



Society of  
International  
Economic  
Law

Online Proceedings  
Working Paper No. 45/08

**Inaugural Conference, Geneva, July 15-17, 2008**

**HOW HARD AND SOFT LAW INTERACT IN INTERNATIONAL  
REGULATORY GOVERNANCE : ALTERNATIVES,  
COMPLEMENTS AND ANTAGONISTS**

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July 8, 2008

Published by the Society of International  
Economic Law

with the support of the University of Missouri-  
Kansas City (UMKC) School of Law



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**How Hard and Soft Law Interact in International Regulatory Governance:  
Alternatives, Complements and Antagonists**

by Gregory C. Shaffer and Mark A. Pollack<sup>1</sup>

There has been a considerable amount of legal scholarship regarding the use of “hard” and “soft” law in international governance, written from legal positivist, normative and political economy perspectives. Within the legal academy, hard law generally refers to legal obligations of a formally binding nature and soft law to law that is not formally binding but may nonetheless exercise significant influence on behavior. Other social scientists slightly vary these definitions of international hard and soft law, viewing international legal instruments as lying along a hard-soft law continuum in terms of different features, such as the law’s precision, obligation and delegation to a third party for dispute resolution, each of which can be of a harder and softer nature.<sup>2</sup> Much of this literature assesses the relative functional attributes and deficiencies of hard and soft law instruments as alternatives for international governance, as well as how these instruments can be combined sequentially as mutually reinforcing complements to lead to greater international cooperation over time. The literature on hard and soft law, in turn, has influenced our understanding of transatlantic economic cooperation, in which the United States (US) and the European Union (EU) have undertaken a wide range of agreements, both bilateral and multilateral, and largely of a soft-law variety.

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<sup>2</sup> See Abbott and Snidal 2000 and discussion in Part IA.

The existing scholarly literature on hard and soft law can be divided into three camps: legal positivists, rationalists and constructivists.<sup>3</sup> All three of these camps predominantly view hard and soft law as interacting in complementary ways, but they have different starting points. Many legal positivists question if soft law can be considered to be law at all because it is not legally binding, but, in any case, they view it at best as an inferior instrument whose only rationale is to serve as a stepping stone to hard (real) law. Rationalists, in contrast, contend that states choose between hard and soft law instruments depending on the level of commitment that they wish to make. Since rationalists find that both hard and soft law can be advantageous to states in different circumstances, neither should be judged to be superior. For example, rationalists contend that because soft law is less costly for states to negotiate and less costly to their sovereignty, states will prefer it in situations of uncertainty where they need to learn more about the intentions of the other parties or about the underlying technical issues. Constructivists, in contrast to rationalists, maintain that state interests are formed through socialization processes of interstate interaction which soft law can facilitate. They thus favor soft law instruments for their capacity to generate shared norms and a sense of common purpose and identity. Many constructivists also focus on the role of non-state actors who only have soft law instruments available and who use these instruments to catalyze change in international law and national regulatory practice. As with legal positivists, both rationalists and constructivist scholars contend that soft law can lead to hard law and, once formed, can help to further elaborate hard law, resulting in progressive cycles of law-making leading to greater regulatory cooperation.

For purposes of this chapter, we will remain agnostic as to which of these three camps most accurately captures the nature of hard and soft law and their relative advantages, although we have our own views in this respect.<sup>4</sup> We will remain agnostic because our primary purpose in this chapter is to reveal what is missing in the analysis of all three camps because of their focus on hard-soft law interaction only in complementary terms. We make two central claims. Our first and primary claim is that international

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<sup>3</sup> A full explication of these three modes of scholarship and their approaches to hard and soft law interaction is set forth in Part I.C.

<sup>4</sup> Neither of us are legal formalists, and both of us can be viewed primarily as rationalists because of our focus on actors and their interests, although our approach is of a soft rationalist variant which takes seriously constructivist insights.

hard and soft law instruments (or, for that matter, any legal instruments that vary in their soft and hard law characteristics) can serve not only as alternatives or as complements but indeed as antagonists, working at cross-purposes with each other. Hard and soft law *may* interact as complements, we argue, but only under certain conditions, including most notably the absence of significant distributive conflict among parties to such agreements. Under other conditions, however, which we identify as the existence of distributive conflicts and of pluralistic regime complexes, hard and soft law may interact in an antagonistic fashion. In this sense, the existing literature may be accused of selection bias, focusing on those issue-areas in which distributive conflict is low and where the interaction of hard and soft law is correspondingly largely complementary.

