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# Hard and Soft Law in International Governance

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Contemporary international relations are legalized to an impressive extent, yet international legalization displays great variety. A few international institutions and issue-areas approach the theoretical ideal of hard legalization, but most international law is “soft” in distinctive ways. Here we explore the reasons for the widespread legalization of international governance and for this great variety in the degrees and forms of legalization.<sup>1</sup> We argue that international actors choose to order their relations through international law and design treaties and other legal arrangements to solve specific substantive and political problems. We further argue that international actors choose softer forms of legalized governance when those forms offer superior institutional solutions. We analyze the benefits and costs of different types of legalization and suggest hypotheses regarding the circumstances that lead actors to select specific forms. We do not purport to develop a full theory of law. Nonetheless, examining these political choices in the sparse institutional context of international relations may contribute to a better understanding of the uses of law more generally.

We begin by examining the advantages of hard legalization. The term *hard law* as used in this special issue refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.<sup>2</sup> Although hard law is not the typical international legal arrangement, a close look at this institutional form provides a baseline for understanding the benefits and costs of all types of legaliza-

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1. We have profited from the insights in Keohane, Moravcsik, and Slaughter 1997, which was prepared in connection with this project.

2. For an extensive discussion of these three dimensions, which guide the articles in this issue, see Abbott, Keohane, Moravcsik, Slaughter, and Snidal, this issue.

tion. By using hard law to order their relations, international actors reduce transactions costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting. Doing so, however, also entails significant costs: hard law restricts actors' behavior and even their sovereignty.

While we emphasize the benefits and costs of legalization from a rational perspective focused on interests, law simultaneously engages normative considerations. In addition to requiring commitment to a background set of legal norms<sup>3</sup>—including engagement in established legal processes and discourse—legalization provides actors with a means to instantiate normative values. Legalization has effect through normative standards and processes as well as self-interested calculation, and both interests and values are constraints on the success of law. We consider law as both “contract” and “covenant” to capture these distinct but not incompatible characteristics. Indeed, we reject vigorously the insistence of many international relations specialists that one type of understanding is antithetical to the other.<sup>4</sup>

The realm of “soft law” begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation. This softening can occur in varying degrees along each dimension and in different combinations across dimensions. We use the shorthand term *soft law* to distinguish this broad class of deviations from hard law—and, at the other extreme, from purely political arrangements in which legalization is largely absent. But bear in mind that soft law comes in many varieties: the choice between hard law and soft law is not a binary one.

Soft law has been widely criticized and even dismissed as a factor in international affairs. Realists, of course, focus on the absence of an independent judiciary with supporting enforcement powers to conclude that all international law is soft—and is therefore only window dressing.<sup>5</sup> But some international lawyers dismiss soft international law from a more normative perspective. Prosper Weil, for example, argues that increasing use of soft law “might destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.”<sup>6</sup> Others justify soft law only as an interim step toward harder and therefore more satisfactory

3. The international legal system has developed over several centuries. International law includes secondary norms prescribing how primary rules are to be made, interpreted, and applied, as well as institutions through which both kinds of rules are implemented. The background legal system shapes many international interactions—indeed, it helps define the very notion of an international actor.

4. To be sure, there may be irreconcilable paradigmatic differences between interest-based and normative approaches at the level of grand theory. On the ground, however, either approach can be improved by carefully incorporating the arguments made by the other, with appropriate adaptation. One can profitably employ both a hammer and a wrench without declaring one tool better for all problems and without resolving whether carpenters or plumbers are the better handymen. This is especially true when analyzing law, which inherently combines both trades.

5. This perspective is so deeply held among neorealists that they rarely discuss international law at all. Classical realists such as Hans Morgenthau recognized that states generally obeyed international law but took the lack of enforcement to mean that law did not cover the significant issues of international affairs. A modern reprise of this theme is offered by Downs and his colleagues, who critique much international cooperation for consisting of agreements that reflect what states would have done on their own and so do not change behavior. Downs, Rocke, and Barsboom 1996.

6. Weil 1983, 423.

legalization. The implication is that soft law—law that “falls short” on one or more of the three dimensions of legalization—is a failure.

We argue, in contrast, that international actors often deliberately choose softer forms of legalization as superior institutional arrangements. To be sure, soft law is sometimes designed as a way station to harder legalization, but often it is preferable on its own terms. Soft law offers many of the advantages of hard law, avoids some of the costs of hard law, and has certain independent advantages of its own.<sup>7</sup> Importantly, because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization. This is especially true when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty. Soft legalization also provides certain benefits not available under hard legalization. It offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time.<sup>8</sup> In addition, soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power.

The specific forms of soft law chosen reflect the particular problems actors are trying to solve. While our analysis focuses on softness in general, different forms of softness may be more acceptable or more efficacious in different circumstances. We suggest a number of variables—including transactions costs, uncertainty, implications for national sovereignty, divergence of preferences, and power differentials—that influence which forms of soft law, which combinations of obligation, precision and delegation, are likely to be selected in specific circumstances.

This article is largely an exercise in comparative statics; we ask why particular situational features lead actors to adopt specific institutional arrangements at given points in time. Soft law is frequently dynamic, however, in the sense that it initiates a process and a discourse that may involve learning and other changes over time. We incorporate these considerations in our analysis by examining how actors (imperfectly) evaluate the dynamic consequences of current soft law commitments.

For ease of exposition, and because states are essential actors in international legalization, we frame our initial discussions in terms of states and the problems they face. We recognize, however, that firms, activist organizations, and other nonstate groups operating at both the domestic and international levels are increasingly key actors in the development of international legalization, and of soft law in particular. In the final section of the article we compare alternative accounts of the role of nonstate actors to examine why such groups press for different forms of legalization. The need to deal with the competing interests and values of nonstate actors also adds to the reasons states have for pursuing soft law strategies.

We employ a range of examples, including some elaborated by other articles in this issue, to illustrate the wide variety of international legal arrangements. Although

7. For a related discussion of the benefits and costs of informal agreements, see Lipson 1991.

8. We draw on Koremenos's insightful work on how states structure treaties to enable mutual learning. Koremenos 1999.

these examples do not provide a true empirical test of our arguments, they do provide evidence for their plausibility. To characterize our examples economically along the hard law/soft law continuum, we use the notation  $[O,P,D]$ . The elements of each triplet refer to the level of obligation, precision, and delegation, respectively. Variations along each dimension are indicated by capital letters for high levels (for example,  $O$ ), small letters for moderate levels (for example,  $o$ ), and dashes for low levels (-). Thus  $[O,P,D]$  indicates an arrangement that is highly legalized on all three dimensions and therefore constitutes “hard law”;  $[o,P,-]$  indicates an issue that has a moderate level of legal obligation coupled with high precision but very limited delegation; and  $[O,-,-]$  indicates an issue with high legal obligation but very low precision and very limited delegation. Although this tripartite categorization remains somewhat coarse, it suggests the continuous gradations of hardness and softness that are blurred when the hard law/soft law distinction is incorrectly taken as binary.<sup>9</sup>

## Contracts and Covenants: Rationales for Hard Law

### *Introduction*

“Contracts” and “covenants” refer to two distinct though not incompatible understandings of international agreements. States enter into “contracts” to further interests; they enter into “covenants” to manifest normative commitments. In international legal scholarship, interest- and norm-based agreements are essentially interchangeable;<sup>10</sup> but international relations scholarship (like other analyses of law<sup>11</sup>) often seeks to distinguish between them: contracts and covenants correspond to the rationalist and constructivist perspectives, respectively, on international institutions, approaches that are usually seen as contrasting, if not mutually exclusive.<sup>12</sup>

In the stereotypical view, rationalists (1) see the relevant actors (usually states) as motivated largely by material interests; (2) view international agreements as “contracts” created to resolve problems of coordination, collaboration, or domestic politics; and (3) understand contracts as operating by changing incentives or other material features of interactions, such as iteration, reciprocity, information, or the influence

9. Because our examples are illustrative, we do not develop formalized coding criteria. Note that a dash (-) indicates a low level of a property, not its absence. Low delegation, for example, would include an international consultative body that facilitates political bargaining among member states. Where an international institution handles more extensive administrative functions—such as substantial information gathering, monitoring, and nonbinding arbitration—we would code delegation as  $d$ . Finally, where an institution includes strong adjudicative capacity or independent administrative power, we would code delegation as  $D$ . The dimensions of obligation and precision pose similar problems and possibilities. A more fine-grained discussion of these dimensions is contained in Abbott et al., this issue; and Abbott and Snidal 1997. The eight rows of Table 1 in Abbott et al., which reflect only high and low values of the three elements of legalization, correspond to combinations of capital letters and dashes in our notation (that is,  $\{O,P,D\}, \{O,-,D\}, \dots, \{O,-,-\}, \{-,-,-\}$ ).

10. Some agreements with strong normative content are entitled “covenants,” most notably the covenants on civil and political and on economic, social, and cultural rights. But this usage is not widespread. Many human rights agreements, for example, are simply entitled “treaty” or “convention.”

11. Tyler 1990.

12. Katzenstein, Keohane, and Krasner 1998.

of particular interest groups, or through enforcement.<sup>13</sup> Constructivist or normative scholars, on the other hand, (1) focus on nonstate and intragovernmental actors,<sup>14</sup> often motivated by moral or social concerns, as the source of international norms; (2) view international agreements as “covenants” embodying shared norms and understandings; and (3) understand covenants as operating through persuasion, imitation, and internalization to modify intersubjective understandings of appropriate behavior, interests, and even identities.<sup>15</sup>

In studying international legalization, this sharp bifurcation is clearly misplaced. In its origins and operation, law is both an interest-based and a normative enterprise:

1. States and other actors look to law to achieve their ends whether they are pursuing interests or values. In fact, these goals are normally deeply intertwined. Business groups and states seeking rules to protect intellectual property, for example, are committed to norms of property and fairness as well as self-interest; nongovernmental organizations (NGOs) and states supporting rules to promote democracy are concerned with security and trade as well as participatory values.
2. Actors utilize both normative and interest-based strategies to create legal arrangements. Business groups and Western states supporting liberal economic rules appeal to norms of individual choice as well as economic interests; NGOs and governments seeking strong human rights rules cite material benefits—and mobilize economic leverage—along with humanitarian values.<sup>16</sup> Most international agreements are simultaneously contract and covenant.
3. Legal rules and institutions operate both by changing material incentives and by modifying understandings, standards of behavior, and identities. In particular, they invoke doctrines and institutions that facilitate enforcement as well as social norms of obedience to law. Concerned actors strive to bring all these effects to bear, through techniques ranging from litigation and sanctions to persuasion, normative appeals, and shaming.<sup>17</sup>

In the remainder of this section we explore why states seek to order their relations through hard law: institutional arrangements generally characterized as  $\{O, P, D\}$  or  $\{O, p, D\}$ .<sup>18</sup> Since states most often create international legal rules and institutions by negotiation and agreement,<sup>19</sup> we employ contracting theory to organize our analysis,

13. Martin and Simmons 1998.

14. In this they follow modern liberal theorists. Moravcsik 1997.

15. See Finnemore 1996; Keck and Sikkink 1998. Recent years have witnessed some convergence. Rationalists increasingly recognize that interests require explanation and that institutions do much to shape them. Keohane 1988. Constructivists stress that norm entrepreneurs pursue their goals rationally, even strategically, seeking to modify the utility functions of others to accord with preferred norms. Finnemore and Sikkink 1998.

