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Explaining Soft Law

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## EXPLAINING SOFT LAW

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## Abstract

Although the concept of soft law has existed for years, scholars have not reached consensus on why states use soft law or even whether “soft law” is a coherent analytic category. In part, this confusion reflects a deep diversity in both the types of international agreements and the strategic situations that produce them. In this paper, we advance four complementary explanations for why states use soft law that describe a much broader range state behavior than has been previously explained.

First, and least significantly, states may use soft law to solve straightforward coordination games in which the existence of a focal point is enough to generate compliance.

Second, under what we term the “loss avoidance” theory, moving from soft law to hard generates higher sanctions which both deter more violations and, because sanctions in the international system are negative sum, increase the net loss to the parties. States will choose soft law when the marginal costs in terms of the expected loss from violations exceed the marginal benefits in terms of deterred violations.

Third, under the “delegation theory,” states choose soft law when they are uncertain about whether the rules they adopt today will be desirable tomorrow and when it is advantageous to allow a particular state or groups of states to adjust expectations in the event of changed circumstances. Moving from hard law to soft law makes it easier for such states to renounce existing rules or interpretations of rules and drive the evolution of soft law rules in a way that may be more efficient than formal renegotiation.

Fourth, we introduce the concept of international common law (“ICL”), which we define as a non-binding gloss that international institutions, such as international tribunals, put on binding legal rules. The theory of ICL is based on the observation that, except occasionally with respect to the facts and parties to the dispute before it, the decisions of international tribunals are non-binding interpretations of binding legal rules. States grant institutions the authority to make ICL as a way around the requirement that states must consent in order to be bound by legal rules. ICL affects all states subject to the underlying rule, regardless of whether they have consented to the creation of the ICL. As such, ICL provides cooperation-minded states with the opportunity to deepen cooperation in exchange for surrendering some measure of control over legal rules.

These four explanations of soft law, and in particular the theory of ICL, provide a firm justification for the coherence of soft law as an analytic category. They demonstrate that there are a range of non-binding international instruments from which legal consequences flow, just as in the domestic setting non-binding documents such as legislative committee reports often have legal consequences when, for example, used to interpret binding rules. Moreover, the theories offered in this paper explain the circumstances under which this quasi-legal characteristic of soft law will be attractive to states.

## EXPLAINING SOFT LAW

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### Introduction

The subject of soft law has always been an awkward one for international legal scholars. On the one hand, it is not “law” at all, strictly speaking. Under traditional approaches, as Professor Weil states, these obligations “are neither soft law nor hard law: they are simply not law at all.”<sup>2</sup> On the other hand, virtually all legal scholars would agree that they are not simply politics either. Language included in the Universal Declaration of Human Rights, the Helsinki Final Act, the Basle Accord on Capital Adequacy, decisions of the UN Human Rights Committee, and rulings of the International Court of Justice (ICJ),<sup>3</sup> are thought to impact states because of their quasi-legal character.

But to say that soft law rules are quasi-legal is simply to beg the question of what separates the quasi-legal from the non-legal, on the one hand, and the legal, on the other hand. The discomfort of legal commentators with soft law stems in significant part from this ambiguity. Soft law is a residual category, defined in opposition to clearer categories rather than on its own terms. Thus, soft law is most commonly defined to include hortatory, rather than legally binding, obligations.<sup>4</sup> The focus of this definition usually on whether or not something that looks like a legal obligation in some ways (e.g., it is a written exchange of promises between states) nevertheless falls short of what is required

<sup>2</sup> Prosper Weil, *Toward Relative Normativity in International Law*, 77 AM. J. INT’L L. 413, 414-417 n.7 (1983).

<sup>3</sup> Rulings of international tribunals are not traditionally considered under the heading of soft law, but for reasons explained below we define the term to include them.

<sup>4</sup> Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 586 (favoring a distinction based on legality).

to formally bind states. This definition, then, is a doctrinal one – things that fall short of international law are called soft law.

Defining soft law this way presents at least two immediate challenges. First, it identifies the border between soft law and “hard” law, but it is vague with respect to the distinction between soft law and the absence of any obligation. Thus, for example, if a leader makes a promise in a public speech, is this soft law or mere politics? This distinction is not well-explored in the existing literature. Consider the second Strategic Arms Limitations Treaty (“SALT II”) between the United States and the Soviet Union. SALT II was signed by President Carter in 1979, but following the Soviet invasion of Afghanistan in 1980, President Carter elected not to pursue ratification by the Senate. Moreover, in 1982 the Reagan administration announced that it would not pursue ratification of the treaty, and so informed the Soviet Union.<sup>5</sup> Despite this disavowment of any legal obligation, President Reagan announced that the United States would voluntarily abide by SALT II as long as the Soviet Union did, and both parties implemented SALT II’s rules voluntarily on a reciprocal basis for several years.<sup>6</sup> Because SALT II was negotiated with the intention of creating legally binding rules, one might think adherence to such rules was soft law; on the other hand, because the United States specifically declined to pursue those steps necessary to create legal rules, one might argue that the voluntary adherence to the treaty was merely a political commitment.

In our view, for reasons that are explained more clearly below, soft law is best understood as a continuum, or spectrum, running between fully binding treaties and fully political positions. Viewed in this way, soft law is something that dims in importance as the commitments of states get weaker – eventually disappearing altogether.

The second challenge presented by soft law is its breadth. Anything that is “law-like” can be described as a form of soft law. This includes formal written documents signed by states but that for whatever reason do not satisfy the requirements of a treaty, informal exchanges of promises through diplomatic correspondence, votes in international organizations, the decisions of international tribunals, and more. There are so many different forms of soft law that it is often more fruitful to think of it as a group of subjects, rather than a single one. To some extent we take that approach here as we offer four different explanations for why states employ soft law, which we argue comes in at least two different forms – agreements and what we term “international common law.”

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<sup>5</sup> Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L.J. 307, 311 (2007). Arguably, under the law of treaties President Carter’s signature itself created the legal obligation not to undermine the treaty. *See id.* This view, and the contours of the obligation not to undermine an unratified treaty, are subject to much debate. *See id.* at 327. As discussed above, however, the Reagan administration specifically disavowed any attempt to pursue ratification, thus canceling any hard legal obligations that might arise from the expectation of ratification. The question, then, is whether the Reagan administration’s unilateral commitment to SALT II’s rules was a political commitment or a soft law commitment.

<sup>6</sup> *Id.* at 325-26.

The above definition, in which soft law consists of law-like promises or statements that fall short of hard law, is the more widely used, but some writers define soft law differently. Rather than focusing on the doctrinal question of whether a rule is binding on states, they focus on the extent to which the obligations imposed are clear or whether the various aspects of an agreement are otherwise likely to constrain state behavior. Thus, for example, soft law instruments are those that create imprecise obligations under which a wide range of activity might be considered compliant.<sup>7</sup>

We do not adopt this minority view. Of course, as these are simply matters of definition, there is no objectively correct choice. Nevertheless, we opt to define soft law in a way that is closer to the doctrinal approach, both because it is the more common definition, focusing on differences in “legality” rather than all design features that affect compliance, and because it turns out to be more useful for the analysis we undertake. Specifically, we define soft law as those nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct. This definition preserves the doctrinal distinction between binding and nonbinding norms, but also tracks an intuitive difference between quasi-legal rules and purely political rules. Obligations are, to a large extent, in the eye of the beholder. In a legal system in which enforcement relies on self-help by the law’s subjects, those subjects’ perceptions as to what an obligation requires effectively define the obligation. But legal texts are often imprecise and ambiguous, and thus reasonable minds may differ over what a legal obligation requires. Interpretations of these binding obligations can themselves be binding – in effect, they can be law as conventionally understood. But they can also be nonbinding; that is, they have legal effect only because they shape states’ understanding of what constitutes compliant behavior with the underlying binding rule. Similarly, and again because obligations depend on the perceptions of other states, non-binding promises by states may create expectations about what constitutes appropriate behavior.

This definition, although different from the conventional one, is a familiar concept in both international and domestic law. In international law, Rosalyn Higgins long ago described the process of influencing states as follows: “the passing of binding decisions [by an international body] is not the only way in which law development occurs. Legal consequences can also flow from acts which are not, in the formal sense, ‘binding’.”<sup>8</sup> This quote captures the essence of how soft law is defined here: nonbinding rules that have legal consequences because they shape states’ expectations as to what constitutes compliant behavior. Even in domestic law, the distinction between binding and nonbinding interpretations is familiar. When an agency interprets a statute that it is charged with enforcing, that interpretation is typically given the force of law through

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<sup>7</sup> Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Legal Governance*, 54 INT’L ORG. 421 (2000); see also W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS (Volume I Contemporary International Law and Human Rights) Emmanuel G. Bello and Prince Bola A. Ajibola, eds., 135 (1992).

<sup>8</sup> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* 25 (Oxford 1995).

various types of regulatory decisions, both adjudicatory and rulemaking. By contrast, Congress frequently includes House and Senate reports along with bills that are eventually signed into law. Although courts routinely consult these sources as guides in interpreting the law – thus giving them some legal effect – no one disputes that House and Senate reports are themselves not law.

The central question about soft law that interests us today is why it is used at all. One can imagine several reasons why a state sometimes prefers to avoid a given international commitment altogether – it may not be in the state’s interest, the state may hope for a better deal in the future, participation may require too many concessions, and so on. Similarly, it is easy to see why states sometimes enter into formal treaties – the strongest form of legal commitment available. Such agreements are a tool to help states overcome problems of cooperation. If states exchange promises, and if the legal commitment serves to increase the cost of violating those promises, then the commitment is useful. Thus, for example, states might enter into an extradition treaty so that each side can have greater confidence in its ability to pursue those that violate criminal laws. Cooperation might emerge without the treaty, but the presence of a legal obligation can increase the cost of violation and, therefore, improve the chances of successful cooperation.

It is more difficult to understand why states would enter into a consensual exchange of promises that represents the culmination of negotiations on an issue, but at the same time declare these promises to be “non-binding.” Consider what the domestic analog to soft law looks like. Imagine two sophisticated private firms entering into an important business relationship. Assume, for the purposes of illustration, that they go to the trouble of writing down the terms of the arrangement, perhaps after drawn out and contentious negotiations. When the text is finally settled, representatives from the two firms sign the agreement, but explicitly provide that it is not to be considered legally binding, and that it is not enforceable in any court.

That domestic firms sometimes employ non-binding agreements of this sort is self-evident. For example, prior to entering into an agreement, private parties may agree on a “letter of intent.” Such a document is often non-binding on the parties (though it may contain some binding provisions) and serves, among other things, to ensure that key aspects of the transaction are clear and that the two sides of the transaction have a common understanding. It is relatively rare, however, for large, sophisticated private parties to leave an important and final agreement as a non-binding (meaning unenforceable) exchange of promises. In the international setting, however, such agreements are commonplace. International soft law is routinely used as the final arrangement among states.<sup>9</sup>

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<sup>9</sup> It should also be noted that there are many, many domestic relationships that could be described as quasi-legal in the sense that legal obligations cannot be enforced as a practical matter or that *de facto commitments* differ from *de jure* ones. See Lisa Bernstein, *Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992). These are important and sometimes sizeable relationships, but are not analogous to soft law.

Despite the theoretical challenges posed by soft law (described in more detail later in the Article), international legal scholars and practitioners are accustomed to the existence of soft law because it is such an integral part of the international legal system. When one attempts to explain its existence, however, soft law is not so easy to understand. This Article attempts to fill this gap in our understanding.

We are of the view that no single theory can explain all instances of soft law – there is simply too much diversity in the system for that. With that in mind, this Article seeks to explain soft law through four distinct mechanisms. Though there is some overlap among the four in the sense that some examples of soft law might be explained using more than one of the theories, we believe that each captures a distinct reason why states might opt for soft law over hard law.

The first reason states might choose soft law is to solve a straightforward coordination problem. By a straightforward coordination problem, we simply mean a situation in which once a given set of rules – a focal point for cooperation – is chosen states have a high degree of certainty that those same rules will remain self-enforcing into the future. In such simple situations, any method of designating a focal point will generate compliance. Still, it may make sense to use soft law because, for example, the bureaucratic transactions costs of creating soft law may in some instances be lower than the costs of creating hard law.

The second of these theories is what we term the “loss avoidance theory” and it is closely tied to basic theories of contract. Starting with the premise that rational states seek to maximize the joint value of their agreements, the puzzle of soft law becomes a matter of identifying why the choice of soft law rather than hard law can be value maximizing for states. The answer lies in the consequences that states face when they violate a legal commitment. The key distinction between hard and soft law is that the former imposes greater costs on the violating state than does the latter. This gives hard law greater “compliance pull” than soft law. These costs, however, are not the zero-sum transfers normally assumed by contracts theory. The costs come, instead, in the form of lost reputation, retaliation, or reciprocal non-compliance. With respect to two of these potential costs – reputation and retaliation – a loss is felt by the violating state without an offsetting gain to its counterparty. Reputational losses are costly because they make it more difficult for a state to enter into value-increasing agreements in the future and may change the way other states treat it today.<sup>10</sup> The violated-against state does not enjoy an offsetting gain. Retaliation is costly by definition. It involves a punishment imposed by one state on the other and it is costly to both. When a violation takes place, then, reputational harms and retaliation impose net costs on the parties. The use of hard law, then, has two effects. Hard law will generate greater compliance pull, which is attractive to the parties, but should there be a violation, it will impose larger net costs on the parties, which is undesirable. When entering into an agreement the parties must consider both of

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<sup>10</sup> ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* 73-78 (Oxford 2008); George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95 (2002).



these effects, and the joint loss in the event of a violation will sometimes cause them to opt for soft law.<sup>11</sup>

The third theory we develop here is what we label the “delegation theory.” Under this theory, soft law is an attempt to improve the value created by international rules over time through a more efficient system of amendment. The key insight of the delegation theory is that states may violate international legal rules for two distinct reasons. One, familiar to all international legal scholars, is to take advantage of one’s cooperative partners by reverting to noncooperative behavior while the other side continues to pay the costs of cooperation. The second, however, is to force a change in one’s cooperative partners’ behavior. In the first situation, states violate legal rules in the hopes that their partners will continue to abide by those rules; in the second, they violate the rules hoping the violation will prompt their partners to change their behavior, in effect amending the legal rules. Making a soft law agreement reduces the penalty to unilaterally deviating from an obligation, and thus increases the likelihood of both types of violations. The delegation theory suggests that soft law will be used when the expected benefits from the latter type of violation – an effort to unilaterally amend sub-optimal legal rules – are greater than the expected costs from both the first type of violation and opportunistic efforts at unilateral amendment.

