

# MONITORING COMPLIANCE WITH UNRATIFIED TREATIES: THE ILO EXPERIENCE

LAURENCE R. HELFER\*

## I

### INTRODUCTION

In *The Concept of International Delegation*, the introductory article to this symposium, Curtis Bradley and Judith Kelley categorize international delegations according to three factors: type of delegated authority, legal effect, and independence of the international body.<sup>1</sup> The authors apply this typology to a diverse array of intergovernmental organizations (IOs), tribunals, treaty secretariats, and commissions. And they usefully include in their definition not only international bodies empowered to issue legally binding rules, but also those whose authority is limited to adopting “nonbinding resolutions, policy proposals, or advisory opinions.”<sup>2</sup>

This article analyzes a hybrid form of delegation that combines these hard- and soft-law elements: grants of authority to international bodies to monitor compliance with unratified treaties and other nonbinding norms and standards.<sup>3</sup> It studies the costs and benefits of this hybrid delegated power by reviewing the history and functions of the International Labor Organization (ILO).

The ILO is among the world’s oldest IOs, but it is also one of the most ignored.<sup>4</sup> According to the prevailing conventional wisdom, “most reasonably informed people have little idea what the letters I-L-O stand for,” and even labor economists and trade specialists are mostly uninterested in the

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\* Professor of Law and Director, International Legal Studies Program, Vanderbilt University Law School. Thanks to Karen Alter, Curt Bradley, Allison Danner, Deborah Greenfield, Judith Kelley, Sharyn O’Halloran, Neil Siegel, Richard Steinberg, and to the participants in the Conference on Delegating Sovereignty for helpful comments and suggestions.

1. Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1 (Winter 2008).

2. *Id.* at 4.

3. *See id.* at 33 (encouraging scholars to give greater attention to “soft delegation[s]”).

4. To their credit, Bradley and Kelley refer to the powers and functions of the ILO at several points in their article. *See id.* at 13 (mentioning the ILO’s investigative powers); *id.* at 15, 29 (mentioning the ILO’s agenda-setting authority); *id.* at 32 n.111 (referring to the ILO as an international institution that has expanded its authority over time).

organization's work.<sup>5</sup> A principal reason for the ILO's inconspicuous profile is the widely held perception that the organization is the "90-pound weakling of UN agencies," a "toothless tiger," that has little effect on improving global labor conditions.<sup>6</sup>

This article challenges the view that the ILO's delegated authority is inconsequential. It does so by analyzing the power of ILO officials and review bodies to monitor compliance with treaties and recommendations that the organization has adopted but that a member state has not ratified or otherwise accepted as legally binding.<sup>7</sup>

As explained in greater detail below, such monitoring has three distinct consequences. It reduces the competitive advantages that a member state might otherwise receive from refusing to ratify treaties that the ILO adopts. It makes it more difficult for a state to cheat surreptitiously and capture those unilateral advantages.<sup>8</sup> And it provides a mechanism for domestic interest groups to challenge government practices that are inconsistent with international legal standards, including those that the government has not formally accepted.<sup>9</sup>

The ILO membership has repeatedly expanded these monitoring powers since the organization's founding in 1919. It has done so both informally (by allowing ILO officials to broaden the scope of the delegation that established the organization) and formally (by amending the ILO constitution to codify and further enlarge the organization's monitoring authority).

This historical trend is at odds with the principal-agent theory that many scholars use to study international delegations.<sup>10</sup> According to this theory, member states (principals) tightly control the authority they confer upon IOs

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5. KIMBERLY ANN ELLIOTT & RICHARD B. FREEMAN, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 93 (2003).

6. *Id.* at 95, 102; see also Sean Cooney, *Testing Times for the ILO: Institutional Reform for the New International Political Economy*, 20 COMP. LAB. L. & POL'Y J. 365, 399 (1999) (stating that the ILO is "[v]iewed by many as a 'slow, cumbersome and low-profile institution' . . . [that] has not made the impact it should in the new political economy") (internal citation omitted); William A. Douglas et al., *An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions, and NGOs*, 26 HUM. RTS. Q. 273, 276 (2004) (noting "frequent allegations that the ILO 'has no teeth,' and that its work consequently makes little difference in the labor practices of governments") (internal citation omitted).

7. For descriptions of this monitoring power, see JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 331 (2005) (opining that the ILO engages in treaty-making "with strings attached"); Frederic L. Kirgis, Jr., *Specialized Law-Making Processes*, in UNITED NATIONS LEGAL ORDER 109, 116, 115 (Oscar Schachter & Christopher C. Joyner eds., 1995) (characterizing the ILO as "a super-treaty system" and observing that "a state—merely by being a member of the ILO—incurs significant responsibilities, and subjects itself to peer pressure, regarding not only conventions it ratifies, but also those of which it disapproves").

8. See *infra* Part IV.

9. See *infra* Part II.C (discussing the Committee on Freedom of Association).

10. For a recent series of essays applying principal-agent theory to IOs, see DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS (Darren Hawkins et al. eds., 2006). For a different perspective that considers IO officials and staff as autonomous actors, see MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS 2-3, 158 (2004) (arguing that "IOs are active agents in their own change," agents that have a "propensity toward dysfunctional, even pathological, behavior").

(agents),<sup>11</sup> and any attempt by those agents to augment their autonomy will be met with swift corrective action.<sup>12</sup> Principal-agent theory would not have predicted that ILO member states would repeatedly endorse the efforts of ILO officials and review bodies to augment their delegated powers.

Entrusting the ILO with the authority to monitor unratified treaties also sits uneasily with a basic tenet of the international legal system. As the Vienna Convention on the Law of Treaties unequivocally states, “[a] treaty does not create either obligations or rights for a third State without its consent.”<sup>13</sup> This bedrock rule legitimizes international delegations and helps to reconcile them with domestic authority. Oona Hathaway’s contribution to this symposium makes this point expressly: “[T]he power to accept or reject an international agreement is the power to accept or reject a delegation of authority.”<sup>14</sup> A state that transfers a portion of that power to an IO may consent, as a formal matter, to the monitoring functions the organization later undertakes.<sup>15</sup> But it also contracts away an essential attribute of its sovereignty, making the ILO an important case study for a symposium on the costs and benefits of international delegation.

How the ILO acquired the authority to police compliance with unratified treaties and recommendations is not widely known outside a small coterie of international labor-law enthusiasts.<sup>16</sup> To remedy that omission, Part II of this article reviews the essential features of the organization’s delegation history. It reveals that the ILO membership created and expanded the organization’s monitoring powers in response to changes in its economic and political environment and to independent initiatives by the ILO Directors General and the organization’s secretariat, the ILO Office. Part II also illustrates how, as a formal matter, these delegations imposed sovereignty costs upon all member states, but in practice often created benefits that disproportionately accrued to powerful ILO member countries.

Part III assesses the implications of the ILO’s experience for Bradley and Kelley’s delegation typology. It first expands the monitoring and enforcement

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11. As Bradley and Kelley make clear, the actors who serve as agents include not only IO officials and staff but also IO member states acting collectively. See Bradley & Kelley, *supra* note 1, at 6–9.

12. See Darren G. Hawkins et al., *Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory*, in DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS, *supra* note 10, at 3, 27–37.

13. Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331; see also LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 28 (1995) (“For treaties, consent is essential. No treaty, old or new, whatever its character or subject, is binding on a state unless it has consented to it.”).

14. Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 123 (Winter 2008).

15. *But see id.* at 124–43 (questioning whether formal consent is sufficient to legitimate states’ adherence to international legal rules).

16. For a detailed interdisciplinary analysis of the ILO’s rich and varied history, see Laurence R. Helfer, *Understanding Change in International Organizations: Globalization and Innovation in the ILO*, 59 VAND. L. REV. 649 (2006).

delegations analyzed by the authors<sup>17</sup> to include delegations that authorize international bodies to monitor compliance with nonbinding international rules. Part III reveals that this type of monitoring authority is not confined to the ILO, but also exists in several other international institutions and issue areas. It then explains why the Bradley–Kelley typology’s emphasis on the formal characteristics of delegations (such as the type of authority granted and its legal effect) can usefully be supplemented with an analysis of how delegations actually operate in practice. Considering how monitoring delegations function “on the ground,” so to speak, also better equips scholars to study how and why delegated authority changes over time.

Part IV considers what insights the ILO offers for other international delegations. It argues that the ability to monitor compliance with unratified treaties and nonbinding recommendations provides a mechanism for IOs to encourage all member nations affected by transborder cooperation problems to aid international efforts to address those problems rather than free-ride on the actions of other countries.

