The Concept of Legalization

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The subject of this volume is "legalization and world politics." "World politics" in this formulation needs no clarification, but "legalization"—the real focus of the volume—must be more clearly defined, if only because of its relative unfamiliarity to students of international relations. In the introduction the editors have briefly previewed the concept of legalization used throughout the volume, a concept developed collaboratively by the authors of this article. We understand legalization as a particular form of institutionalization characterized by three components: obligation, precision, and delegation. In this article, we introduce these three characteristics, explore their variability and the range of institutional forms produced by combining them, and explicate the elements of legalization in greater detail.

The Elements of Legalization

"Legalization" refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.

Each of these dimensions is a matter of degree and gradation, not a rigid dichotomy, and each can vary independently. Consequently, the concept of legalization encompasses a multidimensional continuum, ranging from the "ideal type" of legal-

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ization, where all three properties are maximized; to "hard" legalization, where all three (or at least obligation and delegation) are high; through multiple forms of partial or "soft" legalization involving different combinations of attributes; and finally to the complete absence of legalization, another ideal type. None of these dimensions—far less the full spectrum of legalization—can be fully operationalized. We do, however, consider in the section entitled "The Dimensions of Legalization" a number of techniques by which actors manipulate the elements of legalization; we also suggest several corresponding indicators of the strength or weakness of legal arrangements.

Statutes or regulations in highly developed national legal systems are generally taken as prototypical of hard legalization. For example, a congressional statute setting a cap on emissions of a particular pollutant is (subject to any special exceptions) legally binding on U.S. residents (obligation), unambiguous in its requirements (precision), and subject to judicial interpretation and application as well as administrative elaboration and enforcement (delegation). But even domestic enactments vary widely in their degree of legalization, both across states—witness the vague "proclamations" and restrictions on judicial review imposed by authoritarian regimes—and across issue areas within states—compare U.S. tax law to "political questions" under the Constitution. Moreover, the degree of obligation, precision, or delegation in formal institutions can be obscured in practice by political pressure, informal norms, and other factors. International legalization exhibits similar variation; on the whole, however, international institutions are less highly legalized than institutions in democratic rule-of-law states.

Note that we have defined legalization in terms of key characteristics of rules and procedures, not in terms of effects. For instance, although our definition includes delegation of legal authority (to domestic courts or agencies as well as equivalent international bodies), it does not include the degree to which rules are actually implemented domestically or to which states comply with them. To do so would be to conflate delegation with effective action by the agent and would make it impossible to inquire whether legalization increases rule implementation or compliance. Nor does our definition extend to the substantive content of rules or their degree of stringency. We regard substantive content and legalization as distinct characteristics. A conference declaration or other international document that is explicitly not legally binding could have exactly the same substantive content as a binding treaty, or even a domestic statute, but they would be very different instruments in terms of legalization, the subject of this volume.

Our conception of legalization creates common ground for political scientists and lawyers by moving away from a narrow view of law as requiring enforcement by a coercive sovereign. This criterion has underlain much international relations thinking on the topic. Since virtually no international institution passes this standard, it has led to a widespread disregard of the importance of international law. But theoretical work in international relations has increasingly shifted attention away from the need for centralized enforcement toward other institutionalized ways of promoting co-

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operation.[1] In addition, the forms of legalization we observe at the turn of the millennium are flourishing in the absence of centralized coercion.

Any definition is ultimately arbitrary at the margins. Yet definitions should strive to meet certain criteria. They should be broadly consistent with ordinary language, but more precise. To achieve precision, definitions should turn on a coherent set of identifiable attributes. These should be sufficiently few that situations can be readily characterized within a small number of categories, and sufficiently important that changes in their values will influence the processes being studied. Defining legalization in terms of obligation, precision, and delegation provides us with identifiable dimensions of variation whose effects on international behavior can be empirically explored.

Our concept of legalization is a working definition, intended to frame the analytic and empirical articles that follow in this volume as well as future research. Empiricist in origin, it is tailored to the phenomena we observe in international relations. We are not proposing a definitive definition or seeking to resolve age-old debates regarding the nature of law or whether international law is "really" law. Highly legalized arrangements under our conception will typically fall within the standard international lawyer's definition of international law. But many international commitments that to a lawyer entail binding legal obligations lack significant levels of precision or delegation and are thus partial or soft under our definition.

We acknowledge a particular debt to H. L. A. Hart's *The Concept of Law*.[2] Hart defined a legal system as the conjunction of primary and secondary rules. Primary rules are rules of obligation bearing directly on individuals or entities requiring them "to do or abstain from certain actions." Secondary rules, by contrast, are "rules about rules"—that is, rules that do not "impose obligations," but instead "confer powers" to create, extinguish, modify, and apply primary rules.[3] Again, we do not seek to define "law" or to equate our conception of legalization with a definition of a legal system. Yet Hart's concepts of primary and secondary rules are useful in helping to pinpoint the distinctive characteristics of the phenomena we observe in international relations. The attributes of obligation and precision refer to international rules that regulate behavior; these closely resemble Hart's primary rules of obligation. But when we define obligation as an attribute that incorporates general rules, procedures, and discourse of international law, we are referring to features of the international system analogous to Hart's three main types of secondary rules: recognition, change, and adjudication. And the criterion of delegation necessarily implicates all three of these categories.[4]

1. See the debate between the "managerial" perspective that emphasizes centralization but not enforcement, Chayes and Chayes 1995, and the "compliance" perspective that emphasizes enforcement but sees it as decentralized, Downs, Rocke, and Barsoom 1996.

