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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" delegation in Table 6.1). 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).[5] The general point is that Table 6.1 should be read indicatively, not as a strict ordering.

The middle rows of Table 6.1 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

[5] 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.

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[6] 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 the balance of power.[7] 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.[8] 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. ***

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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.

[6] Kaplan 1957.
[7] Bull 1977.
[8] Compare Goldstein, Kahler, Keohane, and Slaughter.

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

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.

* * *

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. ***

Commitments can vary widely along the continuum of obligation, as summarized in Table 6.2. 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. 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

TABLE 6.2. *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

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 non-binding.[9] Instruments framed as "recommendations" or "guidelines" – like the OECD Guidelines on Multinational Enterprises – are normally intended not to create legally binding obligations.[10]

* * *

Actors utilize many techniques to vary legal obligation between these two extremes, often creating surprising contrasts between form and substance. On the one hand, *** provisions of legally binding agreements frequently are worded to circumscribe their obligatory force. ***

* * *

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.[11]

[9] Zaring 1998.

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

[11] See Chinkin 1989; and Gruchalla-Wesierski 1984.

*** 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.[12]

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.[13] In Thomas Franck's terms, such rules are "determinate."[14] 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.[15] Precise sets of rules are often, though by no means always, highly elaborated or dense, detailing conditions of

[12] Palmer 1992.

[13] 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 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.

[14] Franck 1990.

[15] 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.

application, spelling out required or proscribed behavior in numerous situations, and so on.

* * *

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").[16] 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.[17] 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 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

[16] 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.

[17] Kennedy 1976.

TABLE 6.3. *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

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. ***

Still, many treaty commitments are vague and general, in the ways suggested by Table 6.3.[18] The North American Free Trade Agreement side agreement on labor, for example, requires the parties to "provide for high labor standards." *** 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.[19] As Abbott and Snidal emphasize in their article,[20] 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. *** A recent example makes the point clearly. At the 1998 Rome conference that

[18] 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.

[19] 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.

[20] Abbott and Snidal 2000.

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.[21]

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.[22]

In practice, as reflected in Table 6.4a, 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).

* * *

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

[21] 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.

[22] 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.

TABLE 6.4. *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

delegate often depends on the extent to which these rules are thought capable of constraining the delegated authority.) *** 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 6.4b indicates, a range of institutions – from simple consultative arrangements to fullfledged international bureaucracies – helps to elaborate imprecise legal norms, implement agreed rules, and facilitate enforcement.

* * *

Legalized delegation, especially in its harder forms, introduces new actors and new forms of politics into interstate relations. 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.[23] Although mediators may, for example, be free to broker a bargain based on the "naked preferences" of the parties,[24] 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.

*** Our conception of legalization reflects a general theme: *** 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

[23] Schauer and Wise 1997.
[24] Sunstein 1986.

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."