## II

### MONITORING COMPLIANCE WITH UNRATIFIED INTERNATIONAL LABOR TREATIES

This Part reviews the history of the ILO’s authority to monitor compliance with nonbinding recommendations and unratified conventions. It explains why the ILO’s founders gave the organization this distinctive power and why ILO officials and the ILO membership have augmented that power at key points in the organization’s history.

#### A. The Founding of the ILO and the Expansion of International Monitoring Authority by ILO Officials

The nations that founded the ILO after the First World War sought to combat the myriad hazards of the early 20th century workplace by creating a new rulemaking body to promulgate and enforce international labor standards. A critical challenge facing the new organization was how to apply those standards as widely as possible. The ILO’s founders recognized that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.”<sup>18</sup> This statement succinctly captures the proverbial race-to-the-bottom, in which each country lowers its labor standards in a bid to attract foreign investment or to aid its domestic industries. Such efforts are ultimately futile. They leave all

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17. See Bradley & Kelley, *supra* note 1, at 12–14.

18. Constitution of the International Labour Organization pmb., June 28, 1919, 49 Stat. 2712, 225 C.T.I.A. 373 [hereinafter 1919 ILO CONSTITUTION].

countries with the same share of trade and investment but fewer protections for workers after the race has run its course.<sup>19</sup>

One way to avoid these self-defeating labor policies was to create a true international legislature with the authority to promulgate rules that would automatically bind each member state. Prior to the First World War, several workers' organizations lobbied for the creation of an IO with these broad lawmaking powers.<sup>20</sup> More surprisingly, the French and Italian government delegations to the Versailles peace conference endorsed the workers' demands, and the British delegation proposed a compromise in which member states would, absent exceptional domestic opposition, be required to ratify labor conventions within one year of their adoption.<sup>21</sup>

The founding governments ultimately rejected both proposals, revealing their opposition to delegating substantial legislative authority to the nascent organization. However, the governments took the equally unprecedented step of granting membership to independent worker and employer representatives from each country.<sup>22</sup> This tripartite membership structure ensured that nonstate actors with a direct stake in the industrial workplace would be involved in creating and monitoring international labor rules. For example, the adoption of treaties required only a two-thirds vote of the entire ILO membership, with the result that "in an extreme case a [d]raft convention . . . might be adopted even when the majority of [g]overnment delegates voted against it."<sup>23</sup>

To provide a counterweight to this tripartite treaty-making structure, member states reserved to themselves the discretion to ratify or reject any convention that the organization adopted. But states were not entirely free to ignore treaties they disfavored. Rather, the ILO constitution required all member nations to submit the treaties to their respective political branches, which would then consider "the enactment of legislation or other action."<sup>24</sup> If, however, the state ultimately refused to ratify the treaty, "no further obligation [would] rest upon the Member."<sup>25</sup>

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19. Helfer, *supra* note 16, at 673–74.

20. See ANTONY ALCOCK, HISTORY OF THE INTERNATIONAL LABOUR ORGANIZATION 16–17 (1971).

21. See INT'L LABOUR OFFICE, ILO, THE INTERNATIONAL LABOUR ORGANISATION: THE FIRST DECADE 68–69 (1931) [hereinafter ILO, THE FIRST DECADE].

22. "Representatives of governments, organized labor, and employers . . . participate in the work of the ILO in a ratio of 2-1-1, respectively. Worker and employer delegates . . . form separate caucuses and often vote with their respective groups rather than with their governments." Helfer, *supra* note 16, at 651.

23. ILO, THE FIRST DECADE, *supra* note 21, at 69. In practice, the ILO has nearly always adopted conventions by large majorities of governments, workers, and employer delegates. See also TORSTEN LANDELIUS, WORKERS, EMPLOYERS AND GOVERNMENTS: A COMPARATIVE STUDY OF DELEGATIONS AND GROUPS AT THE INTERNATIONAL LABOUR CONFERENCE, 1919–1964 66–91 (1965).

24. 1919 ILO CONSTITUTION, *supra* note 18, art. 405. See also Bradley & Kelly, *supra* note 1, at 15 (analyzing this as an example of agenda-setting authority).

25. 1919 ILO CONSTITUTION, *supra* note 18, art. 405.

The ILO's founders intended this mandatory submission to encourage the widespread ratification of international labor conventions.<sup>26</sup> It soon became clear, however, that the procedure would not ensure universal adherence to the treaties. The absence of a common global baseline for protecting workers and regulating workplace conditions risked undermining the organization's core objectives. Specifically, a state not bound by the treaties could exploit its competitive position to the detriment of other member nations, triggering anew the race to the bottom that the ILO's founders had feared.

The ILO Office responded to this threat by adopting two procedural innovations that encouraged treaty ratifications. First, the Office acquired an informal power of interpretation, which it used to reassure states that had refrained from ratifying conventions whose provisions were ambiguous. As the Director-General stated in a 1921 report, "Before ratifying, certain States have wished to know exactly to what degree . . . a clause of a Convention might bind them, or to what extent their existing legislation met the provisions of the Convention."<sup>27</sup> Beginning in that year, the ILO Office responded to these queries and published them for the benefit of other member states.<sup>28</sup> The Office had no authority to interpret labor conventions, a function that the ILO constitution entrusted to the Permanent Court of International Justice.<sup>29</sup> States were unwilling to invoke this formal adjudicatory process, however, leading the Office to provide unofficial interpretations of the treaties. The result was a substantial expansion of the initial delegation to ILO officials.<sup>30</sup> Armed with this new de facto power, the Office published interpretations that sought to "remove[] [the] obstacles inhibiting ratification" of ILO conventions.<sup>31</sup>

ILO officials used a second procedural innovation to encourage treaty ratifications while simultaneously expanding their own authority. They collected and published information on compliance with unratified conventions and nonbinding recommendations. The Office justified this practice on functional grounds, as a way to improve the legal and technical assistance it provided to the entire ILO membership. Over time, however, this information-gathering exercise blurred the distinction between ratified and unratified

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26. See E. A. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF I.L.O. EXPERIENCE* 12 (1966).

27. J.F. McMahon, *The Legislative Techniques of the International Labour Organization*, 41 *BRIT. Y.B. INT'L L.* 1, 88 (1965-66) (quoting Report of the Director, *Proceedings of the International Labour Conference*, 3d Sess. 57 (1921)).

28. See C. Wilfred Jenks, *The Interpretation of International Labour Conventions by the International Labour Office*, 20 *BRIT. Y.B. INT'L L.* 132 (1939).

29. 1919 ILO CONSTITUTION, *supra* note 18, art. 423.

30. ALVAREZ, *supra* note 7, at 226 ("The ILO secretariat, without explicit constitutional warrant, [became] the principal organ for rendering these effectively conclusive but formally 'advisory' interpretations.").

31. McMahon, *supra* note 27, at 100.

treaties, reducing hurdles to ratifying any single labor convention but increasing the sovereignty costs of the initial delegation of authority to the organization.<sup>32</sup>

## B. Codifying the Authority to Monitor Compliance With Unratified Treaties

At the close of the Second World War, the ILO's tripartite membership convened a constitutional conference to consider the organization's place in the post-war legal order. The result was a major overhaul of the organization's founding charter and an expansion of its treaty-monitoring authority. In particular, the new ILO constitution codified states' obligation to explain whether they complied with unratified conventions and to identify any impediments to future ratification.<sup>33</sup> The constitution also required states to disclose whether they had implemented the organization's nonbinding recommendations.<sup>34</sup>

Strikingly, these formal expansions of the organization's monitoring powers were supported by the representatives of all three branches of the ILO membership—including the member states themselves. An employer delegate from the United Kingdom was the most vociferous proponent of the reforms.<sup>35</sup> But his proposals were, on the whole, supported by other government, worker, and employer representatives.<sup>36</sup>

A few delegates endorsed the new monitoring powers on normative grounds, as a first step toward the creation of “a code of basic labour conditions which all Members of the organisation will be bound to put into legislative effect and to carry out effectively as a condition of” membership.<sup>37</sup> Others, especially government representatives, supported the amendments for strategic reasons. The United States, for example, had relatively high domestic labor standards but had not ratified many ILO conventions because of federalism

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32. See ERNST B. HAAS, *BEYOND THE NATION-STATE: FUNCTIONALISM AND INTERNATIONAL ORGANIZATION* 253 (1964) [hereinafter HAAS, *BEYOND THE NATION STATE*] (characterizing the ILO's “indirect practice of studying the impact of unratified Conventions” as an “accretion[] in institutional autonomy and responsibility”); ILO, *THE FIRST DECADE*, *supra* note 21, at 267–76, 310–12, 317–20 (reviewing efforts by the ILO Office to overcome obstacles to ratification of conventions and to gather information on the implementation of recommendations).