Our second claim is that this antagonistic interaction between hard and soft law has particular implications in a fragmented international system, affecting the very nature of international hard and soft law regimes and their purported advantages. We will show how the interaction of hard and soft law regimes can lead to the “hardening” of soft law regimes, resulting in more strategic bargaining and reducing their purported advantages of consensus-building through information-sharing and persuasion, and the “softening” of hard law regimes, resulting in reduced legal certainty and predictability.

The chapter is in five parts. Part I provides an overview of the existing literature regarding the definitions of hard and soft law (section A), the relative attributes and deficiencies of hard and soft law as alternatives (section B), and how hard and soft law can act as complements, leading to greater cooperation (section C). Part II provides the background theoretical context for assessing the roles and interaction of hard and soft law in international regulatory governance as alternatives, complements and antagonists, namely the role of US and EU economic and institutional power (section A), the role of distributive conflict between the US, EU and third countries (section B), and the challenges posed by international regime fragmentation (section C). Part III assess how, in the presence of distributive conflicts and fragmented regime complexes, hard and soft law can just as likely act as opposing tools aimed to counter each other’s influence, focusing on the US/EU dispute over genetically modified foods as an illustrative case study.

Part IV then sets forth three hypotheses regarding how hard and soft law instruments interact in international governance, and, in particular, the conditions under which they work in a complementary or opposing manner. Our first two hypotheses concern the impact of US and EU cooperation and rivalry on how international hard and soft law regimes interact. We contend that where the US and EU agree on a regulatory approach, in particular because distributive conflict between them is weak or absent, we are more likely to see hard and soft law work as complements in an evolutionary manner, consistent with the existing literature (section A). In contrast, where the US and EU disagree on a regulatory approach, we are more likely to see hard and soft law work in opposition to each other, especially where there are distributional consequences which spur the US and EU to attempt to advance their perspectives in different international regimes (section B). Given the fragmented nature of the international system, the US and EU will attempt to advance their interests in those regimes that they find to be most favorable to their positions. In such settings, we argue, soft law regimes may be “hardened” through their links to other regimes, losing the purported soft law advantages of flexibility and informality, while hard law regimes such as the World Trade Organization’s dispute settlement process may be “softened.” The United States and the European Union are not the only actors, however, capable of strategically manipulating hard and soft law regimes. Hence, even where the US and EU agree on a regulatory approach, smaller states can also use hard and soft law strategies to attempt to thwart US and EU aims, again choosing regimes more favorable to their positions in a fragmented international system (section C). However, the US and EU have significant advantages because of their market power and resources, and they can attempt to play smaller countries off of each other, including through bilateral negotiations.

We conclude that scholars and policymakers need to recognize more explicitly that there are often real distributive conflicts in international regulatory relations, resulting in conflicts between hard and soft law instruments and regimes. We find that this development is not necessarily to be lamented, but rather reflects a maturation of international law, which is responding to global developments in a world of diverse regulatory competences in which regulation in countries and in diverse international regimes mutually affect each other. This chapter’s findings call for future research

regarding how international hard and soft law instruments and regimes interact in different contexts.

## **I. The Canonical Literature on International Hard and Soft Law: Their Attributes as Alternatives and their Interaction as Complements**

We begin with an overview of scholarship concerning the definitions of hard and soft law, and this scholarship's assessment of the various attributes and deficiencies of hard and soft law as alternatives. We create a typology of this literature into three camps, each of which predominantly views hard and soft law to act as complements, leading to greater international cooperation. We here provide the background for our argument that the existing literature exhibits a selection bias as regards how hard and soft law interact. In Parts II and III, we will show how, in a world of distributional conflict within a decentralized governance system, hard and soft law instruments (or, for that matter, any international legal instruments) can frequently work in opposition to each other as antagonists, affecting the operation of international regimes in the process.

### **A. Definitions of Hard and Soft Law**

To assess how hard and soft law interact in international governance, we must first define these terms. Here there is much disagreement in the existing literature. Many legal scholars use a simple binary binding/non-binding divide to distinguish hard from soft law.<sup>5</sup> Positivist legal scholars tend to deny the very concept of "soft law," since law by definition is "binding."<sup>6</sup> Rational institutionalist scholars respond that "the term 'binding agreement' is a misleading hyperbole" when it comes to international affairs, but they still find that the language of "binding commitments" matters in terms of

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<sup>5</sup> See the leading study by Shelton et al (2000) which settles for this distinction, at 4. See also Reinike and Witte 2000: 76 ("soft law as used herein means normative agreements that are not legally binding"); Snyder 1993: 198 ("soft law consists of "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects"); and Klabbers 1996: 168 (advocating retention of the "traditional binary conception of law").