Finally, with reference to the soft law reflected in the decisions of international tribunals and the standards promulgated by international organizations (IOs), we discuss what we term “international common law.” The theory of international common law we present here is perhaps the farthest removed from the existing discussions of soft law in the literature, but it also describes a type of soft law that has largely gone unrecognized as such. For these twin reasons, we spend much of the Article developing the theory of international common law. We define international common law to refer to the pronouncements of international tribunals or IOs that provide a nonbinding gloss on binding legal rules.<sup>12</sup> States establish tribunals or organizations with the ability to make international common law as a way to get around the state consent requirement to the creation of international obligations. Unlike an explicit agreement, to which states generally must consent before being bound, a tribunal or IO can issue a decision that expounds on a binding legal rule without the consent of all states subject to that rule. The tribunal’s decision is not itself binding (except perhaps on the parties before it) but it shapes the expectations of all states bound by the underlying obligation. Establishing a tribunal with limited jurisdiction to hear disputes arising under a legal rule can thus be a strategy for cooperation-minded states to deepen cooperation even with those states that

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<sup>11</sup> This is an application of the more general notion that if the imposition of sanctions is socially costly, the optimal level of such sanctions is lower than if the sanctions are costless. See Louis Kaplow, *A Note on the Optimal Use of Nonmonetary Sanctions*, 42 J. PUB. ECON. 245 (1990); A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 89 (1984); Steven Shavell, *Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent*, 85 COLUM. L. REV. 1232 (1985). For an application of this theory to international agreements, see Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579 (2004).

<sup>12</sup> Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT’L L. 515 (2009).

would not consent to deeper cooperation in a negotiation. While the cooperation-minded states give up some measure of control over the tribunal or IO, they also create a body of soft legal rules that constrain, to some extent, the behavior of states not party to the creation of the tribunal or IO.

## The Puzzle of Soft Law

International agreements come in a dizzying array of forms.<sup>13</sup> Some have dispute resolution while others do not,<sup>14</sup> monitoring provisions vary from significant to non-existent,<sup>15</sup> and some are highly detailed while others are frustratingly vague.<sup>16</sup>

When states enter into agreements, of course, they have almost complete freedom over both the form and content of the instrument. An obvious question, then, is what makes states choose one form over another. One of the most obvious sources of variety among international agreements is the choice between hard and soft law. Why do states

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<sup>13</sup> There is now a fairly robust literature exploring many of the different ways in which international agreements are made. See Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001); Barbara Koremenos, Charles Lipson, & Duncan Snidal, *Rational Design: Looking Back to Move Forward*, 55 INT'L ORG. 1051 (2001); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005); Kal Raustiala, *Police Patrols & Fire Alarms in the NAAEC*, 26 LOY. L.A. INT'L & COMP. L. REV. 389 (2004); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 579 (2005); Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEG. STUD. 303 (2002); Timothy Meyer, *Soft Law as Delegation*, 32 Ford. Int'l L.J. 888 (2009); Alan O. Sykes, *Protection as a "Safeguard": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 CHI. L. REV. 255 (1991); Michael J. Gilligan, *Is There a Broader-Deeper Trade-off in International Multilateral Agreements?*, 58 INT'L ORG. 459 (2004); Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006); Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SC. REV. 549 (2005).

<sup>14</sup> Bilateral investment treaties, for example, typically include dispute resolution procedures, as does the WTO, whereas the Geneva Convention Relative to the Treatment of Prisoners of War does not. See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., Nov. 14, 1991, arts. II-V. S. TREATY DOC. NO. 103-2 (1993); Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (1949).

<sup>15</sup> For example, the International Covenant on Civil and Political Rights (ICCPR) provides for the submission of reports by the parties when so requested by the Human Rights Committee ("the Committee"), and the Committee is authorized to review and comment on these reports. See International Covenant on Civil and Political Rights, art. 40(1)(b)(4), Dec. 16, 1966, 999 U.N.T.S. 171. The Genocide Convention, on the other hand, does not provide for any formal monitoring system. See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277.

<sup>16</sup> For example, the Chemical Weapons Convention, along with its Annexes provides an extremely detailed set of requirements with respect to specific chemicals and chemical weapons. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, G.A. Res. 47/39, U.N. GAOR, 47th Sess., 74th plen. mtg., U.N. Doc. A/RES/47/39 (Nov. 30, 1992). In contrast the Framework Convention on Climate Change is quite vague. See Framework Convention on Climate Change, June 12, 1992, 31 I.L.M. 849 (1994).

sometimes elect to enter into agreements that are formally binding under international law and other times choose instead to enter into agreements that are “non-binding?”<sup>17</sup>

The central mystery of soft law is the fact that states opt for something more than a complete absence of commitment, but something less than full-blown international law. This middle-of-the-road strategy is widely used in international law, but seems much less common in interactions among sophisticated domestic parties. It would be surprising, for example, to see General Motors enter into an agreement with its major suppliers through a written document that is legally unenforceable.

The choice between soft and hard law in a consensual agreement is only one example of soft law at work, however. States also generate soft law more indirectly through international organizations such as the United Nations, the International Labor Organization, and the Organization for Economic Cooperation and Development.

Soft law has historically been relegated to the fringes of academic international law discourse, notwithstanding its importance in the actual practice of states. This is perhaps because soft law has not been seen as “real” international law. Indeed, so little attention has been paid to soft law that its place within the framework of international law remains uncertain. One thing that is clear, however, is that whatever impact soft law may have, it is perceived by all to be less “law” than the “hard law” of treaties and, for that matter, custom.<sup>18</sup> Hard and soft law are perceived to be different in kind because the former is considered “binding” while the latter is not. One of us has argued that the distinction between hard and soft law is much less than is commonly argued, and that in fact the two generate compliance through the same mechanisms.<sup>19</sup> Nevertheless, we share the consensus view that the impact of soft law on behavior is smaller in magnitude than the impact of hard law, all else equal.

To better understand the impact of soft law, we start by considering international agreements generally. Though the legality of a promise contained in an agreement, the penalty for deviating from it, and actual likelihood of future compliance with it, may

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<sup>17</sup> It should be noted that there is an important relationship between soft law and other design questions facing states when they enter into an agreement. States can, for example, increase or decrease the impact of an agreement alters behavior through (in addition to the choice of hard or soft law) inclusion or omission of dispute settlement (and its form), reservations, escape clauses, exit clauses, alternative monitoring provisions, and even changes to the substance of the agreement. See GUZMAN, *supra* note 10, at 154-61.

<sup>18</sup> Pieter Van Dijk, *Normative Force and Effectiveness of International Norms*, 30 F.R.G Y.B. INT'L L. 9, 20 (1987). Perhaps the most traditional position views agreements other than treaties as nothing more than evidence of custom. See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 432 (1991). Under another view, soft law “tends to blur the line between the law and the non-law, be that because merely aspirational norms are accorded legal status, albeit of a secondary nature; be that because the intended effect of its usage may be to undermine the status of established legal norms.” Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988).

<sup>19</sup> See Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REVIEW 1283 (2002); GUZMAN, *supra* note 10, at 211-18.

vary, in all cases states are representing to one another what they intend to do in the future. There is, of course, a rich literature on the exchange of promises (contracts) in the domestic context, and we turn to that literature to help us understand promises among states. In doing so, we are mindful of the fact that there are differences between states and private actors and between treaties and contracts. Indeed, some of the arguments that follow turn on those very differences. Nevertheless, the analogy is useful as it offers a good starting point for our discussion.

Our analysis begins with the familiar Coase Theorem.<sup>20</sup> This theorem teaches us that in the absence of transaction costs, the parties to an agreement will negotiate an efficient contract, meaning one that generates the maximum possible joint surplus. The terms of the contract are then used to distribute this surplus, most commonly by adjusting price terms. So, for example, in a contract between a buyer and a seller, the seller will offer higher and higher quality, at higher and higher prices, up to the point where the buyer's willingness to pay for higher quality is less than the cost of further price increases. This generates the optimal quality level in the sense that the buyer is not willing to pay for higher quality and lower quality would reduce the gains to the parties by more than the cost savings. The gains from the transaction are distributed through the price terms in this example, and depend on the relative bargaining power of the parties.

The analogy to the international context is straightforward. For example, Mexico and the United States might be concerned about a set of environmental issues that affect both states. The states may have different priorities and different goals, and each is assumed to pursue its own interests without regard for the other. Whatever agreement they ultimately reach, however, our assumption that they will reach an efficient agreement ensures that there is no alternative agreement that could make both parties better off. Suppose, for instance, that the United States prefers tougher environmental standards than does Mexico. If those standards are sufficiently important to the US, it will get the standards it wants in exchange for some other concession – perhaps better treatment for illegal immigrants within the United States. Alternatively, if the cost to Mexico of higher standards is greater than what the US is willing to pay, lower standards will prevail in the agreement because the compensation demanded by Mexico for its acceptance of higher standards would exceed the willingness to pay of the United States. The parties will increase the level of agreed-upon standards as long as the US is willing to pay more than Mexico demands – leading them to an agreement that maximizes their joint welfare. No other agreement could, when combined with some transfer payment, make both parties better off.

For the most part, the literature on domestic contracting would predict an end to the story at this point – it is generally assumed in the literature that, having reached an agreement that maximizes joint welfare, the parties will enter into a binding legal contract.<sup>21</sup> In

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<sup>20</sup> Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

<sup>21</sup> As discussed above, domestic parties do sometimes enter into agreements that are not binding. E.g., in the course of the negotiation of a loan, two parties may sign a “letter of intent” which lays out the terms of the ultimate agreement but is not itself legally enforceable. Agreements of this sort are often,

particular, such a binding agreement has the advantage of being enforceable through the courts or, perhaps, through private arbitration. This legal commitment, backed by the threat of coercive enforcement, would encourage both parties to honor their commitment. This, in turn, permits greater reliance by the parties and allows the parties to resolve common problems in a cooperative way.

A glance at international agreements reveals that they are inconsistent with the above description. Not only do states routinely make use of non-binding soft law agreements, even when they enter into hard law agreements international law provides quite limited enforcement.<sup>22</sup> Indeed, even if states were to provide for the full array of enforcement mechanisms available to them, including formal dispute resolution, substantial monitoring, sanctions for violations, and so on, international agreements would remain considerably weaker than domestic contracts due to the lack of coercive enforcement.<sup>23</sup> We are not aware of any commentator who argues that enforcement measures in international law are sufficient to secure efficient levels of compliance.

Given the weakness of the international enforcement system, one might expect that international agreements would include mechanisms intended to increase the likelihood of compliance. In fact, such mechanisms are not routinely included in agreements, and sanctions are normally not provided for. Where sanctions are provided, they are often not severe, and usually only prospective.<sup>24</sup> In other words, states entering into agreements often turn away from readily available and inexpensive ways to make the agreements more credible and the commitment more reliable. Though there may also be retaliation and a reputational sanction in response to breach, there is no reason to think that these consequences are sufficient to provide for an efficient level of compliance. Retaliation has limited effect both because it is costly to apply and because there is a severe free-rider problem in multilateral agreements.<sup>25</sup> As for reputational sanctions, they are limited in magnitude and can be unpredictable, and even a total loss of reputation may not be enough to deter a violation of international law. Reputational sanctions are also likely to

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though probably not always, intended to help the parties make sure that they have a common expectation about ongoing negotiations.

<sup>22</sup> As discussed above, some scholars view all of these as dimensions of “hardness” or “softness,” essentially viewing “hardness” not as an aspect of agreement design but as the agreement’s overall propensity to induce compliance. *See supra* note 7.

<sup>23</sup> *See, e.g.,* Lori Fisler Damrosch, *Enforcing International Law Through Non-Forcible Measures*, in 269 RECUEIL DES COURS 19 (Academie de Droit International de La Ha ed. 1997) (“A fundamental (and frequent) criticism of international law is the weakness of mechanisms for enforcement.”); Richard A. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 249 (1964) (“Among the most serious deficiencies in international law is the frequent absence of an assured procedure for the identification of a violation.”); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT’L L. 705 (1988) (observing “[t]he surprising thing about international law is that nations ever obey its strictures” because the international system is organized in a voluntarist fashion, supported by so little coercive authority).

<sup>24</sup> *See, e.g.,* WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 22(4), LT/UR/A-2/DS/U/1 (Apr. 15, 1994) (“The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.”).

<sup>25</sup> *See* GUZMAN, *supra* note 10, at 46-48.

under-deter breach because the actions of the parties may not be observable to third parties. In the absence of a disinterested adjudicator, the breached-against party cannot credibly demonstrate that the other party was at fault.

Although our focus is on soft law, it is worth emphasizing that the above paragraph also applies to the formal treaties negotiated among states. Thus, even when the parties opt for a treaty they often fail to provide the full set of available enforcement mechanisms. When they select soft law, as they often do, they opt for an even less credible commitment device

All of this presents a puzzle. There is a widespread consensus that international law suffers from a lack of enforcement. Certainly it is without coercive enforcement and those tools that it provides offer no more than a weak substitute. Analogizing to contract theory one would expect states to do the best they can – meaning one would expect them to use the full set of design features available to make their agreements more credible. Perhaps the most obvious of these design features is the choice of a formal treaty rather than soft law. The practice of states, however, is inconsistent with the expectation that virtually all important agreements will take the form of treaties. States routinely enter into soft law agreements, including in areas of great importance to the states.