2. Hart 1961.

3. Hart 1961, 79.

4. Hart, of course, observed that in form, though not in substance, international law resembled a primitive legal system consisting only of primary rules. We sidestep that debate, noting only that the characteristics we observe in international legalization leave us comfortable in applying Hart's terms by analogy. We also observe that the international legal framework has evolved considerably in the decades since Hart

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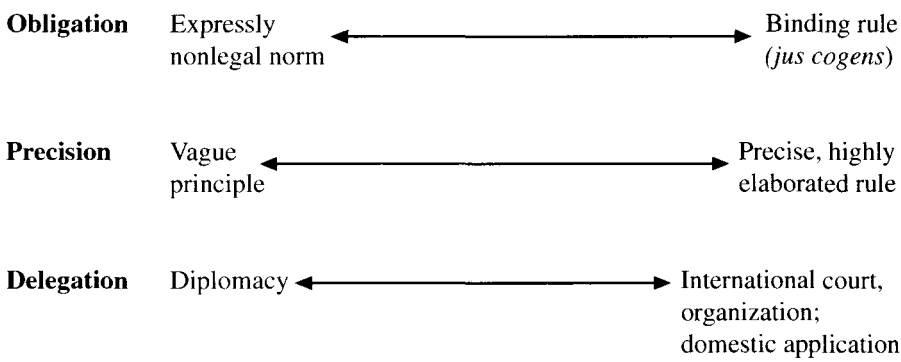


FIGURE 1. *The dimensions of legalization*

The Variability of Legalization

A central feature of our conception of legalization is the variability of each of its three dimensions, and therefore of the overall legalization of international norms, agreements, and regimes. This feature is illustrated in Figure 1. In Figure 1 each element of the definition appears as a continuum, ranging from the weakest form (the absence of legal obligation, precision, or delegation, except as provided by the background operation of the international legal system) at the left to the strongest or "hardest" form at the right.[5] Figure 1 also highlights the independence of these dimensions from each other: conceptually, at least, the authors of a legal instrument can combine any level of obligation, precision, and delegation to produce an institution exactly suited to their specific needs. (In practice, as we shall explain, certain combinations are employed more frequently than others.)

It would be inappropriate to equate the right-hand end points of these dimensions with "law" and the left-hand end points with "politics," for politics continues (albeit in different forms) even where there is law. Nor should one equate the left-hand end points with the absence of norms or institutions; as the designations in Figure 1 suggest, both norms (such as ethical principles and rules of practice) and institutions (such as diplomacy and balance of power) can exist beyond these dimensions. Figure 1 simply represents the components of legal institutions.

Using the format of Figure 1, one can plot where a particular arrangement falls on the three dimensions of legalization. For example, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs), administered by the World Trade Organization (WTO), is strong on all three elements. The 1963 Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space, and Under Water is legally binding and

wrote. Franck reviews these changes and argues that international law has developed a general rule of recognition tied to membership in the international community. Franck 1990, 183–207.

5. On the "obligation" dimension, *jus cogens* refers to an international legal rule—generally one of customary law, though perhaps one codified in treaty form—that creates an especially strong legal obligation, such that it cannot be overridden even by explicit agreement among states.

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quite precise, but it delegates almost no legal authority. And the 1975 Final Act of the Helsinki Conference on Security and Cooperation in Europe was explicitly not legally binding and delegated little authority, though it was moderately precise.

The format of Figure 1 can also be used to depict variations in the degree of legalization between portions of an international instrument (John King Gamble, Jr. has made a similar internal analysis of the UN Convention on the Law of the Sea[6]) and within a given instrument or regime over time. The Universal Declaration of Human Rights, for example, was only minimally legalized (it was explicitly aspirational, not overly precise, and weakly institutionalized), but the human rights regime has evolved into harder forms over time. The International Covenant on Civil and Political Rights imposes binding legal obligations, spells out concepts only adumbrated in the declaration, and creates (modest) implementing institutions.[7]

Table 1 further illustrates the remarkable variety of international legalization. Here, for concise presentation, we characterize obligation, precision, and delegation as either high or low. The eight possible combinations of these values are shown in Table 1; rows are arranged roughly in order of decreasing legalization, with legal obligation, a peculiarly important facet of legalization, weighted most heavily, delegation next, and precision given the least weight. A binary characterization sacrifices the continuous nature of the dimensions of legalization as shown in Figure 1 and makes it difficult to depict intermediate forms. Yet the table usefully demonstrates the range of institutional possibilities encompassed by the concept of legalization, provides a valuable shorthand for frequently used clusters of elements, and highlights the tradeoffs involved in weakening (or strengthening) particular elements.

Row I on this table corresponds to situations near the ideal type of full legalization, as in highly developed domestic legal systems. Much of European Community (EC) law belongs here. In addition, the WTO administers a remarkably detailed set of legally binding international agreements; it also operates a dispute settlement mechanism, including an appellate tribunal with significant—if still not fully proven—authority to interpret and apply those agreements in the course of resolving particular disputes.

Rows II–III represent situations in which the character of law remains quite hard, with high legal obligation and one of the other two elements coded as "high." Because the combination of relatively imprecise rules and strong delegation is a common and effective institutional response to uncertainty, even in domestic legal systems (the Sherman Antitrust Act in the United States is a prime example), many regimes in row II should be considered virtually equal in terms of legalization to those in row I. Like the Sherman Act, for example, the original European Economic Community (EEC) rules of competition law (Articles 85 and 86 of the Treaty of Rome) were for the most part quite imprecise. Over time, however, the exercise of

6. Gamble 1985.

7. The declaration has also contributed to the evolution of customary international law, which can be applied by national courts as well as international organs, and has been incorporated into a number of national constitutions.