16. Klotz 1995.

17. See Klotz 1995; Keck and Sikkink 1998; and Koh 1996.

18. As noted earlier, the first and second sections of this article focus on states and the third section on nonstate actors. Even in the first and second sections, however, some arguments turn on actions by and effects on nonstate actors, often in domestic politics.

19. Our emphasis, then, is on treaties, especially multilateral regulatory treaties. Chayes and Chayes 1995. Customary law is also an important element of the international legal system, but we do not address

incorporating normative considerations as well as the interest-based factors that dominate the contracting literature.

### *Credible Commitments*

The difficulty states have in credibly committing themselves to future behavior is widely viewed as a characteristic feature of international “anarchy” and an impediment to welfare-enhancing cooperation. In contracting theory, credible commitments are crucial when one party to an agreement must carry out its side of the bargain before other parties are required to perform, or more generally when some parties must make relation-specific investments in reliance on future performance by others.<sup>20</sup> In game theory, similarly, credible commitments are essential whenever some parties to a strategic interaction demand “assurance” from others, as in situations modeled by games such as Assurance, Chicken, or Prisoners’ Dilemma and when parties seek to ensure that they arrive at the same coordination point.

Other assurance issues appear when one begins to disaggregate the state. For one thing, relation-specific investments can be political as well as material: a government offering economic or political concessions in return for human rights pledges, for example, would suffer domestic political costs if the other party reneged; it would therefore demand credible assurances. The government making those pledges might also wish to enhance credibility for internal purposes: to bind its successors in office or other branches of government, or to strengthen its citizens’ incentives to adjust their practices and attitudes.

Legal commitments can speak to private parties abroad as well as at home. As Frederick Abbott notes in this issue, the Mexican government sought to legalize the North American Free Trade Agreement (NAFTA) in part to increase the credibility of its increasingly liberal economic policies in the eyes of foreign investors. Reversing longstanding national policy, it even accepted significant international delegation, allowing investors from NAFTA countries to take disputes to binding arbitration.

In domestic societies, legal commitments are credible because aggrieved parties can enforce them, with the power of the state if necessary. Even “hard” international law falls short of this standard: international regimes do not even attempt to establish legal obligations centrally enforceable against states.<sup>21</sup> Yet it is erroneous to conclude that the “formal legal status” of international agreements is therefore meaningless. Legalization is one of the principal methods by which states can increase the credibility of their commitments.<sup>22</sup>

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it systematically here. Our impression, though, is that much customary law today is the result of conscious political action by states and other actors, rather than the gradual accretion of state practice. To the extent this is correct, much of our analysis will also apply to custom.

20. Williamson 1989.

21. Keohane 1984, 88–89.

22. A more extreme way to address commitment problems, analogous to the merger of firms in business relationships that raise assurance problems, is to integrate separate sovereignties into a single political unit, such as a federal state. Integration can be partial as well as complete, as the EU illustrates. Even full integration, though, cannot solve commitment and other contracting problems among the many political, economic, and other interests within and across societies.

One way legalization enhances credibility is by constraining self-serving auto-interpretation. Precision of individual commitments, coherence between individual commitments and broader legal principles, and accepted modes of legal discourse and argument all help limit such opportunistic behavior. Granting interpretive authority to courts or other legal institutions further constrains auto-interpretation.<sup>23</sup> Another way legalization enhances credibility is by increasing the costs of renegeing. Regime scholars argue that agreements are strengthened when they are linked to a broader regime: violating an agreement that is part of a regime entails disproportionate costs, because the reputational costs of renegeing apply throughout the regime. Legal commitments benefit from similar effects, but they involve international law as a whole in addition to any specific regime.

When a commitment is cast as hard law, the reputational effects of a violation can be generalized to all agreements subject to international law, that is, to most international agreements.<sup>24</sup> There are few alternatives to legalization when states wish to identify undertakings as reliable commitments. Alternatives like bonding and escrow are much more costly. In addition, international law provides the very foundations of statehood: principles of sovereignty, recognition, territorial competence, nonintervention, and so on. Violations weaken the international legal system and are self-defeating, at least over time.

More concretely, legalization enhances (albeit modestly) the capacity for enforcement. First, hard legal commitments,  $[O, P, D]$  or  $[O, p, D]$ , are interpreted and applied by arbitral or judicial institutions, like those associated with the European Union (EU), the European human rights regime or the World Trade Organization (WTO). (Softer commitments may be invoked in political institutions.) Because legal review allows allegations and defenses to be tested under accepted standards and procedures, it increases reputational costs if a violation is found. The EU may currently be experiencing such aggravated costs as a result of the repeated negative legal rulings by WTO dispute settlement bodies in litigation over European restrictions on imports of hormone-treated beef (for which the EU was unable to demonstrate a legitimate scientific justification) and bananas.

Second, the law of state responsibility fixes consequences for legal violations. In particular, like some legalized regimes (such as the WTO), it authorizes proportional "countermeasures" where other remedies are unavailable. This legitimizes retaliation and clarifies its intent, reducing the costs and risks of self-help. Third, even international law can draw on some forms of centralized enforcement, through institutions like the UN Security Council and the international financial institutions.

Other interest-based costs of legal violations arise because international legal commitments often become part of domestic law. As John K. Setear points out, for ex-

23. Deconstructionists, of course, would contest these statements. In practice, however, even observers of this bent see law as constraining interpretation. Koskeniemi 1999.

24. Keohane observes that states can reduce the force of reputational effects by distinguishing the circumstances of a violation from those surrounding other agreements. Keohane 1995. In the nineteenth century, the United States sought in this way to distinguish its treaties with "savage" Indian tribes, which it frequently violated, from agreements with European countries. The effort devoted to making this distinction, however, suggests that reputational effects would otherwise have spread across all legal agreements.

ample, Congress has provided that violations of the Whaling Convention and the Convention on International Trade in Endangered Species (CITES) constitute violations of U.S. law, carrying criminal penalties.<sup>25</sup> Ellen L. Lutz and Kathryn Sikkink in their article in this issue further describe how international rules condemning torture and other atrocities have been characterized as customary international law and applied by U.S. courts.<sup>26</sup> When international commitments are incorporated into domestic law, the level of delegation associated with them rises dramatically (though it evokes weaker concern for national sovereignty): the commitments can now be applied by well-established systems of courts and administrative agencies; private actors can often initiate legal proceedings; and lawyers have incentives to invoke the rules. When supranational bodies like the European Court of Justice (ECJ) have also been granted legal authority, they can nurture “partnerships” with their domestic counterparts, strengthening both institutions.<sup>27</sup>

**Domesticated commitments can more easily be enforced against private persons and their assets.** A striking example is the recent litigation against General Pinochet, which was initiated by a Spanish magistrate enforcing international conventions banning torture and other atrocities that had become part of Spanish law. Although the British House of Lords ruled that Pinochet could not be held responsible for most of the charges against him, it did hold him answerable for acts committed after the torture convention had been incorporated into British law.

Legal commitments mobilize legally oriented interest and advocacy groups, such as the organized bar, and legitimize their participation in domestic decision making. They also expand the role of legal bureaucracies within foreign offices and other government agencies. Finally, so long as domestic actors understand legal agreements to be serious undertakings, they will modify their plans and actions in reliance on such commitments, increasing the audience costs of violations.

Legalization also increases the costs of violation through normative channels. Violation of a legal commitment entails reputational costs—again generalizable to all legal commitments—that reflect distaste for breaking the law. International law reinforces this effect through its strong emphasis on compliance (*pacta sunt servanda* and the principle of good faith).<sup>28</sup> To the extent that states (or certain states) see themselves as members of an international society structured by international law, reputational effects may be even broader.<sup>29</sup> Law observance is even more highly valued in most domestic societies; efforts to justify international violations thus create cognitive dissonance and increase domestic audience costs.

Legal obligations are widely perceived as having particular legitimacy. In Thomas Franck’s words, legitimacy creates an independent “compliance pull.”<sup>30</sup> Individuals,

25. Setear 1999.

26. Lutz and Sikkink, this issue.

27. See Burley and Mattli 1993; and Helfer and Slaughter 1997.

28. The rule of *pacta sunt servanda* is to some extent weakened by exceptions and defenses, notably the broad change-of-circumstances defense known as *rebus sic stantibus*. Yet these doctrines introduce needed flexibility; when they are found inapplicable, the normative force of the basic rule is enhanced.

29. See Wight 1977; Bull 1977; Hurrell 1993; and Buzan 1993.

30. Franck 1990.



government agencies, and other organizations internalize rules so that the advantages and disadvantages of compliance need not be recalculated each time they are invoked. Franck argues that the legitimacy of rules varies according to certain substantive qualities—determinacy and coherence, among other properties—and the procedures by which they were approved. Legal rules are often strong on these dimensions: relatively precise, internally consistent, and adopted through formalized and often elaborate procedures.

Legalization entails a specific form of discourse, requiring justification and persuasion in terms of applicable rules and pertinent facts, and emphasizing factors such as text, precedents, analogies, and practice. Legal discourse largely disqualifies arguments based solely on interests and preferences. The nature of this discourse affords legal professionals a prominent role. When authority is delegated to adjudicative institutions, proceedings can be highly formalized. Even without strong delegation, however, this discourse imposes some constraint on state action: governments will incur reputational costs within the legal community, and often beyond, if they act without a defensible position or without reasonable efforts to justify their conduct in legal terms.

Certain hypotheses regarding the independent variables that lead states to use hard law can be distilled from this analysis. First, states should use hard legal commitments as assurance devices when the benefits of cooperation are great but the potential for opportunism and its costs are high. These conditions are most likely in “contracts,” such as trade or investment agreements, that include reciprocal commitments and nonsimultaneous performance. But they may also appear in “covenants”—such as environmental or labor agreements—when violations would impose significant externalities on others. Opportunism is less significant in coordination situations, where agreements are largely self-enforcing.<sup>31</sup> Indeed, international coordination standards are often voluntary,  $[-, P, d]$ , and are created through institutions in which private actors have a significant role. Opportunism, and thus international legalization, is also less significant in settings where national actions have few external effects.<sup>32</sup>

Second, states should use hard legalization to increase the credibility of commitments when noncompliance is difficult to detect, as in most arms control situations. Legal arrangements often include centralized or decentralized monitoring provisions as an aspect of delegation. Even apart from these, however, legal commitments compensate in part for the reduced likelihood of detection by increasing the costs of detected violations.