### **Past Efforts to Explain Soft Law**

We are not, of course, the first to offer an explanation for why states enter into soft law agreements. Indeed, over the last fifteen years or so a number of theories have been offered. Some of these explanations advance our understanding of soft law and are, in this sense, complementary to our own, while other are, in our view, flawed. In this section we discuss and evaluate some of the current theories.

The first explanation of soft law worth mentioning is the claim that states prefer soft law because states are risk averse and thus generally prefer to lower the costs of avoiding their obligations. Although, as discussed below, we agree that under certain conditions soft law's flexibility may be a primary reason for its use, we disagree that risk aversion is the motivation for building flexibility into international agreements. It is far from obvious that using soft law reduces a state's risk. While soft law creates flexibility in one's own commitments, thereby reducing risk, soft law also creates flexibility in other parties' commitments. This flexibility increases the likelihood that all states party to an agreement will deviate from their commitments and thereby increase each state's risk. Whether the reduction in risk from being able to more easily avoid one's own commitments outweighs the greater risk that other states will avoid theirs is a case-specific question.

More fundamentally, while it is commonplace to model states as risk averse in the international relations literature, it is more appropriate to model states as risk neutral when dealing with international legal obligations. This is so for two reasons. First, it may be that states are in fact risk neutral – that is, that they are indifferent between receiving a payoff with certainty and receiving the outcome of a lottery with the same expected payoff. Second, even if states are risk averse with respect to aggregate

outcomes, they should be risk neutral with respect to any given legal obligation. The risk in making a legal commitment is having to violate the commitment and suffer the associated reputational sanction, which is most likely to be reputational. But just as investors strive to be diversified in their investments, states have thousands of legal commitments that span a wide range of subjects. This diversification spreads the risk associated with any given legal commitment, allowing states to behave in a risk neutral fashion towards their legal commitments. In effect, a state's reputation for compliance with international law is unlikely to hinge on any one commitment, and so states are free to be risk neutral with respect to individual commitments.

A second family of explanations of soft law is that it is the product of domestic political and legal forces. There is clearly much to be said for this argument. Domestic politics and legal institutions play a major role in shaping how states interact with each other at the international level. At the same time, however, it is important to be precise about how exactly domestic forces influence international law and international relations. A close examination of domestic theories shows that while they do indeed provide some purchase into when states may be more apt to want binding rather than nonbinding rules, some of these claims have been overstated.

Broadly speaking, domestic arguments can be separated into those that rely on domestic legal institutions to explain soft law, and those that rely on domestic politics. Arguments relying on the structure of domestic legal institutions generally begin from the premise that nonbinding international agreements are easier to conclude than binding agreements.<sup>26</sup> These arguments hang on the difficulties and transaction costs associated with obtaining ratification of binding agreements when separation of powers concerns are brought into play. It is not unheard of, for example, for treaties to sit with the Senate Foreign Relations Committee for decades without being sent to the full Senate for an up-or-down vote on advice-and-consent. But while it is true that having to seek the approval of a coordinate branch of government can be extremely burdensome (which can also be a benefit because it allows a state to send a costly signal of how important cooperation is to it),<sup>27</sup> it is probably more accurate to say that separation of powers concerns are the exception rather than the rule. Throughout most of history, of course, monarchs had no formal legal checks on their power to enter into binding international agreements. Today most forms of government still do not have meaningful *de jure* checks on the executive's power to create international obligations. Authoritarian governments, for example, are unlikely to have a legislature that acts as a brake on their authority internationally. And Westminster-style democracies also lack a legislature that can act separately from the executive; instead, the executive arises from and controls parliament, such that if the executive approves of a treaty any required legislative approval is likely to be *pro forma*.

Even the United States is not strictly bound to seek the advice and consent of the Senate to ratification of binding international agreements. The executive's freedom in this

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<sup>26</sup> Lipson, *supra* note **Error! Bookmark not defined.**, at 515.

<sup>27</sup> Lisa Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 *Presidential Studies Quarterly* (2005).

regard follows from the fact that binding international agreements can be concluded in three ways under American domestic law: 1) as so-called Art. II treaties, by seeking the advice and consent of the Senate; 2) through congressional-executive agreements involving both houses of Congress; or 3) by sole executive agreements. The first category is perhaps the most onerous, requiring the vote of two-thirds of the Senate, while the second requires only a simple majority of both houses, and the third does not require the permission of Congress at all.<sup>28</sup> The executive thus has a menu of options that allow it to reduce intergovernmental transaction costs if it wishes.

Intra-executive bureaucratic costs are a different source of domestic costs associated with binding agreements. Governments have a clear incentive to centralize in some measure the authority to enter into binding international agreements. In the United States, this is done through the Circular-175 process, the purpose of which is to reduce duplicative efforts as well as to ensure that all relevant government agencies are able to weigh in on the content of the proposed agreement.<sup>29</sup> But while the costs and attendant delay associated with obtaining C-175 authority raise the cost of concluding a binding international agreement, and in some cases tension between the interests of government agencies may defeat efforts at developing a coherent negotiating position, for many routine matters obtaining C-175 authority will not be so burdensome as to dictate the legal form an agreement with significant stakes takes.

A slightly different type of argument focuses on domestic politics rather than domestic legal institutions. Raustiala has argued, for example, that hard law is more prevalent than soft law because domestic advocates for an international agreement in a particular area will generally demand that the agreement be binding.<sup>30</sup> They will do so, in his view, for two reasons. First, domestic groups may have the perception that binding agreements are more effective at changing state behavior.<sup>31</sup> Second, because they are subject to greater oversight and are generally more public, binding agreements provide more possibilities for public interest groups to influence the political process.<sup>32</sup> Both of these rationales offer insight into why domestic groups might well prefer hard law over soft law. But both of these rationales should also be qualified. With respect to the first, Raustiala's view, which we share, is that in many circumstances soft law will be more effective at changing state behavior than hard law because in exchange for agreeing to nonbindingness (which all else equal reduces effectiveness) a state should be able to extract concessions on substantive obligations.<sup>33</sup> Domestic interest groups are often repeat players in the political process. It would be strange, therefore, if they held on to the belief that contracts were always superior. To hold the view that in some

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<sup>28</sup> Congress does, however, exercise oversight of sole executive agreements by requiring, through the Case-Zablocki Act, that all agreements having binding international effect be reported to Congress.

<sup>29</sup> See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L. J.* 1236 (2008) (describing the C-175 procedure).

<sup>30</sup> Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT'L L.* 581, 598 (2005).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 612-13; GUZMAN, *supra* note 10, at 154-56.



circumstances domestic groups could better achieve their objectives through a soft law agreement, but that they still prefer a hard law agreement, is to assume that domestic interest groups repeatedly make the same mistake. We do not mean to say definitively that interest groups are not biased in this way – indeed, relatively new interest groups whose chief experiences are with the domestic legal system with its strong enforcement mechanisms may well be prone to this type of bias – but absent empirical data we hesitate to place too much weight on an explanation that relies on unexplained and persistently irrational behavior.

With respect to whether binding agreements create more access points in the policy process, many of the same qualifications as to limits on domestic legal costs apply here as well. The Case Act, for example, which requires the State Department to report to Congress all binding international agreements, does not require consultation with Congress during the negotiations of such agreements.<sup>34</sup> The executive merely must inform Congress of what it has done within sixty days of doing it.<sup>35</sup> Thus, while the Case Act does create some oversight over the activities of the executive, it does so only in an ex post fashion. Agreements that actually require the consent of one or both houses of Congress are more likely to provoke public debate before consummation, allowing interest groups access to the process, but again, the extent to which the same type of access is conferred on interest groups in different political systems will vary with domestic legal structures and political freedoms.

At the end of the day, the existing literature on soft law has advanced our understanding of this relatively common phenomenon, but it has not fully explained it. In particular, existing accounts of soft law have not adequately explained its advantages at the international level. In the sections that follow, we lay out four complementary theories of soft law that capture a much fuller range of state motivations for creating soft law.

### **Four Explanations for Soft Law**

Soft law often takes the form of an international instrument that has some of the features of a formal treaty, but falls short of the requirements to be one. In general, this means that the states involved do not intend to be bound by international law.<sup>36</sup> Examples of

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<sup>34</sup> Case-Zablocki Act of 1972, 1 U.S.C.S §112b(a) (2005).

<sup>35</sup> *Id.*

<sup>36</sup> There is a certain circularity to the definition of a treaty. The Vienna Convention on the Law of Treaties defines a treaty as an agreement that is, among other things, “governed by international law.” Vienna Convention on the Law of Treaties, art. 2.1(1)(a), May 23, 1969, 1155 U.N.T.S. 331. The raises the question of what constitutes “international law.” The statute of the International Court of Justice is probably the most accepted source for a definition of what constitutes international law and it lists several sources including “international conventions . . . establishing rules expressly recognized by . . . states.” Statute of the International Court of Justice art. 38(1)(a) [hereinafter ICJ Statute]. Thus an agreement is a treaty if it is governed by international law, and international law is defined as including treaties. Fortunately this circularity need not detain us. It is generally accepted that an agreement is a treaty—and therefore is binding under international law—if the states involved intend it to be so. While one can certainly imagine ambiguities in this pragmatic definition, and one can imagine disputes among states about

this type of soft law abound. The Universal Declaration of Human Rights, for example, lays out a set of human rights obligations for states, but is explicitly not “binding” on states. The Basle Accords seek to improve banking regulatory practices and are also soft law. The Nuclear Suppliers Group Guidelines are a set of export control guidelines governing the transfer of nuclear materials between states promulgated by the 45-member Nuclear Suppliers Group, or London Club.<sup>37</sup> The Guidelines are not legally binding, but provide content to the legally binding – but vague – export control obligation established by the Nuclear Nonproliferation Treaty.<sup>38</sup>

For each of these examples, and many more, one can ask why states chose to enter into a soft law agreement rather than opting for either a formal treaty or no agreement at all. Why, in other words, would states choose this middle ground approach to commitment?

### A. Soft Law as Coordinating Device

From a compliance perspective, the simplest explanation for using soft law concerns international agreements or other devices that serve to assist states in coordinating their behavior. Here we have in mind interactions among states in which states are relatively certain they will have no interest in deviating from the promised behavior in the future. A good example of this sort of coordinating device is the Paris Memorandum of Understanding on Port State Control, an agreement with twenty-seven member states that harmonizes inspection procedures aimed at ensuring compliance with major maritime conventions governing pollution and safety.<sup>39</sup>

Soft law, in other words, can be used to resolve coordination games. This is true whether the problem is a pure coordination game or any of the variations on coordination games (e.g., battle-of-the-sexes games).<sup>40</sup> Unlike pure coordination games, these more complicated variations generally involve some degree of distributional tension between the parties to an agreement. Individual parties may strongly prefer one focal point for cooperation to another, even though neither has any incentive to defect once an agreement is reached. Identifying the venue for the Olympic Games, for example, is a coordination game in which there are normally several states that would like to host the event. No formal treaty is required to resolve this problem, however. Indeed, the decision is not even made by states but instead by the International Olympic Committee (IOC), a nongovernmental organization over which states have no direct control. Once the IOC selects a host city, there is no incentive for others to defect by attempting to stage some competing events.<sup>41</sup>

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the legal status of an agreement, it is generally the case that the parties to an agreement have a shared perspective on whether or not it is binding on them.

<sup>37</sup> Nuclear Suppliers Group, <http://nuclearsuppliersgroup.org/> (last visited Feb. 19, 2009).

<sup>38</sup> Meyer, *supra* note 13, at 136.

<sup>39</sup> Paris Memorandum of Understanding on Port State Control, Jan. 26, 1982, 21 I.L.M. 1; <http://www.parismou.org/ParisMOU/home/xp/menu.4284/default.aspx>.

<sup>40</sup> GUZMAN, *supra* note 10, at 25-29.

<sup>41</sup> Absent some external reason such as the cold war tensions that led to the boycott of the 1980 Moscow Summer Olympics by the United States.

The bargaining aspects of resolving distributional tensions present a rich field for research in international law. For purposes of this section, however, we abstract away from these bargaining problems and focus on compliance once a distribution (a focal point) has been agreed upon. And where states have a high degree of certainty that their incentives will not change in the future, soft law can be used to agree upon a focal point and thereby generate high levels of future compliance.

These sorts of problems do not require soft law solutions, of course. States might opt instead for a formal treaty to deal with these problems. Formal agreements are often used, for example, to establish the frequency of meetings among the parties to an agreement.<sup>42</sup> It would normally not be necessary to make attendance at such meetings a formal legal obligation because once a state is party to the agreement they are likely to be willing to meet. One reason why the timing and location of meetings is made a binding obligation is that it is easy and convenient to include such details when an agreement on substantive issues is being negotiated as a formal treaty.<sup>43</sup>

States might also choose to not have any form of agreement at all and let the problems resolve themselves in other ways. Indeed, many coordination games are resolved in this way. For example, the Olympic Games are held every two years (alternating between summer and winter games). For the event to succeed there must be some agreement on the location at which the games will be held – it is a classic coordination problem which could be solved through some form of government agreement. Rather than engage in explicit agreement, however, states leave it to the International Olympic Committee (IOC), a nongovernmental organization over which states have no direct control, to manage the coordination. Though states compete to host the games, once the IOC announces its chosen host city, the issue is settled. Countries that sought the games but did not get them do not attempt to hold competing games or defect in some other way (political boycotts aside).

So these coordination problems can be solved in a variety of ways, and soft law instruments are among them. But because in a true coordination setting any means of generating a focal point will be equally successful in generating compliance, we are left without a compelling explanation as to why states would use soft law in these relatively straightforward situations. Put differently, if expected levels of compliance are equal across forms of agreements, how do states make the choice between a soft or hard law agreement, or between an agreement and allowing an informal norm to emerge as a focal point?

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<sup>42</sup> See, e.g., North American Free Trade Agreement, art. 2001, 32 I.L.M. 289, 605 (1993).