33. Constitution of the International Labour Organization art. 19, § 5 cl. (e) (as amended Oct. 9, 1946), 62 Stat. 3485, 15 U.N.T.S. 35 [hereinafter 1946 ILO CONSTITUTION] (requiring nonratifying member states to “report . . . at appropriate intervals . . . the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention”).

34. *Id.* at art. 19, § 6 cl. (d) (requiring member states to “report . . . at appropriate intervals . . . the position of the law and practice in their country in regard to the matters dealt with in the Recommendation, showing the extent to which effect has been given, or is proposed to be given, to the provisions of the Recommendation and such modifications of these provisions as it has been found or may be found necessary to make in adopting or applying them”).

35. See INT'L LABOUR OFFICE, ILO, OFFICIAL BULLETIN, vol. XXVII *Constitutional Questions* 179, 420, 464–66 (Dec. 15, 1945) [hereinafter ILO, *Constitutional Questions*].

36. See *id.* 181, 537, 553, 650, 714, 718, 947.

37. *Id.* at 470 (amendments proposed by Sir John Forbes Watson).

concerns.<sup>38</sup> The organization's monitoring of compliance with unratified treaties thus engendered few sovereignty costs for the United States. But it created a useful procedure to highlight weak labor standards in other countries, including countries that were competitively advantaged by maintaining minimal worker- and workplace protections.<sup>39</sup>

Equipped with these new powers, ILO monitoring bodies began to gather information on compliance with unratified treaties. The reports that governments filed with these bodies were sometimes "onerous" and "embarrassing."<sup>40</sup> By the 1960s, however, a majority of member states were regularly or intermittently submitting information on these nonbinding instruments.<sup>41</sup>

Echoing its pre-war practice, the ILO Office soon enhanced these delegated powers. It did so by broadly interpreting member states' constitutional obligation to submit ILO conventions and recommendations to their domestic "authorities . . . for the enactment of legislation or other action."<sup>42</sup> In a 1959 memorandum, the Office defined such authorities as "the bod[ies] empowered to legislate in respect of the questions to which the Convention or Recommendation relates, i.e.[,] as a rule, the Parliament."<sup>43</sup> The memorandum opined that states were required to submit every adopted ILO legal instrument to these authorities, not merely the smaller number of treaties and recommendations that the government intended to ratify or implement. The Office also interpreted the constitution as requiring such submissions to "always be accompanied by . . . a statement or proposals setting out the government's views as to the action to be taken on the instruments. It would not be sufficient merely to append the text of the decisions . . . without making any proposal."<sup>44</sup>

The Office's interpretation of the ILO constitution enhanced the delegation of agenda-setting and informational authority to the organization. Perhaps most strikingly, the Office's memorandum gave an international organization

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38. Concerns that United States membership in the ILO would upset the balance between federal and state power were first expressed at the time of the organization's founding, and they persisted after the United States joined the organization in 1934. See Pitman B. Potter, *Inhibitions Upon the Treaty-Making Power of the United States*, 28 AM. J. INT'L L. 456 (1934).

39. HAAS, *BEYOND THE NATION-STATE*, *supra* note 32, at 545-46 n.73 (stating that, because of "the high level of American labor standards," the United States "gladly agreed to the suggestion that all member states submit periodic reports on the degree of implementation of [ILO treaties] irrespective of formal ratification"). The United States did, however, successfully defeat a proposal for a constitutional provision obligating member states periodically to resubmit unratified conventions to their respective national legislatures. *Id.*; see also ILO, *Constitutional Questions*, *supra* note 35, at 759 (statement of Sir John Forbes Watson that "[s]uch a country as the United States did not under the present system receive its due credit for the advanced character of its social conditions, and [that] some way of formally recognising these advanced standards was necessary").

40. HAAS, *BEYOND THE NATION-STATE*, *supra* note 32, at 264.

41. See *id.* at 265, tbl.5.

42. 1946 ILO CONSTITUTION, *supra* note 33, art. 19, § 5 cl. (b).

43. Int'l Labour Office, ILO, *Memorandum Concerning the Obligation to Submit Conventions and Recommendations to the Competent Authorities* (1959), Appl. 195 (Rev. 1), quoted in McMahon, *supra* note 27, at 18.

44. McMahon, *supra* note 27, at 18.

agenda-setting power over *domestic* lawmaking processes by requiring governments to submit all treaties to the legislature and to take a position on whether the treaties should be ratified. Such domestic agenda-setting power—which is included in Bradley and Kelley’s capacious typology—is far more constraining of sovereignty than a delegation to set the rulemaking agenda of an international body.<sup>45</sup>

Of course, member states retained the ultimate prerogative to accept or reject any labor treaty or recommendation that the organization had adopted. But the costs of doing so were increased by the monitoring authority exercised by ILO officials. Not only were states obligated to submit legal instruments to their domestic legislatures, they were also required to disclose the details of that submissions process to the ILO and to domestic worker and employer groups.<sup>46</sup> Whenever lawmakers declined to ratify a treaty, the state was required to explain whether it intended to implement any of its provisions “by legislation, administrative action, collective agreement or otherwise” and to indicate “the difficulties which prevent or delay the ratification of such Convention.”<sup>47</sup>

The Office used these monitoring powers to promote the ratification and implementation of labor treaties and recommendations.<sup>48</sup> According to one commentator of the period, “the recurrent pressure and exposure to which States were subjected [was] greatly intensified and States were placed in a position in which they had to justify to other member States their refusal to ratify a particular convention or implement a certain recommendation.”<sup>49</sup> In some countries, the ILO’s information-gathering and monitoring authority “provided a stimulus to governments to examine the law and practice in regard to those . . . Conventions which they had not ratified.”<sup>50</sup> Other nations—principally developing and communist countries—“apparently prefer[red] defiance of the rules to the risks of exposure.”<sup>51</sup> The recalcitrance of this latter group of states served as the backdrop for the creation of a new monitoring procedure authorizing labor unions to file complaints against member states for infringing the right to freedom of association.

### C. The Committee on Freedom of Association

In the late 1940s, with Cold War rivalries intensifying, the ILO and the newly created United Nations faced a mounting wave of worker protests concerning the suppression of trade unions. In response to these allegations, the two organizations established a joint fact-finding and conciliation commission to

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45. See Bradley & Kelley, *supra* note 1, at 14–15.

46. McMahon, *supra* note 27, at 15.

47. 1946 ILO CONSTITUTION, *supra* note 33, art. 19, § 5 cl. (e).

48. INT’L LABOUR OFFICE, ILO, THE IMPACT OF INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS 11–26 (1976); see also E.A. Landy, *The Influence of International Labour Standards: Possibilities and Performance*, 101 INT’L LAB. REV. 555, 563 (1970).

49. Landy, *supra* note 48, at 563.

50. *Id.* at 564 (quoting an Australian government official).

51. HAAS, BEYOND THE NATION-STATE, *supra* note 32, at 265.

conduct impartial investigations and assist governments in resolving these disputes. However, a state's consent was required before the commission could review any allegations against it.<sup>52</sup> When Peru, the state against which the first complaint was filed, refused to give its consent, worker groups lobbied the Governing Body—the ILO's executive arm, composed of a subgroup of governments, employers, and workers, including ten permanent seats reserved for states of “chief industrial importance”<sup>53</sup>—to establish an alternative mechanism to review the allegations against that country.<sup>54</sup>

The Governing Body acceded to the workers' demands and created a new tripartite Committee on Freedom of Association (CFA) in 1951.<sup>55</sup> Nominally, the CFA possessed only a narrow procedural mandate—to filter complaints alleging violations of trade union rights and decide whether they warranted submission to the Governing Body. For complaints that survived this screening procedure, the Governing Body was to seek the consent of the defendant state to submit the dispute to the joint conciliation commission.