Third, states should find hard law of special value when forming “clubs” of sincerely committed states, like the EU and NATO. Here legalization functions as an *ex ante* sorting device: because hard legal commitments impose greater costs on violators, a willingness to make them identifies one as having a low propensity to defect. Conversely, hard legalization is less significant in looser groupings like the Asia-

31. Coordination agreements may not be self-enforcing when the benefits of moving the group to a new equilibrium are high. In these situations, especially when the gains to certain parties are large enough to make such attempts feasible, hard law may be useful as an assurance device.

32. Abbott and Snidal 2000.

Pacific Economic Cooperation forum (APEC), described by Miles Kahler in this issue, that are not pursuing deep cooperation and thus do not require *ex ante* evidence of a sincere commitment from members.<sup>33</sup>

Fourth, looking within the state, executive officials should look to hard international law to commit other domestic agencies (especially legislatures) or political groups when those officials are able to make international agreements with little interference or control, and when their preferences differ significantly from those of competing power centers. In this perspective, domestic politics and constitutional law are significant explanatory variables.

Finally, as a secondary hypothesis, legal commitments should be more credible when made by states with particular characteristics. Externally, participation in other international legal regimes should enhance credibility: it exposes states to greater reputational costs and makes them more vulnerable to countermeasures. Internally, strong domestic legal institutions and traditions should enhance credibility. Many of the special costs of violating legal commitments stem from these characteristics.

### *Reducing Transactions Costs*

On balance, at least, hard legalization reduces the transactions costs of subsequent interactions.<sup>34</sup> Two types of interactions are especially relevant: one is the “managerial” process of applying and elaborating agreed rules; the other is the more adversarial process of enforcing commitments. The role of international regimes in reducing transactions costs—especially the costs of negotiating supplementary agreements—has been extensively analyzed.<sup>35</sup> That literature has not, however, distinguished legalization from other institutional forms.<sup>36</sup>

Consider the need to “manage” the application and evolution of agreements. With virtually all agreements, even those that are quite precise, provisions must be interpreted, applied to specific fact situations, and elaborated to resolve ambiguities and address new and related issues. Delegation to courts and other legal institutions is one important way states address these problems; we discuss delegation later in connection with incomplete contracts. Even where delegation is weak—for example,  $[O, p, d]$  or  $[O, p, -]$ —legalization facilitates interpretation, application, and elaboration by setting relatively clear bounds on dispute resolution and negotiation. Substantively, legalization implies that proposals for resolving disputes and for new or expanded rules must be integrated with existing norms. They should be compatible with settled rules if possible, so that bargains need not be reopened. In any case they should be compatible with the basic principles of the relevant regime, so that legal coherence is maintained.

Procedurally, hard law constrains the techniques of dispute settlement and negotiation. Even when delegation is relatively low, legalization implies that most disputes

33. Kahler, this issue.

34. As discussed later, the costs of reaching a fully legalized agreement are often relatively high, leading actors to adopt softer forms of legalization.

35. Keohane 1984.

36. Compare Abbott and Snidal 1998.

and questions of interpretation should be addressed through specialized procedures, operated primarily by legal professionals using professional modes of discourse. Even when directly negotiated solutions are permitted, the existence of legal institutions means that states will bargain “in the shadow” of anticipated legal decisions. When legal rules are in effect, moreover, unauthorized coercive behavior is generally seen as illegitimate. It is no coincidence that legalization in the WTO was explicitly tied to a requirement that member states resolve their trade disputes through the new dispute settlement procedures, not through unilateral determinations and responses—a provision aimed directly at the coercive tactics of the United States under Section 301. Even hard international law is not foolproof, of course; the principles discussed here may be ignored in practice, especially by powerful states. Nonetheless, on the whole legalization remains an effective device for organizing ongoing interactions.

Consider next the need to “enforce” commitments. The previous section examined how legalization helps states increase the credibility of their own commitments. But legalization is also significant from the perspective of the states (and other actors) that have worked to obtain commitments from others, often in the face of strong resistance. We refer to such parties as “demandeurs.” Whenever there are incentives for noncompliance with international commitments, demandeurs will seek ways to forestall or respond to violations by others.

As discussed earlier, hard legalization offers a rich assortment of international and domestic institutions and procedures and normative and reputational arguments for actors in this position. Compared to alternatives like frequent renegotiation, persuasion, or coercion, it materially reduces the costs of enforcement. Other things being equal, assuming in particular that the substance of an agreement is acceptable, demandeurs should prefer hard legalization, especially in the form  $[O, P, D]$ .<sup>37</sup> Of course, other things being equal, states that resist agreement or desire greater flexibility should resist hard legalization, or at least strive for  $[O, p, D]$  commitments, for these very reasons. The compromises and tradeoffs that result are discussed in the following section.

Many of the hypotheses in the previous subsection can be reformulated from the demandeur’s perspective. Demandeurs should seek hard legalization (1) when the likelihood of opportunism and its costs are high, and noncompliance is difficult to detect; (2) when they wish to limit participation to those strongly committed to an agreement; and (3) when executive officials in other states have preferences compatible with those of the demandeurs, but other elites within those states have divergent preferences. Finally, demandeurs should place greatest reliance on commitments by states that participate actively in legal regimes and have strong legal institutions, professions, and traditions.

### *Modifying Political Strategies*

As proponents of legal process theory make clear, hard legalization allows states (and other actors) to pursue different political strategies as they work to extend and

37. We consider later the specific forms of legalization preferred by powerful and weak states.

enforce (or to weaken or escape) international agreements.<sup>38</sup> Indeed, those strategies are often unavoidable. Both demanders and resisters may be as concerned with these tactical attributes as with the strategic issues of credibility and enforceability.

As defined in this issue, hard law includes specialized legal institutions. Regimes of the form  $\{O, P, D\}$  and  $\{O, p, D\}$  include judicial or arbitral organs that offer the specialized procedures and techniques of litigation as a supplement or alternative to more overtly political techniques for addressing disputes, questions of interpretation, and instances of noncompliance. Nonjudicial institutions, as in  $\{O, p, d\}$  regimes, are often authorized to interpret governing instruments, issue regulations or recommendations, draft proposed conventions, and the like. These fora combine the politics and rhetoric of law with ordinary politics.

Legal institutions often require even more subtle strategies. In some, for example, states may not even initiate proceedings. Thus, although the International Criminal Tribunal for the Former Yugoslavia (ICTY) is a valuable tool of humanitarian and interest-based politics, decisions to prosecute (or not to prosecute) are made by ICTY officials. NATO governments (and private groups) must therefore pursue such tactics as lobbying for the appointment of acceptable ICTY officials, gathering evidence, encouraging prosecutors to bring cases—as the United States did in pressing for the indictment of Slobodan Milosevic—and arranging for the arrest of potential defendants, while using the threat of prosecution to pressure the Serbian government.

Hard legal commitments are sometimes incorporated directly into the internal law of participating states; even more frequently international agreements require states to enact implementing legislation, and sometimes to establish particular implementing institutions. Domestic litigation then becomes part of the international toolkit. There may, however, be jurisdictional obstacles to litigation by state claimants. In those situations, states must engage in the subtle process of identifying, encouraging, and supporting private litigants who will advance their interests.<sup>39</sup> Recent scholarship analyzes the strategies that supranational judges pursue to encourage actions by private litigants and national courts that will strengthen international law.<sup>40</sup> National governments presumably follow parallel strategies. Karen Alter's article in this issue explores the complex strategies pursued by this range of public and private actors in the highly legalized institutions of the EU.<sup>41</sup>

We hypothesize broadly that states will be more likely to seek hard legalization when the political strategies it offers are advantageous to them. Mundane issues such as the availability of resources and trained personnel can be quite significant: the United States and other advanced industrial nations with large legal staffs should be more amenable to legalization than countries with few trained specialists. States

38. Koh 1997.

39. This reverses the process associated with more traditional institutions like the Iran–U.S. Claims Tribunal, where private actors encourage governments to initiate proceedings and provide support and encouragement to government litigators.

40. See Burley and Mattli 1993; Helfer and Slaughter 1997; Alter 1998b; Garrett, Kelemen, and Schulz 1998; and Mattli and Slaughter 1998b.

41. Alter, this issue.

should also favor hard legalization when they can be confident that agreements will track their preferences, for legal procedures will allow them to implement those preferences efficiently and at low political cost. This suggests that powerful states have a significant and often overlooked stake in hard legalization. And states that seek to minimize political conflict in relations with other states or in particular issue-areas should favor hard legalization, for it sublimates such conflict into legal argument.

### *Handling Problems of Incomplete Contracting*

States sometimes attempt to write detailed agreements to constrain auto-interpretation, reduce transactions costs, and increase enforceability. But though precision has great value, it also has several problems. It may be wasteful, forcing states to plan for highly unlikely events; it may be counterproductive, introducing opaque and inconsistent provisions; it may lead to undesirable rigidity; and it may prevent agreement altogether.

In any case, writing complete contracts is extremely difficult.<sup>42</sup> The principal-agent literature demonstrates that asymmetric information typically makes it impossible to write an optimal contract if the agent is risk-averse. Yet even this literature assumes that one could in principle write a contract complete with respect to all possible future states of the world. In fact, given bounded rationality and the pervasive uncertainty in which states operate, they can never construct agreements that anticipate every contingency. This problem invites opportunistic behavior and discourages both relation-specific investments and value-enhancing agreements.

Delegation is often the best way to deal with incomplete contracting problems. Regimes of the form  $[O, p, D]$  are clearly designed with this purpose in mind: they utilize administrative and judicial institutions to interpret and extend broad legal principles. The Treaty of Rome, for example, authorizes the ECJ and the European Community's legislative institutions to elaborate and apply general principles of competition law, such as "concerted practices" and "distortion of competition," through individual cases and general regulations. Even  $[O, P, D]$  regimes grant significant powers to administrative organs and judicial or arbitral bodies. Although many provisions of the European Convention on Human Rights, for example, are quite detailed, the European Court of Human Rights must still apply general standards—such as "inhuman and degrading treatment" and "respect for . . . private and family life"—in situations that could not have been anticipated when the convention was drafted.

Softer regimes often include nonjudicial procedures for filling out incomplete contracts, though these normally require state consent. Hard legal regimes, in contrast, grant greater independence to judicial or arbitral bodies but require them to follow agreed upon principles and to act only on specific disputes and requests. This combination of attributes, along with the background rules and expectations of interna-

42. Incomplete contracting problems arise when any agreement is negotiated under conditions of incomplete or asymmetric information, risk, and uncertainty. For a recent overview, see Hart 1995.

tional law, simultaneously constrains and legitimates delegated authority. One can hypothesize that states will grant such authority when the anticipated gains from cooperation are large and there is reasonable consensus on general principles, but specific applications are difficult to anticipate.

## The Advantages of Soft Legalization

Hard law facilitates international interactions in the many ways already discussed, but it has significant costs and limitations. In this section, we explore how softer forms of legalization provide alternative and often more desirable means to manage many interactions by providing some of the benefits of hard law at lower cost. We emphasize both rationalist concerns, such as contracting costs, and the special role soft legal rules and institutions play in promoting learning and normative processes.