<sup>6</sup> Klabbers takes a positivist approach, arguing that "law can't be more or less binding" so that the soft law concept is logically flawed. Klabbers 1996: 181. Prosper Weil takes a normative approach, arguing that the increasing use of soft law represents a shift pursuant to which international law norms vary in their relative normativity, and he finds that this trend "might destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose." Weil 1983: 423.

signaling by states of the seriousness of their commitments, such that non-compliance will entail greater reputational costs.<sup>7</sup> Constructivist scholars, in contrast, focus less on the binding nature of law at the enactment stage, and more on the effectiveness of law at the implementation stage, addressing the gap between the law-in-the-books and the law-in-action. They note how even domestic law varies in terms of its impact on behavior, so that binary distinctions between binding “hard law” and non-binding “soft law” are illusory.<sup>8</sup> They find that the very concept of “binding” international law is highly suspect as an operational concept. At the international level where centralized institutions are typically missing, most observers realize that “most international law is ‘soft’ in distinctive ways.”<sup>9</sup>

Working within this rationalist perspective, Kenneth Abbott and his coauthors have defined legalization in international relations as consisting of a spectrum of three factors (i) precision of rules; (ii) obligation; and (iii) delegation to a third-party decision-maker.<sup>10</sup> International regimes vary in the extent of their legalization along these dimensions, which can give them a “harder” or “softer” legal character. In this respect, hard law “refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”<sup>11</sup> International trade law, at least formally, comes closest to this ideal type, although as we will see, it too is soft (or can become soft) in certain areas.<sup>12</sup>

By contrast with this ideal-type of hard law, soft law can be defined as a residual category: “The realm of ‘soft law’ begins once legal arrangements are weakened along

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<sup>7</sup> Lipson 1991: 508. See also Raustiala 2005; and Guzman 2008 and Guzman 2005. Guzman states that “an agreement is soft if it is not a formal treaty.” Guzman 2005: 591. He finds that states rationally choose soft law because they wish to reduce the cost to their reputation of potentially violating it in light of uncertainty.

<sup>8</sup> Some scholars accuse legal formalists of “elite ignorance” and “non-knowledge of the social.” See, for example, Goodrich 2000: 150.

<sup>9</sup> Abbott and Snidal 2000: 421.

<sup>10</sup> Abbott et al. 2000. Abbott and Snidal work within a “rational design” approach to international institutions, in Koremenos, Lipson, and Snidal 2001. See also Guzman 2008.

<sup>11</sup> Abbott and Snidal 2000: 37.

<sup>12</sup> See our discussion in Part III below. In addition, from a formal perspective, international trade law does not have independent enforcement power. Rather WTO panels authorize a winning party to withdraw equivalent concessions, in an amount determined by the panel, in the event of non-compliance by the losing party.

one or more of the dimensions of obligation, precision and delegation.”<sup>13</sup> Thus, if an agreement is not formally binding, it is soft along one dimension. Similarly, if an agreement is formally binding but its content is vague so that the agreement leaves almost complete discretion to the parties as to its implementation, then the agreement is soft along this second dimension. Finally, if an agreement does not delegate any authority to a third party to monitor its implementation or to interpret and enforce it, then the agreement again can be soft because the parties can discursively justify their acts in legalistic terms with less consequence, whether in terms of reputational costs or other sanctions.

Some scholars with sociological, constructivist leanings have questioned the characterization of law in terms of these three attributes (precision, obligation and delegation) because it distracts from how law operates normatively.<sup>14</sup> They likely do so because of their opposition to a presumption among legal positivists and rational institutionalists that “hardness” means binding rules interpreted and enforced by courts. In other words, their counterparts in interdisciplinary debates in international relations — realist and rationalist institutionalist scholars — tend to discount the efficacy of soft law because it creates no binding obligation on states who can thus ignore it at their whim in light of their interests. For example, Richard Steinberg contends, from a realist perspective, that “most public international lawyers, realists and positivists, consider soft law to be inconsequential.”<sup>15</sup> Similarly, Andrew Guzman maintains, from a rational institutionalist perspective, that “soft law represents a choice by the parties to enter into a weaker form of commitment.”<sup>16</sup> Guzman and Steinberg focus on states’ pursuit of pre-determined interests. They do not address how states may change those interests through

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<sup>13</sup> Abbott and Snidal 2000: 38.