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TABLE 1. *Forms of international legalization*

Type	*Obligation*	*Precision*	*Delegation*	*Examples*
Ideal type:				
Hard law				
I	High	High	High	EC; WTO—TRIPs; European human rights convention; International Criminal Court
II	High	Low	High	EEC Antitrust, Art. 85-6; WTO—national treatment
III	High	High	Low	U.S.–Soviet arms control treaties; Montreal Protocol
IV	Low	High	High (moderate)	UN Committee on Sustainable Development (Agenda 21)
V	High	Low	Low	Vienna Ozone Convention; European Framework Convention on National Minorities
VI	Low	Low	High (moderate)	UN specialized agencies; World Bank; OSCE High Commissioner on National Minorities
VII	Low	High	Low	Helsinki Final Act; Nonbinding Forest Principles; technical standards
VIII	Low	Low	Low	Group of 7; spheres of influence; balance of power
Ideal type: Anarchy				

interpretive authority by the European courts and the promulgation of regulations by the Commission and Council produced a rich body of law. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (row III), in contrast, created a quite precise and elaborate set of legally binding rules but did not delegate any significant degree of authority for implementing them. Because third-party interpretation and application of rules is so central to legal institutions, we consider this arrangement less highly legalized than those previously discussed.

As we move further down the table, the difficulties of dichotomizing and ordering our three dimensions become more apparent. For example, it is not instructive to say that arrangements in row IV are necessarily more legalized than those in row V; this judgment requires a more detailed specification of the forms of obligation, precision, and delegation used in each case. In some settings a strong legal obligation (such as the original Vienna Ozone Convention, row V) might be more legalized than a weaker obligation (such as Agenda 21, row IV), even if the latter were more precise and entailed stronger delegation. Furthermore, the relative significance of delegation vis-à-vis other dimensions becomes less clear at lower levels, since truly "high" delegation, including judicial or quasi-judicial authority, almost never exists together with low levels of legal obligation. The kinds of delegation typically seen in rows IV and VI are administrative or operational in nature (we describe this as "moderate" delega-

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tion in Table 1). Thus one might reasonably regard a precise but nonobligatory agreement (such as the Helsinki Final Act, row VII) as more highly legalized than an imprecise and nonobligatory agreement accompanied by modest administrative delegation (such as the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe, row VI).[8] The general point is that Table 1 should be read indicatively, not as a strict ordering.

The middle rows of Table 1 suggest a wide range of "soft" or intermediate forms of legalization. Here norms may exist, but they are difficult to apply as law in a strict sense. The 1985 Vienna Convention for the Protection of the Ozone Layer (row V), for example, imposed binding treaty obligations, but most of its substantive commitments were expressed in general, even hortatory language and were not connected to an institutional framework with independent authority. Agenda 21, adopted at the 1992 Rio Conference on Environment and Development (row IV), spells out highly elaborated norms on numerous issues but was clearly intended not to be legally binding and is implemented by relatively weak UN agencies. Arrangements like these are often used in settings where norms are contested and concerns for sovereign autonomy are strong, making higher levels of obligation, precision, or delegation unacceptable.

Rows VI and VII include situations where rules are not legally obligatory, but where states either accept precise normative formulations or delegate authority for implementing broad principles. States often delegate discretionary authority where judgments that combine concern for professional standards with implicit political criteria are required, as with the International Monetary Fund (IMF), the World Bank, and the other international organizations in row VI. Arrangements such as those in row VII are sometimes used to administer coordination standards, which actors have incentives to follow provided they expect others to do so, as well as in areas where legally obligatory actions would be politically infeasible.

Examples of rule systems entailing the very low levels of legalization in row VIII include "balances of power" and "spheres of influence." These are not legal institutions in any real sense. The balance of power was characterized by rules of practice[9] and by arrangements for diplomacy, as in the Concert of Europe. Spheres of influence during the Cold War were imprecise, obligations were partly expressed in treaties but largely tacit, and little institutional framework existed to oversee them.

Finally, at the bottom of the table, we approach the ideal type of anarchy prominent in international relations theory. "Anarchy" is an easily misunderstood term of art, since even situations taken as extreme forms of international anarchy are in fact structured by rules—most notably rules defining national sovereignty—with legal or pre-legal characteristics. Hedley Bull writes of "the anarchical society" as characterized by institutions like sovereignty and international law as well as diplomacy and

8. Interestingly, however, while the formal mandate of the OSCE High Commissioner on National Minorities related solely to conflict prevention and did not entail authority to implement legal (or nonlegal) norms, in practice the High Commissioner has actively promoted respect for both hard and soft legal norms. Ratner 2000.

9. Kaplan 1957.

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the balance of power.[10] Even conceptually, moreover, there is a wide gap between the weakest forms of legalization and the complete absence of norms and institutions.

Given the range of possibilities, we do not take the position that greater legalization, or any particular form of legalization, is inherently superior.[11] As Kenneth Abbott and Duncan Snidal argue in "Hard and Soft Law in International Governance" (this volume), institutional arrangements in the middle or lower reaches of Table 1 may best accommodate the diverse interests of concerned actors. A concrete example is the argument made by Judith Goldstein and Lisa Martin in their article "Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note": more highly legalized trade rules can be problematic for liberal trade policy.