Within a few months of its creation, however, the CFA had effectively supplanted the commission, with the result that a “supposedly harmless procedural device [was transformed into] a mechanism for investigating the merits of a case.”<sup>56</sup> The Committee's screening functions quickly evolved into “a full investigation of the facts and . . . an effort at ILO conciliation and pressure.”<sup>57</sup> In assessing the CFA's disposition of hundreds of trade-union complaints, commentators of the period described this transformation as a “revolutionary” expansion of the ILO's monitoring authority.<sup>58</sup>

Several institutional features of the CFA support this characterization. First, as a product of the ILO's tripartite lawmaking processes, the committee, unlike the conciliation commission, operated “free from the consent requirement.”<sup>59</sup> In addition, the Governing Body authorized the CFA to review complaints against all ILO member states, including countries that had not ratified two recently

52. *See id.* at 381–83.

53. *See* Int'l Labour Office, ILO, *Election of the Officers of the Governing Body for 2000–01*, GB.278/1 (June 2000), available at [www.ilo.org/public/english/standards/relm/gb/docs/gb278/pdf/gb-1.pdf](http://www.ilo.org/public/english/standards/relm/gb/docs/gb278/pdf/gb-1.pdf). The ten “states of chief industrial importance” are Belgium, Brazil, Canada, France, Germany, India, Italy, Japan, the United Kingdom, and the United States. *Id.*

54. *See* HAAS, BEYOND THE NATION-STATE, *supra* note 32, at 381–83; ERNST B. HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION: THE CASE OF FREEDOM OF ASSOCIATION 25–30 (1970) [hereinafter HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION]; C. WILFRED JENKS, THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM 187–200 (George W. Keeton & George Schwarzenberger eds., 1957).

55. DAVID TAJGMAN & KAREN CURTIS, INT'L LABOUR OFFICE, ILO, FREEDOM OF ASSOCIATION: A USER'S GUIDE ix (2000), available at <http://www.ilo.org/public/english/standards/norm/download/resources/freedomassociation.pdf>.

56. HAAS, BEYOND THE NATION-STATE, *supra* note 32, at 383.

57. *Id.*

58. Nicolas Valticos, *Les méthodes de la protection internationale de la liberté syndicale*, in 144 RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 77 (1975).

59. HAAS, BEYOND THE NATION-STATE, *supra* note 32, at 383.

adopted conventions protecting freedom of association and trade-union rights.<sup>60</sup> The CFA nevertheless viewed these two treaties “as the relevant yardsticks for blaming or exonerating governments, irrespective of whether they have ratified these texts.”<sup>61</sup>

As a formal matter, the CFA derived its authority to monitor compliance with these unratified treaties from the ILO constitution, which references freedom of association in its preamble.<sup>62</sup> The Committee asserted that, by recognizing this right in the constitution, states had implicitly sanctioned its review powers “by virtue of their membership [in] the Organization alone.”<sup>63</sup> In fact, this cloak of constitutional authority was quite threadbare. “The complaint procedure that evolved came about without formal conventional or constitutional sanction.”<sup>64</sup> Remarkably, no state attempted to challenge the CFA’s powers. To the contrary, over the next fifty years the Committee reviewed thousands of complaints from workers groups and issued nearly 2,500 decisions concerning a wide range of labor-rights issues.<sup>65</sup>

Why would ILO member states agree to create such an intrusive monitoring regime? And, even more surprisingly, why would they acquiesce in the CFA’s arrogation of *new* monitoring powers? Competition between rival IOs provides a partial answer. The newly formed United Nations Economic and Social Council had claimed jurisdiction over labor rights, a subject formerly within the ILO’s exclusive domain. The CFA—whose creation several UN bodies had opposed—provided a highly visible way for the ILO membership to counter this threat to the organization’s policy dominance.<sup>66</sup>

A different explanation is provided by Ernst Haas, whose magisterial mid-century study of the ILO answers these questions by analyzing the Cold War rivalries then pervading the organization:

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60. ILO, *Freedom of Association and Protection of the Right to Organise Convention*, ILOLEX No. C087 (July 9, 1948) [hereinafter ILO, *Freedom of Association and Protection of the Right to Organise Convention*], available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C087> (last visited Feb. 1, 2008); ILO, *Right to Organize and Collective Bargaining Convention*, ILOLEX No. C098 (July 1, 1949) [hereinafter ILO, *Right to Organize and Collective Bargaining Convention*], available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C098> (last visited Feb. 1, 2008).

61. HAAS, *BEYOND THE NATION-STATE*, *supra* note 32, at 407–08; see also Philip Alston, ‘*Core Labour Standards’ and the Transformation of the International Labour Rights Regime*, 15 EUR. J. INT’L L. 457, 481 (2004) (stating that the CFA examined “allegations in situations in which the government concerned had neither ratified [the relevant conventions] nor given its voluntary agreement to the ILO to consider the matter”).

62. 1946 ILO CONSTITUTION, *supra* note 33, pmb1. (recognizing “the principle of freedom of association”).

63. N. VALTICOS & G. VON POTOBOSKY, *INTERNATIONAL LABOUR LAW* 295 (1995); see also HAAS, *supra* note 32, at 407–08 (stating that “the ILO Constitution[’s] capacity to generate binding norms” provided the authority for the CFA to review complaints against all ILO member states).

64. HAAS, *HUMAN RIGHTS AND INTERNATIONAL ACTION*, *supra* note 54, at 27.

65. See ERIC GRAVEL ET AL., *THE COMMITTEE ON FREEDOM OF ASSOCIATION: ITS IMPACT OVER 50 YEARS 10–11* (2002).

66. See JOHN P. HUMPHREY, *HUMAN RIGHTS & THE UNITED NATIONS: A GREAT ADVENTURE* 83–84 (1984); Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL* 580, 602–03 (Philip Alston ed., 1992).

The major democracies never liked the Committee, but they learned to live with it as the best way to counter communist charges with full publicity. . . . The Soviets . . . took special delight in exploiting the procedure for anti-colonial and Cold War purposes, and thus could not very well denounce the machinery when it was turned against them.<sup>67</sup>

In short, the CFA was born and thrived because democratic and socialist countries, trade unions, and ILO officials all believed that the complaints procedure served their respective interests. As a result, these actors supported or “acquiesce[d] in a totally unplanned growth in [the Committee’s] institutional competence.”<sup>68</sup>

#### D. The Declaration on Fundamental Principles and Rights at Work

The ILO’s most recent expansion of its authority to monitor compliance with unratified treaties is also its most ambitious. In the mid-1990s, the organization faced a crisis.<sup>69</sup> It feared being eclipsed by the new and powerful WTO, which was considering adding labor standards to its mandate at the urging of industrialized countries and civil society groups. The crisis came to a head at a 1996 WTO ministerial meeting. The trade ministers recognized the relationship between free trade and labor, but rejected calls to enforce labor standards with WTO sanctions. Instead, the ministers “propel[led] the issue back into the ILO’s court by reasserting . . . the importance of the core rights dimension of globalization and the leading role of the ILO in managing that issue.”<sup>70</sup>

The ministers’ actions served as a catalyst for the ILO to return to first constitutional principles. Taking a page from the WTO’s book—in particular, its rule that states must accept a package of treaty commitments as a condition of joining the organization—the ILO membership, assisted by the ILO Office, developed a mechanism to apply core labor standards to all member states regardless of whether they had ratified the treaties that protected those standards. The result was the 1998 Declaration on Fundamental Principles and Rights at Work.<sup>71</sup> Understanding how the Declaration increases the delegation costs for some ILO member states requires a detailed analysis of the contents and the genesis of this distinctive document.

The text of the Declaration succinctly restates four core labor rights—freedom of association, the elimination of forced labor, the abolition of child labor, and nondiscrimination in employment—protected in eight

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67. HAAS, *BEYOND THE NATION-STATE*, *supra* note 32, at 415–16.

68. *Id.* at 383.

69. For a more detailed discussion of this crisis, see Helfer, *supra* note 16, at 705–07.

70. Brian A. Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 *EUR. J. INT’L L.* 409, 421 (2005).

71. ILO, *ILO Declaration on Fundamental Principles and Rights at Work*, ILOLEX No. 261998 (June 19, 1998) [hereinafter *1998 Declaration*], available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (last visited Feb. 1, 2008).

“fundamental” ILO conventions.<sup>72</sup> It requires member states “to respect, to promote and to realize, in good faith[,]” the “principles concerning the[se] fundamental rights.”<sup>73</sup> Because these obligations emanate from the ILO constitution—in particular its provisions for monitoring unratified treaties and nonbinding recommendations—they apply to all member states without regard to the treaties they have adopted or their level of economic development.<sup>74</sup> By nominally anchoring these commitments in “the very fact of membership in the Organization,”<sup>75</sup> the Declaration ingeniously mimics the WTO’s single-undertaking approach using the ILO’s existing constitutional architecture.