<sup>14</sup> See e.g., Finnemore and Toope 2001 (taking a more sociological perspective, and critiquing Abbott et al.’s formal definition of legalization because it obscures how law and legal norms actually operate in practice). We also recognize that these formal definitions can obscure the relative roles of “hard” and “soft” law in sociological terms—that is, from the way law and norms operate in the world, which indeed is what interests us. Binding dispute settlement can be ignored or simply reflect existing power asymmetries, so that “hard” law may in fact not be so “hard” in practice. Similarly, softer forms of law can be much more transformative of state and constituent conduct, which should be the real measure of law’s impact in the world. Despite these caveats, we believe that that hard/soft distinction does capture something important about the making and implementation of international law, and we find the distinction to be particularly useful for our analyses of how hard and soft law regimes and instruments interact.

<sup>15</sup> Steinberg 2002: 340

<sup>16</sup> Guzman, 2005: 611

transnational processes of interaction, deliberation and persuasion coordinated through international institutions.

Constructivists, in contrast, explicitly address how international regimes can lead states to change their perceptions of state interests.<sup>17</sup> International law scholars frequently take such an approach. For example, Abraham and Antonia Chayes contend, “what is left out of the institutionalist account is the active role of the regime in modifying preferences, generating new options, persuading the parties to move toward increasing compliance with regime norms, and guiding the evolution of the normative structure in the direction of the overall objectives of the regime.”<sup>18</sup> Similarly Harold Koh stresses the “internalization” processes to which international law gives rise through iterative processes involving interpretation over time,<sup>19</sup> and Thomas Franck stresses the compliance pull of international law that is deemed legitimate in its procedures.<sup>20</sup> From the constructivist perspective, soft law mechanisms can be as or more effective than hard law by creating settings in which states engage in open-ended discussions to reach better and more effective policy because they are less wary of rigid hard law consequences.

In sum, the typology used by Abbott and Snidal does not prejudge these instruments’ relative value. Rather, the typology simply characterizes different instruments which actors may choose in terms of their precision, binding legal obligation and delegation along a continuum. We find this typology and continuum to be particularly useful for our analyses of how hard and soft law instruments and regimes *interact*, and thus we adopt the definition of Abbott and Snidal for our purposes.

## **B. Advantages and Disadvantages of Hard and Soft Law as Alternatives**

States and private actors have increasingly used a wide range of instruments having a relatively harder or softer legal nature in terms of precision, obligation and delegation to advance their aims. These instruments offer different advantages and

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<sup>17</sup> Ruggie 1998.

<sup>18</sup> Chayes and Chayes 1993: 229; see also Franck 1990 (on the “compliance pull” of law); and Koh 1998 (on “internalization” processes).

<sup>19</sup> The transnational legal process theory of Harold Koh addresses how states internalize legal norms through repeated “interaction,” including through the work of non-state actors, resulting in new “interpretation,” which is “internalized” within states at the domestic level. Koh 1998.

<sup>20</sup> FRANCK 1990.

disadvantages in different contexts, involving factors at the domestic and international levels. They are sometimes used alone and sometimes combined dynamically over time, resulting in a complex hybrid of hard and soft law instruments. In this section, we address the use of hard and soft law instruments as alternatives in light of their respective attributes and deficiencies before turning to an assessment of how they interact.

The quantitative growth in the use of international hard and soft law instruments reflects the breadth and intensification of economic globalization, by which we mean “a process of widening, deepening and speeding up of worldwide connectedness, in particular in the economic sphere.”<sup>21</sup> The very emergence of the soft law concept reflects the multiplication of producers of international law in this context, including not only foreign ministries, but also sector-specific transgovernmental networks, supranational bureaucracies, multinational corporations and business associations, and international non-governmental organizations.<sup>22</sup> These groups generally do not have the authority to create binding international law in a traditional sense, which is reserved to states, yet they use non-binding instruments to advance their policy goals, instruments which may be subsequently transformed into binding hard law, at either the national or international levels.<sup>23</sup>

Private actors can also work with and through states to create binding hard law. As John Braithwaite and Peter Drahos find in their masterful study of thirteen areas of global business regulation, business actors play frequently leading roles. First, Braithwaite and Drahos find that “state regulation follows industry self-regulatory practice more than the reverse.”<sup>24</sup> Janet Levit’s recent work on the law of documentary letters of credit provides an excellent example.<sup>25</sup> Second, corporate actors enroll states to advance their aims. In this respect, Braithwaite and Drahos find that “US corporations exert more power in the world system than corporations of other states because they can enroll the support of the most powerful state in the world.”<sup>26</sup>

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<sup>21</sup> We adapt this definition from Held et al, 1999: 2.

<sup>22</sup> Robilant 2005: 500.

<sup>23</sup> Functional state agencies, however, will play the leading roles in areas within their competence, which can result in hard law. Braithwaite and Drahos 2000: 479-485.