### *Contracting Costs*

A major advantage of softer forms of legalization is their lower contracting costs. Hard legalization reduces the post-agreement costs of managing and enforcing commitments, but adoption of a highly legalized agreement entails significant contracting costs.<sup>43</sup> Any agreement entails some negotiating costs—coming together, learning about the issue, bargaining, and so forth—especially when issues are unfamiliar or complex. But these costs are greater for legalized agreements. States normally exercise special care in negotiating and drafting legal agreements, since the costs of violation are higher. Legal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements.

Two examples suggest the impact of contracting costs on forms of legalization. First, the costs and risks of national ratification procedures led the International Labor Organization (ILO) to modify its legalization strategy.<sup>44</sup> Throughout its history, the ILO has acted primarily by adopting draft conventions. In recent decades, however, states have been ratifying ILO conventions at a low and declining rate. Believing that this phenomenon was damaging the prestige of the organization, two successive directors-general called for the ILO to emphasize nonlegally binding instruments, such as recommendations and codes of conduct, at the expense of binding treaties in order to reduce the costs of national ratification. Although labor representatives resisted this change, the ILO has begun to adopt some new rules in softer legal form.

Second, contracting costs were used as a delaying tactic in the negotiations that led to the 1997 Organization for Economic Cooperation and Development (OECD) con-

43. The regimes literature does not always distinguish between the costs of transacting *within* regimes and the costs of *creating* regimes. In early work, regimes are seen as the legacy of hegemony, so that their creation is not directly addressed.

44. Maupain 1998.

vention restricting foreign bribery in international business transactions. In those discussions, the United States hoped to reduce the commercial disadvantage created by its Foreign Corrupt Practices Act by supporting a legally binding treaty,  $\{O, P, d\}$ , requiring all OECD members to adopt equivalent regulatory limits. As negotiations proceeded, however, the very states that had resisted any action on the issue came out in favor of a binding treaty! These nations hoped to use the high contracting costs of hard legalization to impede agreement. The United States responded by supporting a nonlegally binding OECD recommendation,  $\{-, P, d\}$ . The two sides eventually compromised by setting a short deadline for treaty negotiations and agreeing to adopt a recommendation if the deadline was not met.

The costs of hard legalization are magnified by the circumstances of international politics. States, jealous of their sovereign autonomy, are reluctant to limit it through legalized commitments. Security concerns intensify the distributional issues that accompany any agreement, especially ones of greater magnitude or involving greater uncertainty. Negotiations are often multilateral. The scope of bargaining is often not clearly delimited, since the issues themselves are ill defined (for example, is free trade in magazines an economic issue or a cultural one?). Finally, the thinness of the international institutional context (including the low prevailing level of legalization) does little to lower the costs of agreement.

Soft legalization mitigates these costs as well. For example, states can dampen security and distributional concerns by opting for escape clauses,  $\{o, P, d\}$ ; imprecise commitments,  $\{O, p, d\}$ ; or “political” forms of delegation that allow them to maintain future control if adverse circumstances arise,  $\{O, p, -\}$ . These institutional devices protect state sovereignty and reduce the costs and risks of agreement while providing some of the advantages of legalization. Furthermore, soft legalization offers states an opportunity to learn about the consequences of their agreement. In many cases such learning processes will lower the perceived costs of subsequent moves to harder legalization.

The international nuclear regime illustrates these advantages.<sup>45</sup> Although fundamental nonproliferation obligations are set out in the Nuclear Non-Proliferation Treaty and other legally binding agreements,  $\{O, P, d\}$ , many sensitive issues—such as the protection of nuclear materials—are regulated predominantly through recommendations from the International Atomic Energy Agency (IAEA),  $\{-, P, d\}$ . Recommendations deal with technical matters, such as inventory control and transportation, at a level of detail that would be intractable in treaty negotiations. They also address issues of domestic policy, such as the organization of national regulatory agencies and the supervision of private actors, that states might regard as too sensitive for treaty regulation. When a high level of consensus forms around an IAEA recommendation, member states may incorporate its provisions into a binding treaty—as occurred with rules on the management of spent nuclear fuel and radioactive waste—but even these treaties must usually be supplemented by recommendations on technical issues.

45. Kellman 1998.

The international trade regime also illustrates the advantages of soft law in costly contracting environments. The proposed charter of the International Trade Organization contemplated legally binding commitments with constraints on the right of withdrawal and significant institutionalization,  $[O,P,d]$ ; it also covered a wide range of economic issues. Such an instrument was very difficult to negotiate and draft; its institutional strength also provoked political resistance within the United States.<sup>46</sup> Because of these problems, the participating states adopted the 1947 General Agreement on Tariffs and Trade (GATT) as a low-cost, interim framework for tariff reductions. Compared to the draft charter of the International Trade Organization, GATT 1947 was relatively soft: it was adopted only “provisionally,” included a lenient withdrawal clause, and created only skeletal institutions,  $[o,p,-]$ . Over time, GATT developed into the WTO as states learned the advantages of harder legalization in governing international trade. But the history of the regime—from its earliest days through the November 1999 ministerial meeting—demonstrates clearly that achieving harder legalization is a sensitive and protracted process.

In sum, we argue that states face tradeoffs in choosing levels of legalization. Hard agreements reduce the costs of operating within a legal framework—by strengthening commitments, reducing transactions costs, and the like—but they are hard to reach. Soft agreements cannot yield all these benefits, but they lower the costs of achieving (some) legalization in the first place. Choices along this continuum of tradeoffs determine the “hardness” of legalization, both initially and over time.

In general, we hypothesize that softer forms of legalization will be more attractive to states as contracting costs increase. This proposition should be true both for relatively mechanical costs—such as those created by large numbers of actors and rigorous national ratification procedures—and for more intensely political costs like those prevailing in negotiations with potentially strong distributional effects. In the remainder of this section, we explore the hard law/soft law tradeoff in terms of several key independent variables, each of which increases the costs of international agreement. These variables include sovereignty costs, uncertainty, divergence among national preferences, differences in time horizons and discount rates, and power differentials among major actors.

### *Sovereignty Costs*

**The nature of sovereignty costs.** Accepting a binding legal obligation, especially when it entails delegating authority to a supranational body, is costly to states. The costs involved can range from simple differences in outcome on particular issues, to loss of authority over decision making in an issue-area, to more fundamental encroachments on state sovereignty. While we recognize that the concept of “sovereignty” is broad and highly contested,<sup>47</sup> we use “sovereignty costs” as a covering term for all

46. Diebold 1952.

47. Krasner offers four meanings or categories of sovereignty: *domestic* sovereignty (the organization of authority and control within the state), *interdependence* sovereignty (the ability to control flows across borders), *international legal* sovereignty (establishing the status of a political entity in the international



three categories of costs to emphasize the high stakes states often face in accepting international agreements. The potential for inferior outcomes, loss of authority, and diminution of sovereignty makes states reluctant to accept hard legalization—especially when it includes significant levels of delegation.

Sovereignty costs are relatively low when states simply make international legal commitments that limit their behavior in particular circumstances. States typically accept these costs in order to achieve better collective outcomes—as illustrated by solutions to Prisoners' Dilemma and collective action problems that limit individual choices. Such agreements are undoubtedly exercises of legal sovereignty. Nevertheless, even they may limit the ability of states to regulate their borders (for example, by requiring them to allow goods, capital, or people to pass freely) and to implement important domestic policies (as when free trade impinges on labor, safety, or environmental regulations), thus encroaching on other aspects of sovereignty.

Greater sovereignty costs emerge when states accept external authority over significant decisions. International agreements may implicitly or explicitly insert international actors (who are neither elected nor otherwise subject to domestic scrutiny) into national decision procedures. These arrangements may limit the ability of states to govern whole classes of issues—such as social subsidies or industrial policy—or require states to change domestic laws or governance structures. Their significance is reflected in European concerns over the “democratic deficit” and complaints of American activists regarding the “faceless bureaucrats” in the WTO. Nevertheless, the impact of such arrangements is tempered by states' ability to withdraw from international agreements—although processes of enmeshment may make it increasingly costly for them to do so.

Sovereignty costs are at their highest when international arrangements impinge on the relations between a state and its citizens or territory, the traditional hallmarks of (Westphalian) sovereignty. Of course, ordinary restrictions on domestic policies can have such effects in contemporary welfare states, but these are heightened and generalized when, for example, an international human rights regime circumscribes a state's ability to regulate its citizens. Similarly, the United States has correctly been concerned that an International Criminal Court might claim jurisdiction over U.S. soldiers participating in international peacekeeping activities or other foreign endeavors. Agreements such as the Law of the Sea Convention both redefine national territory (for example, by delineating jurisdiction over a territorial sea, exclusive economic

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system), and *Westphalian* sovereignty (preventing external actors from influencing or determining domestic authority structures). Krasner 1999. These categories overlap and do not covary in any necessary pattern.

Krasner argues that sovereignty has never been immutable, although legal sovereignty has tended to be more respected than Westphalian or other types of sovereignty. Indeed, some legal purists see sovereignty as a fundamental and inviolable legal concept relating to state supremacy in making and withdrawing from international treaties. But recent legal theorists argue that such a view is untenable given ongoing developments in international legalization; they conclude that “it is time to slowly ease the term out of polite language in international relations, surely in law.” See Henkin et al. 1993, 19. We skirt these conceptual debates, focusing instead on the fact that states often perceive international legalization as infringing on their sovereignty, broadly construed.

zone, and continental shelf) and limit the capacity of states to restrict its use (for example, by establishing rights of innocent passage). Here, too, individual states retain the capacity to withdraw, but doing so may actually diminish their (legal) sovereignty, risking loss of recognition as members in good standing of the international community.

Legalization can lead to further, often unanticipated sovereignty costs over time. Even if rules are written precisely to narrow their range, or softened by including escape clauses or limiting delegation, states cannot anticipate or limit all of their possible effects.

Delegation provides the greatest source of unanticipated sovereignty costs. As Charles Lindblom points out, a grant of "authority always becomes to a degree uncontrollable."<sup>48</sup> The best example is the ECJ. As Karen Alter describes in this issue, ECJ rulings transformed the preliminary ruling procedure of Article 177 of the Treaty of Rome from a check on supranational power into a device through which private litigants can challenge national policies as inconsistent with European law. Similarly, while France and Canada have consistently sought to minimize the impact of expanding trade legalization on their autonomous cultural policies, they have nevertheless seen that autonomy slowly trimmed back by decisions in the WTO and NAFTA. Even nonjudicial organizations like the IMF or World Bank exert their independence in ways that go beyond the initial intentions or anticipations of the contracting states.<sup>49</sup>

The delegation of legal authority to independent domestic courts and agencies can create similar unexpected consequences. However, states generally feel they have ultimate control over domestic courts—they appoint the judges and control the justice departments that bring criminal actions—and so they find, in general, that domestic delegation has lower sovereignty costs.