In addition to its normative provisions, the Declaration creates a new monitoring procedure to review government- and private-sector conduct.<sup>76</sup> The ILO has given this “follow-up mechanism” a high degree of institutional support and funding.<sup>77</sup> The mechanism includes two components—an annual performance review of countries that have not joined all eight fundamental conventions, and an annual “Global Report” that addresses one of the protected rights in depth. The performance review singles out the practices of nonratifying nations for special scrutiny.<sup>78</sup> By contrast, “[t]he aim of each Global Report is to provide an overall picture of the trends and evolution with respect to the right concerned, both in countries which have ratified the relevant conventions, and in those which have not.”<sup>79</sup>

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72. The eight fundamental conventions are: ILO, *Freedom of Association and Protection of the Right to Organise Convention*, *supra* note 60; ILO, *Right to Organize and Collective Bargaining Convention*, *supra* note 60; ILO, *Forced Labour Convention*, ILOLEX No. C029 (June 28, 1930), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029> (last visited Feb. 1, 2008); ILO, *Abolition of Forced Labour Convention*, ILOLEX No. C105 (June 25, 1957), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C105> (last visited Feb. 1, 2008); ILO, *Equal Remuneration Convention*, ILOLEX No. C100 (June 29, 1951), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C100> (last visited Feb. 1, 2008); ILO, *Discrimination (Employment and Occupation) Convention*, ILOLEX No. C111 (June 25, 1958), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111> (last visited Feb. 1, 2008); ILO, *Minimum Age Convention*, ILOLEX No. C138 (June 26, 1973), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C138> (last visited Feb. 1, 2008); ILO, *Worst Forms of Child Labour Convention*, ILOLEX No. C182 (June 17, 1999), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182> (last visited Feb. 1, 2008).

73. 1998 Declaration, *supra* note 71, ¶ 2. The operative paragraph of the Declaration provides that “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.” *Id.*

74. See Brian A. Langille, *The ILO and the New Economy: Recent Developments*, 15 INT’L J. COMP. LAB. L. & IND. REL. 229, 244–45 (1999).

75. 1998 Declaration, *supra* note 71, ¶ 2.

76. ILO, *Follow-up to the Declaration*, ILOLEX No. 261998 (June 19, 1998), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm> (last visited Feb. 1, 2008).

77. See Francis Maupain, *Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights*, 16 EUR. J. INT’L L. 439, 444–46 (2005).

78. See Francis Maupain, *The Liberalization of International Trade and the Universal Recognition of Workers’ Fundamental Rights: The New ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up*, in SCIENTIFIC AND TECHNOLOGICAL DEVELOPMENT AND HUMAN RIGHTS 35, 45 (Linos-Alexander Sicilianos & Maria Gavouneli eds., 2001).

79. Maupain, *supra* note 77, at 445.

What did ILO member states hope to accomplish by creating these new obligations and monitoring mechanisms? According to some observers, not very much. For these commentators, the Declaration is little more than institutional window dressing and is not intended to have significant real-world consequences.<sup>80</sup> Two attributes of the Declaration might be viewed as supporting this assessment: first, that a large majority of the ILO membership endorsed the document, and second, that the Declaration essentially restates commitments already contained in the ILO constitution. Both of these statements are true. But the conclusion that the Declaration is merely cheap talk is erroneous.

First, although the vote to adopt the Declaration—273 delegates in favor, none opposed, and forty-three abstentions—suggests widespread support for the instrument, the final tally masks significant dissent among governments, workers, and employers.<sup>81</sup> As Brian Langille explains in his blow-by-blow account of the Declaration's genesis, “[v]irtually every aspect of . . . the Declaration was contested and debated at excruciating length”<sup>82</sup> and “[u]ncertainty as to whether the Declaration would be adopted existed, literally, to the very last moment of the [ILO’s] June conference.”<sup>83</sup> Opponents delayed the vote until many delegates had left the ILO’s Geneva headquarters, hoping to reduce the number of delegates below the required quorum. In the end, the Declaration received only nine votes more than the minimum required for adoption.<sup>84</sup> This behind-the-scenes portrait suggests that the Declaration was something ILO members believed was worth fighting (or fighting for).

Nor can the Declaration be dismissed as a mere restatement of obligations already implicit in the constitution.<sup>85</sup> To be sure, ILO officials who favored the

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80. See Cooney, *supra* note 6, at 379–80 (stating that although the Declaration “looks promising as a new focus of ILO activities,” it suffers from “several shortcomings”); Patrick Macklem, *Labour Law Beyond Borders*, 5 J. INT’L ECON. L. 605, 619 (2002) (“Although [the Declaration] addresses some of the deficiencies traditionally associated with international labour standards as a mode of regulating transnational corporate activity, it reproduces others in new forms.”); Andrew J. Samet, *Doha and Global Labor Standards: The Agenda Item That Wasn’t*, 37 INT’L LAW. 753, 755 (2003) (criticizing the Declaration’s follow-up mechanism as “limited by the ILO’s failure to develop a politically potent process to debate and prioritize” violations); Leah F. Vosko, *The Shifting Role of the ILO and the Struggle for Global Social Justice*, 2 GLOBAL SOC. POL’Y 19, 29 (2002) (arguing that the Declaration is “unlikely to alter fundamentally the corporate/state-centric power relations characterizing the ILO historically”).

81. Langille, *supra* note 74, at 249; see also Francis Maupain, *International Labor Organization Recommendations and Similar Instruments*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 372, 388 (Dinah Shelton ed., 2000) (stating that the Declaration “initially met with great suspicion and even open hostility from some governments”).

82. Langille, *supra* note 74, at 248.

83. *Id.* at 231. Industrialized countries and workers organizations were, on the whole, supporters of the Declaration, whereas developing states and some employer groups opposed its adoption. *Id.* at 249.

84. *Id.* at 249.

85. In fact, the ILO constitution does not make reference to all of the fundamental labor rights that the Declaration incorporates. See Maupain, *supra* note 78, at 43 (noting the differences between the objectives mentioned by the constitution and those endorsed by the Declaration). In the decade since the Declaration’s adoption, however, no state has challenged its constitutional pedigree.

Declaration were careful to adhere to the formal trappings of state consent—much as other IOs have done when modifying delegations in legally consequential ways.<sup>86</sup> As the ILO Director General stated in 1997,

It [the Declaration] is in no way a question of imposing . . . new obligations on member states against their will. The Declaration is aimed at reaffirming the logic of the commitments and values to which states have already freely subscribed in joining the ILO. . . . [N]obody could reproach the organization for inviting its members to take seriously such commitments by making them more explicit.<sup>87</sup>

Yet it is just this greater specificity, together with the new monitoring mechanisms accompanying the Declaration, that, as a practical matter, increased the sovereignty costs to ILO member states.<sup>88</sup> By augmenting the precision of member states' constitutional commitments and by establishing new mechanisms to scrutinize their compliance with those commitments, the Declaration expanded the powers that states had previously delegated to the ILO.<sup>89</sup> It should come as no surprise, therefore, that many observers have heralded the Declaration as “nothing short of a revolution in legal terms”<sup>90</sup> and a “constitutional moment[] in the life of the ILO.”<sup>91</sup>

Having established that the Declaration in fact expands the ILO's competence, a more difficult issue to be addressed is why member states would, once again, augment the organization's authority to monitor its members' compliance with unratified treaties.

Commentators offer divergent ideational and instrumental explanations. For international-law optimists and ILO enthusiasts, the Declaration reflects “a moment of renewal and reaffirmation by the [organization's] nearly global membership of basic constitutional values and commitment to social justice on

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86. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 365 (2002) (analyzing the Uruguay Round of trade negotiations leading to the creation of the WTO and demonstrating that “GATT/WTO decision-making rules have allowed adherence to both the instrumental reality of asymmetrical power and the logic of appropriateness of sovereign equality”).

87. GOVERNING BODY, ILO, *Follow-Up on the Discussion of the Report of the Director-General to the 85th Session (1997) of the International Labour Conference—(a) Inclusion on the Agenda of the 86th Session (1998) of the International Labour Conference of an Item Concerning a Declaration on Workers' Fundamental Rights*, GB.270/3/1 (November 1997), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb270/gb-3-1.htm> (last visited Feb. 1, 2008).