<sup>24</sup> Braithwaite and Drahos 2000: 481.

<sup>25</sup> Levit 2008.

<sup>26</sup> Braithwaite and Drahos 2000: 482.

As an institutional form, hard law features many advantages. In particular, rationalist scholars find that:

- Hard law instruments allow states to commit themselves more credibly to international agreements. Hard law instruments make state commitments more credible because they increase the cost of reneging, whether on account of legal sanctions or on account of the costs to a state's reputation where it is found to have acted in violation of its legal commitments.<sup>27</sup>
- Hard law treaties are more credible because they can have direct legal effects in national jurisdictions (being "self-executing"), or they can require domestic legal enactment. Where treaty obligations are implemented through domestic legislation, they create new tools that mobilize domestic actors, increasing the audience costs of a violation and thus making their commitments more credible.<sup>28</sup>
- Hard law instruments solve problems of incomplete contracting by creating mechanisms for the interpretation and elaboration of legal commitments over time.<sup>29</sup>
- Hard law instruments better permit states to monitor and enforce their commitments, including through the use of dispute settlement bodies such as courts.<sup>30</sup>

States, as well as private actors working with and through state representatives, thus tend to use hard law where the benefits of cooperation are great and the potential for opportunism and its costs are high.<sup>31</sup> To control for the risks of opportunism, they can create third party monitoring and enforcement mechanisms, as under the WTO

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<sup>27</sup> States are arguably particularly concerned with their reputation for compliance. Andrew Guzman contends that states' calculus over the reputational costs of non-compliance is the primary factor for explaining state compliance with international law. Guzman 2005. See also Abbott and Snidal 2000; and Lipson 1991: 508.

<sup>28</sup> Abbott and Snidal 2000.

<sup>29</sup> Abbott and Snidal 2000.

<sup>30</sup> Abbott and Snidal 2000: 38.

<sup>31</sup> Abbott and Snidal: 2000: 429.

committee, trade policy review and dispute settlement systems. These monitoring and enforcement mechanisms reduce the transaction costs of subsequent interstate interaction through providing an ongoing forum for interpreting, applying, enforcing and elaborating agreed rules.<sup>32</sup>

Yet hard law also entails significant costs. It can create formal commitments that restrict the behavior of states, thus infringing on national sovereignty in potentially sensitive areas. As a result, it can encourage states to bargain fiercely and at length regarding the legally binding commitments into which they are entering which will continue to apply over time. Because states are more likely to drag out negotiations over legally binding commitments, the use of hard law can increase contracting costs. In addition, hard law agreements can be more difficult to amend to adapt to changing circumstances. Therefore writing detailed binding agreements may be wasteful because it can force states to plan for contingent events that may not occur, and can lead to undesired rigidity or prevent agreement altogether.<sup>33</sup> Soft law, in contrast, can be adapted, amended and replaced more easily because its provisions are non-binding and thus no single state or group of states can block its amendment.

Defenders of soft law argue that soft law instruments offer significant offsetting advantages over hard law. They find, in particular, that:

- Soft law instruments are easier and less costly to negotiate.
- Soft law instruments impose lower “sovereignty costs” on states in sensitive areas.
- Soft law instruments provide greater flexibility for states to cope with uncertainty and learn over time.
- Soft law instruments allow states to be more ambitious and engage in “deeper” cooperation than they would if they had to worry about enforcement.
- Soft law instruments cope better with diversity.

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<sup>32</sup> Abbott and Snidal 2000: 430.

<sup>33</sup> Abbott and Snidal 2000: 433. Trubek, Cottrell and Nance 2006. These arguments also support the use of soft law in purely domestic settings as advocated by the “new governance literature.” See Scott and de Burca 2006.

- Soft law instruments are available to non-state actors, including international secretariats, sub-state public actors such as administrative agencies and business associations and non-governmental organizations.<sup>34</sup>

Abbott and Snidal, for example, contend that states use soft law where contracting costs increase, whether because of the number of parties involved, factual uncertainty, domestic ratification challenges, politically charged issue areas or distributional asymmetries. They note how, in these contexts, “states can limit their legal obligation through hortatory language, exceptions, reservations and the like,” such as safeguard and rebalancing clauses under the WTO.<sup>35</sup>