Even the most powerful states recognize that legalization will circumscribe their autonomy. U.S. opposition to autonomous international institutions, whether the Enterprise in the Law of the Sea Convention, the International Criminal Court, or the UN more generally, reflects the special concern that delegation raises.<sup>50</sup> Even in NAFTA, where its political influence is paramount, the United States resisted delegating authority to supranational dispute settlement bodies for interstate disputes; only the Chapter 19 procedure for reviewing antidumping and countervailing duty rulings creates significant delegated authority. Congress also explicitly provided that the agreement would not be self-executing in domestic law, limiting delegation to national courts.<sup>51</sup> More recently, concern that highly legalized WTO dispute settlement institutions might expand the meaning of the Uruguay Round agreements led Con-

48. Lindblom 1977, 24.

49. Abbott and Snidal 1998.

50. Shapiro takes the extreme view that such developments are an inevitable part of the development of any legal system. Shapiro 1981. Our view is that the advantages of legalization exert a powerful pull in this direction but that sovereignty costs provide significant resistance; we should expect a mixed level of international legalization according to the characteristics of issues and states, at least in the foreseeable future.

51. F. Abbott, this issue.

gress to provide for an early review of the costs and benefits of WTO membership, including the results of legal proceedings, tied to a fast-track procedure for withdrawal from the organization. Conversely, the willingness of the United States and other countries to subscribe to more constrained institutions indicates that their benefits outweigh their sovereignty costs—at least up to a point.

The notion of sovereignty costs is more complicated when competing domestic and transnational interests affect the development of international legalization. Certain domestic groups may perceive negative sovereignty costs from international agreements that provide them with more favorable outcomes than national policy. Examples include free-trade coalitions that prefer their states' trade policies to be bound by WTO rulings rather than open to the vagaries of individual legislatures, and environmental groups that believe they can gain more from an international accord than from domestic politics. For similar reasons, although a government that anticipates staying in power may be reluctant to limit its control over an issue, a government less certain of its longevity may seek to bind its successors through international legal commitments.<sup>52</sup> We discuss such domestic variations in the following section.

Sovereignty costs may also be negative for external reasons, as where participation in international arrangements enhances a state's international and domestic position.<sup>53</sup> Key aspects of sovereignty have been codified in a variety of legal instruments, including the 1933 Montevideo Convention on the Rights and Duties of States, Article 2 of the UN Charter, and the UN General Assembly Declaration on Principles of International Law Concerning Friendly Relations Among States. Regional legal arrangements like the Organization of American States (OAS) provide much-needed support for state sovereignty. Chapter IV of the OAS Charter promotes the independence and sovereign equality of member states regardless of power differentials and protects internal sovereignty through principles of nonintervention.

Although negative sovereignty costs are an important exception, positive sovereignty costs are the more standard (and more difficult) case for international legalization. Hard legalization—especially the classic legal model with centralized judicial institutions capable of amplifying the terms of agreements in the course of resolving disputes—imposes high sovereignty costs. Thus states face tradeoffs between the benefits and sovereignty costs of different forms of legalization.

States can limit sovereignty costs through arrangements that are nonbinding or imprecise or do not delegate extensive powers. Most often, states protect themselves by adopting less precise rules and weaker legal institutions, as in the Council of Europe's framework Convention for the Protection of National Minorities, [*O,p,d*]. They frequently provide that member states must adhere to a special treaty protocol before a court or quasi-judicial body can assert jurisdiction over them, as in the

52. Colombatto and Macey offer a related view in arguing that governmental agencies seek international legalization in order to protect their administrative positions at a cost to domestic groups. Colombatto and Macey 1996.

53. In Krasner's terminology, these constitute international legal and Westphalian sovereignty, respectively.

inter-American human rights system, or that all parties to a particular dispute must consent before the case can be litigated. Still weaker forms of delegation—such as the consultation arrangements characteristic of arms control agreements,  $[O,P,-]$ —limit sovereignty costs even more, coupling legal obligations with political mechanisms of control and defense. Thus soft legalization offers a variety of means—none of them perfect—by which states can limit sovereignty costs.

The international money-laundering regime provides a good example.<sup>54</sup> Beginning in the 1980s, the United States led an effort to control the international laundering of criminal profits. Many nations resisted efforts to criminalize money laundering or to require greater scrutiny of financial transactions, fearing interference with legitimate business dealings and with the division of domestic authority between prudential regulators and prosecutors. To address these concerns, in 1989 the OECD created the Financial Action Task Force of financial experts. The task force has issued policy recommendations, administers a system of peer review, and can even impose mild sanctions. Its guidelines are not as tightly constraining as hard legal commitments and are more difficult to “enforce.” Yet they provide a common basis for domestic implementation (with enough flexibility to accommodate national differences), guide behavior, and create expectations that violations will bring political costs. Task force guidelines legitimize participation in national decisions by international actors and by concerned domestic bureaucracies and NGOs. They invoke a form of legal discourse and some principles of international law. In its decade of operation, the task force has fostered a significant degree of convergence around the principles contained in its guidelines.

As this example demonstrates, soft law provides a means to lessen sovereignty costs by expanding the range of available institutional arrangements along a more extensive and finely differentiated tradeoff curve. How states evaluate these tradeoffs—and thus determine their preferences for different forms of legalization—depends on their own characteristics and the circumstances of particular issue-areas.

**Sovereignty costs and issue type.** Viewing constraints on national autonomy and sovereignty as costs that vary across issues, we hypothesize that states will prefer different forms of legalization in different issue-areas. At one extreme, sovereignty costs are especially high in areas related to national security. Adversaries are extremely sensitive to unanticipated risks of agreement for the standard reasons advanced by realists, including relative gains. Even allies facing common external threats are reluctant to surrender autonomy over their security affairs. Therefore it is unsurprising that even in NATO, the most institutionalized alliance ever, delegation is moderate,  $[O,p,d]$ , or that security arrangements have lagged behind other institutional developments in the EU. Similarly, bilateral arms control agreements like SALT can be very precise in specifying missile numbers and types and are unquestionably legally binding but are only minimally institutionalized,  $[O,P,-]$ .

54. Simmons 2000a.

Political economy issues display a wide range of sovereignty costs and hence of legalization. At one extreme lie technical matters on which state interests are closely aligned, such as international transportation or food standards. Here sovereignty costs are low and the incidence of legalized agreements is correspondingly high. One even sees a significant level of delegation—including to organizations in which private actors play major roles, such as the International Organization for Standardization (ISO)—where sovereignty costs are low and technical complexity makes it hard to adapt agreements rapidly without some coordinating authority. Political economy issues like investment policy, money laundering, and security-related export controls, however, remain sensitive and have not been legalized to nearly the same extent. Similarly, tax policy, which lies at the core of all state functions but increasingly requires international coordination, is characterized by many bilateral treaties but displays little overall institutionalization.

Trade issues range between these extremes—sovereignty costs are significant but are frequently outweighed by the perceived benefits of legalized agreements. This is due partly to lesser conflicts of interest among states and partly to strong domestic support from beneficiaries of legalization. Consequently, even on a given issue, sovereignty costs can vary across states and over time. For example, the sovereignty costs of agricultural agreements are typically greater for less-developed states where the sector is larger and politically central; they have gradually decreased in OECD countries along with the relative importance of agriculture.

Finally, the most highly institutionalized arrangements, such as the EU, occur where there is a strong commitment to reducing sovereignty, or where a long process of legalized cooperation has led to institutionalization even against state resistance. The history of trade institutionalization is again instructive. In many respects, the WTO today is a stronger institution than the proposed International Trade Organization. Continued success in expanding trade under GATT changed domestic political balances and lowered the costs of further legalization. Moreover, states “learned” that harder legalization (such as a stronger dispute settlement mechanism) can produce greater benefits; they may also have been reassured regarding the dangers of enmeshment. Nevertheless, vigorous continuing disputes over the future of the WTO reflect states’ continued wariness of sacrificing autonomy.

### *Uncertainty*

Many international issues are new and complex. The underlying problems may not be well understood, so states cannot anticipate all possible consequences of a legalized arrangement. One way to deal with such problems is to delegate authority to a central party (for example, a court or international organization) to implement, interpret, and adapt the agreement as circumstances unfold. This approach avoids the costs of having no agreement, or of having to (re)negotiate continuously, but it typically entails unacceptably high sovereignty costs. Soft legalization provides a number of more attractive alternatives for dealing with uncertainty.

First, states can reduce the precision of their commitments:  $[O, p, d]$ . Of course, if they do not know the relevant contingencies, they cannot achieve the precision of hard law even if they wish to do so, except as to better-understood aspects of the problem. Thus an arms control agreement can precisely control known technologies and can even limit research into technologies whose results can reasonably be anticipated (such as testing antiballistic missile systems). But it cannot govern technologies whose military impact cannot be foreseen. And blanket limitations on all research with potential military implications would unacceptably impair the development of beneficial civilian technologies.

But uncertainty makes precision less desirable as well as less attainable. The classic distinction between risk and uncertainty is significant here.<sup>55</sup> When risk is the central concern—that is, when actors cannot predict the outcome of an agreement but know the probability distribution of possible outcomes, conditional on agreement terms—precise agreements offer a way to manage and optimize risk-sharing.<sup>56</sup> But when circumstances are fundamentally uncertain—that is, when even the range and/or distribution of possible outcomes is unknown—a more precise agreement may not be desirable. In particular, if actors are “ambiguity-averse,”<sup>57</sup> they will prefer to leave agreements imprecise rather than face the possibility of being caught in unfavorable commitments. Unfamiliar environmental conditions like global warming provide good illustrations: because the nature, the severity, even the very existence of these threats—as well as the costs of responding to them—are highly uncertain, the imprecise commitments found in environmental “framework” agreements may be the optimal response.

A second way to deal with uncertainty is through arrangements that are precise but not legally binding, such as Agenda 21, the Forest Principles, and other hortatory instruments adopted at the 1992 Rio Conference on Environment and Development,  $[-, P, -]$ . These allow states to see the impact of rules in practice and to gain their benefits, while retaining flexibility to avoid any unpleasant surprises the rules might hold. Sometimes precision is actually used to limit the binding character of obligations, as with carefully drawn exceptions or escape clauses. These also protect the parties in case the agreement turns out to have hidden costs or unforeseen contingencies, so that states are not locked into commitments they regret.

Third, although strong delegation can aggravate the uncertainty of agreements, moderate delegation—typically involving political and administrative bodies where

55. See Knight 1921; and Ellsberg 1963.

56. More precise agreements might, for example, contain renegotiation provisions so that states can modify the agreement as events unfold. See Koremenos 1999. This case for greater precision assumes risk-averse states; risk seekers would gamble on imprecise, binding agreements. Finally, optimization of the agreement will be second-best when it is constrained by asymmetries of information exemplified in standard principal-agent models.