88. Enhancing the precision of international rules increases the “legalization” of those rules and thus increases sovereignty costs. See Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 401–06, 412–15 (2000). Enhanced legalization also occurs when previously underenforced international rules become subject to new monitoring mechanisms. See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1855–58 (2002).

89. For an analysis of the first decade of ILO monitoring of fundamental labor rights under the Declaration's authority, see Int'l Lab. Office, ILO, *Review of Annual Reports Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work*, GB.295/5, 295th Sess. (Mar. 2006), available at [http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD\\_BLOB?Var\\_DocumentID=5939](http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5939) (last visited Feb. 1, 2008).

90. Maupain, *supra* note 78, at 44.

91. Alston, *supra* note 61, at 459 (noting, but not endorsing, this viewpoint).

the basis of economic progress.”<sup>92</sup> According to this view, the ILO responded to the “identity crisis” that the WTO’s rejection of a trade-labor linkage engendered by rededicating itself to the values and objectives that had animated the organization since its founding.<sup>93</sup>

For skeptics and realists, by contrast, instrumentalist logic and a convergence of diverse interests explain the Declaration’s genesis. According to this view, the United States backed the Declaration for two reasons: first, to highlight its domestic protection of labor rights while obscuring its failure to ratify all but a handful of ILO conventions,<sup>94</sup> and second, to legitimize its promotion of workers’ rights in other countries through the imposition of unilateral trade sanctions and the inclusion of labor-protection clauses in bilateral and regional trade pacts.<sup>95</sup> Conversely, developing countries and employers viewed the Declaration as a way of paying lip service to the linkage between trade and labor while sidestepping any new labor rules in the WTO.<sup>96</sup> Worker groups, by contrast, emphasized the document’s focus on membership-wide obligations and hoped that its follow-up mechanism would evolve into a more legalistic, complaints-driven process, as did the CFA before it.<sup>97</sup>

The accuracy of these competing accounts of the Declaration’s origins—and their power to predict its future evolution and influence on international labor standards—remain the subjects of lively debate among ILO officials and academic commentators, a debate that is likely to continue for the foreseeable future.<sup>98</sup>

### III

#### LESSONS OF THE ILO FOR THE STUDY OF INTERNATIONAL DELEGATION

The allocation to the ILO of the authority to monitor compliance with unratified labor treaties and recommendations, and the expansion of that authority over the course of the organization’s nearly ninety-year history, have three implications for the Bradley–Kelley delegation framework.

##### A. The Frequency of Delegations to Monitor Compliance with Nonbinding International Rules

First, the ILO’s experience suggests the need to include in the framework a more extensive analysis of how IOs (or their member states acting collectively) monitor compliance with international rules to which individual countries have

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92. Langille, *supra* note 74, at 232 (describing, but ultimately rejecting, this view).

93. *Id.* at 233–34.

94. See Janet R. Bellace, *The ILO Declaration of Fundamental Principles and Rights at Work*, 17 INT’L J. COMP. LAB. L. & INDUS. REL. 269, 279 (2001).

95. See Alston, *supra* note 61, at 495–506.

96. See *id.* at 470–71.

97. See Langille, *supra* note 74, at 247.

98. See Helfer, *supra* note 16, at 711 (reviewing claims of the Declaration’s proponents and its critics and citing additional authorities); Vosko, *supra* note 80, at 28–32 (same).

not formally consented. Bradley and Kelley correctly identify delegations that enable international bodies to create and enforce such unconsented-to rules as having high sovereignty costs. But formal delegations of this kind are rare—a point the authors acknowledge—with the UN Security Council and European Union being the two most prominent examples.<sup>99</sup>

Far more common, however, are delegations of authority to monitor states' adherence to international rules without requiring them formally to recognize those rules as legally binding.<sup>100</sup> The ILO's detailed reporting obligations concerning unratified labor conventions and recommendations are distinctive in degree, but not in kind. The founding charters of the World Health Organization, the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the Council of Europe, for example, contain reporting requirements relating to recommendations adopted by their respective standard-setting bodies, although these requirements have been invoked only infrequently.<sup>101</sup>

Cross-institutional delegations of authority that require states to adhere to formally unconsented-to legal rules are even more widespread. The interaction between the International Maritime Organization (IMO) and the United Nations Convention on the Law of the Sea (UNCLOS) provides a useful illustration. UNCLOS incorporates, by reference, generally accepted standards, procedures, and practices concerning various maritime matters.<sup>102</sup> As José Alvarez has written, this linkage “effectively transforms a number of the IMO's codes, guidelines, regulations, and recommendations [dealing with pollution control and navigation safety] into binding norms, even for states that may have not approved of these standards within the context of the IMO but have become parties to” UNCLOS.<sup>103</sup> The linkage also significantly augments the authority of the IMO, which “has no power under its constitution to [issue] formally binding decisions.”<sup>104</sup>

Cross-institutional delegations can also enable monitoring and enforcement by international tribunals. In the trade context, the reference to the Codex Alimentarius in the Agreement on the Application of Sanitary and Phytosanitary Measures and the similar reference to standards generated by the

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99. Bradley & Kelley, *supra* note 1, at 10. The number of such delegations increases if they are defined to include the authority to amend regulatory schedules or annexes attached to treaties. *See id.* at 14; Bernhard Boockmann & Paul W. Thurner, *Flexibility Provisions in Multilateral Environmental Treaties*, 6 INT'L ENVTL. AGREEMENTS 113, 117–25 (2006) (surveying amendment procedures in 400 environmental agreements, protocols, and annexes).

100. For a comprehensive recent discussion of these issues that incorporates numerous examples and citations to additional authorities, see ALVAREZ, *supra* note 7, at 217–57.

101. *See* Kirgis, *supra* note 7, at 116–17, 145; Jutta Brunnée, *International Legislation*, in THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed.) (forthcoming 2008).

102. United Nations Convention on the Law of the Sea arts. 207–12, Dec. 10, 1982, 1833 U.N.T.S. 243.

103. ALVAREZ, *supra* note 7, at 220.

104. *Id.*

International Organization for Standardization in the Agreement on Technical Barriers to Trade provide two high-profile examples.<sup>105</sup> These references transform norms that are formally nonbinding under the charters of the IOs that created them into de facto legally binding rules policed by the WTO's powerful dispute-settlement system.

In each of the above examples, states expressly delegated the authority to monitor compliance with nonbinding norms and standards. Yet international decisionmakers can themselves expand existing delegations to create or enhance such monitoring powers. An advisory opinion by the Inter-American Court of Human Rights concluding that the nonbinding American Declaration on the Rights and Duties of Man had become binding by its indirect incorporation into the Charter of the Organization of American States (OAS) nicely illustrates this point.<sup>106</sup> Relying in part on this creative and controversial reinterpretation of soft law as hard law, the Inter-American Commission on Human Rights has reviewed individual complaints against OAS member nations (including the United States) that had refrained from ratifying the American Convention on Human Rights.<sup>107</sup> ILO officials are thus not alone in arrogating to themselves the power to police international rules that states have not accepted as legally binding.<sup>108</sup>

The examples discussed in this Part reveal that delegations of authority to monitor compliance with unratified treaties and other nonbinding international rules are quite common. In fact, scholars have argued that "much of the work of the UN specialized agencies [reflects] a conscious effort to side-step the question of binding effect[,] in favor of standard-setting" that elides "positivist distinctions between non-binding [and] binding action."<sup>109</sup> This finding supports the need for more extensive study of monitoring delegations that blur the line between hard and soft law. It also suggests that both governments and IO officials benefit by sidestepping the formal mechanisms by which states express their consent to be bound while, at the same time, treating those rules as de facto legally binding. Part IV considers this issue in greater detail.

## B. Comparing Formal Delegations to the Actual Exercise of Delegated Authority

*The Concept of International Delegation* analyzes the sovereignty costs associated with formal delegations of authority to IOs and other international bodies. Identifying such formal delegations requires consulting treaties, statutes,

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105. *Id.* at 220–21.

106. Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1990 Inter-Am. Ct. H.R. (ser. A), No. 10 (July 14, 1989).

107. See Douglass Cassel, *Inter-American Human Rights Law, Soft and Hard*, in COMMITMENT AND COMPLIANCE, *supra* note 81, at 393, 397–98.

108. The United States has repeatedly and vociferously objected to the de facto legally binding status of the American Declaration. See *id.* at 397.

