

IO

International Organization

Legalization and World Politics

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Preface *Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter* xi

Legalization and World Politics: An Introduction

Introduction: Legalization and World Politics *Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter* 385

The Concept of Legalization *Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal* 401

Legalization and Dispute Resolution

Hard and Soft Law in International Governance *Kenneth W. Abbott and Duncan Snidal* 421

Legalized Dispute Resolution: Interstate and Transnational *Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter* 457

Law and Economic Integration

The European Union's Legal System and Domestic Policy: Spillover or Backlash? *Karen J. Alter* 489

NAFTA and the Legalization of World Politics: A Case Study *Frederick M. Abbott* 519

Legalization as Strategy: The Asia-Pacific Case *Miles Kahler* 549

Legalization in Three Issue Areas

The Legalization of International Monetary Affairs 573
Beth A. Simmons

Legalization, Trade Liberalization, and Domestic Politics: 603
A Cautionary Note *Judith Goldstein and Lisa L. Martin*

International Human Rights Law and Practice in Latin America 633
Ellen L. Lutz and Kathryn Sikkink

Conclusion

Conclusion: The Causes and Consequences of Legalization 661
Miles Kahler

References 685

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Abstracts

The Concept of Legalization

by Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik,
Anne-Marie Slaughter, and Duncan Snidal

We develop an empirically based conception of international legalization to show how law and politics are intertwined across a wide range of institutional forms and to frame the analytic and empirical articles that follow in this volume. International legalization is a form of institutionalization characterized by three dimensions: obligation, precision, and delegation. Obligation means that states are legally bound by rules or commitments and therefore subject to the general rules and procedures of international law. Precision means that the rules are definite, unambiguously defining the conduct they require, authorize, or proscribe. Delegation grants authority to third parties for the implementation of rules, including their interpretation and application, dispute settlement, and (possibly) further rule making. These dimensions are conceptually independent, and each is a matter of degree and gradation. Their various combinations produce a remarkable variety of international legalization. We illustrate a continuum ranging from “hard” legalization (characteristically associated with domestic legal systems) through various forms of “soft” legalization to situations where law is largely absent. Most international legalization lies between the extremes, where actors combine and invoke varying degrees of obligation, precision, and delegation to create subtle blends of politics and law.

Hard and Soft Law in International Governance

by Kenneth W. Abbot and Duncan Snidal

We examine why international actors—including states, firms, and activists—seek different types of legalized arrangements to solve political and substantive problems. We show how particular forms of legalization provide superior institutional solutions in different circumstances. We begin by examining the baseline advantages of “hard” legalization (that is, precise, legally binding obligations with appropriate third-party delegation). We emphasize, however, that actors often prefer softer forms of legalization (that is, various combinations of reduced precision, less stringent obligation, and weaker delegation). Soft legalization has a number of significant advantages, including that it is easier to achieve, provides strategies for dealing with uncertainty, infringes less on sovereignty, and facilitates compromise among differentiated actors.

Although our approach is largely interest-based, we explicitly incorporate the normative elements that are central in law and in recent international relations theorizing. We also consider the important role of nonstate actors who, along with states, are central participants in contemporary international legalization. We illustrate the advantages of various forms of international legal arrangements with examples drawn from articles in this special issue and elsewhere.

Legalized Dispute Resolution: Interstate and Transnational

by Robert O. Keohane, Andrew Moravcsik, and Anne-Marie Slaughter

We identify two ideal types of international third-party dispute resolution: interstate and transnational. Under interstate dispute resolution, states closely control selection of, access to, and compliance with international courts and tribunals. Under transnational dispute resolution, by contrast, individuals and nongovernmental entities have significant influence over selection, access, and implementation. This distinction helps to explain the politics of international legalization—in particular, the initiation of cases, the tendency of courts to challenge national governments, the extent of compliance with judgments, and the long-term evolution of norms within legalized international regimes. By reducing the transaction costs of setting the process in motion and establishing new constituencies, transnational dispute resolution is more likely than interstate dispute resolution to generate a large number of cases. The types of cases brought under transnational dispute resolution lead more readily to challenges of state actions by international courts. Transnational dispute resolution tends to be associated with greater compliance with international legal judgments, particularly when autonomous domestic institutions such as the judiciary mediate between individuals and the international institutions. Overall, transnational dispute resolution enhances the prospects for long-term deepening and widening of international legalization.

The European Union's Legal System and Domestic Policy: Spillover or Backlash?

by Karen J. Alter

Under what conditions do domestic actors use international legal mechanisms to influence domestic policy? Drawing on the European case, where legalization has progressed the furthest, I develop a generalizable framework for explaining variation in the use of the European Union's legal system by domestic actors to influence national policy. Four steps are involved in using the European legal process to pressure for policy change: (1) there must be a point of European law that creates legal standing and promotes the litigant's objectives; (2) litigants must embrace this law, adopting a litigation strategy; (3) a national court must refer the case to the European Court of Justice or apply ECJ jurisprudence; and (4) domestic actors must follow through on the legal victory to pressure national governments. Different factors influence each step, creating cross-national and cross-issue variation in the influence of EU law on national policy. Raising a significant challenge to neofunctionalist theory, I argue that negative interactive effects across the four steps and backlash created by the success of integration can stop or even reverse the expansionary dynamic of the legal process. I conclude by exploring the generalizability of this framework to other international contexts.