<sup>43</sup> One can imagine other reasons why states might opt for a formal treaty to address what appears to be a coordination game. The parties may be concerned, for example, that the nature of the game will change over time and become a game in which cooperation is more difficult. A formal treaty makes it easier to rely on the future behavior of a state in the future. Another possibility is that the states are not certain about the structure of the game (perhaps because they cannot observe the payoffs of their treaty partners). Even if they believe it is a coordination game, they may prefer a formal treaty to guard against the possibility that it is, in fact, a prisoner's dilemma or some similar game in which cooperation is difficult.

Several factors suggest themselves, although admittedly none rise to the level of a general explanation as to why states choose soft law in these situations. First, as between having an explicit agreement that identifies a focal point and having no agreement, the former has obvious advantages. Without getting into the bargaining aspects that can complicate coordination games considerably, suffice it to say that an explicit agreement may be necessary to generate a focal point in situations in which distributional tension exists among the parties. Absent an explicit agreement, or perhaps absent the ability of one party to credibly commit to its preferred focal point, the parties may fail to coordinate even when both parties prefer coordinating on any focal point to each separating pursuing their preferred policy.

Second, in essence, the fact that all else is equal from a compliance perspective should mean that any little difference between a soft law and a hard law agreement determines the form of an agreement. As we alluded to above, hard law may be preferable in situations in which states are uncertain whether their strategic environment will change in the future. In other words, states may be faced with a situation in which any focal point will generate self-enforcing compliance for the foreseeable future, but states may nevertheless be worried that one state will develop an incentive to defect that might be deterred by a hard law agreement. Alternatively, if the domestic group pushing for an agreement has a preference for hard law for whatever reason, choosing hard law may provide a government with a political benefit that has nothing to do with compliance.<sup>44</sup>

On the other hand, all else equal, a soft law instrument can be concluded by lower ranking officials, who are knowledgeable about a particular area, without going through potentially cumbersome bureaucratic processes associated with making a binding agreement. For example, as discussed above, in the United States authority to conclude a treaty, even a sole executive agreement, is granted pursuant to Circular 175 procedures.<sup>45</sup> Bringing in multiple players through use of the C-175 procedure can slow down the process of negotiating an agreement. Thus, where little is at stake, as when states are simply choosing a focal point to coordinate on, it may not make sense to invest even the sometimes minimal resources necessary to obtain domestic approval for a binding agreement when any agreement will be self-enforcing. In the area of international competition policy, for example, states (or rather competition policy agencies, generally acting without formal government approval to enter into a binding legal agreement) frequently enter into non-binding “memoranda of understanding” that represent a form of cooperation with respect to that subject area. The actual requirements contained in these agreements, however, are quite modest and can fairly be described as efforts to coordinate behavior. For the most part they involve information sharing among domestic enforcement authorities.<sup>46</sup> Domestic competition policy regulators have an incentive to

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<sup>44</sup> See Raustiala, *supra* note 4, at 598.

<sup>45</sup> Hathaway, *supra* note 29, at 1249.

<sup>46</sup> See *e.g.*, Agreement Between the Government of the United States of American and the Government of the Federal Republic of Germany Relating to Mutual Cooperation Regarding Restrictive

cooperate with one another in carrying out their duties, and a central role of these agreements is to improve the lines of communication among regulators and to lay out some guidelines for interaction. There is little reason to defect from the requirements of the agreements and, in any event, language of the agreements themselves makes it clear that the virtually all the meaningful commitments made are discretionary. The ultimate purpose of these agreements appears to be a form of coordination achieved through soft law instruments.

In its pure form, this category of soft law is the least interesting from a compliance perspective, both because it functions in such a straightforward fashion and because at the same time there is no general predictive theory to explain how states choose between hard and soft law when cooperation will be self-enforcing under either. For this reason we do not spend a great deal of time discussing it. Its role in promoting international cooperation, however, is significant and a complete story of soft law must surely take it into account.

### **B. Loss Avoidance Theory**

Though international legal rules are intended to constrain state conduct they do so imperfectly. When states enter into an agreement, then, they must consider the possibility that at some point in the future one of them will choose to violate its terms. In other words, when states enter into an agreement, they consider not only the gains they will enjoy if the agreement is honored, but also the costs they will bear if it is violated.

In the domestic contracts context, the cost of violation is less significant than it is in the international realm. This is so because the court system can force the violating party to pay damages to its counterparty.<sup>47</sup> These damages normally take the form of a cash transfer and, as such, it has no impact on the total welfare of the parties. That which is lost by one is gained by the other. Viewed from the perspective of the parties at the time of contracting, then, the legal sanctions for a violation matter only to the extent they impact the likelihood of a violation. If the sanctions are too low there will be too much violation and if they are too high there will be too little (i.e., inefficient compliance).

The consequences for violation in the international arena, however, are quite different. Money damages are rarely paid from one party to the other in response to a violation. In fact, violations are often not compensated through any direct mechanism and in those instances where some compensation exists, it is almost never a zero-sum transfer comparable to money damages. In the WTO's dispute settlement system, for example, there are provisions allowing, under the right circumstances, for the suspension of concessions previously granted to a violating party (e.g., the raising of tariffs on certain products). This suspension of concessions, however, is costly for both parties. Furthermore, the sanctions are entirely forward looking in the sense that they are intended

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Business Practices, June 23, 1976, *reprinted in* TRADE REGULATION REPORTER (CCH) 4, par. 13, 501; Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 74 N.Y.U. L. REV. 1142 (2001).

<sup>47</sup> Lipson, *supra* note **Error! Bookmark not defined.**, at 505; Guzman, *supra* note 11.

only to encourage the violating party to halt its violative conduct. They are not available for the purpose of penalizing past conduct.<sup>48</sup>

To the extent international agreements are effective, however, it must be because they make it costly for states to engage in violative conduct.<sup>49</sup> Put differently, if international law works it must be because there are sanctions associated with violating that law. Those sanctions correspond to the “Three Rs of Compliance:” reputation, retaliation, and reciprocity.

Many international agreements, especially bilateral ones, rely on reciprocity. Each state takes some costly action that benefits the other state, but does so only because in exchange the other state does something that benefits the first state. If one side of the bargain breaks down, both parties stop performing. The most obvious example of this sort of agreement is an ongoing relationship between a buyer and a seller. The buyer pays the seller periodically, but does so only because it receives goods in exchange. The seller delivers goods periodically, but only because it is being paid. If the buyer stops paying, the seller will stop delivering. If the seller stops delivering, the buyer will stop paying. An example in the international context is the Boundary Waters Treaty between the United States and Canada. This treaty, entered into in 1909, provides a set of rules governing the boundary waters between Canada and the United States. It has been successful for 100 years because each side knows that its refusal to comply with the treaty would trigger violation by the other side as well. As both sides prefer mutual compliance to mutual defection, cooperation is achieved.

Reciprocity offers one reason why states might opt for a soft law agreement rather than a treaty. Because the compliance of each party is secured by the continued compliance of the other party, no other enforcement mechanisms is needed. The more solemn promise of hard law is unnecessary.

The explanatory power of reciprocity, however, has clear limits. First, it provides no protection against the possibility of a change in the interests of the parties. Though the agreement may serve both parties when it is entered into, one of them may subsequently conclude that it is better off violating. At the time the agreement is entered into, the parties may wish to tie their hands to prevent a violation even if the situation changes. Reciprocity provides no protection against violation in this situation so something else is necessary to prevent an undesirable violation if the threat of reciprocal non-compliance proves ineffective.<sup>50</sup>

Reciprocity may also fail to encourage compliance if a threat to withdraw one’s own compliance lacks credibility or is of no consequence to the other side. Consider, for

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<sup>48</sup> See Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 24, art. 22.

<sup>49</sup> See Guzman, *supra* note 19, at 1823.

<sup>50</sup> A violation of the agreement may remain undesirable in the sense of imposing net costs on the parties even if circumstances change such that one party prefers to violate the agreement.

example, a multilateral human rights agreement such as the International Covenant on Civil and Political Rights (ICCPR). If a party to the treaty violates one of the rights required by the agreement (say, for example, the ban on ex post facto application of criminal laws) other parties are unlikely to halt their own compliance in retaliation. There are, after all, many reasons quite unrelated to the treaty that countries provide these rights. And even if states could credibly threaten to respond to a violation by ceasing their own compliance, it is hard to imagine that the violating states would care.

In addition, reciprocity is problematic as an enforcement device in many multilateral agreements. The problem here is that threats to terminate cooperation in response to a violation by one party will often lack credibility. Imagine, for example, a large multilateral environmental agreement. If a small country were to violate the agreement, it is hard to believe that all the other parties would respond by terminating their own compliance. Simply put, reciprocity is often unable to overcome the free rider problem in multilateral agreements. For all the above reasons, reciprocity alone is not a satisfactory explanation for the existence of soft law agreements.

Most importantly, reciprocity works just as well with a treaty as it does with soft law. In other words, reciprocity offers no reason to prefer a soft law agreement over a treaty. As already mentioned, because a treaty is a more serious commitment, and because international law generally suffers from a dearth of commitment mechanisms, the puzzle of why states would ever prefer soft law over a treaty remains.

Careful consideration of reputation, however, reveals a reason why soft law agreements will sometimes be appealing. To understand this reason requires a sense of how reputation works to encourage compliance with international law. When states enter into an agreement, they promise to comply. If they fail to do so, their future promises will be less credible and this will make it more difficult or more costly for them to enter into future promises.<sup>51</sup> It is in this sense – a reduced ability to make credible promises – that a loss of reputation is costly to states.<sup>52</sup> A state that is known to honor its agreements even when it is costly to do so can extract more for its promises than can a state known to readily violate agreements.<sup>53</sup>

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<sup>51</sup> See GUZMAN, *supra* note 10, ch. 3, for a more complete exposition of how reputation works.

<sup>52</sup> See Guzman, *supra* note 10; Lipson, *supra* note **Error! Bookmark not defined.**, at 510-512.

<sup>53</sup> Of course, the details of how reputation works in practice remain the subject of discussion. *See, e.g.,* Guzman, *supra* note 10; Downs & Jones, *supra* note 10; Rachel Brewster, *Unpacking the State's Reputation*, 50 Harv. J. Int'l L. (forthcoming 2009). For example, whether states have a single reputation for compliance with international law across issue areas and partners, or whether states have multiple reputations broken down by issue area and partner, may have an effect on reputation's ability to generate compliance. Downs & Jones, *supra* note 10; Guzman, *supra* note 10, at 100-110. Similarly, there is an open question about whether a reputation for compliance with international law properly belongs to a state or to a government. Guzman, *supra* note 10, at 106-108; Brewster, at \*17-19. These questions do not go to the heart of reputation's ability to generate compliance, but rather go to the magnitude of the compliance pull reputation generates.

Notice that while a violation of an international obligation generates a reputational penalty for the violating state, it does not lead to an offsetting gain to its counterparty. Assuming that the violation comes to be widely known the offending state's reputation is hurt with respect to all states – not only those party to the agreement at issue. Suppose, for example, that Russia and the United States entered into an arms control agreement under which both states agree to reduce their stockpiles of nuclear weapons. If Russia subsequently violates that agreement, countries around the world will observe that violation and Russia's reputation for compliance with international law will suffer. This loss will not, however, be captured as a benefit by the United States. In other words, the loss to Russia exceeds the gain to the United States – from the perspective of the parties to the agreement it is a negative sum sanction.

Now, consider once again the decision of the parties when they enter into an agreement. To keep the analysis simple, suppose they must choose between a treaty and a “non-binding accord.” The difference between these instruments is that the treaty is more likely to induce compliance – this is why treaties are considered the most effective instrument of cooperation.<sup>54</sup> A treaty, however, is a double-edged sword. If there is a compliance benefit, it must be that a violation of the treaty imposes greater costs than a violation of the accord – that is, the reputational and direct harms associated with a violation must be greater for a treaty. When choosing between a treaty and a soft law instrument, then, the parties face a trade-off. A treaty generates higher levels of compliance, which (assuming the parties select terms optimally) increases the joint payoff, but in the event of a violation it imposes a larger penalty on the violating state. The reputational penalty to the state is greater when a treaty is violated because entering into a treaty involves a more serious pledge of reputational collateral. A treaty is the most solemn promise a state can make, so if that promise is violated it suffers a larger reputational loss.

To see how this trade-off operates as the parties draft their agreement, notice that there are three categories of outcomes relevant to the choice between soft and hard law. The first category includes those states of the world in which the parties to the agreement will comply whether or not the agreement includes design elements intended to enhance the credibility of the commitments. That is, international law provides sufficient incentives even if a soft law agreement is chosen. In this category, the parties are neither better nor worse off if they opt for a formal treaty over a soft law agreement.

The second category consists of all circumstances in which there would be compliance if a treaty is chosen, but violation otherwise. This is the category of all cases in which the increased compliance pull of the treaty makes the difference between compliance and violation. Because compliance is preferred to violation, the parties are better off in this category if they choose a formal treaty.

The third and final category of cases includes those in which there is a violation even if a formal treaty is used. In these states of the world the use of a formal treaty would impose

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<sup>54</sup> See Lipson, *supra* note 26, at 508 (“The effect of treaties, then, is to raise the political costs of noncompliance.”).



a larger reputational cost on the parties than would be the case if they chose a soft law agreement. There is no compliance benefit to offset this cost, so in these cases the parties are better off with a soft law agreement.

In deciding between hard and soft law, then, the states face a trade-off between the second and third categories above. In the former, the use of hard law increases cooperation and gains to the states but in the latter hard law brings net costs. To maximize the total value of the agreement the states must balance these concerns.

The result of all of this is that in the choice between hard and soft law reputation has two effects. First, choosing hard law increases compliance, which is good for the parties. Second, it generates a negative sum sanction in the event of a violation. When choosing between hard and soft law, then, states must consider both aspects of this tradeoff. In some instances the compliance benefits will outweigh the impact of costly sanctions and the parties will opt for a formal treaty. In other instances the cost of the sanctions will be too large and they will prefer a soft law agreement.