On a related set of issues—whether international legalization is increasing, or likely to increase, over time—we take no position. The comparative statics approach that informs this volume is not suitable for analyzing such dynamic phenomena. Yet the issues are important and intriguing. We undoubtedly witness increasing legalization in many issue areas. The ozone depletion regime, for example, began in 1985 with a binding but otherwise weakly legalized convention (row V). It was augmented two years later by the more precise and highly elaborated Montreal Protocol (row III). Since then, through practice and subsequent revisions, the regime has developed a "system for implementation review," with a noncompliance procedure that still falls short of third-party dispute resolution but appears to have had some impact on behavior.[12] In other issue areas, like the whaling regime described by John K. Setear, the level of legalization appears to remain largely constant over time, even as the substance of the regime changes.[13] And in still others, legalization seems to decline, as in the move from fixed to floating exchange rates. Exploration of legal dynamics would be the logical next step in the research program that this volume seeks to inaugurate.

In the remainder of this article we turn to a more detailed explication of the three dimensions of legalization. We summarize the discussion in each section with a table listing several indicators of stronger or weaker legalization along the relevant dimension, with delegation subdivided into judicial and legislative/administrative components.

The Dimensions of Legalization

Obligation

Legal rules and commitments impose a particular type of binding obligation on states and other subjects (such as international organizations). Legal obligations are different in kind from obligations resulting from coercion, comity, or morality alone. As

10. Bull 1977.
11. Compare Goldstein, Kahler, Keohane, and Slaughter, this issue.
12. Victor, Raustalia, and Skolnikoff 1998, especially chap. 4.
13. Setear 1999.

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discussed earlier, legal obligations bring into play the established norms, procedures, and forms of discourse of the international legal system.[14]

The fundamental international legal principle of *pacta sunt servanda* means that the rules and commitments contained in legalized international agreements are regarded as obligatory, subject to various defenses or exceptions, and not to be disregarded as preferences change. They must be performed in good faith regardless of inconsistent provisions of domestic law. International law also provides principles for the interpretation of agreements and a variety of technical rules on such matters as formation, reservation, and amendments. Breach of a legal obligation is understood to create "legal responsibility," which does not require a showing of intent on the part of specific state organs.

The international legal system also contains accepted procedures and remedies for breaches of legal commitments. Only states injured by a breach have standing to complain; and the complaining state or its citizens must exhaust any domestic remedies within the breaching state before making an international claim. States may then pursue their claims diplomatically or through any formal dispute procedure they have accepted. International law also prescribes certain defenses, which include consent, self-defense, and necessity, as well as the broad doctrine called *rebus sic stantibus*: an agreement may lose its binding character if important conditions change materially. These doctrines automatically inject a degree of flexibility into legal commitments; by defining particular exceptions, though, they reinforce legal obligations in other circumstances.

When breach leads to injury, legal responsibility entails an obligation to make reparation, preferably through restitution. If this is not possible, the alternative in the event of material harm is a monetary indemnity; in the event of psychological harm, "satisfaction" in the form of an apology. Since achieving such remedies is often problematic, international law authorizes self-help measures, including reprisals, reciprocal measures (such as the withdrawal of equivalent concessions in the WTO), and retorsions (such as suspending foreign aid). Self-help is limited, though, by the doctrine of proportionality and other legal conditions, including restrictions on the unilateral use of force.

Finally, establishing a commitment as a legal rule invokes a particular form of discourse. Although actors may disagree about the interpretation or applicability of a set of rules, discussion of issues purely in terms of interests or power is no longer legitimate. Legalization of rules implies a discourse primarily in terms of the text, purpose, and history of the rules, their interpretation, admissible exceptions, applicability to classes of situations, and particular facts. The rhetoric of law is highly devel-

14. In linking obligation to the broader legal system, we are positing the existence of international law as itself imposing a body of accepted and thereby legitimized obligations on states. If the ultimate foundation of a legal system is its acceptance as such by its subjects, through a Kelsenian *Grundnorm* or an ultimate rule of recognition, then we are positing the existence of that acceptance by states with regard to the existing international legal system. The degree of obligation that we seek to measure refers instead to acceptance by subject states of a particular rule as a legal rule or not, that is, as binding or not binding as a matter of international law.

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TABLE 2. *Indicators of obligation*

High
Unconditional obligation; language and other indicia of intent to be legally bound
Political treaty: implicit conditions on obligation
National reservations on specific obligations; contingent obligations and escape clauses
Hortatory obligations
Norms adopted without law-making authority; recommendations and guidelines
Explicit negation of intent to be legally bound
Low

oped, and the community of legal experts—whose members normally participate in legal rule-making and dispute settlement—is highly socialized to apply it. Thus the possibilities and limits of this discourse are normally part and parcel of legalized commitments.

Commitments can vary widely along the continuum of obligation, as summarized in Table 2. An example of a hard legal rule is Article 24 of the Vienna Convention on Diplomatic Relations, which reads in its entirety: "The archives and documents of the mission shall be inviolable at any time and wherever they may be." As a whole, this treaty reflects the intent of the parties to create legally binding obligations governed by international law. It uses the language of obligation; calls for the traditional legal formalities of signature, ratification, and entry into force; requires that the agreement and national ratification documents be registered with the UN; is styled a "Convention;" and states its relationship to preexisting rules of customary international law.[15] Article 24 itself imposes an unconditional obligation in formal, even "legalistic" terms.