NAFTA and the Legalization of World Politics: A Case Study

by Frederick M. Abbott

I examine the trend toward using hard legal instruments in international trade governance and explain this trend in the context of the North American Free Trade Agreement (NAFTA). I suggest that hard law (1) reduces intergovernmental transaction costs, (2) reduces private risk premiums associated with trade and investment, (3) promotes transparency and provides corollary participation benefits, (4) tends to restrain strategic political behaviors, and (5) may increase the range of integration effects by encouraging private actors to enforce intergovernmental obligations. I compare the legalization model of NAFTA with those of the European Union (EU) and the Asia-Pacific Economic Cooperation (APEC) forum.

Legalization as Strategy: The Asia-Pacific Case

by Miles Kahler

The Asia-Pacific region offers an example of low legalization of regional institutions and perhaps an explicit aversion to legalization. An examination of three key regional institutions—ASEAN (Association of Southeast Asian Nations), APEC (Asia-Pacific Economic Cooperation), and the ARF (ASEAN Regional Forum)—confirms a regional process of institution building without legalization. Recent developments in these institutions permit some discrimination among competing explanations for low legalization. On the one hand, ASEAN has embraced a legalized dispute-settlement mechanism; Asian governments have also employed legalized global institutions. On the other hand, the ARF and APEC continue to resist clear-cut legal obligations and third-party dispute resolution. This pattern suggests that legalization is best viewed as driven by the demands of economic integration and as a strategic response by governments in particular institutional settings. These explanations undermine alternatives based on domestic legal culture and uniformly high sovereignty costs. The Asian economic crisis has reopened a debate over regional institutions, which may fix on legalization as part of a new regional institutional design.

The Legalization of International Monetary Affairs

by Beth A. Simmons

For the first time in history, international monetary relations were institutionalized after World War II as a set of legal obligations. The Articles of Agreement that formed the International Monetary Fund contain international legal obligations of the rules of good conduct for IMF members. Members were required to maintain a par value for their currency (until 1977), to use a single unified exchange-rate system, and to keep their current account free from restrictions. In this article I explore why governments committed themselves to these rules and the conditions under which they complied with their commitments. The evidence suggests that governments tended to make and keep commitments if other countries in their region did so as well. Governments also complied with their international legal commitments if the regime placed a high value on the rule of law domestically. One inference is that reputational concerns have a lot to do with international legal commitments and compliance. Countries that have invested in a strong reputation for protecting property rights are more reluctant to see it jeopardized by international law violations. Violation is more likely, however, in the face of widespread noncompliance, suggesting that compliance behavior should be understood in its regional context.

Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note

by Judith Goldstein and Lisa L. Martin

If the purpose of legalization is to enhance international cooperation, more may not always be better. Achieving the optimal level of legalization requires finding a balance between reducing the risks of opportunism and reducing the potential negative effects of legalization on domestic political processes. The global trade regime, which aims to liberalize trade, has become increasingly legalized over time. Increased legalization has changed the information environment and the nature of government obligations, which in turn have affected the pattern of mobilization of domestic interest groups on trade. From the perspective of encouraging the future expansion of liberal trade, we suggest some possible negative consequences of legalization, arguing that these consequences must be weighed against the positive effects of legalization on increasing national compliance. Since the weakly legalized GATT institution proved

sufficient to sustain widespread liberalization, the case for further legalization must be strong to justify far-reaching change in the global trade regime.

International Human Rights Law and Practice in Latin America

by Ellen L. Lutz and Kathryn Sikkink

Human rights practices have improved significantly throughout Latin America during the 1990s, but different degrees of legalization are not the main explanation for these changes. We examine state compliance with three primary norms of international human rights law: the prohibition against torture, the prohibition against disappearance, and the right to democratic governance. Although these norms vary in their degree of obligation, precision, and delegation, states have improved their practices in all three issue-areas. The least amount of change has occurred in the most highly legalized issue-area—the prohibition against torture. We argue that a broad regional norm shift—a “norms cascade”—has led to increased regional and international consensus with respect to an interconnected bundle of human rights norms, including the three discussed in this article. These norms are reinforced by diverse legal and political enforcement mechanisms that help to implement and ensure compliance with them.

Conclusion: The Causes and Consequences of Legalization

by Miles Kahler

The intersection of law and politics provides tentative answers for two questions: First, why, among the variety of institutional forms available to governments, are legalized institutions preferred in some contexts and not in others? Second, what are the consequences of legalization? Explanations for variation in legalization are directed to the supply of legalized institutions, grounded in the preferences of the most powerful states. Those preferences are shaped, in turn, by domestic political demands for legalization as well as unanticipated domestic political dynamics that can increase legalization over time. Domestic political demands for legalization have increased as a result of international economic integration; the effects of democratization have been more ambiguous. Outside the industrialized democracies, the intersection of supply and demand is often different: supply of legalized institutions is lower and sovereignty costs are often higher. The authors in this special issue examine three important consequences of legalization: its effects on government compliance with international agreements, its impact on the evolution of international norms, and the conditions under which it will harden and spread. In each case, domestic political links are central to the effects of legalization. International agreements and institutions that are legalized, compared with those that are not, seem to be more deeply rooted in domestic politics: their existence often draws on both anticipated and unanticipated actions by domestic actors; their consequences are shaped by domestic characteristics and constituencies.