109. *E.g.*, ALVAREZ, *supra* note 7, at 222.

and executive orders to discern the different attributes emphasized by Bradley and Kelley, such as type of authority, legal effect, and independence of the international body.<sup>110</sup>

A paradox that this symposium has revealed, however, is that we know relatively little about the topography of formal international delegations precisely because such delegations are so pervasive. Barbara Koremenos' article begins to map this uncharted terrain by coding the delegation provisions of a random sample of treaties.<sup>111</sup> Her analysis reveals that delegations differ by issue area and by the complexity of the problems that states seek to resolve.<sup>112</sup> It also suggests a relationship between delegations and other treaty design provisions, implying that delegations affect how states manage the risks of international cooperation.<sup>113</sup> Similarly, Karen Alter's article disaggregates formal adjudicative delegations to international courts and tribunals into four distinct roles or functions, each of which addresses a different type of problem.<sup>114</sup>

Given that comprehensive empirical information of the kind provided by Koremenos and Alter is only now emerging, there is much to be learned from analyzing the formal attributes of international delegations.<sup>115</sup> But a deeper understanding of the causes and consequences of delegation often requires looking beyond treaty texts and institutional design features to consider how allocated authority is actually exercised.<sup>116</sup> This is especially true for IOs with large secretariats or heterogeneous memberships, whose formal rules can mask asymmetric distributions of power.<sup>117</sup> Examining the operation of IOs may

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110. Bradley & Kelley, *supra* note 1, at 17–25.

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

112. *See id.*

113. *Id.* at 176–79; *see also* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005) (analyzing tradeoffs between treaty denunciation clauses and other treaty risk-management provisions).

114. Karen J. Alter, *Delegating Sovereignty to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 62 (Winter 2008).

115. Michael Tierney's contribution to this symposium makes this point most forcefully. *See* Michael J. Tierney, *Delegation Success and Policy Failure: Collective Delegation and the Search for Iraqi Weapons of Mass Destruction*, 71 LAW & CONTEMP. PROBS. 286 (Winter 2008) (“If we want to explain (or judge) the choices of states, the behavior of IOs, or the outcomes within and around international institutions, then a focus on the formal decision rules within IOs and official mandates issued by member states is an underappreciated research strategy.”).

116. Michael Tierney cautions that, because “informal rules and norms are more difficult to identify *ex ante*, analysts will disagree on the substance of informal rules purportedly guiding behavior in any given case.” Under these conditions, he warns, “‘testing’ hypotheses can degenerate into spin control, cherry-picked cases, and literary criticism.” *Id.* I disagree with Tierney's statement to the extent that it includes longstanding, unofficial practices that have no formal pedigree in an IO's founding charter—such as the ILO Office's nearly ninety-year history of interpreting international labor treaties. In addition, the lack of agreement on informal rules (to the extent it exists) reflects the fact that scholars often ignore informal IO practices even where they have measurable real-world effects. Giving more systematic attention to these issues rather than ignoring them can help to distinguish informal practices that are theoretically consequential from those that are not.

117. *See* Steinberg, *supra* note 86, at 350–67 (analyzing how powerful nations exploited the GATT/WTO's formal negotiating rules to capture asymmetric gains at the expense of weaker states).

reveal, for example, that delegations with modest official pedigrees in fact reflect more capacious transfers of authority. Conversely, delegations that appear highly sovereignty-restrictive on paper may turn out to be far less constraining in practice.

The history of the ILO suggests that informal expansions of delegated authority are often initiated by IO officials with the acquiescence or approval of member states. There are at least two reasons why such expansions are likely to remain unofficial, at least in the short term. First, amending the ground rules under which international institutions operate is a cumbersome and time-consuming process. Second, even when member states benefit by allowing IO officials to exercise powers outside their formal mandates, the publicity that accompanies the codification of such expanded authority may precipitate a domestic political backlash. For both reasons, member states may prefer that IO officials exercise their augmented authority outside official channels of power. Studies that consider only the formal attributes of IOs will overlook these important delegated powers.

Analyses restricted to formal treaty provisions can also fall prey to the converse error—incorrectly identifying modest delegations as consequential. According to one recent study, for example, a statistically significant number of treaties that address complex cooperation problems include provisions for external third-party dispute settlement by international tribunals or arbitrators.<sup>118</sup> This finding suggests that states recognize the benefits of delegating broad adjudicatory authority to international jurists to help resolve complex transborder problems. However, this study overlooks the fact that states often file reservations to exempt themselves from these dispute-settlement provisions.<sup>119</sup> And even when they do not unilaterally opt out of these clauses, states only rarely submit treaty disputes to international tribunals.<sup>120</sup> As a result, what appears on paper to be a capacious delegation is in fact far more limited.

Once scholars recognize the need to consider the exercise of delegated authority, they face the difficult task of understanding the day-to-day workings of international institutions, the relationship between those institutions and the political and geostrategic environments in which they are embedded, and the

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118. Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 J. LEGAL STUD. 189, 194–207 (2007).

119. See Anne Peters, *International Dispute Settlement: A Network of Cooperational Duties*, 14 EUR. J. INT'L L. 1, 20–21 (2003) (noting that reservations to dispute-settlement clauses are pervasive, but arguing against their validity).

120. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 285–86 (1997) (“[S]tates are reluctant to sue one another. The decision to invoke the jurisdiction of an international tribunal, even where it is available in the context of a specific dispute, inevitably involves a host of political and legal considerations.”); Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 361 & n.14 (1998) (explaining that “no state has ever challenged another’s laws under the . . . cumbersome dispute settlement mechanisms” contained in several multilateral intellectual-property agreements).

different ways that member states wield power and influence. Such information lends itself to qualitative studies that investigate the workings of one or a small number of institutions in depth. These fine-grained analyses can provide useful complements to econometric studies that survey the legal and political landscape from a higher elevation.

### C. The Changing Costs and Benefits of International Delegations

Third and finally, the history of the ILO demonstrates that international delegations can change substantially over time. Bradley and Kelley recognize that the sovereignty costs of delegations are not static.<sup>121</sup> Oona Hathaway's article also provides an extended treatment of this topic. Hathaway considers the time-inconsistent preferences of states and delegation's unintended consequences. But her principal interest lies in identifying when shifting preferences and outcomes undermine the domestic legitimacy of international delegations.<sup>122</sup>

An antecedent issue is understanding when and why IOs evolve after they have been established and how that evolution alters the costs and benefits of international cooperation. Scholars have made substantial progress in explaining why states create IOs.<sup>123</sup> But they have devoted far less attention to the equally consequential issue of IO change. As Michael Tierney and Catherine Weaver have recently written, the theoretical and empirical questions to be addressed include

who or what catalyzes such formal or informal change of/in IOs and how is a consensus on the direction of change attained (if at all)? Is this fundamentally driven by principals in a response to changes in rational interests or shifting domestic/global norms? Or do IOs, as bureaucratic actors, strategically initiate specific reforms in anticipation of challenges in their external environments? . . . [W]hat enables or constrains principals and/or IOs themselves from changing the formal and/or informal rules that drive organizational actions?<sup>124</sup>

One reason why these important questions remain unanswered is that the rational choice and principal-agent theories that dominate the study of international cooperation generally ignore shifts in state preferences, and IOs as autonomous actors. Considering these issues opens up opportunities for theorizing institutional change. When preferences shift—in response to external shocks or changes in domestic politics, for example—states may assign IOs new

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121. See Bradley & Kelley, *supra* note 1, at 31 (discussing changes in sovereignty costs resulting from recent International Court of Justice decisions interpreting the Vienna Convention on Consular Relations).

122. Hathaway, *supra* note 14, at 123–33.

123. See Michael Barnett & Liv Coleman, *Designing Police: Interpol and the Study of Change in International Organizations*, 49 INT'L STUD. Q. 593, 593–94 (2005) (“We know a lot about the conditions under which states will establish IOs, why states will design them the way they do, and some of the conditions under which states will grant autonomy to IOs.”).