Both rationalist and constructivist scholars recognize the potential advantages of soft law instruments, but they do so in different ways. While rationalist-oriented scholars focus on the reduction of contracting and sovereignty costs under soft law, constructivist scholars stress how soft law can “facilitate constitutive processes such as persuasion, learning, argumentation, and socialization.”<sup>36</sup> While rationalist scholars note the importance of soft law instruments for generating information leading to common understandings in situations of uncertainty, constructivist scholars contend that soft law instruments can help states to develop common norms and a sense of a collective enterprise. For both rationalists and constructivists, then, soft law can create mechanisms for parties to learn about consequences before obligations are made binding. This process occurred under the Montreal Protocol for Protection of the Ozone, an agreement to protect a global commons, the earth’s atmosphere. Soft law instruments can bring a broad array of participants together, as under a framework convention, in a process that over time permits them to gain trust, leading to harder obligations in the future.<sup>37</sup>

Soft law instruments, nonetheless, have obvious disadvantages. First, from a normative perspective, if soft law instruments are effective, they can be criticized for their relative obscurity, since they can remove law-making from democratic oversight,

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<sup>34</sup> For good discussions on the purported strengths of soft law, see e.g. Lipson 1991: 500-501, 514-527 (discussing the strengths of “informal agreements”); Raustiala and Victor 1998: 684-686; Hillgenburg 1999: 501, 504; Abbott and Snidal 2000: 38-39; Trubek, Cottrell and Nance 2006; Trebilcock and Kirtin 2004; and Sindico 2006: 832.

<sup>35</sup> Abbott and Snidal 2004: 54.

<sup>36</sup> Trubek, Cottrell and Nance 2006: 75.

<sup>37</sup> Brunnee and Toope 1997.

such that provisions with distributive implications are not fully discussed within legislative or other government bodies.<sup>38</sup> Second, from the perspective of effectiveness, soft law instruments create little or no legal obligation and provide no binding third-party dispute settlement to resolve disputes among the parties and fill in the details of incomplete contracts. Soft law instruments, depending on their level of precision, may also make it difficult to determine whether a state is acting in accordance with its commitments and thus create greater opportunities to evade responsibility.<sup>39</sup> For example, the OECD created a Financial Action Task Force (FATF) of financial experts which issued guidelines which limit sovereignty costs because of their soft law nature. Some commentators, however, have found that the task force guidelines have been largely ineffective in leading to policy change.<sup>40</sup> Similarly, at the 1992 Rio Summit, the parties only agreed to a non-binding set of principles and an Agenda 21 to create a “comprehensive plan of action,” contrary to the demands of environmental non-governmental organizations (NGOs) for a hard law treaty. Skeptics question the effectiveness of these soft law instruments. They contend that much of international law, when it lacks teeth, can be simply symbolic, constituting a form of junk law.<sup>41</sup>

It would nonetheless be a mistake, in our view, to view hard law instruments as always preferable to soft law instruments from the standpoint of effectiveness, even though states may sometimes use soft law instruments only to paper over differences. As Kal Raustiala points out, we must distinguish between the concepts of compliance (as with hard law obligations) and effectiveness.<sup>42</sup> He writes, “compliance as a concept draws no causal linkage between a rule and behavior, but simply identifies a conformity between the rule and behavior. To speak of effectiveness is to speak directly of causality: to claim that a rule is ‘effective’ is to claim that it led to certain behavior or outcomes, which may or may not meet the legal standard of compliance.”<sup>43</sup> In terms of the law-in-action, we are less concerned with formal compliance, which may mean little if the

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<sup>38</sup> See Klabbbers 1998, Levit 2008.

<sup>39</sup> Abbott and Snidal 2000: 446.

<sup>40</sup> Simmons 2000: 244-263. Cf. Machado 2008.

<sup>41</sup> Cf Edelman 1964 Goldsmith and Posner 2005; Raustiala 2005; Susskind and Ozawa 1992.

<sup>42</sup> Raustiala 2000: 398; Raustiala and Slaughter 2002. On the “depth” of cooperation, i.e. cooperative agreements that require a greater change in state behavior relative to the status quo, see Downs, Rocke and Barsoom 1996.

<sup>43</sup> Raustiala 2000: 398.

obligations reflect no policy change, than with effectiveness, in terms of attaining policy goals. Advocates of soft law as an alternative contend that soft law can be more effective in practice than many formally binding treaties.