The third category of sanctions associated with a violation of international law is retaliation. A retaliatory sanction is one that is costly to both the violating party and the retaliating party. As such it is necessarily a negative sum sanction and the arguments made above about reputation apply here as well. Though a credible threat of retaliation can increase the rate of compliance, when retaliatory sanctions are actually imposed they impose costs on both parties. When entering into an agreement, then, the parties will take both of these effects into account. Sometimes this will favor the use of a formal treaty and other times it will call for the use of soft law.

### **C. Delegation Theory**

International rules generally do not operate indefinitely.<sup>55</sup> In designing international agreements, states will anticipate the need for, and the pressure on, legal rules to evolve in response to changed circumstances. The delegation theory posits that under certain circumstances soft law will be an effective way for states to control their uncertainty over the future desirability of legal rules adopted today. Soft law does this by increasing the feasibility of a market leadership process for amending legal rules, a process of amendment that can be more efficient than explicitly renegotiating international rules. Making an agreement non-binding lowers the penalty associated with deviating from existing legal rules, and thus encourages states with a significant interest in the content of legal rules to unilaterally innovate. This approach to the evolution of legal rules can, under certain circumstances, lead to welfare-enhancing amendments to legal rules by avoiding the hold-up problem involved in renegotiating contracts in which every state effectively exercises a veto over potential amendments. As such, the choice between soft law and hard law implicates a tradeoff between the procedural equity inherent in the doctrine of sovereign equality, and the efficiency of legal rules.

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<sup>55</sup> Meyer, *supra* note 13, at 104; Koremenos, *supra* note 13.

To spin the delegation theory out more, note that the presence of any number of transaction costs can prevent states from reaching agreement on welfare enhancing amendments to international agreements. Most international agreements operate by unanimity, for example, and thus holdups may emerge that block Pareto improving amendments, despite the fact that in theory transfers should exist sufficient to convert any welfare enhancing amendment into a Pareto improving one. Moreover, even in those agreements that do use some form of majoritarian voting, transaction costs are not eliminated: tools such as agenda control can still be used to defeat welfare improving amendments, and cycling majorities can themselves be a cost of bargaining under a majoritarian voting system. Thus, where states expect circumstances to change, generating pressure to renegotiate legal rules, states may wish to avail themselves of a more efficient process of amendment.

Soft law provides such a process – albeit an informal one – by reducing the cost of unilaterally deviating from legal rules. This is not to say, however, that soft law is *formally* easier to amend than hard law as a general matter, a claim that is occasionally made in the literature.<sup>56</sup> Quite the opposite, we are of the view that, all else equal, as a formal matter soft law is not significantly easier to amend than hard law.<sup>57</sup> Of course, all else is rarely equal in the real world. Most obviously, a complicated multilateral soft law agreement that operates by unanimity will generally be more difficult to amend than a single-issue, bilateral hard law agreement. But the point here is that the decision to include an amendment process other than unanimous consent, and the political, economic, and other factors that affect renegotiation, are usually independent of the legal form of the agreement. The relative ease in amending soft law thus does not stem from a greater likelihood of successful bargaining through a formal amendment process, but rather in encouraging amendment through informal processes spurred by violations of existing rules – violations that are made easier by soft law.

As mentioned earlier, states may violate their legal commitments for two very different reasons. On the one hand, they may wish to take advantage of their partner's cooperative behavior; on the other hand, they may wish to provoke a change in their partner's cooperative behavior. In the first situation, an agreement stipulates that both sides will pay certain costs to fulfill their obligations under an agreement and reap the resulting benefits. The violating state decides to cheat on its obligations (it stops paying the costs for compliance), calculating that the expected punishment for violation (the probability of being caught cheating multiplied by the sanction) is less than the short-term gain from taking advantage of a partner's continued compliance without paying one's own compliance costs. When this is a state's motivation for violation, it hopes that the "sucker," its partner, does not change its behavior, as doing so would reduce the violating state's payoff.

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<sup>56</sup> See Lipson, *supra* note **Error! Bookmark not defined.**, at 500 9 "[Informal agreements] are willows, not oaks.")

<sup>57</sup> See Meyer, *supra* note 13, at 909.

The second motivation for violation is entirely different. Rather than hoping to mask one's own noncompliance in the hopes that a partner's behavior remains unchanged, violating an agreement can be a tool to spur change in a partner's behavior. Here, there is no concern about monitoring compliance – the violation is intended to be public. In its pure form, a state announces a new interpretation of an existing rule or a new legal policy pursuant to an existing legal agreement – a so-called “unilateral amendment.” Because the new interpretation deviates from states' prior understanding of the relevant rules, the state offering the unilateral amendment incurs a reputational sanction for violating its obligations. At the same time, however, other states must decide whether to accept the unilateral amendment. In other words, they must decide going forward whether they will understand the obligation to require Y when they previously understood it to require X. Where successful, states will recoordinate their expectations of what constitutes compliant behavior on the unilateral amendment, and the only negotiating costs incurred will be the reputational sanction incurred by the violating state.

Of course, encouraging unilateral amendments will not always be welfare enhancing. Most notably, reducing the penalty from deviation by using soft law encourages both unilateral amendments and opportunistic cheating. Moreover, unilateral amendments themselves will not always be welfare-enhancing. When they fail, they will result in a net loss to the parties because the parties will have lost the benefits of cooperation and the violating state will also have suffered a reputational sanction, all without any resulting benefits. Even when they do not fail, it is possible that the logic of self-interest can dictate agreeing to an amendment that actually makes one worse off. This will happen when the violating state can credibly threaten not to return to cooperating on the status quo rules (or at least not within a time frame that allows the compliant state to wait), effectively taking the status quo rules off the table. In such a situation, the relevant comparison for the compliant state is between the unilateral amendment and the alternative, which may be noncooperation or may be an explicit renegotiation in which the outcome is in doubt.

Because of these costs associated with using soft law to encourage unilateral amendments, the delegation theory predicts that states will use soft law when the expected benefits from using unilateral amendments exceeds these expected costs. This will be true under three conditions: (1) when states are uncertain about whether the rules they can agree on in the present will be optimal in the future; (2) when they are uncertain about their ability to renegotiate the rules in response to changed circumstances; and (3) when one state or a small group of states can act as a focal point for reCOORDINATING expectations about what constitutes compliant behavior.

The first factor focuses on states' uncertainty about the future state of the world. Where states are relatively certain that no relevant conditions will change, there is little reason for them to build in mechanisms to deal with changed circumstances. The second factor focuses on when unilateral amendment, as opposed to explicit renegotiation, might be a superior method of amending agreements. As discussed above, explicit bargaining can break down for a number of reasons, even in the presence of welfare-enhancing amendments, and so sometimes states may prefer to create or increase the possibility of

unilateral amendments. The third factor focuses on maintaining cooperation in the face of pressures for an agreement to dissolve. Consider a situation in which conditions change such that an existing set of rules are now sub-optimal. If multiple states offer unilateral amendments, cooperation can break down if each state adopts the rules it prefers most. From a design standpoint, if states anticipate such an occurrence, they should opt for provisions that channel renegotiation away from unilateral amendments. Where states anticipate that only one state, or a small group of like-minded states, will act unilaterally, those states can act as a focal point for generating new expectations of what constitutes compliant behavior. Those states act, in effect, as entrepreneurs or market leaders for legal or quasi-legal rules. States that are apt to act as market leaders will typically be those states that have a particularly strong interest in the rules in question, such that they do not mind incurring the reputational cost of violating existing legal rules in order to bring about preferable rules.

That unilateral amendments occur is not difficult to see. The most notable recent example was the amendment of the Nuclear Suppliers Group Guidelines to permit nuclear trade with India. The Nuclear Suppliers Group consists of 45 states that promulgate nonbinding export control standards for nuclear materials (the NSG Guidelines). While nonbinding, the NSG guidelines arguably provide content to the binding obligation contained in the Nuclear Nonproliferation Treaty (“NPT”) not to assist non-nuclear weapons states in obtaining nuclear weapons. The NSG Guidelines have historically prevented civilian nuclear trade with India because India is not a party to the NPT and has not accepted measures, known as safeguards, issued by the International Atomic Energy Agency and designed to ensure that a state does not divert to military purposes nuclear material intended for civilian purposes. Indeed, the NSG was formed in response to India’s 1974 “peaceful nuclear explosion.”

Despite this history and the fact that the NSG Guidelines clearly prohibited civilian nuclear trade with India, the United States decided that conditions had changed sufficiently since 1974 that it was time to allow civilian nuclear cooperation with India. The shift in American views toward India’s nuclear capacity reflected the fact that the United States had come to view India as a stable democracy, a potential market for exporting nuclear technology, and also a state whose presence outside of the nuclear nonproliferation regime threatened American efforts to contain the spread of nuclear weapons beyond the nine states that already possess them. In 2005-06, rather than going first to the NSG, the United States unilaterally negotiated a deal permitting civilian nuclear cooperation with India (the U.S.-India Nuclear Cooperation Pact). The deal required Congress to amend statutory prohibitions on civilian nuclear cooperation with India (essentially implementing the NSG Guidelines), which Congress did in December 2006. Despite substantial criticism by NSG members of the United States’ decision to normalize nuclear trade with India unilaterally, on September 6, 2008, the NSG acquiesced in the *fait accompli*.

#### **D. International Common Law Theory**

Yet a fourth type of soft law is what we term “international common law” (ICL). Unlike the prior two theories of soft law, and indeed much of the soft law discussed in the

literature, which often (but not always) focuses on international agreements, ICL is the product of non-state actors, principally international tribunals and international organizations (IOs), with the authority to speak about international legal rules. Both because ICL is a new concept that falls outside the purview of many discussions of soft law, and because ICL is critical to a complete discussion of how states employ legal form to advance their interests, we spend the bulk of this Article expounding on the theory of ICL.

ICL itself refers to the non-binding rulings or standards issued by these international institutions. The theory of ICL rests on the fact that, with some exceptions, the most notable of which is customary international law,<sup>58</sup> a state's consent is necessary for it to be bound by a rule of international law. In multilateral contexts, then, states that prefer a deeper level of cooperation can be stymied by states that prefer only shallow cooperation. And while the creation of an institution with authority to promulgate binding rules without the unanimous consent of its members is one solution to this issue, it does not solve the problem of getting initial unanimous consent to the creation of the institution itself.

ICL offers a solution to this problem. A subset of states preferring a particular set of (potentially deeper) rules on which they are unable to generate a broad agreement, can instead agree to shallow or vague rules. Having reached unanimous agreement on shallow cooperation, the subset of states can then, for example, establish a tribunal with jurisdiction to hear disputes arising under the binding agreement. The tribunal's decisions normally will not be binding (except with respect to the particular parties and the particular facts at issue) and thus represent a form of soft law.<sup>59</sup> But the tribunal's decisions shape the expectations of every state – regardless of whether they have recognized the jurisdiction or authority of the tribunal – as to what the underlying binding legal rules require.

There is a broad consensus in the international law literature that the non-binding rulings of international tribunals do, indeed, influence legal rules. This becomes clear when one researches the state of international law in any area with a functioning tribunal. A discussion of the right to collective self-defense, for example, is not complete without a discussion of the ICJ's *Nicaragua* case.<sup>60</sup> This case addressed the circumstances in which collective self-defense permits the use of force, concluding among other things that a third party can only participate in the collective self-defense of an ally in response

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<sup>58</sup> Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115 (2005).

<sup>59</sup> Unlike the preceding explanations of soft law, which emphasized why states would choose a medium range of legality in creating an obligation itself, the theory of ICL focuses on how states design non-state institutions – international tribunals – that will themselves subsequently fashion obligations. The analysis of the legality of an obligation is thus one-step removed in the theory of ICL. Where the theories addressed in the preceding sections of this Article explain how states design obligations themselves, the theory of ICL explains how states decide to create non-state institutions with the authority to create obligations.

<sup>60</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar v US)*, 1986 ICJ 14 (June 27, 1986).

to an armed attack on that ally. Mere use of force against that ally is not enough.<sup>61</sup> The United Nations Charter gave the ICJ little clear guidance in the case, so the court had no choice but to engage in a form of judicial rule-making. The resulting ruling has become an integral part of our understanding of the law of self-defense. Yet, critically, the ruling is not binding international law as applied to other states or even as applied to future disputes on different facts between the United States and Nicaragua. Thus, the ruling's most expansive effect is through its role as a form of soft law – a ruling that, while not binding itself, informs our expectations of what constitutes compliant behavior with other legally binding rules.

ICL also provides the clearest example of why a sharp distinction between binding international law and nonbinding norms simply fails to adequately describe international legal practice. As discussed below, international tribunals issue a host of rulings that are crucial to shaping expectations about what constitutes compliant behavior across a range of subject areas. No one seriously argues that these rulings are devoid of legal consequences; nor could they. At the same time, ending one's analysis of the legality of tribunal decisions with the doctrinal distinction between binding and nonbinding legal rules – the approach advocated by proponents of the view that soft law is “incoherent”<sup>62</sup> or “nonlaw”<sup>63</sup> – inevitably results in the conclusion that the rulings of international tribunals are not law. They are at most only a form of binding arbitration without any collateral legal consequences. Unless opponents of the use of soft law are prepared to jettison the rulings of international tribunals as law, they must concede that ICL is a form of soft law.<sup>64</sup>

The tradeoff that states face in conferring authority on an institution to create ICL is clear. On the one hand, precisely because ICL affects the expectations of all states, and therefore the obligation of all states subject to the underlying rule, ICL allows states that favor greater specificity in rules to bind even those states that refuse to participate in or

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<sup>61</sup> Id.

<sup>62</sup> Raustiala, *supra* note 3; Anthony D'Amato, *International Soft Law, Hard Law, and Coherence* (Northwestern Public Research Paper No. 08-01, 2008), available at <http://ssrn.com/abstract=1103915>.

<sup>63</sup> Weil, *supra* note 2.

