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statistics about the average rate of compliance with international agreements that require states to depart only slightly from what they would have done in the absence of an agreement. Techniques used to ensure compliance with an agreement covering interstate bank transfers cannot be counted on to ensure the success of the WTO's new rules governing intellectual property.

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We do not mean to imply that the managerial model and the failure to embrace the idea that enforcement is often necessary are the only things preventing deeper cooperation. Obviously, states have reasons to refrain from vigorous enforcement. The question is whether it is better to cope with such reluctance by declaring that its importance has been vastly exaggerated or by trying to remedy matters.

We obviously prefer the second course of action, and we believe that the managerialists' vision of cooperation and compliance distracts political scientists from a host of problems that lie squarely within their area of expertise. For example, the vast majority of political economists would argue that the reason the GATT has encountered compliance problems and the reason why states have not obtained the cooperative benefits that would be possible through the use of more aggressive enforcement strategies involves an agency problem. Political leaders, if not the consumers who make up their constituencies, are left better off if they acquiesce to protectionist demands during those periods (e.g., recessions, following a technological breakthrough by foreign competition) when interest groups are likely to pay a premium that is greater than the electoral punishment they are likely to receive. Because the timing of such events is uncertain and most leaders are similarly vulnerable to such events, they deal with this situation by creating penalties for violations that are high enough to prevent constant defection but low enough to allow self-interested defection when circumstances demand it. Even leaders of states that are, for whatever reason, more committed to free trade are reluctant to increase the penalty for violations to a very high level because they suspect (probably correctly) that the "protectionist premium" is at times far greater than the cost of any credible punishment for violations. Thus, their hand is stayed not by any appreciation for the accidental nature of defection but by an appreciation for just how unaccidental it is.[37]

[37] Downs and Rocke 1995.

This is a dimension of political capacity that the managerial school rarely discusses and that is unlikely to be exorcized by technical assistance. It is, however, intimately connected to the design of both domestic political institutions and international regimes. One possible strategy is to restrict regime membership to states that will not have to defect very often. The idea is that whatever benefit is lost by excluding such states from the regime will be more than made up by permitting those that are included to set and also enforce a deeper level of cooperation – in this case a higher standard of free trade. This may be a reason, quite different from the large-*n* coordination concerns of collective action theory, why many deeply cooperative regimes have a limited number of members and why regimes with a large number of members tend to engage in only shallow cooperation. Is this trade-off real? Must states sometimes choose between aggressively addressing an environmental or trade problem and trying to create a community of states? We do not know. What we do know is that to ignore the issue on the basis of high compliance rates and the relative absence of enforcement is dangerously premature.

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PART III

LEGALIZATION AND ITS LIMITS

6

The Concept of Legalization

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"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 legalization, 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.

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

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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 6.1. In Figure 6.1 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.[2] Figure 6.1 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.)

[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] 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.

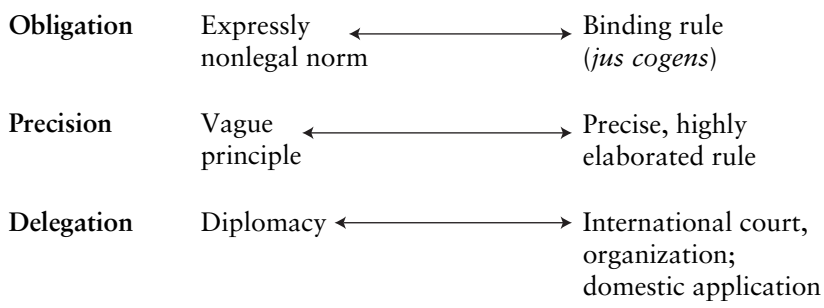

FIGURE 6.1. The dimensions of legalization.

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 6.1 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 6.1 simply represents the components of legal institutions.

Using the format of Figure 6.1, 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 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 6.1 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[3]) 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,

[3] Gamble 1985.

spells out concepts only adumbrated in the declaration, and creates (modest) implementing institutions.[4]

Table 6.1 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 6.1 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 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

[4] 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.

TABLE 6.1. *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				

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" 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.