sup>29</sup> 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. Controls over new chemicals apply only to parties that ratify the relevant amendment. The delegation, then, applies only to changes in the pace at which certain chemicals are to be eliminated.<sup>30</sup>

Delegation alarmists also raise concerns regarding 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.<sup>31</sup> Prior to the adoption of this Protocol (which the United States has ratified), each state had a veto over such decisions. This delegation is limited to the activities listed in Annex I and the material specified in Annex II. From an American perspective, however, there is no real delegation here. The relevant safeguards agreement between the IAEA and the United States retains a national security exception.<sup>32</sup> This exception gives the United States the ability to legally avoid any amendments of consequence and ensures that there is no delegation of consequence. To be clear, for many other countries this example represents a non-trivial delegation of authority, in contrast to the 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 in this instance one could describe the rules as a highly cabined, though non-trivial delegation, subject to a national security exception.

Another example of true delegation – perhaps the most important – is the United Nation's Security Council. It is clear that the Security Council can issue decisions that are legally binding on Members of the United Nations.<sup>33</sup> This body is unique in many, many ways, and so while its merits and demerits can be debated, it is a poor indicator of

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<sup>29</sup> Montreal Protocol, Art. 2.9(c).

<sup>30</sup> Montreal Protocol, art. 2.9.

<sup>31</sup> Additional Protocol, Art. 16(b).

<sup>32</sup> The Protocol Additional to the Agreement Between the United States of America and the International Atomic Energy Agency for the Application of Safeguards in the United States of America, with Annexes, S. Treaty Doc. No. 107-7, art. 1 (2002) (letter of transmittal from the President to the Senate (May 9, 2002)).

<sup>33</sup> 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.

future delegations. For the permanent members of the Security Council, of course, there is no delegation involved because each possesses a veto.

Finally, some constitutional scholars have raised concerns about the direct effect of customary international law in domestic law.<sup>34</sup> For example, the Alien Tort Statute (ATS) provides U.S. district courts with original jurisdiction over civil actions by aliens for torts committed on foreign soil “in violation of the law of nations or a treaty of the United States,” which includes customary international law.”<sup>35</sup> The simple response to this concern is that this form of delegation does not meet the definition that we are relying upon.

[To Conference Participants: Additional examples of delegation will eventually be discussed, including the Codex Alimentarius, the International Office of Epizootics, the Secretariat of the International Plant Protection Convention, the Chemical Weapons Convention, and others]

### **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 meets our definition of delegation. Evaluating the extent of delegation to these tribunals is made simpler by the fact that there are relatively few of them.

Before turning to the tribunals themselves, however, two further definitional issues must be settled. First, the central claim of this Essay is that states have not seen fit to delegate meaningful authority to international entities. Consistent with the claim, we limit the definition of delegation to instances of consensual delegation. 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. It is true that after the horrors of the 1994 genocide ravaged its own judicial system, Rwanda approached the United Nations and requested the establishment of a tribunal similar to the International Criminal Tribunal for Yugoslavia (ICTY). When the Rwandan demands for that tribunal were not met, however, that country, occupying a seat on the Security Council at the time, entered the only vote against the establishment of the ICTR.

Second, agreements to arbitrate that are made after a dispute arises (i.e., consensual arbitration) will not be considered instances of delegation for our purposes.

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<sup>34</sup> See e.g., Swaine *supra* note 7, 1522-30; Young, *supra* note 16, 533-534; Bradley, *supra* note 16, 1580-81 (2003).

<sup>35</sup> 28 U.S.C. §1350 (2000). The United States Supreme Court has made it clear that courts should demand strong evidence that a particular rule is a rule of customary international law, stating that such a rule must be “a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th century paradigms” (offenses against ambassadors, violations of safe conduct, and piracy). *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

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

[The remainder of this section remains to be written. We intend to address the most important tribunals: the WTO's Appellate Body, the ICC, the ICJ, the Law of the Sea Tribunal, and some human rights bodies are currently on our list. Our basic claim is that though these tribunals do have some delegated authority (as is necessary for any dispute resolution) that authority has been carefully limited by the states that established the entities, has been exercised in a very restrained manner that is honest to the text of the relevant treaties, has prompted (in the case of the ICJ) withdrawals of consent to jurisdiction, and even when added up over these several tribunals, amounts to a very modest surrender of authority to tribunals. One important point to note is that one must distinguish between the agreements that states have consented (e.g., the WTO Agreements) – which often involve significant commitments – and the impact of the tribunals – which is dramatically less. We expect to ultimately conclude that there is more delegation to tribunals than to decision-making bodies, but that the level of delegation remains extraordinarily modest. We also expect to discuss why delegations to tribunals are less worrying than delegations to rule-making bodies: the charge to tribunals is to resolve disputes and this discourages policy making, most tribunals do not issue rulings that generate formal legal precedent, states retain control over jurisdiction in some cases, etc]