124. Michael Tierney & Catherine Weaver, *Principles and Principals? The Possibilities for Theoretical Synthesis and Scientific Progress in the Study of International Organizations 12–13* (2005) (unpublished manuscript, on file with author) (citations omitted).

functions. In addition, as the ILO's history reveals, many IO officials are independent strategic actors who have the autonomy to set agendas and select tasks that chart a course away from an institution's origins. Developing more precise theories of the causes and consequences of institutional change would significantly enrich the interdisciplinary study of international delegation.<sup>125</sup>

#### IV

##### LESSONS OF THE ILO FOR OTHER INTERNATIONAL DELEGATIONS

What lessons does the ILO hold for delegations to other IOs? One way to answer this question is to consider whether the ILO's power to monitor adherence to unratified treaties and nonbinding recommendations—what Frederic Kirgis colorfully labels as “the ILO super-treaty system”—can be replicated in other venues. According to Kirgis,

[S]uch a super-treaty system is simply not subject to replication outside the ILO. It was developed when the ILO was a much smaller and more homogenous organization than it (or any specialized agency) is now; it is tailored in part to the ILO's unique, tripartite system of representation; there are some economic incentives to make it work; and it covers a nontechnical, rather well-defined field (labor relations) that lends itself to a supervisory system relying heavily on independent experts.<sup>126</sup>

As this article illustrates, however, the delegation of authority to monitor adherence to unconsented-to international rules is in fact quite common, notwithstanding the tension such delegation creates with traditional principles of state consent.<sup>127</sup> But the specific mechanisms of such monitoring differ significantly from those exercised by the ILO, reducing the value of cross-institutional comparisons. A more theoretically interesting way to answer to the question posed above, therefore, is to analyze the functions that such monitoring delegations serve.

Consider transborder problems that can be modeled as collaboration games such as the Prisoners' Dilemma. Collaboration games underlie delegations in many issue areas, including trade, environmental protection, and arms control. IOs created pursuant to these delegations face the same basic problem—how to convince all affected nations to participate in the organization and adhere to its rules rather than free-ride on the efforts of other states.<sup>128</sup>

International agreements solve this problem in different ways. In the trade context, the WTO links disparate treaties into a global package-deal that must

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125. For a more detailed treatment of these theories, see Helfer, *supra* note 16, at 657–71.

126. Kirgis, *supra* note 7, at 119; *see also* Helfer, *supra* note 16, at 720–26 (considering the ILO's relevance to international law and politics).

127. *See supra* Parts I & III.A. Kirgis recognizes that selected features of the ILO's distinctive powers could be replicated in other IOs. *See Kirgis, supra* note 7, at 119.

128. *See* SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 195–220 (2003) (analyzing the importance of membership rules in promoting international cooperation); George W. Downs et al., *Managing the Evolution of Multilateralism*, 52 INT'L ORG. 397, 398 (1998) (same).

be accepted by all member states.<sup>129</sup> Environmental treaties use an iterative approach that pairs the creation of framework agreements and protocols with the delegation of authority to bind states to treaty amendments adopted by a majority or supermajority vote.<sup>130</sup> Still other treaties pair deep substantive commitments with strong enforcement mechanisms to deter states from renegeing on their promises.<sup>131</sup>

International labor standards can also be conceptualized as a collaboration game.<sup>132</sup> To prevent countries from competing for foreign investment by progressively reducing domestic work-protection rules, all countries (or at least all those with sizable export markets) must commit themselves not to enter this self-defeating race to the bottom. But how to achieve such a result? The international legislature championed by workers and even a few governments at the time of the ILO's founding is one option.<sup>133</sup> But the rejection of that proposal and others like it demonstrates "the reluctance of states to endow [international] agencies with broad, formal legislative powers."<sup>134</sup>

A delegation that authorizes an IO to monitor compliance with unratified treaties and other formally nonbinding standards may provide an alternative mechanism to reach an equilibrium in which states adhere to, rather than violate, international rules. It does so in two distinct ways: first, by making it more costly for states to defect, and second, by modifying the game's underlying structure to eliminate or reduce the incentive to defect in the first instance.

The 1998 Declaration on Fundamental Principles and Rights at Work illustrates both of these functions.<sup>135</sup> First, by committing all states to a core group of labor standards as a condition of membership in the ILO, the Declaration reduces the competitive advantages to any state of refraining from ratifying fundamental labor conventions. The several hundred ratifications of these treaties in the years since the Declaration's adoption suggests that such a

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129. See Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 *Nw. J. INT'L L. & BUS.* 398, 442 (1996-97) (characterizing agreements relating to services and intellectual property as part of "global package deals" negotiated within the GATT/WTO).

130. See Brunnée, *supra* note 101, ¶¶ 11-34 (reviewing numerous examples).

131. See George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 *INT'L ORG.* 379, 383 (1996); James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 *INT'L ORG.* 137, 148 (2000) (stating that "the more ambitious the level of proposed integration, the more willing political leaders should be to endorse legalistic dispute settlement").

132. The protection of international labor standards has been modeled using two collaboration games—the Prisoners' Dilemma and the Stag Hunt. See Brian A. Langille, *Re-Reading the Preamble to the 1919 ILO Constitution in Light of Recent Data on FDI and Worker Rights*, 42 *COLUM. J. TRANSNAT'L L.* 87, 91-92 (2003); Alan Hyde, *A Game-Theory Account and Defence of Transnational Labour Standards—A Preliminary Look at the Problem*, in *GLOBALIZATION AND THE FUTURE OF LABOUR LAW* 143, 146-51 (John D.R. Craig & S. Michael Lynk eds., 2006).

133. See *supra* Part II.A.

134. Kirgis, *supra* note 7, at 142.

135. See *supra* Part II.D.

reduction has in fact occurred.<sup>136</sup> In addition, the Declaration's authorization to ILO officials to collect and publicize information about each member country's labor practices without regard to the treaties it has formally approved has made it more difficult for states to cheat surreptitiously and capture those unilateral advantages.

The Declaration also has a second and more profound function—to demonstrate that “flows of trade and investment do *not* create inexorable pressure on each country to lower its labour standards so as to attain comparative advantage.”<sup>137</sup> A growing number of empirical studies conclude that “[i]nvestment is attracted, not repelled, by adherence to core labor standards.”<sup>138</sup> The Declaration's monitoring mechanisms have reinforced the findings of these studies, helping to convince governments that compliance with international labor rules is both “individually and collectively rational.”<sup>139</sup> This reduction of the incentive to defect has allowed the ILO to focus on technical assistance and capacity-building that increases the benefits of treaty compliance for all member countries.

To be sure, delegations of authority to monitor adherence to unratified treaties cannot always so neatly realign state incentives. But the ILO's history of expanding and adapting its monitoring powers reveals that such delegations can provide valuable information to states and nonstate actors, information that enhances the benefits of compliance with international rules without incurring the higher sovereignty costs of formally binding states to unconsented-to legal obligations.

## V

### CONCLUSION

This article has examined the history of the ILO's delegated authority to monitor compliance with unratified treaties and nonbinding recommendations. It has explained how ILO officials initially claimed this authority by broadly interpreting the powers granted to them under the first ILO constitution adopted in 1919. Rather than reign in this unauthorized assertion of monitoring powers, ILO member states codified and expanded it when they revised the organization's constitution after the Second World War. They created a complaints procedure authorizing workers to challenge violations of treaties that a state had not ratified, and they adopted a Declaration and follow-up mechanism that made adherence to fundamental labor rights a condition of membership in the ILO, even for states that had not acceded to treaties

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136. See Int'l Lab. Office, Comm. on Legal Issues and Int'l Lab. Standards, *Ratification and Promotion of Fundamental ILO Conventions*, GB.297/LILS/6, at 1 (Nov. 2006), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/lils-6.pdf>.

137. Hyde, *supra* note 132, at 162 n.25.

138. Langille, *supra* note 132, at 93; see also Hyde, *supra* note 132, at 162 n.25 (citing numerous empirical studies).

139. Langille, *supra* note 132, at 96.

protecting those rights. Taken together, these developments challenge the conventional wisdom that the delegation of authority to the ILO involves only modest sovereignty costs.

This article has also used the ILO's history to emphasize the importance of studying delegations that authorize IOs to monitor compliance with nonbinding international rules—a type of delegation that exists in many issue areas of international relations. Such delegations often arise and thrive outside of the formal channels of authority. This makes it essential for scholars to look beyond treaty texts and institutional design features to consider how power is actually exercised within IOs and how the costs and benefits of international delegations can change over time.

Finally, this article has considered what insights the ILO offers for delegations to other international bodies. It has argued that granting IOs the authority to monitor compliance with unconsented-to legal rules helps to ensure that all member states address international cooperation problems in some fashion, rather than free-ride on the efforts of other countries. The creation and expansion of these monitoring powers in the ILO suggests that the member states of other IOs may wish to consider the benefits of delegating such authority as a way to enhance interstate cooperation.