At the other end of the spectrum are instruments that explicitly negate any intent to create legal obligations. The best-known example is the 1975 Helsinki Final Act. By specifying that this accord could not be registered with the UN, the parties signified that it was not an "agreement . . . governed by international law." Other instruments are even more explicit: witness the 1992 "Non-Legally Binding Authoritative Statement of Principles for a Global Consensus" on sustainable management of forests. Many working agreements among national government agencies are explicitly nonbinding.[16] Instruments framed as "recommendations" or "guidelines"—like the

15. Under accepted legal principles, many of which are codified in the Vienna Convention on the Law of Treaties, the intent of the parties to an agreement determines whether that instrument creates obligations that are legally binding, not merely personal or political in effect, and that are governed by international law, rather than the law of some nation. Intent is sometimes explicitly stated; otherwise it must be discerned from the overall context of an agreement, its negotiating history, the nature of its commitments, and its form. As a practical matter, however, legalization is the default position: significant agreements between states are assumed to be legally binding and governed by international law unless the parties indicate otherwise. U.S. practice on this score is summarized in the State Department's *Foreign Relations Manual*, pt. 181.

16. Zaring 1998.

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OECD Guidelines on Multinational Enterprises—are normally intended not to create legally binding obligations.[17]

These contrasting legal forms have distinctive implications. Under legally binding agreements like the Vienna Convention, states may assert legal claims (under *pacta sunt servanda,* state responsibility and other doctrines of international law), engage in legal discourse, invoke legal procedures, and resort to legal remedies. Under nonbinding instruments like the Forest Principles states may do none of these things, although they may make normative claims, engage in normative discourse, and resort to political remedies. Further theorizing and empirical investigation are needed to determine whether these distinctions—at least in the absence of strong delegation—lead to substantial differences in practice. The care with which states frame agreements, however, suggests a belief that they do.

Actors utilize many techniques to vary legal obligation between these two extremes, often creating surprising contrasts between form and substance. On the one hand, it is widely accepted that states expect some formally binding "political treaties" not to be observed if interests or circumstances change.[18] More frequently, provisions of legally binding agreements are worded to circumscribe their obligatory force. One common softening device is the contingent obligation: the 1994 Framework Convention on Climate Change, for example, requires parties to take various actions to limit greenhouse gas emissions, but only after considering "their specific national and regional development priorities, objectives, and circumstances."

Another widely used device is the escape clause.[19] The European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, authorizes states to interfere with certain civil rights in the interest of national security and the prevention of disorder "when necessary in a democratic society," and more broadly during war "or other public emergency threatening the life of the nation."[20] Most arms control agreements include the following clause, repeated verbatim from the Limited Test Ban Treaty: "Each party shall in exercising its national sovereignty have the right to withdraw from [this agreement] if it decides that extraordinary events, related to the subject matter of [this agreement], have jeopardized the supreme interests of its country."[21] Many instruments, from the Outer Space Treaty to the Convention on the Settlement of Investment Disputes, simply allow for withdrawal after a specified notice period.

17. Although precise obligations are generally an attribute of hard legalization, these instruments use precise language to avoid legally binding character.

18. See Baxter 1980; and Schachter 1977.

19. In addition to the explicit escape clauses considered here, states are often able to escape from the strictures of particular provisions by filing reservations, declarations, and other unilateral conditions after an agreement has been negotiated.

20. These avenues of escape are quite precisely drafted and are supervised by the European Commission and Court of Human Rights, limiting the ability of states to evade their substantive obligations.

21. In contrast to the European Convention on Human Rights, this withdrawal clause is self-judging, increasing its softening effect. Nonetheless, the clause was originally inserted to impose some constraints on what might otherwise have been seen as an unconditional right to withdraw.

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Other formally binding commitments are hortatory, creating at best weak legal obligations. Article IV of the IMF Articles of Agreement, for example, requires parties only to "endeavor" to adopt specified domestic economic policies and to "seek to promote" economic stability, "with due regard to [their] circumstances." The International Covenant on Economic, Social, and Cultural Rights requires parties only "to take steps . . . with a view to achieving progressively the full realization of the rights recognized in the . . . Covenant."[22]

On the other hand, a large number of instruments state seemingly unconditional obligations even though the institutions or procedures through which they were created have no direct law-creating authority! Many UN General Assembly declarations, for example, enunciate legal norms, though the assembly has no formal legislative power.[23] Instruments like the 1992 Rio Declaration on Environment and Development and the 1995 Beijing Declaration on Women's Rights are approved at UN conferences with no agreed law-making power.[24]

Instruments like these should not be troublesome in legal terms, since they do not conform to the established "rules of recognition" of international law. In fact, though, they are highly problematic. Over time, even nonbinding declarations can shape the practices of states and other actors and their expectations of appropriate conduct, leading to the emergence of customary law or the adoption of harder agreements. Soft commitments may also implicate the legal principle of good faith compliance, weakening objections to subsequent developments. In many issue areas the legal implications of soft instruments are hotly contested. Supporters argue for immediate and universal legal effect under traditional doctrines (for example, that an instrument codifies existing customary law or interprets an organizational charter) and innovative ones (for example, that an instrument reflects an international "consensus" or "instant custom"). As acts of international governance, then, soft normative instruments have a finely wrought ambiguity.[25]

Precision

A precise rule specifies clearly and unambiguously what is expected of a state or other actor (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances. In other words, precision narrows the scope for reasonable interpretation.[26] In Thomas Franck's terms, such rules are

22. Some agreements authorize particular conduct rather than requiring or prohibiting it. Such provisions are usually couched as rights, using the word *may*. Gamble 1985.