In sum, hard and soft law instruments offer different advantages for different contexts involving a range of factors that actors consider. For these reasons, a growing number of scholars in law and political science have advocated a pragmatic approach, selecting alternative hard and soft law approaches depending on the characteristics of the issue and the negotiating and institutional context in question. Scholars have noted, in particular, how hard and soft law instruments may be effectively combined to lead to greater cooperation. Yet as Abbott and Snidal write, while “soft law sometimes [is] designed as a way station to harder legalization, ... often it is preferable on its own terms” as an alternative.<sup>44</sup>

### **C. Hard and Soft Law Interaction as Complements**

Although the respective costs and benefits of hard and soft law remain a subject of contention, legal and political science scholars have moved increasingly towards a view that hard and soft international law can build upon each other as complementary tools for international problem-solving. These scholars contend that hard and soft law mechanisms can build upon each other in two predominant ways: (1) non-binding soft law can lead the way to binding hard law, and (2) binding hard law can subsequently be elaborated through soft law instruments. For example, a leading US international law casebook introduces the concept of soft law in terms of how “soft law instruments are consciously used to generate support for the promulgation of treaties or to help generate customary international law norms [i.e. binding hard law],” and how “treaties and state practice give rise to soft law that supplements and advances treaty and customary norms.”<sup>45</sup> Scholars thus take a pragmatic policy-oriented approach to show how hard and soft law instruments provide not only alternative tools for cooperation, but also serve as

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<sup>44</sup> Abbott and Snidal 2000: 423.

<sup>45</sup> Dunoff et al. 2006: 95.

complements of each other in dynamic processes of legalization, leading to greater international [regulatory] cooperation and coordination over time.<sup>46</sup>

These scholars' views regarding hard and soft law complements can be divided into three camps: (1) positivist legal scholars who find that soft law is inferior to hard law but should not be discarded because it can potentially lead to hard law; (2) rationalist scholars with a political economy orientation who view soft law as a complement to hard law which serves state interests in many contexts, including because the hard law option is not available; and (3) constructivist scholars who view soft law as a complement to hard law which may be desirable in itself by facilitating dialogic and experimentalist transnational and domestic processes which transform norms, understandings and perceptions of state interests.

Positivist legal scholars find that soft law is inferior to hard law because it does not correspond to the ideal type of law.<sup>47</sup> That is, soft law lacks formally binding obligations which are interpreted and enforced by courts, and it thus fails to generate jurisprudence over time. For this reason, these scholars view soft law as a second-best alternative to hard law, either as a way-station on the way to hard law, or as a fall-back when hard law approaches fail.<sup>48</sup> Kirton and Trebilcock, for example, in a study of the use of soft and hard law in global trade, environment and social governance, find “strong support for the familiar feeling that soft law is a second-best substitute for a first-best hard law, being created when and because the relevant hard law does not exist and the intergovernmental negotiations to produce it have failed.”<sup>49</sup> Sindico likewise writes, “[s]oft law, and voluntary standards in particular, are a stage in the creation of international legal norms. It is as a pioneer of hard law that soft law finds its *raison d'être* in the normative challenge for sustainable global governance.”<sup>50</sup> The implication is that soft law otherwise has no *raison d'être*. Sindico, for example, views the corporate social responsibility (CSR) movement in terms of “the beginning of a step towards

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<sup>46</sup> See e.g. Shelton 2000 (“combinations may be essential to achieve specific goals”); Chinkin 1989: 853.

<sup>47</sup> See e.g. Klabbers 1996,

<sup>48</sup> See Weil 1983; Klabbers 1998.

<sup>49</sup> Kirton and Trebilcock 2004: 24.

<sup>50</sup> Sindico 2006: 846.

comprehensive hard law in this field,”<sup>51</sup> as opposed to a flexible, adaptive process which is valuable in itself.

These scholars often view soft law solely in terms of its *relationship* to a hard law ideal. In her valuable introduction to a special volume on soft law organized by the American Society of International Law (ASIL), for example, Dinah Shelton categorizes soft law in the following five ways, each of which is linked to positivist conceptions of hard law:

“(i) Elaborative soft law, that is principles that provide guidance to the interpretation, elaboration, or application of hard law [i.e. soft law which *builds from* hard law]...

(ii) Emergent hard law, that is principles that are first formulated in non-binding form with the possibility, or even aspiration, of negotiating a subsequent treaty, or harden into binding custom through the development of state practice and *opinio juris* [i.e. soft law which *builds to* hard law]...

(iii) Soft law as evidence of the existence of hard obligations [i.e. soft law which *builds to* hard customary international law].

(iv) Parallel soft and hard law, that is similar provisions articulated in both hard and soft forms allowing the soft version to act as a fall-back provision.

(v) Soft law as a source of legal obligation, through acquiescence and estoppel, perhaps against the original intentions of the parties.”<sup>52</sup>

Reinicke and Witte likewise stress, in their cross-cutting overview in the same volume, how soft law agreements “can and often do represent the first important element in an evolutionary process that shapes legal relationships among and between multiple actors,

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<sup>51</sup> Sindico 2006: 836.