57. Ambiguity aversion means that actors prefer known outcomes (including the status quo) to unknown ones. When actors know the possible outcomes but do not know which of two alternative probability distributions governs them, Ellsberg characterizes ambiguity aversion as assuming that an act leads to the minimum possible expected outcome. Ellsberg 1963. In this case, agents prefer incomplete to complete contracts even at zero contracting costs. See Mukerji 1998.

states retain significant control—provides another way to manage uncertainty. UN specialized agencies and other international organizations,  $\{-,p,d\}$ , play restricted administrative roles across a wide variety of issues, and a small number of (mainly financial) organizations have more significant autonomy.<sup>58</sup> These organizations have the capacity to provide information (and thus reduce uncertainty) and some capacity to modify and adapt rules or to initiate standards.<sup>59</sup> In general, however, even this level of delegation appears only in areas with low sovereignty costs, such as technical coordination. More fundamental elaboration of arrangements is typically accomplished through direct political processes. Thus arms control agreements are precise and binding but limit delegation to forums that promote political bargaining, not independent third-party decision making,  $\{O,P,-\}$ .

Viewed dynamically, these forms of soft legalization offer strategies for individual and collective learning.<sup>60</sup> Consider the case where states are legally bound but in an imprecise way, as under the original Vienna Ozone Convention,  $\{O,p,-\}$ . These obligations offer flexibility and protection for states to work out problems over time through negotiations shaped by normative guidelines, rather than constrained by precise rules. Hortatory rules, for example,  $\{-,p,d\}$ , similarly provide general standards against which behavior can be assessed and support learning processes that reduce uncertainty over time. Some emerging arrangements on the rights of women and children fit this model. Agreements that are precise but nonbinding, like the Helsinki Final Act,  $\{-,P,d\}$ , often include institutional devices such as conferences and review sessions where states can potentially deepen their commitments as they resolve uncertainties about the issue.

Indeed, moderate delegation—including international organizations that provide support for decentralized bargaining, expertise, and capacities for collecting information—may be more appropriate than adjudicative procedures (domestic or international) for adapting rules as circumstances are better understood. Examples include the numerous international agencies that recommend (often in conjunction with private actors) international standards on a range of issues, including technology, transportation, and health. Although not binding, their recommendations provide precise and compelling coordination points to which states and private actors usually adhere. In other cases, consultative committees or formal international organizations may be empowered to make rules more precise as learning occurs. Effective institutions of this sort require a certain autonomy that states may be reluctant to grant over truly important issues.

The learning processes described here are illustrated by the joint Food and Agriculture Organization–UN Environment Program (FAO–UNEP) regime requiring prior informed consent to international transfers of hazardous chemicals and pesticides.<sup>61</sup>

58. Abbott and Snidal 1998.

59. Gold 1983.

60. For a rational approach to learning, see Morrow 1994; and Koremenos 1999. For a more constructivist approach, see Finnemore 1996. Our view is that both learning as acquiring information and learning as changing preferences or identity are relevant (and compatible) aspects of legalization.

61. Mekouar 1998.

The FAO adopted a “code of conduct” on the distribution and use of pesticides in 1985; UNEP adopted “guidelines” on the exchange of information on internationally traded chemicals in 1987. Because of continued concern over exports of restricted substances to developing countries, the two organizations coordinated the amendment of their respective soft law instruments in 1989 to add a requirement for prior informed consent for international transfers of hazardous substances and a procedure for handling consents. This procedure was managed by the FAO and UNEP. Both organizations sponsored extensive consultations with expert groups from government and industry and provided technical assistance. The consent system, then, involved low obligation, relatively high precision, and moderate, largely administrative and technical, delegation,  $[-, P, d]$ . At the 1992 Rio conference, supporters attempted to “harden” the consent system through a binding treaty, but this effort failed. The FAO and UNEP continued to administer the existing system, however, and a few years later the member states of both organizations authorized formal treaty negotiations. The convention approved in September 1998 tracked the FAO-UNEP system almost exactly,  $[O, P, d]$ .

In this section we have argued that soft legalization provides a rational adaptation to uncertainty. It allows states to capture the “easy” gains they can recognize with incomplete knowledge, without allowing differences or uncertainties about the situation to impede completion of the bargain. Soft legalization further provides a framework within which states can adapt their arrangement as circumstances change and can pursue “harder” gains through further negotiation. Soft law avoids the sovereignty costs associated with centralized adjudication or other strong delegation and is less costly than repeated renegotiation in light of new information.

Our discussion also suggests hypotheses as to when different forms of legalization are most likely to be used. Consider the four possible high/low combinations of uncertainty and sovereignty costs, two of the major independent variables in our analysis. Where both variables are low, states will be inclined toward hard legal arrangements to efficiently manage their interactions,  $[O, P, D]$ . When sovereignty costs are high and uncertainty is low, states will be reluctant to delegate but will remain open to precise and/or binding arrangements,  $[O, P, -]$ . Conversely, if sovereignty costs are low and uncertainty is high, states will be willing to accept binding obligations and at least moderate delegation but will resist precise rules,  $[O, p, d]$ . Finally, when both uncertainty and sovereignty costs are high, legalization will focus on the statement of flexible or hortatory obligations that are neither precise nor highly institutionalized,  $[o, p, -]$  or  $[-, p, -]$ . In all these cases, legalization provides a framework within which states can work to resolve their uncertainty, making harder legalization more attractive.

### *Soft Law as a Tool of Compromise*

**Compromise at a point in time.** Soft law can ease bargaining problems among states even as it opens up opportunities for achieving mutually preferred compromises. Negotiating a hard, highly elaborated agreement among heterogeneous states is a costly and protracted process. It is often more practical to negotiate a softer



agreement that establishes general goals but with less precision and perhaps with limited delegation.

Soft legalization allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text. This provides for flexibility in implementation, helping states deal with the domestic political and economic consequences of an agreement and thus increasing the efficiency with which it is carried out. Accordingly, soft law should be attractive in proportion to the degree of divergence among the preferences and capacities of states, a condition that increases almost automatically as one moves from bilateral through regional to multilateral negotiations.

Flexibility is especially important when uncertainty or one sticky problem threatens to upset a larger "package deal." Rather than hold up the overall agreement, states can incorporate hortatory or imprecise provisions to deal with the difficult issues, allowing them to proceed with the rest of the bargain. The labor and environmental side agreements to NAFTA are suggestive on this point.

Softness also accommodates states with different degrees of readiness for legalization. Those whose institutions, laws, and personnel permit them to carry out hard commitments can enter agreements of that kind; those whose weaknesses in these areas prevent them from implementing hard legal commitments can accept softer forms of agreement, perhaps through exceptions, reservations, or phase-in periods. Many treaties make such special provisions for developing countries, transitional economies, and other categories of states. States may prefer such an arrangement to either a softer agreement among all or a harder agreement with limited membership. Over time, if the soft arrangements are successful and without adverse consequences, the initially reluctant states may accept harder legalization.

The 1996 Wassenaar Arrangement for national controls on exports of conventional weapons and dual-use technologies illustrates the use of soft legalization to facilitate compromise.<sup>62</sup> Wassenaar is a successor to the Coordinating Committee for Multilateral Export Controls, the informal institution through which the West coordinated controls on exports to the Soviet bloc. The United States pressed for a new institution to address post-Cold War security threats like terrorism, regional conflicts, and arms buildups by rogue nations like Iraq. But it faced several barriers to agreement: nearly twice as many nations would have to take part; the "common enemy" of the Cold War no longer existed; the participating nations had very different attitudes toward particular countries and conflicts; the economic costs of export controls would fall unevenly across countries; and some states were more technically prepared than others to operate a sophisticated export control system.

The nonbinding "arrangement" overcame these barriers by incorporating substantial flexibility in all three elements of legalization, [-,*p*,-]. The core of the arrangement is the exchange of information on past exports of agreed upon products to buyers in agreed target markets. This information alerts members to suspicious acquisition patterns and focuses peer pressure against commercial undercutting. The arrange-

62. Dursht 1997.

ment operates by consensus, and member countries implement its requirements in domestic law. The United States yielded on a number of issues, such as prior approval of export sales. In return, however, it obtained inclusion of both conventional arms and dual-use goods, specific lists of controlled items, designation of some specific target nations, and a degree of transparency that allows it to respond in serious cases.

These advantages of flexibility do not come without cost. Soft law compromises make it harder to determine whether a state is living up to its commitments and therefore create opportunities to shirk. They also weaken the ability of governments to commit themselves to policies by invoking firm international commitments and therefore make it easier for domestic groups, including other branches of government, to undo the agreement. Again, states face a tradeoff between the advantages of flexibility in achieving agreement and its disadvantages in ensuring performance.

States can design different elements of an agreement with different combinations of hardness to fine-tune this tradeoff on different issues. Alternative forms of delegation can be used to limit the tendencies to shirk. In some cases, international reporting requirements may be sufficient to determine whether states are meeting their commitments. Elsewhere, requirements for domestic implementation, including domestic legalization, may empower private actors like firms or NGOs to enforce the agreement.

**Compromise over time.** Because even soft legal agreements commit states to characteristic forms of discourse and procedure, soft law provides a way of achieving compromise over time. Consider a patient state (low discount rate) that is seeking a concession but is unwilling to offer enough immediately (for example, in linkage to other issues) to induce an impatient state to offer the concession. The patient state may nevertheless be willing to make a (smaller) current payoff in return for a soft legal agreement that has some prospect of enmeshing the impatient state in a process that will deliver the concession down the road. Insofar as states find it progressively costly to extricate themselves from legal processes, soft law helps remedy the commitment problem that looms large in international relations.

The Helsinki process is a dramatic illustration of this form of compromise. The Soviet Union (the impatient party) had an immediate need to stabilize military and political relations with Western Europe and the United States so that economic relations could develop more rapidly. The West (the more patient party) was not prepared to recognize Soviet dominance in Eastern and Central Europe on a legally binding basis, but it was willing to do so in less precise and explicitly nonlegally binding terms—if in return the Soviets would accept a soft human rights framework that turned out to have an unexpectedly significant bite over the longer term.

The Soviets surely underestimated the long-run effects of Basket III, but their tenacious bargaining (including efforts to obscure the provisions with “nonintervention” terminology) shows that they took these concessions very seriously.<sup>63</sup> Thus the

63. Maresca 1985. U.S. negotiators and the American public also underestimated the long-term significance of these arrangements.

Soviet leadership addressed its pressing problems with soft commitments that deferred the costs to its successors. The subsequent inability of the Soviet regime to contain the Basket III arrangements, either domestically or internationally, illustrates the subtle strength of soft law over time.

The longer-term consequences of soft law, including processes of learning, do not mean that legal agreements have an inevitable life cycle from softer toward harder legalization. Hard law is probably more likely to evolve from soft law than from (utopian) plans to create hard law full-blown. But this does not imply that all soft legalization is a way station to hard(er) legalization, or that hard legalization is the optimal form. The contracting difficulties noted earlier may never be resolved in some issue-areas; here, the attainable soft legalization will be superior to hard law that cannot be achieved. In these cases, continuing movement toward greater legalization is neither inevitable nor necessarily desirable.