23. See Chinkin 1989; and Gruchalla-Wesierski 1984.

24. This discussion also applies to instruments adopted by organizations with law-making competency but outside prescribed procedures. A significant example is the European Social Charter, adopted by all members of the EC Council except the United Kingdom. These states bypassed a unanimity requirement to avoid a U.K. veto, adopting a softer instrument to guide subsequent legislative action.

25. Palmer 1992.

26. A precise rule is not necessarily more constraining than a more general one. Its actual impact on behavior depends on many factors, including subjective interpretation by the subjects of the rule. Thus, a rule saying "drive slowly" might yield slower driving than a rule prescribing a speed limit of 55 miles per hour if the drivers in question would normally drive 50 miles per hour and understand "slowly" to mean

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"determinate."[27] For a set of rules, precision implies not just that each rule in the set is unambiguous, but that the rules are related to one another in a noncontradictory way, creating a framework within which case-by-case interpretation can be coherently carried out.[28] Precise sets of rules are often, though by no means always, highly elaborated or dense, detailing conditions of application, spelling out required or proscribed behavior in numerous situations, and so on.

Precision is an important characteristic in many theories of law. It is essential to a rationalist view of law as a coordinating device, as in James D. Morrow's account of the laws of war.[29] It is also important to positivist visions of law as rules to be applied, whether through a centralized agency or through reciprocity.[30] Franck argues that precision increases the legitimacy of rules and thus their normative "compliance pull." Lon L. Fuller, like other liberals, emphasizes the social and moral virtues of certainty and predictability for individual actors.[31] In each case, clarity is essential to the force of law.

In highly developed legal systems, normative directives are often formulated as relatively precise "rules" ("do not drive faster than 50 miles per hour"), but many important directives are also formulated as relatively general "standards" ("do not drive recklessly").[32] The more "rule-like" a normative prescription, the more a community decides *ex ante* which categories of behavior are unacceptable; such decisions are typically made by legislative bodies. The more "standard-like" a prescription, the more a community makes this determination *ex post,* in relation to specific sets of facts; such decisions are usually entrusted to courts. Standards allow courts to take into account equitable factors relating to particular actors or situations, albeit at the sacrifice of some *ex ante* clarity.[33] Domestic legal systems are able to use standards like "due care" or the Sherman Act's prohibition on "conspiracies in restraint of trade" because they include well-established courts and agencies able to interpret and apply them (high delegation), developing increasingly precise bodies of precedent.

In some international regimes, the institutional context is sufficiently thick to make similar approaches feasible. In framing the EEC's common competition policy, for example, the drafters of the Treaty of Rome utilized both rules and stan-

10 miles per hour slower than normal. (We are indebted to Fred Schauer for both the general point and the example.) In addition, precision can be used to define limits, exceptions, and loopholes that reduce the impact of a rule. Nevertheless, for most rules requiring or prohibiting particular conduct—and in the absence of precise delegation—generality is likely to provide an opportunity for deliberate self-interested interpretation, reducing the impact, or at least the potential for enforceable impact, on behavior.

27. Franck 1990.

28. Franck labels this collective property "coherence." We use the singular notion of precision to capture both the precision of a rule in isolation and its precision within a rule system.

29. Morrow 1997 and 1998.

30. Simma and Paulus 1999.

31. Fuller 1964.

32. The standard regime definition encompasses three levels of precision: "principles," "norms," and "rules." Krasner 1983. This formulation reflects the fact that societies typically translate broad normative values into increasingly concrete formulations that decision-makers can apply in specific situations.

33. Kennedy 1976.

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dards.[34] Wherethey could identify disfavored conduct in advance, they specified it for reasons of clarity and notice: Article 85, for example, prohibits agreements between firms "that . . . fix purchase or selling prices." Because they could not anticipate all problematic conduct, though, the drafters also authorized the European Court to apply a general standard, prohibiting "agreements . . . which have as their object or effect the . . . distortion of competition within the common market."

In most areas of international relations, judicial, quasi-judicial, and administrative authorities are less highly developed and infrequently used. In this thin institutional context, imprecise norms are, in practice, most often interpreted and applied by the very actors whose conduct they are intended to govern. In addition, since most international norms are created through the direct consent or practice of states, there is no centralized legislature to overturn inappropriate, self-serving interpretations. Thus, precision and elaboration are especially significant hallmarks of legalization at the international level.

Much of international law is in fact quite precise, and precision and elaboration appear to be increasing dramatically, as exemplified by the WTO trade agreements, environmental agreements like the Montreal (ozone) and Kyoto (climate change) Protocols, and the arms control treaties produced during the Strategic Arms Limitation Talks (SALT) and subsequent negotiations. Indeed, many modern treaties are explicitly designed to increase determinacy and narrow issues of interpretation through the "codification" and "progressive development" of customary law. Leading examples include the Vienna Conventions on the Law of Treaties and on Diplomatic Relations, and important aspects of the UN Convention on the Law of the Sea. Even many nonbinding instruments, like the Rio Declaration on Environment and Development and Agenda 21, are remarkably precise and dense, presumably because proponents believe that these characteristics enhance their normative and political value.

Still, many treaty commitments are vague and general, in the ways suggested by Table 3.[35] The North American Free Trade Agreement side agreement on labor, for example, requires the parties to "provide for high labor standards." Article VI of the Treaty on the Non-proliferation of Nuclear Weapons calls on the parties "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race . . . and to nuclear disarmament." Commercial treaties typically require states to create "favorable conditions" for investment and avoid "unreasonable" regulations. Numerous agreements call on states to "negotiate" or "consult," without specifying particular procedures. All these provisions create broad areas of discretion for the affected actors; indeed, many provisions are so general that one cannot meaningfully assess compliance, casting doubt on their legal force.[36] As Abbott and

34. Similarly, agreements administered by the WTO can, with similar legitimacy and effectiveness, specify detailed rules on the valuation of imports for customs purposes and rely on broad standards like "national treatment."