<sup>64</sup> To be fair, some prior critics of the analytic category of soft law have focused their analysis on international agreements, where the bindingness of the document is within states' control each time they negotiate an instrument. See Raustiala, *supra* note 4. But even as applied merely to agreements, the doctrinal distinction between binding and nonbinding agreements—without any space for quasi-legal agreements—fails to make sense of how states conduct their international legal affairs. Whether an agreement is binding or not is often a matter of perception, a judgment made on the basis of whether contractual language, or whether certain terms of art associated with international treaties are used. To be sure, major agreements—those negotiated at the cabinet- or head of state-level—are generally quite clear about whether they are binding. But the overwhelming number of agreements states enter into are made at lower levels, with considerably less time and attention to detail. It is thus possible for states to use the language of binding commitments in agreements that they intend to be nonbinding. Doing so may create ambiguity about the status of a particular agreement. From a compliance standpoint, in which states are more likely to comply with binding obligations, the presence of such ambiguity suggests a continuum of “bindingness,” rather than sharp distinctions. Ambiguity about whether an agreement is in fact binding reduces the compliance pull of an agreement, relative to the ideal type of perfect clarity as to its bindingness, and thus makes the agreement quasi-legal.

engage with the international institution. On the other hand, in granting an international institution the power to create a soft law jurisprudence states necessarily give up some control over the content of the jurisprudence. States, of course, generally retain some influence over international institutions that are formally autonomous, such as by appointing judges to an international tribunal or by threatening to withdraw their participation, but that control does not usually amount to the ability to dictate outcomes all the time. An institution with authority to make ICL thus has some measure of freedom to deviate from its “sponsors’” ideal positions. This freedom can also provoke a backlash. Just as decisions creating ICL can deepen cooperation, so too can they create conflict and disrupt existing patterns of cooperation when they make rules that are so burdensome that they provoke conflict among states and potentially drive states to exit an agreement or regime entirely.<sup>65</sup> States should thus create an institution with authority to make ICL in situations in which the ICL results in beneficial (from the point of view of the sponsor states) behavioral changes in all states affected by the underlying legal rule, and those benefits outweigh the costs of undesirable (again, from the sponsor states’ point of view) rulings.

Obviously, for this tradeoff to make sponsoring an ICL institution worthwhile, states must be able to predict with some measure of accuracy the direction of an institution’s decisions. In the case of a tribunal, the easiest prediction is that a tribunal’s decisions will make the general more specific. For example, human rights agreements are typically vague as to what specifically they require. Much in the way that common law courts have discretion when they measuring the legality of the specific facts and circumstances of individual cases against the general law as written, human rights tribunals have a great deal of discretion to shape the content of treaty-based obligations through contextual applications of the law. This generates an empirical prediction: ICL should be relatively common in areas in which international law is vague and a subset of states would prefer more specific rules than the set of affected states will agree to.

Another way to think of moving from the specific to the general is in terms of the depth of cooperation. International relations scholars use the term “depth of cooperation” to refer to how much a state must deviate from its status quo behavior. A specific agreement is of course not synonymous with a deep agreement. An agreement can very specifically describe exactly what states are already doing, making the agreement both specific and shallow. It is true, however, that vague agreements tend also to be shallow – a wide range of behavior generally can be considered compliant.<sup>66</sup> If an agreement is vague and shallow, sponsoring an ICL institution may be a way for cooperation minded states to obtain deeper cooperation by all states, including those opposed to deeper cooperation. A tribunal, by specifying (in a nonbinding way) more precisely what legal rules require, can deepen cooperation that would otherwise be shallow.

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<sup>65</sup> See Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 Colum. L. Rev. 1832 (2002).

<sup>66</sup> Hypothetically it would be possible for a vague agreement to be deep. This would occur where states’ status quo behavior did not fall within the wide range of behavior that could be considered compliant. While possible, however, vague, deep agreements seem to be rather rare.

This use of ICL has direct implications for a major debate in both the international law and international relations literatures: whether there is tradeoff between the breadth of cooperation (the number of states involved) and the depth of cooperation. Michael Gilligan has shown that there is such a tradeoff when solving a cooperative problem dictates applying a single rule to all states, but not when states can adopt differential responsibilities.<sup>67</sup> Extending this line of argument to legal institutions, one might argue that optional jurisdictional protocols appended to treaties are one way to soften the broader-deeper tradeoff. On this view, parties can select the level of their commitment – they may either agree only to the more general (and presumably less onerous) treaty rules, or they may submit themselves to the jurisdiction of a tribunal with authority to interpret the treaty as well, constituting a deeper level of commitment. Our theory of ICL, however, suggests that even where states undertake differential jurisdictional commitments (i.e., only some states submit themselves to dispute resolution), states will ultimately be subject to the same set of obligations. That is, the soft law jurisprudence of the tribunal affects all parties to the underlying treaty, not only those that accept the tribunal’s jurisdiction. Thus, over time the obligations of all parties to the treaty are deepened.

Empirically, we should observe states opposed to deeper cooperation taking this potential deepening of cooperation into account when joining a treaty that includes a dispute resolution provision. There a number of ways states could behave to mitigate the effects of an ICL-institution to which they are opposed. Aside from simply not joining the treaty, we might observe a high correlation between treaties with optional dispute resolution provisions and those with exit clauses or other mechanisms allowing states to completely void their legal obligations under the treaty. Alternatively, it may be that optional jurisdictional provisions are the product of bargaining between states that discount the future at a higher rate and those that are more patient. In one variation of this view, states favoring shallow cooperation should also be impatient. Thus, they value whatever payoff they receive from signing an agreement much more than they value the future payoff they receive from being subject to the rules resulting from the optional protocol. A second, similar take on the same theme would have the jurisdictional provisions as a compromise position. On this view, rather than writing deep cooperation into the present agreement, the agreement creates only shallow cooperation but also an optional jurisdictional protocol that all parties expect will lead to deeper cooperation over time. The optional protocol, then, serves as a present commitment to defer deep cooperation until tomorrow on terms to be decided. If this sort of compromise is what drives the creation of optional protocols, we would expect to see membership in optional protocols rise over time as a soft law jurisprudence accrues and states wish to influence its shape by participating in the ICL-creating institution. Finally, it might also be, as some commentators have suggested, that states often fail to realize how aggressive tribunals created pursuant to optional protocols would be in promulgated ICL.<sup>68</sup> If

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<sup>67</sup> Michael Gilligan, *Is There a Broader-Deeper Tradeoff in International Multilateral Agreements?*, 58 INT’L ORG. 3 (2004).

<sup>68</sup> See Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 ILL. L. R. 71 (2008).



correct, we would expect to see a decline in optional protocols over time as states learned how ICL works.

States can predict the way an institution will shape ICL by determining both the jurisdiction of the institution and the communities that play a role in the institution's deliberations. In terms of jurisdiction, legal scholars have long understood that the types of cases a tribunal can hear will affect the decisions it makes. In the human rights context, for example, a tribunal's jurisdiction can be limited to disputes brought by individual states,<sup>69</sup> or it can extend to complaints brought by individuals.<sup>70</sup> Allowing individual complaints to reach a tribunal will affect a human rights tribunal in a number of ways, such as by allowing a wider range of disputes to reach the tribunal, resulting in more decisions on a broader range of issues and faster accretion of precedent. Filtering issues before they reach the tribunal, by contrast, is a way of controlling the decisions it makes. Again in the human rights context, tribunals such as the UN Human Rights Committee frequently require they complainants exhaust all of the domestic remedies before pursuing a matter before the international tribunal.

Below, we consider several specific areas in which ICL is particularly important to the international legal architecture.

## **1. The International Court of Justice**

The ICJ is, of course, the preeminent international tribunal in the world (which is not to say that it is the most active or the most effective). It is perhaps somewhat strange, then, to realize that the ICJ operates almost exclusively through ICL. There are multiple reasons for this. First, as we have argued above, when tribunals interpret binding international agreements, their rulings themselves are really a form of soft law. The rulings are not binding on any but the parties before them with respect to the specific facts of the case. Disputes calling on the ICJ to interpret treaties can reach the court in several ways. States can, for example, accept the compulsory jurisdiction of the ICJ.<sup>71</sup> Another common route is through a provision in a treaty granting the jurisdiction to the ICJ to decide disputes arising under the treaty. In many cases, these provisions will be embodied in optional protocols. For example, the Vienna Convention on Consular Relations ("VCCR") has an optional protocol that grants the ICJ jurisdiction to resolve disputes "arising out of the interpretation or application of the Convention."<sup>72</sup> No one seriously argues that the impact of the ICJ's rulings is limited to the parties before the court in a given case, or even limited to those states that have accepted the jurisdiction of the ICJ. Rather, in such situations those states acquiescing to the jurisdiction of the ICJ are effectively delegating to the ICJ the authority to create a soft law jurisprudence that affects the obligations of all states-parties.

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<sup>69</sup> This is true of many tribunals, including those at the WTO.

<sup>70</sup> Guzman & Meyer, *supra* note 12.

<sup>71</sup> ICJ Statute art. 36(2).

<sup>72</sup> Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

Second, the ICJ can issue advisory opinions on questions referred to it by the General Assembly, the Security Council, or other organs of the United Nations authorized by the General Assembly.<sup>73</sup> The ICJ has issued advisory opinions on some of the most important geopolitical questions facing states, including the legality of the use of nuclear weapons,<sup>74</sup> the construction by Israel of a physical barrier between Israel and the West Bank,<sup>75</sup> and most recently on the legality of the Kosovar declaration of independence from Serbia.<sup>76</sup> Unlike disputes involving agreements, in which the Court's rulings are ICL with respect to all states not presently before it but binding with respect to the parties to the particular dispute at issue, advisory opinions are not binding law with respect to any state.<sup>77</sup> Despite this fact, states often call on the subjects of advisory opinions to comply with international law as set forth in those opinions. For example, following the ICJ's advisory opinion in the Israeli-Palestinian Wall case, the General Assembly passed a resolution calling on Israel to abide by its obligations as set forth in the advisory opinion,<sup>78</sup> and the European Union called on Israel to abide by its international law obligations, presumably also a reference to the ICJ's opinion.<sup>79</sup>

This treatment of the ICJ's advisory opinion again puts pressure on a sharp dichotomy between law and nonlaw. Because advisory opinions are just that – advice on what the law is, rather than rulings that are themselves law – they might have to be categorized as purely political statements. Yet states themselves generally do not understand advisory opinions to be purely political.<sup>80</sup> Rather, they expect that legal consequences flow from the failure to comply with advisory opinions. The only explanation for such a phenomenon is that while the opinions are undeniably not themselves binding law, they elaborate on what binding rules require. The rulings are, of course, not accepted in their entirety by all states as statements of what binding law requires; if they were, there would be no meaningful difference between a nonbinding ruling and the underlying binding rules. Instead, to put it in social science terms, the obligations set forth in advisory opinions are positively correlated with and shape state expectations about what

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<sup>73</sup> ICJ Statute art. 65; UN Charter, art. 96.

<sup>74</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 242-43, (July 1996).

<sup>75</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 171 (July 9, 2004).

<sup>76</sup> The ICJ has not ruled on this as of yet. We will adjust the text to reflect the status of the case at the time of publication.

<sup>77</sup> Aloysius P. Llamzon, Jurisdiction and Compliance in Recent Decisions of the International Court of Justice, 18 EURO. J. INT'L L. 815, 820 (2007).

<sup>78</sup> UN General Assembly Resolution "Acknowledging" the Advisory Opinion of the ICJ on Israel's Apartheid Wall on July 9, 2004, Palestine Media Center, Mar. 21, 2006, <http://www.palestine-pmc.com/details.asp?cat=11&id=84> (last visited Feb. 19, 2009).

<sup>79</sup> Moshe Hirsch, The Impact of the Advisory Opinion on Israel's Future Policy: International Relations Perspective, 1 J. INT'L L. & INT'L REL. 319, 330 (2005).

<sup>80</sup> There are, not surprisingly, exceptions in particular instances in which states are opposed to a specific ruling. For example, Israel referred to the Wall ruling as a "politically motivated maneuver." See Isr. Ministry of Foreign Aff., ICJ Advisory Opinion on Israel's Security Fence—Israeli Statement, July 9, 2004,

<http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2004/Statement+on+ICJ+Advisory+Opinion+9-July-2004.htm> (last visited Feb. 19, 2009).

constitutes compliant behavior with binding rules, but are not perfectly correlated with state expectations.

Third, the ICJ is the principal neutral arbiter of customary international law. Customary law, as a general rule, is applicable to all states.<sup>81</sup> But because customary law as traditionally conceived is the result of an ill-defined mix of state practice and state belief, there often will be no authoritative statement as what custom requires. States that wish clarity in customary rules have several strategies at their disposal. The first strategy is the codification of custom.<sup>82</sup> A group of particularly interested states can bind themselves to a treaty that purports to codify custom, and in doing so send a signal to nonmember states as to what they think customary law requires.<sup>83</sup> To the extent that this process is effective as means of dictating the content of customary law, it works because binding oneself to a particular interpretation of customary law is a costly signal. A state loses the freedom to reinterpret the law in the future when doing so might be convenient.<sup>84</sup> The presence of this cost is critical to whether nonmember states will perceive the agreement to really be an expression of custom, or whether it will be perceived as merely a codification of a rule in the best interest of the member states.

An alternative to codification that is potentially more costly – and thus potentially more effective at clarifying customary law – is granting jurisdiction to a tribunal to rule on the content of CIL. Such a move is costlier than codification because states granting jurisdiction lose control of the resulting interpretation of the customary rules. Somewhat paradoxically, this loss of control can actually enhance the effectiveness of a tribunal's sponsors in deepening cooperation based on customary rules. Consider again the *Nicaragua* case.<sup>85</sup> One of the principal legal checks on the use of force is the customary rules circumscribing the right of self-defense. For those states seeking to curb the use of force between nations, or more narrowly those states seeking to inhibit the intervention of certain states in the internal affairs of other states, a tribunal provides a way to elaborate more precisely the limits on the right of self-defense. At the same time, because there is the *ex ante* risk that a particular use of force will be found justified, submission to the authority of a tribunal is costly. In the *Nicaragua* case, for example, the ICJ ruled that, *inter alia*, customary international law prohibits one state from intervening in the internal affairs of another state for the purpose of “us[ing] methods of coercion in regard to” choices “of a political, economic, social, and cultural system.”<sup>86</sup> And despite the ICJ's professed limitations that left it bereft of “jurisdiction to rule upon the conformity with international law of any conduct of States not parties to the present dispute, or of conduct of the Parties unconnected with the dispute”<sup>87</sup> in any binding capacity, there is little doubt

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<sup>81</sup> Customary law only applicable to certain states is referred to as special custom. See Guzman, *supra* note 58.