The Helsinki experience and the "backlash" against ECJ activism described by Alter in this issue suggest a further limitation on the evolution of soft law: states may learn from experience that even soft forms of legalization can have powerful effects over time. As states internalize this lesson, they will be more alert to the possibilities of enmeshment and evolutionary growth in other negotiations. It would not be surprising, for example, if the Helsinki experience were still informing China's position on (even soft) human rights commitments. Impatient states may be forced to accept soft legalization in order to obtain current payoffs, but they may demand a higher price.

**Compromise between the weak and the strong.** Soft legalization facilitates compromise between weak and powerful states. The traditional legal view is that law operates as a shield for the weak, whereas the traditional international relations view is that law acts as an instrument of the powerful. These seemingly contradictory views can be reconciled by understanding how (soft) law helps both types of states achieve their differing goals.

Whatever their views on soft law, traditional legal scholars generally agree that legalization aids weak states. Weil, a severe critic of soft law, writes that "it is [hard] law with its rigor that comes between the weak and the mighty to protect and deliver."<sup>64</sup> Michael Reisman, more favorable toward soft law, agrees that law advantages the weak.<sup>65</sup> These views echo analyses of constitutionalism as a movement to create a government of laws, not of men (or states), in order to constrain the powerful.<sup>66</sup> At the international level, rules ranging from general principles of nonintervention to agreements like the Nuclear Non-Proliferation Treaty can be seen as bounding the struggle for power.

For just these reasons, small and dependent states often seek hard legalization. To the extent it is effective, hard law offers protection and reduces uncertainty by demar-

64. Weil 1983, 442.

65. Reisman 1988, 377.

66. Lindblom 1977.

cating the likely behavior of powerful states. Lutz and Sikkink argue in this issue that Latin American states have long seen international law as providing them with exactly this type of protection from the United States.<sup>67</sup> Since they have less direct control over their own fates, small states also incur lower sovereignty costs from hard legalization. Indeed hard law may entail negative sovereignty costs, enhancing international standing and offering at least formal equality. Widespread African support for postcolonial boundaries, which make little sense on ethnic, political, or economic grounds, provides a striking illustration of the value of legal arrangements to weak states.

In contrast, many international relations scholars (and some critical legal scholars) hold the more skeptical view that international law is wholly beholden to international power. Powerful states have greater control over international outcomes, are less in need of protection, and face higher sovereignty costs. They have less need for legalization and more reason to resist it, even though their adherence is crucial to its success.

For these reasons, realists see international law largely as epiphenomenal, merely reflecting the distribution of power. Institutionalists also treat power (for example, hegemony and/or a capacity for decentralized retaliation) as a primary source of order and rules in the international system. Unlike realists, however, they argue that institutions have real effects, resulting in a disjuncture between the distribution of power and benefits in the system.

These perspectives can to some extent be reconciled by understanding legalization, especially soft legalization, as furthering the goals of both classes of states. Most importantly, legally binding and relatively precise rules allow strong and weak states to regularize their asymmetric relations. Because the continual, overt exercise of power is costly, powerful states gain by embodying their advantage in settled rules. Because weaker states are at a constant disadvantage in bargaining, they benefit from the certainty and credibility of legalized commitments. The result is not unlike an insurance contract, where a weaker party gladly pays a premium to a stronger one in return for the latter bearing, or in this case reducing, certain risks. In addition, both sides benefit by reducing the transactions costs of continual bargaining.

Of course, stronger states have disproportionate influence over the substance of agreed upon rules. But even the most powerful states cannot simply dictate the outcome of every negotiation because of the high costs of coercion. Instead, strong states must typically make the substantive content of legalized arrangements (just) attractive enough to encourage broad participation at an acceptable cost. Reduced bargaining costs normally provide ample room for such concessions.

Powerful states are most concerned with delegation, the major source of unanticipated sovereignty costs. As a result, forms of legalization that involve limited delegation, for example,  $\{O,p,-\}$  or  $\{O,p,d\}$ , provide the crucial basis for cooperation between the weak and the strong. Lower levels of delegation prevent unexpected intrusions

67. Lutz and Sikkink, this issue.

into the sovereign preserves of powerful countries while allowing them significant influence over decision making. Delegation to administrative bodies rather than judicial organs allows powerful states to retain control over ongoing issue management. The structure and decision-making rules of those bodies, including formal voting procedures, provide further means of balancing members' interests.<sup>68</sup>

Soft legalization provides other important grounds for cooperation as well. We described earlier how legalization helps states solve commitment problems. This point becomes relevant when powerful states want small states to take actions that would leave them vulnerable. Powerful states can induce cooperation in such cases by agreeing to operate within a framework of legally binding rules and procedures, credibly constraining themselves from opportunistic behavior; with low levels of delegation, though, they can maintain predominant influence over decision making. For example, the United States ran its Gulf War operation through the UN Security Council,  $[O,p,d]$ , even though doing so was burdensome, because this helped it to mobilize valuable support from weaker states, including bases in Saudi Arabia and financing from Japan. Involving the Security Council also allowed the supporting states to monitor and influence the scope of U.S. activities, notwithstanding the U.S. veto.<sup>69</sup>

Finally, even without an external commitment problem, governments of weak states may find it domestically costly to be perceived as following the dictates of a powerful state. Organizing international arrangements in a legalized way, and delegating modest supervisory authority to international agencies, can mitigate these costs without unduly interfering with the outcomes desired by the powerful state. We have elsewhere described the role of formal international organizations as vehicles for this type of "laundering."<sup>70</sup>

Two examples illustrate how softness facilitates bargains between stronger and weaker states. The Law of the Sea Convention expanded the territorial sovereignty of littoral states, gave less developed countries a role in the exploitation of ocean resources, and protected such rights as military passage for powerful states. Obligation and precision are high in most parts of the agreement, but delegation is limited—

68. Where power is very asymmetric, dominant states may prefer bilateral bargaining. Thus Doremus finds that the United States pursued legalized arrangements through the patent regime for biotechnology where bargaining power was relatively equal among states, used the more political mechanism of bilateral reciprocity for semiconductors where the United States was most powerful, and used its unilateral power to enforce the copyright regime for software where its power advantage was moderate. Doremus 1996. Doremus also argues that legalization will be more likely during stages of the product cycle in which no country has a strong market advantage.

69. The legalization of the Eastern bloc during the Cold War provides another intriguing example. The Soviet Union was coercively preponderant within its sphere of influence throughout the period, but it learned early on that rule by stick was not as efficient as more balanced relations. Beginning in the mid-1950s, it transformed the Council for Mutual Economic Assistance (CMEA) from an instrument of unilateral control into an arrangement that offered Eastern European states the carrot of subsidized and secure supplies of fuel and raw materials in exchange for acquiescence to Soviet control. See Marreese 1986. The level of legalization in the CMEA was low,  $[o,p,-]$ , and the Soviet Union could readily have reverted to a coercive strategy, as it did in Czechoslovakia in 1968. Still, the CMEA promoted continuing cooperation among the Eastern bloc states.

70. Abbott and Snidal 1998.

although the convention creates a special tribunal it has handled very few disputes—and the operation of the Enterprise remains to be worked out in practice.

The Nuclear Non-Proliferation Treaty reflected an explicit bargain: weaker states accepted the existing nuclear oligopoly; powerful states agreed to pursue weapons restraints and technology transfer. Obligation was high, though limited by escape clauses and the twenty-five-year renegotiation clause. Precision was high in limiting the transfer of military technology, but lower with regards to commercial technology transfers. Delegation to the IAEA has been largely controlled by the major powers (who monopolize the necessary expertise).

An understanding of soft legalization helps reconcile the seemingly contradictory views of the effect of law. Viewed as a process, legalization is a form of political bargaining where powerful states are advantaged. However, the efficiency gains of legalization for the powerful—cynically, providing an efficient means to extract benefits from the weak—depend on their offering the weak sufficiently satisfactory terms to induce their participation. Viewed as an outcome, legalization appears less political, since even powerful states must accept the constraints of legal principles and discourse to take advantage of legalized arrangements. Yet powerful states have the greatest influence on the substantive legal rules, and the institutions associated with (soft) international legalization are frequently constructed to ensure them a leading voice.

## **The Role of Private Actors**

In many issue-areas, from trade and investment to human rights and the environment, individuals and private groups are the actors most responsible for new international agreements—and for resisting new agreements in favor of the status quo. A flurry of research has documented the growing role of nonstate actors, including traditional interest groups, epistemic communities based on causal knowledge and professional disciplines,<sup>71</sup> and NGOs committed to normative values.<sup>72</sup> International conferences and organizations have become more accessible to private groups, allowing them to act internationally as well as domestically. Transnational advocacy coalitions have emerged congruent with the scope of international issues and fora.<sup>73</sup> At the same time, individual governmental units have increasingly engaged in transnational rule making. These trends have inspired the systematic reformulation of international relations theory from a “liberal” perspective<sup>74</sup> and its application to issues of international law.<sup>75</sup>

The same developments lead us to consider the role of nonstate actors in international legalization. Our discussion thus far, while focused on states, has been consis-

71. Haas 1992.

72. See Slaughter 1997a; Risse-Kappen 1995a; and Raustiala 1997.

73. Keck and Sikkink 1998.

74. Moravcsik 1997.

75. Slaughter 1997b and 1995a,b.

tent with the liberal assumption that government actions reflect balances of domestic interests; much of that discussion also applies to agreements among governmental units. In this section, though, we explicitly examine why nonstate actors pursue different forms of legalization. We consider three theoretical perspectives: a pluralist account in which interactions among private groups determine national preferences and international outcomes; a public choice account in which government officials pursue private rewards; and a statist account in which (partially) autonomous national governments interact with private actors.

### *Pluralist Interactions*

In Andrew Moravcsik's pure liberal account, individuals and groups operating within (and across) states are the fundamental actors in international politics.<sup>76</sup> They "organize exchange and collective action" to further their interests and values. National governments merely ratify these private bargains, acting internationally—as unitary entities or through individual units—to implement the resulting national preferences.

This view implies that variations in domestic politics will produce national preferences that diverge more widely than rationalist models normally assume. For example, wide domestic variations almost certainly characterized the negotiations on Agenda 21, [-,*P*, -], and the framework Convention on National Minorities, [*O*, *p*, -]. Divergent preferences increase transaction costs, uncertainty, and bargaining problems, making soft legalization even more valuable.

Fundamentally, however, Moravcsik's account is pluralist, viewing international outcomes as resulting directly from interactions among private individuals and groups. These interactions can be understood as political bargains between demandeur groups seeking new redistributive or normative arrangements and resister groups working to block or weaken them.