35. Operationalizing the relative precision of different formulations is difficult, except in a gross sense. Gamble, for example, purports to apply a four-point scale of "concreteness" but does not characterize these points. Gamble 1985.

36. The State Department's *Foreign Relations Manual* states that undertakings couched in vague or very general terms with no criteria for performance frequently reflect an intent not to be legally bound.

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TABLE 3. *Indicators of precision*

High
Determinate rules: only narrow issues of interpretation
Substantial but limited issues of interpretation
Broad areas of discretion
"Standards": only meaningful with reference to specific situations
Impossible to determine whether conduct complies
Low

Snidal emphasize in their article,[37] such imprecision is not generally the result of a failure of legal draftsmanship, but a deliberate choice given the circumstances of domestic and international politics.

Imprecision is not synonymous with state discretion, however, when it occurs within a delegation of authority and therefore grants to an international body wider authority to determine its meaning. The charters of international organizations provide important examples. In these instruments, generality frequently produces a broader delegation of authority, although member states almost always retain many levers of influence. A recent example makes the point clearly. At the 1998 Rome conference that approved a charter for an international criminal court, the United States sought to avoid any broad delegation of authority. Its proposal accordingly emphasized the need for "clear, precise, and specific definitions of each offense" within the jurisdiction of the court.[38]

Delegation

The third dimension of legalization is the extent to which states and other actors delegate authority to designated third parties—including courts, arbitrators, and administrative organizations—to implement agreements. The characteristic forms of legal delegation are third-party dispute settlement mechanisms authorized to interpret rules and apply them to particular facts (and therefore in effect to make new rules, at least interstitially) under established doctrines of international law. Dispute settlement mechanisms are most highly legalized when the parties agree to binding third-party decisions on the basis of clear and generally applicable rules; they are least legalized when the process involves political bargaining between parties who can accept or reject proposals without legal justification.[39]

37. Abbott and Snidal, this issue.

38. U.S. Releases Proposal on Elements of Crimes at the Rome Conference on the Establishment of an International Criminal Court, statement by James P. Rubin, U.S. State Department spokesperson, 22 June 1998, <secretary.state.gov/www/briefings/statements/1998/ps980622b.html>, accessed 16 February 1999.

39. Law remains relevant even here. The UN Charter makes peaceful resolution of disputes a legal obligation, and general international law requires good faith in the conduct of negotiations. In addition, resolution of disputes by agreement can contribute to the growth of customary international law.

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TABLE 4. *Indicators of delegation*

a. Dispute resolution
- **High**
  - Courts: binding third-party decisions; general jurisdiction; direct private access; can interpret and supplement rules; domestic courts have jurisdiction
  - Courts: jurisdiction, access or normative authority limited or consensual
  - Binding arbitration
  - Nonbinding arbitration
  - Conciliation, mediation
  - Institutionalized bargaining
  - Pure political bargaining
- **Low**

b. Rule making and implementation
- **High**
  - Binding regulations; centralized enforcement
  - Binding regulations with consent or opt-out
  - Binding internal policies; legitimation of decentralized enforcement
  - Coordination standards
  - Draft conventions; monitoring and publicity
  - Recommendations; confidential monitoring
  - Normative statements
  - Forum for negotiations
- **Low**

In practice, as reflected in Table 4a, dispute-settlement mechanisms cover an extremely broad range: from no delegation (as in traditional political decision making); through institutionalized forms of bargaining, including mechanisms to facilitate agreement, such as mediation (available within the WTO) and conciliation (an option under the Law of the Sea Convention); nonbinding arbitration (essentially the mechanism of the old GATT); binding arbitration (as in the U.S.-Iran Claims Tribunal); and finally to actual adjudication (exemplified by the European Court of Justice and Court of Human Rights, and the international criminal tribunals for Rwanda and the former Yugoslavia).

Another significant variable—the extent to which individuals and private groups can initiate a legal proceeding—is explored by Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter in "Legalized Dispute Resolution" (this volume). Private actors can influence governmental behavior even in settings where access is limited to states (such as the WTO and the International Court of Justice). Increasingly, though, private actors are being granted access to legalized dispute settlement mechanisms, either indirectly (through national courts, as in the EC, or a supranational body like the European Commission on Human Rights) or directly (as will shortly be the case for the European Court of Human Rights). As Keohane, Moravcsik, and Slaughter argue, private access appears to increase the expansiveness of legal institutions.

As one moves up the delegation continuum, the actions of decision-makers are increasingly governed, and legitimated, by rules. (Willingness to delegate often de-

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pends on the extent to which these rules are thought capable of constraining the delegated authority.) Thus, this form of legal delegation typically achieves the union of primary and secondary rules that Hart deemed necessary for the establishment of a legal system. Delegation to third-party adjudicators is virtually certain to be accompanied by the adoption of rules of adjudication. The adjudicative body may then find it necessary to identify or develop rules of recognition and change, as it sorts out conflicts between rules or reviews the validity of rules that are the subject of dispute.

Delegation of legal authority is not confined to dispute resolution. As Table 4b indicates, a range of institutions—from simple consultative arrangements to full-fledged international bureaucracies—helps to elaborate imprecise legal norms, implement agreed rules, and facilitate enforcement.