<sup>82</sup> Andrew T. Guzman & Timothy L. Meyer, *Customary International Law in the 21st Century*, in PROGRESS IN INTERNATIONAL ORGANIZATION 197 (Russel Miller & Rebecca Bratspeis, eds., 2007).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> See *supra* note 60.

<sup>86</sup> *Id.* at 108.

<sup>87</sup> *Id.* at 109.

that its ruling affected how states perceived the law on the use of force as applied to other conflicts. That is, despite the ICJ's professed inability to create binding international law with respect to conflicts other than the way before it, legal commentators have generally understood the ICJ rulings to explicate customary law in a way that does affect state obligations. Because its ruling is not binding except with respect to the dispute before it, such a broad collateral legal consequence can only come about through the decision's role as ICL.

## 2. Human Rights

Human rights law is another area in which international common law has played a vital role in the development of international law. In the aftermath of the Second World War, human rights treaties became the principle instrument through which states tried to constrain the ways in which they could treat their own citizens. Human rights law, though, has a host of difficulties that, if not unique to it, are particularly significant in that area of the law. Unlike most other areas of international law, human rights law does not attempt to solve a problem created by negative externalities. For the most part, the way a state treats its citizens does not have tangible cross-border consequences.<sup>88</sup> This lack of consequences, coupled with the fact that violations occur in territory under the control of the violating state, makes compliance particularly difficult. Moreover, generating agreement on concrete standards is difficult, especially because the conflict between national cultural traditions and international law is at its high point in the area of human rights.

In response to these concerns, human rights treaties often establish international tribunals or committees with responsibility for monitoring compliance. For example, the International Covenant on Civil and Political Rights establishes the UN Human Rights Committee.<sup>89</sup> The Committee monitors state compliance in three ways: 1) it "comments" on state reports regarding their compliance with the ICCPR's obligations; 2) it issues reports on disputes between states pursuant to a challenge system (into which states must opt); and 3) it issues nonbinding views on complaints filed by individuals against states that have agreed to submit to the Committee's jurisdiction.<sup>90</sup> Although the Committee's work product in all three of these areas is nonbinding and meets our definition of international common law, the third is the most interesting both because it results from submitting to the jurisdiction of the Committee through an optional protocol – and thus implicates the tradeoff we describe above – and because it is generally considered to have been the most effective in expanding the Committee's role in generating a human rights jurisprudence.<sup>91</sup> Regional tribunals, created by regional

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<sup>88</sup> There are, of course, exceptions to this. Large scale human rights violations can create refugee problems for neighboring countries, for example.

<sup>89</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) at 59, U.N. Doc. A/6316 (Dec. 16, 1966) (entered into force Mar 23, 1976).

<sup>90</sup> See Guzman & Meyer, *supra* note 12.

<sup>91</sup> Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L. J. 273, 351 (1997).

agreements and with structures that vary to one degree or another from the UNHRC's, also abound.<sup>92</sup>

Of course, monitoring often carries with it interpretive authority.<sup>93</sup> This is a result of the fact that most legal rules are phrased at some level of generality, and thus whether any specific act or omission violates the rule will require detailing further what the rule requires. As with the ICJ, a court's rulings are never binding law with respect to parties not before the suit, and are not indirectly binding on those parties through the doctrine of *stare decisis*. Indeed, in the human rights area such rulings are frequently not even binding on the parties to the dispute. The "views" expressed by the UNHRC, for example, have no binding effect, but clearly inform the way in which states think about the obligations created by the underlying binding legal rules. Moreover, both the UNHRC and other states clearly believe that the UNHRC's views, developed pursuant to its jurisdiction to hear individual complaints under the Optional Protocol, apply to states not party to the Optional Protocol. In *Toonen v. Australia*, the UNHRC found that Tasmania's anti-sodomy laws violated the privacy and antidiscrimination provisions of the ICCPR.<sup>94</sup> A year after issuing its decision, the UNHRC, commenting on a report of the United States made pursuant to the self-reporting requirements under Art. 40 of the ICCPR, expressed concern "at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination."<sup>95</sup> The Committee's comments are a direct effort to expand the effect of its *Toonen* opinion beyond to a state that has not consented to jurisdiction under the ICCPR's Optional Protocol.

This use of international common law helps explain how international law evolves in a way that is faithful to the doctrinal distinction between binding and nonbinding rules, while preserving a role for nonbinding norms in affecting how states understand legal rules. Scholars studying human rights regimes have sometimes made the claim that human rights tribunals have transformed nonbinding obligations into binding rules.<sup>96</sup> But consider whether this is literally possible. What we might think of as forward-looking binding obligations only come from three sources: 1) a binding agreement; 2) a legislative body (such as the UN Security Council) acting pursuant to a binding agreement; 3) or customary law. Those decisions of international tribunals that are

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<sup>92</sup> Two examples are the European court of Human Rights and the Inter-American Court of Human Rights.

<sup>93</sup> Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 ILL. L. R. 71, 87 (2008).

<sup>94</sup> *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 ¶ 7.8 (1994), in *ICCPR: Selected Decisions of the Human Rights Committee under the Optional Protocol*, (Vol. 5) at 133, U.N. Doc. CCPR/C/OP/5/133 (2005), available at [www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf](http://www.ohchr.org/Documents/Publications/SDecisionsVol5en.pdf) (last visited Feb. 19, 2009).

<sup>95</sup> Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. GAOR Human Rights Committee, 53d Sess., U.N. Doc. CCPR/C/79/Add 50 (1995), available at <http://www.unhcr.ch/tbs/doc.nsf/0/b7d33f6b0f726283c12563f000512bd1?Opendocument> (last visited Feb. 19, 2009).

<sup>96</sup> See, e.g., Helfer, *supra* note 93, at 87.

binding tend to be backwards looking. They decide that certain specific past conduct did or did not violate the law, but, with some exceptions, they do not impose binding obligations going forward.<sup>97</sup> If a rule is nonbinding, then, it can only become binding through one of these three channels. It cannot become binding of its own force through judicial decisions. This is in contrast to how domestic courts operate. When the Supreme Court issues a decision that the death penalty is unconstitutional as applied to the crime of raping a child,<sup>98</sup> the principle of *stare decisis* operates to make that decision the law of the land. Lower courts, bound by the Supreme Court's decision, will apply the ruling to invalidate similar statutes.<sup>99</sup> In international law, however, there is no such mechanism, and states not subject to the jurisdiction of the tribunal are beyond even the limited review (binding or otherwise) of international tribunals.

International common law provides a more coherent way to think about the role international tribunals play in the evolution of human rights law. When a tribunal reinterprets a binding legal obligation in light of a nonbinding norm, the nonbinding norm does not itself become binding. The tribunal's decision, as we have said, is at most binding with respect to the narrow dispute before it, and in many scenarios, such as the UNHRC, is not binding at all. Instead, the nonbinding norms referenced in the tribunal's opinion affect what types of behavior states consider compliant with the underlying legal rules. Compliance with nonbinding norms and decisions, in other words, becomes one guidepost for states to use in assessing whether future behavior is compliant with the underlying legal rules. Unlike a Supreme Court decision, though, which would control the outcome of a compliance analysis when on point, states remain free to disagree with a tribunal's nonbinding rulings. In other words, precisely because the decisions are nonbinding, states' expectations may remain unchanged.

### 3. Trade

Examples of international common law are rampant in the trade area as well. The chief tribunal in trade is the GATT/WTO dispute resolution body, which has evolved over time. At present, WTO disputes are governed by the Dispute Settlement Understanding (DSU), which establishes a multi-tier system of review. That review consists, most notably, of a panel of legal and technical experts that review the challenged conduct, and the WTO Appellate Body, which is empowered to review the panel's legal conclusions.<sup>100</sup> Panel reports and Appellate Body decisions are then adopted by the Dispute Settlement Body (DSB) unless the DSB unanimously decides to reject the proceedings below.<sup>101</sup>

It is generally agreed that the WTO Appellate Body has played an extraordinary role in defining and expanding WTO obligations. For example, in the U.S.—Shrimp Turtle

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<sup>97</sup> Some exceptions include the functional equivalent of temporary restraining orders designed to preserve the status quo before an issue is decided.

<sup>98</sup> *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

<sup>99</sup> This is not to deny that lower courts may distinguish similar laws to avoid invalidating them.

<sup>100</sup> Benjamin H. Liebman & Kasaundra M. Tomlin, *Safeguards and Retaliatory Threats*, 51 J. L. & ECON. 351, 356-57 (2008).

<sup>101</sup> *Id.* at 357.

case, the Appellate Body was called upon to develop a framework for when a state may not exercise Art. XX of the GATT's exceptions to the GATT's general affirmative obligations.<sup>102</sup> In that case, several countries filed a complaint with the WTO alleging that the United States had violated its free trade obligations by banning the importation of certain shrimp and shrimp products from WTO members that did not have laws mandating certain methods of protecting endangered sea turtles during shrimp fishing. The Appellate Body concluded that the United States' ban was provisionally justified under Art. XX(g) as a measure necessary for the "conservation of exhaustible natural resources."<sup>103</sup> In so holding, the Appellate Body rejected an earlier understanding of Art. XX(g), which required that the resource in question be located within the jurisdiction of the state invoking the exception.<sup>104</sup> The Appellate Body went on, however, to address whether the ban was also consistent with the chapeau of Art. XX, which provides that Art. XX's exception may be invoked "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." In interpreting what constitutes "unjustifiable discrimination," the Appellate Body devised a test consisting of at least five different factors, ranging from whether the actions have an "intended and actual coercive effect" on WTO member's policy decisions,<sup>105</sup> and whether prior to enacting the ban the respondent (the United States) had attempted to accomplish its objectives through bilateral or multilateral negotiations.<sup>106</sup> These factors are a nonbinding interpretation of Art. XX's chapeau, but their legal effect (or lack thereof) beyond the Shrimp—Turtle case notwithstanding, they have influenced how states evaluate what constitutes compliance with Art. XX.

Goldstein and Steinberg have analyzed this type of lawmaking by the Appellate Body in the same terms that legal scholars think about common law courts: gap-filling and clarification of ambiguities.<sup>107</sup> In the case of the former, courts create obligations for which there is no textual hook; in the case of the latter, courts define text left ambiguous, often deliberately, by its drafters.<sup>108</sup> In reality, the distinction between these two modes of lawmaking is a difference in degree rather than a difference in kind. Regardless of whether an ambiguous textual basis for a tribunal's ruling exists, in both cases a court is crafting an obligation not explicitly defined by the text of an agreement.

From a jurisdictional standpoint, it is worth noting that the DSU deviates somewhat from the earlier tribunals discussed. The DSU is formally an annex to the WTO agreement,

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<sup>102</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 79-91, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter U.S.—Shrimp-Turtle], available at <http://docsonline.wto.org/DDFDocuments/t/WT/DS/58ABR.doc> (last visited Feb. 19, 2009).

<sup>103</sup> *Id.* ¶ 145.

<sup>104</sup> Judith Goldstein & Richard Steinberg, *Negotiate or Litigate? Effects of WTO Judicial Delegation on U.S. Trade Politics*, 71 *Law & Contemp. Probs.* 257, 269 (2008).

<sup>105</sup> U.S.—Shrimp Turtle, ¶ 161.

<sup>106</sup> *Id.* ¶ 166.

<sup>107</sup> Goldstein & Steinberg, *supra* note 104, at 268.

<sup>108</sup> *Id.*

and thus is binding on all WTO members. The state-level question whether to grant jurisdiction thus does not arise in the context of the WTO. However, the decision to create the DSU in the first place, and to tie it to the acceptance of the WTO as a whole, was driven by concerns similar to those that motivate the creation of international common law. The DSU was pushed by the United States, which objected to the dispute resolution rules of the GATT, under which any member could block a dispute from going forward.<sup>109</sup> The United States proposed a DSU which included the Appellate Body (which did not exist under the GATT) and required unanimity to reject a ruling.<sup>110</sup> The motive behind the DSU, and its effect, was a dramatic increase in the number of disputes adjudicated under the DSU as measured against the GATT's dispute resolution provisions. While 452 complaints were filed during the forty-six year tenure of the GATT, 279 complaints were filed in the first eight years of the WTO.<sup>111</sup> And while other states may have agreed to the DSU as a means of restraining the United States' penchant for unilaterally applying trade sanctions in response to a perceived violation of the GATT, the United States calculated the decisions under the WTO would, on balance, advance its objectives more than they would constrain its ability to achieve those objectives.<sup>112</sup> The United State, in other words, pushed for the DSU because it believed that under the DSU an international common law of trade would develop that would be favorable to its interests. In effect, it believed that tribunals established to rule on an agreement establishing free trade obligations would be more likely to rule in favor of free trade, the position more often supported by the United States.<sup>113</sup>

#### 4. Other Source of ICL

International tribunals are not, however, the only source of what we call international common law. Similar soft law norms arise from all manner of international organizations. The United Nations General Assembly, for example, issues resolutions that, though not binding as a matter of international law, are widely acknowledged to impact the legal obligations of states. These resolutions might be relevant because they help in identifying relevant rules of customary international law by providing evidence of state practice, *opinio juris*, or both. If this were the role played by the General Assembly we would not describe the resolutions as forming international common law because they would only be relevant as evidence of custom.<sup>114</sup>

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<sup>109</sup> *Id.* at 264-65.