As with states, private demandeurs will normally press for hard law, other things being equal, to raise the costs of violation for other parties and to facilitate enforcement against resister groups and governments, including their own. Thus business groups in Mexico favored a legalized NAFTA and high technology firms favored a legalized WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), while worker representatives in the ILO resisted proposals to emphasize recommendations over binding conventions. Activist groups seek international legalization to gain leverage in domestic politics, a process Margaret E. Keck and Kathryn Sikkink call the "boomerang effect."<sup>77</sup> Here, too, the demand for hard law should be especially strong when the risks of opportunism are high and compliance is difficult to monitor.

Hard legalization also provides new strategies for nonstate actors. First, as Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter discuss in this issue, a growing number of international dispute settlement institutions are open to private

76. Moravcsik 1997.

77. Keck and Sikkink 1998, 12–13.

claimants, substantially altering political dynamics.<sup>78</sup> Second, when international legal rules are incorporated into national law, private actors can invoke them in national courts and agencies. Multinational firms, advocacy coalitions, and other transnational groups are best suited to pursue this strategy, at least if they have sufficient resources. Finally, legal rules present new strategies even when private litigation is restricted. Private groups can, for example, urge governments to espouse their legal claims, as foreign investors have long done; the WTO Appellate Body has recently determined that dispute settlement panels can accept friend-of-the-court briefs from NGOs.

When resister groups are able to blunt or defer demands for international action, soft legalization offers a prime instrument of compromise, just as in interstate interactions. In these situations *demandeurs* will seek the particular forms of legalization they are best equipped to utilize, whereas resister groups, by the same logic, oppose those elements that would be most costly for them. If *demandeurs* are well situated to conduct national litigation, for example, they might demand binding and precise norms (to facilitate direct applicability or incorporation into domestic legal systems) but be willing to yield on international delegation,  $[O, P, -]$ .<sup>79</sup>

Activist *demandeurs* appear to place a high priority on precise normative statements, yielding on other elements when necessary,  $[-, P, -]$ . This compromise often appears to suit the needs of business and other resister groups as well, since it avoids concrete legal enforcement. At the 1992 Rio conference, for example, after business interests blocked legally binding agreements on various issues, environmental groups turned their efforts to obtaining nonbinding but highly elaborated documents like the Rio Declaration, Agenda 21, and the Forest Principles.

Instruments like these are valuable tools for activists. Although they cannot be invoked as law, they support a similar normative discourse. A major technique of activist campaigns is to expose gaps between international commitments and actual government conduct.<sup>80</sup> Legal obligations might be more compelling, but soft undertakings can fuel "accountability politics" if they contain clear normative commitments. Instruments like the Beijing Declaration and the Helsinki Final Act also give legitimacy to issues and initiate political processes that may lead to harder law over time.

### *Public Choice*

In the public choice account, government officials have power to affect political outcomes and act to further their own private redistributive interests. In effect, offi-

78. Participation by private actors is also crucial to the political strategies of supranational judges seeking to enhance the strength and scope of their own institutions and the bodies of law they administer. Helfer and Slaughter 1997.

79. The supporters of TRIPs did not have to make this choice: they obtained both domestic implementation and delegation to the strengthened WTO dispute settlement system.

80. Keck and Sikkink 1998, 24–25.



cials become another class of private actor negotiating political bargains. As a result, this perspective is explicitly included in Moravcsik's formulation.

From a public choice perspective, officials pursue forms of legalization that maximize their opportunities for reelection, campaign contributions, bribes, or other personal benefits. Thus, officials might support a highly legalized agreement like TRIPs as a way of making credible commitments to influential private actors in return for electoral support.

Yet soft law will often be appealing in the public choice context, especially to government officials. For one thing, soft legalization allows officials to supply present benefits to private demanders while retaining the possibility of extracting future rents. Legally binding rules are relatively inflexible; strong delegation introduces additional actors who may behave unpredictably. Precise but nonbinding normative commitments,  $[-, P, d]$ , may be the optimal solution.

Soft legalization also enables rent-seeking officials to minimize political losses in the face of strong private distributional conflicts. In domestic politics, officials facing such conflicts resist taking sides, hoping not to alienate either group of constituents; they use such expedients as calling for further study, supporting vague statements of principle, or passing the buck to administrative agencies. Weak obligation, precision, and delegation are the international counterparts of these actions.

Significant forms of soft law are created in "transgovernmental" institutions, such as the Basle Committee of central bankers or the International Organization of Securities Commissions. Participants do not represent states as such, but rather individual agencies within the "state."<sup>81</sup> Public choice theory suggests that officials concerned with advancing their influence can use these organizations to reinforce their positions or justify new regulations at home.<sup>82</sup> Participating agencies may be forced to rely on soft law because they lack authority to enter binding treaties. Informal arrangements may also avoid executive or legislative approval and public scrutiny. Less cynically, soft law is well suited to the loose coordination these associations normally pursue.

### *Statism*

In a statist account—contrary to the pure public choice view—governments retain (some) autonomy, which they exercise to influence and restrict accommodations among private actors. Government preferences are determined by factors such as national self-preservation and independence, relations with other states, the nature of individual issue-areas, and prevailing ideas and norms, as well as domestic politics.

A simple statist model might assume that governments act as "transmission belts" for private bargains on most issues but intervene when those bargains would impair national autonomy. In these situations, soft legalization allows governments to respond to private demands while limiting sovereignty costs. One would expect governments in these settings to avoid legally binding commitments and to limit delega-

81. See Zaring 1998; and Slaughter 2000.

82. Colombatto and Macey 1996.

tion to competing centers of power. Again, precise but nonbinding norms with weak delegation,  $[-, P, -]$ , would be a frequent outcome.

Here, too, the Rio and Beijing conferences are perfect illustrations. Although environmental and women's groups are increasingly influential, at least in many countries, it is extremely unlikely that the United States or virtually any other government would have accepted the innovative and expansive Rio and Beijing declarations as legally binding obligations. Yet in soft law form, with sovereignty costs as well as economic and social costs limited, they were adopted by almost every nation in the world.

A more complex statist model might credit states with a broader range of independent preferences. Soft legalization would then function as an instrument of accommodation between the state and private actors, as well as among private actors. When the United States was considering ratification of NAFTA, for example, labor and other constituencies demanded legally binding rules on labor rights. The Clinton administration wished to respond, but it was also aware—quite apart from countervailing business pressures—of Mexico's sensitivity to interference in its internal affairs. Consequently, the administration addressed labor rights in a side agreement that was legally binding, quite precise in terms of the parties' obligation to enforce national labor laws, and with moderate delegation,  $[O, P, d]$ .<sup>83</sup> In addressing the content of national labor laws, though, U.S. negotiators accepted markedly vague rules and weaker delegation,  $[-, p, d]$ .

States and private actors might also have divergent discount rates. At the time of the Helsinki conference, activist groups were impatient for progress on human rights, but Western governments were more patient. The United States also hoped to retain flexibility on human rights so that it could pursue trade and security issues. In the end, U.S. negotiators accepted a nonbinding declaration.

Given independent preferences, governments might use different forms of legalization offensively as well as defensively. They could, for example, use binding agreements to forestall demands of moderately powerful domestic groups. Alternatively, they could use nonbinding or imprecise agreements to introduce potentially unpopular new rules to domestic audiences. "Framework" agreements like the Vienna Ozone Convention and the WTO services agreement change political discourse and create incentives for private actors to adjust, but leave costly regulation for the future.

## Conclusion

We have analyzed the spectrum of international legalization from soft informal agreements through intermediate blends of obligation, precision, and delegation to hard legal arrangements. Although even hard international law does not approach stereotypical conceptions of law based on advanced domestic legal systems, international

83. The parallel agreement on environmental protection included an innovative provision allowing private parties to initiate reviews of compliance.

legalization nevertheless represents a distinctive form of institutionalization. Ultimately, we can only understand the inclination of actors to cast their relations in legal form, and the variety of ways in which they do so, in terms of the value those institutional forms provide for them. Put plainly, international legalization is a diverse phenomenon because it helps a diverse universe of states and other actors resolve diverse problems.

Legalization reflects a series of tradeoffs. States are typically torn between the benefits of hard legalization—for example, mitigating commitment and incomplete contracting problems—and the sovereignty costs it entails. For their part, private actors generally seek hard legal arrangements that reflect their particular interests and values, but these demands often conflict with those of other private actors or of governments. In settings like these, soft legalization helps balance competing considerations, offering techniques for compromise among states, among private actors, and between states and private actors. In addition, soft law helps actors handle the exigencies of uncertainty and accommodate power differentials.

Our analysis necessarily combines the rational incentives associated with “contracts” and the normative considerations associated with “covenants.” Legalization is a strategy through which actors pursue their interests and values; it also supplies a body of norms and procedures that shape actors’ behavior, interests, and identities. Thus, though we premise our analysis on the notion of actors rationally pursuing goals, we argue that they do so knowing that legalization embeds them in a partially autonomous process and discourse that constrains their behavior and may modify important understandings. The wariness with which states regard the prospect of enmeshment in such normative processes is testimony to the power of legalization—soft and hard.

More generally, the many forms of legalization remind us that international politics and international law are not alternative realms, but are deeply intertwined. Although one goal of law—as of institutions in general—is to settle key issues so that actors can regularize their interactions, the creation and development of legal arrangements is highly political. This is especially true in the international sphere, where most legal regimes are relatively new and undeveloped. Politics permeates international law and limits its autonomy.

Conversely, international politics is rooted in legal considerations. From the principles of sovereignty that define modern nation-states, through the rules of diplomacy, war, and commerce that structure their interactions, to the specific regimes they create, legalized agreements and normative processes guide and constrain the behavior of states. Without this foundation in law, neither states nor analysts could make sense of international interactions.

The deep connection of law and politics is most apparent in the area of delegation. States almost never delegate authority to independent courts of general and mandatory jurisdiction like those of advanced domestic legal systems—although more constrained judicial delegation appears to be increasing and is supplemented in many cases by the participation of national courts. More typically, even in connection with binding legal commitments, they delegate authority only to international organiza-

tions or other administrative bodies subject to direct and indirect controls. This choice of venue limits the extent to which interactions can be governed by purely legal procedures and discourse.

In forecasting the future of international legalization, we subscribe to the theories of neither Pollyanna nor Chicken Little. To be sure, the twentieth century and especially the period following World War II witnessed a remarkable expansion of international legalization. But in large part that growth merely allowed international institutions to catch up with the dramatic changes in globalization (*née* interdependence) that had overtaken the inherited framework. It does not follow that international legalization will continue at the same rate, or that the apparent tendency toward (somewhat) harder legalization will continue. Indeed, a central part of our argument is that states and nonstate actors can achieve many of their goals through soft legalization that is more easily attained or even preferable.

In this light, we argue vigorously against those who discount international legalization because it is so often soft. Soft law is valuable on its own, not just as a stepping-stone to hard law. Soft law provides a basis for efficient international “contracts,” and it helps create normative “covenants” and discourses that can reshape international politics. International legalization in all its forms must be considered one of the most significant institutional features of international relations.

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