Like domestic administrative agencies, international organizations are often authorized to elaborate agreed norms (though almost always in softer ways than their domestic counterparts), especially where it is infeasible to draft precise rules in advance and where special expertise is required. The EU Commission drafts extensive regulations, though they usually become binding only with the assent of member states. Specialized agencies like the International Civil Aviation Organization and the Codex Alimentarius Commission promulgate technical rules—often framed as recommendations—in coordination situations. In cases like these, the grant of rule-making authority typically contains (in Hart's terms) the rule of recognition; the governing bodies or secretariats of international organizations may subsequently develop rules of change. At lower levels of delegation, bodies like the International Labor Organization and the World Intellectual Property Organization draft proposed international conventions and promulgate a variety of nonbinding rules, some for use by private actors. International organizations also support interstate negotiations.

Many operational activities serve to implement legal norms.[40] Virtually all international organizations gather and disseminate information relevant to implementation; many also generate new information. Most engage in educational activities, such as the WTO's training programs for developing country officials. Agencies like the World Health Organization, the World Bank, and the UN Environment Program have much more extensive operations. These activities implement (and thus give meaning to) the norms and goals enunciated in the agencies' charters and other agreements they administer. Although most international organizations are highly constrained by member states, the imprecision of their governing instruments frequently leaves them considerable discretion, exercised implicitly as well as through formal interpretations and operating policies. The World Bank, for example, has issued detailed policies on matters such as environmental impact assessment and treatment of indigenous peoples; these become legally binding when incorporated in loan agreements.[41] The World Bank's innovative Inspection Panel supervises compliance, often as the result of private complaints.[42]

40. Abbott and Snidal 1998.
41. Boisson de Chazournes 1998.
42. Shihata 1994.

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In Austinian approaches, centralized enforcement is the sine qua non of law. Yet even domestically, many areas of law are not closely tied to enforcement; so too, much international legalization is significant in spite of a lack of centralized enforcement. And international law can draw on some centralized powers of enforcement. The UN Security Council, for example, imposed programs of inspection, weapons destruction, and compensation on Iraq for violations of international law; it also created ad hoc tribunals for Rwanda and the former Yugoslavia that have convicted national officials of genocide, crimes against humanity, and other international crimes. As in domestic legal systems, moreover, some international agencies can enforce norms through their power to confer or deny benefits: international financial institutions have the greatest leverage, but other organizations can deny technical assistance or rights of participation to violators. (These actions presuppose powers akin to rule interpretation and adjudication.) Further, international organizations from the Security Council to the WTO legitimate (and constrain) decentralized sanctioning by states. Many also monitor state behavior and disseminate information on rule observance, creating implicit sanctions for states that wish to be seen as trustworthy members of an international community.

Legalized delegation, especially in its harder forms, introduces new actors and new forms of politics into interstate relations. As other articles in this volume discuss, actors with delegated legal authority have their own interests, the pursuit of which may be more or less successfully constrained by conditions on the grant of authority and concomitant surveillance by member states. Transnational coalitions of nonstate actors also pursue their interests through influence or direct participation at the supranational level, often producing greater divergence from member state concerns. Deciding disputes, adapting or developing new rules, implementing agreed norms, and responding to rule violations all engender their own type of politics, which helps to restructure traditional interstate politics.

Conclusion

Highly legalized institutions are those in which rules are obligatory on parties through links to the established rules and principles of international law, in which rules are precise (or can be made precise through the exercise of delegated authority), and in which authority to interpret and apply the rules has been delegated to third parties acting under the constraint of rules. There is, however, no bright line dividing legalized from nonlegalized institutions. Instead, there is an identifiable continuum from hard law through varied forms of soft law, each with its individual mix of characteristics, to situations of negligible legalization.

This continuum presupposes that legalized institutions are to some degree differentiated from other types of international institutions, a differentiation that may have methodological, procedural, cultural, and informational dimensions.[43] Although me-

43. Schauer and Wise 1997.

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diators may, for example, be free to broker a bargain based on the "naked preferences" of the parties,[44] legal processes involve a discourse framed in terms of reason, interpretation, technical knowledge, and argument, often followed by deliberation and judgment by impartial parties. Different actors have access to the process, and they are constrained to make arguments different from those they would make in a nonlegal context. Legal decisions, too, must be based on reasons applicable to all similarly situated litigants, not merely the parties to the immediate dispute.

On the whole, however, our conception of legalization reflects a general theme of this volume: the rejection of a rigid dichotomy between "legalization" and "world politics." Law and politics are intertwined at all levels of legalization. One result of this interrelationship, reflected in many of the articles in this volume, is considerable difficulty in identifying the causal effects of legalization. Compliance with rules occurs for many reasons other than their legal status. Concern about reciprocity, reputation, and damage to valuable state institutions, as well as other normative and material considerations, all play a role. Yet it is reasonable to assume that most of the time, legal and political considerations combine to influence behavior.

At one extreme, even "pure" political bargaining is shaped by rules of sovereignty and other background legal norms. At the other extreme, even international adjudication takes place in the "shadow of politics": interested parties help shape the agenda and initiate the proceedings; judges are typically alert to the political implications of possible decisions, seeking to anticipate the reactions of political authorities. Between these extremes, where most international legalization lies, actors combine and invoke varying degrees of obligation, precision, and delegation to create subtle blends of politics and law. In all these settings, to paraphrase Clausewitz, "law is a continuation of political intercourse, with the addition of other means."

44. Sunstein 1986.

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