<sup>110</sup> *Id.* at 265.

<sup>111</sup> *Id.* at 265-66.

<sup>112</sup> *Id.* at 265.

<sup>113</sup> Steinberg has argued that in negotiating the DSU states did not realize that the WTO Appellate Body would act much like a common law court. *See id.* at 266; Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247 (2004). While possible, this argument is not terribly persuasive. As mentioned earlier, to suggest that a tribunal established to rule on disputes under a set of ambiguous and indeterminate legal standards would not exercise some discretion to expand and redefine those ambiguous and indeterminate obligations is to suggest that negotiators of the DSU ignored the experience with other international tribunals as well as the history of common law courts in general.

<sup>114</sup> *See*, Guzman, *supra* note 58; Andrew T. Guzman & Timothy L. Meyer, *supra* note 82.



A glance at General Assembly resolutions and their impact, however, makes it clear that many such resolutions do not represent CIL and yet implicate issues of concern to states, impact debates among states, and appear to affect behavior. They do so by influencing the expectations of states and shaping the meaning of existing legal rules. In this way, General Assembly resolutions are similar to the rulings of tribunals. They elaborate on what an underlying binding rule of international law requires. To the extent that their interpretations differ from or add to the baseline requirements of the binding legal rules, that gloss is international common law. They shape state expectations about what constitutes compliant behavior with the underlying legal rules, but do so in a nonbinding way.

Consider, for example, the principle of non-refoulement, under which a state may not return a person to a place where he or she might be tortured or face persecution. This principle has been codified in Art. 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention).<sup>115</sup> Non-refoulement strikes at the heart of a core notion of national sovereignty: that a nation may be the ultimate arbiter of who it permits within its borders.<sup>116</sup> Non-refoulement, which is often considered to be a rule of customary international law as well as a treaty-based rule,<sup>117</sup> is subject to a number of exceptions under the Refugee Convention. Art. 1(F) provides that the Convention's protections do not apply in the event the person seeking refugee status

(a) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) has been guilty of acts contrary to the purposes and principles of the United Nations.

While the exceptions' original impetus was to preserve the right of states to extradite and pursue the prosecution of criminals, states have worried that the language of the convention is too narrowly drawn for a world in which nonstate actors routinely commit acts of violence that may not satisfy the strict legal definitions of the enumerated exceptions.<sup>118</sup> Rather than seek to amend the convention, however, states favoring more expansive exceptions to the non-refoulement principle pursued their agenda through nonbinding General Assembly resolutions. In 1996, for example, the United Kingdom sponsored a resolution that would have barred, as running afoul of Art. 1(F)(c)'s exception for those guilty of acts contrary to the purposes and principles of the United

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<sup>115</sup> Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954).

<sup>116</sup> James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT'L L. J. 257, 259 (2001).

<sup>117</sup> Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT'L J. REFUGEE L. 373, 383 (2008).

<sup>118</sup> Hathaway & Harvey, *supra* note 116, at 263.

Nations, those “who financed, planned, and incited terrorist deeds.”<sup>119</sup> The resolution was clearly aimed at changing how states understood Art. 1(F)(c)’s limits; in this case, it was an attempt to expand that understanding to encompass a form of activity not contemplated at the time the treaty was drafted. The resolution was defeated, but the next year the General Assembly passed a Resolution on Measures to Eliminate International Terrorism, which provided that “acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations.”<sup>120</sup> At the same time, the resolution also called on states to ensure before granting asylum that asylum seeker had not participated in terrorist acts.<sup>121</sup>

The decision to call on states to consider terrorism before granting asylum, and then to define terrorism in terms that mirror the language of Art. 1(F)(c), clearly indicates an attempt to expand states’ understanding of the exception, and thus to redefine as compliant behavior acts – refouling an individual guilty of “terrorist acts” that may not necessarily rise to the level of, *inter alia*, a crime against humanity – that might have been thought to be noncompliant. Several commentators have objected to this use of nonbinding declarations to amend states’ understanding of binding international agreements.<sup>122</sup> Hathaway and Harvey, for example, write that “the General Assembly should not characterize a matter as contrary to the principles and purposes of the United Nations absent a clear normative consensus.”<sup>123</sup> Only consensus, usually necessary under treaty rules to formally amend a binding obligation, is acceptable when expanding or contracting obligations. From a descriptive standpoint, however, the logic behind using nonbinding General Assembly resolutions to effectively modify existing binding obligations is clear. Unlike most multilateral treaties, General Assembly resolutions need not be the product of unanimity. Taking what can be thought of as a proposed rule, such as whether a past “terrorist” act can justify the denial of refugee status and refolement under the Refugee Convention, to a majoritarian institution makes it more likely that the rule will pass. At the same time, though, it weakens the relationship between the rule and state expectations about what constitutes compliant behavior with the underlying legal rule. If written into the Convention itself, there would little room for states’ expectations to differ (although obviously in individual cases they might differ over whether an act constitutes a terrorist act); leaving the rule outside of the convention, states’ views as to what the Refugee Convention requires with respect to “terrorist” acts may differ. The Resolution itself thus affects states’ expectations as international common law, a nonbinding gloss on international refugee law.

The distinction between a resolution’s role as evidence that a customary rule exists and its role as a legally nonbinding, but nevertheless constitutive, act that shapes state

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<sup>119</sup> U.N. GAOR, 51st Sess., 10th mtg. at 5, U.N. Doc. A/C.6/51/SR.10 (Oct. 3, 1996) (statement of Ms. Whilmhurst of the United Kingdom).

<sup>120</sup> Measures to Eliminate International Terrorism, G.A. Res. 51/210, Annex ¶ 2, GAOR 52nd Sess., U.N. Doc. A/RES/52/165 (Jan. 16, 1997).

<sup>121</sup> *Id.* ¶ 3.

<sup>122</sup> Hathaway & Harvey, *supra* note 116, at 267.

<sup>123</sup> Hathaway & Harvey, *supra* note 116, at 267-68.

expectations may shed light on a common confusion about General Assembly resolutions. Scholars and tribunals often treat such Resolutions as if the Resolutions themselves are binding law. But, as we alluded to above, General Assembly resolutions are nowhere officially recognized as a source of binding international law. Art. 38 of the Statute of the International Court of Justice, the starting place for studying sources of international law, refers only to treaties, custom and principles accepted by nations, and judicial decisions and scholarly writing.<sup>124</sup> And while the UN Charter gives the Security Council the authority to issue binding edicts, the General Assembly lacks any such grant of legislative authority. What role, then, do General Assembly resolutions play? Those who favor a strict dichotomy between law and non-law are once again put in the position of trying to make sense of why international tribunals and scholars routinely treat General Assembly resolutions as if they have *some* legal effect, even if they themselves are not binding. On their theory, multiple international tribunals, including the International Court of Justice, whose statute provides the principle list of the sources of international law, are regularly and erroneously according legal significance to purely political obligations.

That courts, judges, and scholars do regularly treat General Assembly resolutions as if they have freestanding legal effect is obvious from a cursory inspection of major judicial opinions. In its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, for example, the ICJ wrote that:

The Court will now determine the rules and principles of international law which are relevant in assessing the legality of the measures taken by Israel. Such rules and principles can be found in the United Nations Charter and certain other treaties, in customary international law and in the relevant resolutions adopted pursuant to the Charter by the General Assembly and the Security Council.<sup>125</sup>

The reference to the General Assembly resolutions as a source of law stands out in the opinion as a sore thumb next to the sources of law whose pedigree is unquestioned.

Similarly, in the Nuclear Weapons Advisory Opinion, the Court was called upon to assess the relationship between the right of self-defense and obligations to protect the environment. In the course of concluding that “while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict,” the Court cited approvingly General Assembly Resolution 47/37, which it held “affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in

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<sup>124</sup> ICJ Statute art. 38.

<sup>125</sup> See *supra* note 75.

the implementation of the principles of the law applicable in armed conflict.”<sup>126</sup> Moreover, although not a General Assembly Resolution, the Court also cited the Rio Declaration, a nonbinding declaration of principles, as supporting the proposition the environmental concerns are relevant to an inquiry into the legality of the use of nuclear weapons.<sup>127</sup>

Finally, in the Case Concerning the Arrest Warrant of 11 April 2000, a case between Belgium and the Congo involving Belgium’s issuance of an arrest warrant charging a former foreign minister of the Congo with violations of the Geneva Conventions and crimes against humanity, Judge Bula-Bula’s separate opinion defined the crime of aggression with reference to “Article 51 of the United Nations Charter, as further defined by Article 3 of resolution 3314 of 14 December 1974 and confirmed as a rule of customary law by the Judgment of the Court of 27 June 1986 in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*.”<sup>128</sup> If General Assembly Resolution 3314, defining the crime of aggression, was devoid of all legal significance, one would hardly expect to see a judge on the ICJ referring to the resolution as having “defined” the crime of aggression. And while one might argue that the resolution is customary law, Judge Bula-Bula’s opinion disclaims this possibility; he locates the rule’s pedigree in custom in the *Nicaragua* decision, and instead treats the General Assembly Resolution as an exposition of Art. 51 of the UN Charter.<sup>129</sup>

The answer to this puzzle, as we have said, lies in the fact that the content of international legal obligations flows from states’ expectations about what constitutes compliant conduct with legal rules. States’ responses to the legally significant international acts of other states depend on their preexisting view of what constitutes compliant behavior. States, then, have an incentive to shape those expectations. There is nothing that limits a state’s efforts to so shape expectations to the creation of more binding obligations, yet that is exactly what a sharp dichotomy between law and nonlaw suggests. If states have a legally binding obligation not to commit acts of aggression, for example, those who suggest soft law cannot exist as a coherent category must hold the view that what

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<sup>126</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 242-43, (July 1996).

<sup>127</sup> *Id.* at 242.

<sup>128</sup> Arrest Warrant of April 11 2000 (Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14).

<sup>129</sup> Moreover, in making application to the ICJ, states themselves regularly frame conduct as illegal under General Assembly resolutions. *See, e.g.*, Case Concerning Oil Platforms (Iran v. U.S.), 1996 I.C.J. 803, 812 (Dec. 12) (Iran arguing that there is an obligation to maintain peaceful and friendly relations “in accordance with the relevant provisions of the Charter of the United Nations and of customary law governing the use of force, as well as with General Assembly Resolution 2625.”); Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), 2000 I.C.J. 111, 113 (Jan. 30) (The Congo requested the ICJ declare that “Uganda is guilty of an act of aggression within the meaning of Article 1 of resolution 3314 of the General Assembly of the United Nations of 14 December 1974 and of the jurisprudence of the International Court of Justice.”). The way in which states frame their own complaints, however, is somewhat less probative of how they actually perceive the status of resolutions. In acting as advocates, states have an incentive to muster support for the legality of their position from any source available.

constitutes an act of aggression can itself only be defined through binding law. But such a view is regularly belied by state conduct, which employs a range of nonbinding instruments that have legal consequences precisely because they shape state expectations. General Assembly Resolutions are but one example of such a tool, although perhaps one of the more prominently cited by both states and international tribunals. Of course, not all General Assembly Resolutions will be international common law. Resolutions that do not purport to define binding legal obligations and can plausibly be thought to shape states' expectations about such obligations are purely political. But for those resolutions that do speak to the content of binding obligations, they are not deprived of their ability to shape expectations – and thus to effect legal consequences – merely because they are nonbinding. Binding legal rules thus remain the benchmark by which legality and quasi-legality are measured, but binding instruments are not the exclusive tool for defining legal obligations.

The General Assembly is just one example of an international organization that creates international common law. In common law systems the law created by courts is, of course, binding law. In this sense international common law is quite different. We refer to it as “common law” because like judge-made law in domestic systems it is made by entities other than legislatures or, in the case of international law, states entering into treaties. Because international common law is made by many actors in a decentralized way, and because there is no formal process through which it is created, it is impossible to generate a closed list of relevant sources of international common law. Many actors attempt to influence this set of international legal norms, and some have more relevance and success than others. Among those that seek to influence the international understanding of soft law norms are the UN General Assembly, the OECD, the IMF, the World Bank, the Human Rights Committee, the International Labor Organization, Greenpeace, Amnesty International, Human Rights Watch, and many others.

## **Conclusion**

In bargaining over the design of international agreements, states have multiple concerns. It is thus perhaps not surprising that no single theory can explain why states employ different degrees of legal formality in their international commitments. Legality – with its associated compliance pull – is a general, not a special purpose, tool.

In this Article, we have advanced four complementary theories explaining why in certain circumstances states may use soft law – legally nonbinding commitments from which legal consequences flow. These theories – coordination, loss avoidance, delegation, and international common law – explain a significant range of the soft law we observe. Under the loss avoidance theory, the negative sum aspect to sanctions for violating international legal rules means that in many cases binding legal obligations are inefficient. Nonbinding soft law obligations allow states to realize more value from their commitments by reducing the losses in the event of undeterrable violations. Under the delegation theory, soft law allows states to tap into a more efficient method of amending legal rules as circumstances change – by allowing individual states to act as a focal point for reordinating expectations about what constitutes compliant behavior with legal rules.

Finally, our theory of international common law explains how states transfer soft lawmaking authority to nonstate entities in order to circumvent the requirement that a state consent before being bound by a legal obligation. International common law refers to those obligations that emerge from institutions that are authorized to speak about legal rules but whose pronouncements are nonbinding with respect to future conduct. It is this category of soft law that most deeply underscores the analytic need for a category of quasi-legal rules. International common law refers to, among other things, the decisions of international tribunals as applied to all conduct but that before it (and sometimes even to that conduct), to the standards of conduct set by international organizations, and to the resolutions of international bodies such as the UN General Assembly. Scholars have long had the impulse to accord these acts legal significance, but have been forced to shoe-horn these rules into the category of customary law or ascribe greater binding effect to the ruling of tribunals than they in fact have. Our theory of international common law explains that scholars and commentators need not make this choice – nonbinding rules can have legal significance when they shape expectations as to what constitutes compliance with binding rules.