<sup>52</sup> Shelton 2000: 30-31 (while putting forth this categorization, Shelton admits that it “is problematic in that it defines soft law in terms of its distinction from hard law, and not in its own terms”). Shelton’s fourth category has also been referred to as co-regulation: a regulatory regime premised on both mandatory government regulation and voluntary self-regulation or regulatory measures with both binding and non-binding elements. See e.g. Gordon 1999.

facilitating and ultimately enhancing the effectiveness and efficiency of transnational policy-making.”<sup>53</sup> Similarly, John Kirton and Michael Trebilcock conclude that “at best, it [soft law], is a complement.”<sup>54</sup>

Abbott and Snidal, in contrast, taking a rational institutionalist political economy approach, are agnostic as to whether hard or soft law is preferable because they focus on varying state interests in different contexts. Sometimes states prefer hard law and sometimes soft law to advance their joint policy aims. In their work on the “pathways to cooperation,” Abbott and Snidal nonetheless define three pathways of which two explicitly involve the progressive hardening of law. The three pathways are: the use of a framework convention which subsequently deepens in the precision of its coverage; the use of a plurilateral agreement which subsequently broadens in its membership; and the use of a soft law instrument which subsequently leads to binding legal commitments. They note how these three pathways can be “blended” and “sequenced,” once more resulting in a mutually reinforcing, evolutionary interaction between hard and soft law mechanisms.<sup>55</sup>

Finally, constructivist-oriented scholars likewise focus on how hard and soft law are used as complements. For example, Braithwaite and Drahos point both to the importance of using framework conventions and soft law as a first step which “can, over time be more detailed through rule-making.”<sup>56</sup> They contend that neither hard nor soft law provisions should necessarily be privileged because states and non-state actors need flexibility to address situations that involve uncertainty and require experimentation. Trubek and his co-authors, for example, contend that soft law instruments can help to generate knowledge (as through the use of benchmarking, peer review, and exchange of good practices), develop shared ideas, build trust, and, if desirable, establish “non-binding standards that can eventually harden into binding rules once uncertainties are reduced and a higher degree of consensus ensues.”<sup>57</sup> Janet Levit, working in a legal pluralist framework, finds that international soft law instruments generate normativity

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<sup>53</sup> Reinicke and Witte 2000: 76

<sup>54</sup> Kirton and Trebilcock 2004: 27.

<sup>55</sup> Abbott and Snidal 2000: 80.

<sup>56</sup> Braithwaite and Drahos 2000L 261-262.

<sup>57</sup> Trubek, Cottrell and Nance 2006: 32.

that affects both subsequent hard law enactments and judicial decisions.<sup>58</sup> Some scholars working in an experimentalist “new governance” tradition go further, arguing that soft law approaches should generally be privileged to promote responsive governance.<sup>59</sup>

## **II. Theorizing International Hard and Soft Law Interaction:**

### **Power, Distributive Conflict and Regime Complexes**

The existing literature on hard and soft law typically takes as its starting assumption the possibility of joint gains from cooperation among states, and proceeds to explore the advantages and disadvantages, the choice, and the effectiveness of hard and soft law approaches to international cooperation. We agree that the prospect of joint gains is an important prerequisite for international cooperation, and we have seen in Part I that such prospects continue to exist for international policy cooperation.

Nevertheless, we cannot fully understand our central question – the *interaction* of hard and soft law – without considering the ways in which power, distributional conflict, and regime complexes affect how hard and soft law regimes interact, and whether they will do so productively. Indeed, we argue below that the harmonious, complementary, mutually reinforcing interaction of hard and soft law relies on a hitherto unspecified set of scope conditions, including most importantly in particular a low level of distributional conflict among the players. These conditions may hold in certain areas, we maintain, but there are good theoretical and empirical reasons to believe that variation in distributive conflict will spur hard and soft law regimes to interact in different ways, sometimes as alternatives, sometimes as complements and sometimes as antagonists.

In this section, therefore, we lay out our theoretical argument about the reasons why, and the conditions under which, we expect hard and soft law to interact as antagonists. The analysis is in three parts. First, reflecting the transatlantic theme of this volume, we examine the sources of United States and European Union power in international regulatory affairs, arguing that both market size and institutional

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<sup>58</sup> Levit 2008: 132-141.

<sup>59</sup> See e.g. Simon 2005; and Sable and Simon 2005.

characteristics have made the US and the EU the leading, and roughly equal, powers in global as well as bilateral regulatory cooperation (section A). Next, we argue that international regulatory cooperation, and indeed international cooperation more broadly, is frequently characterized by intense distributional conflict, in which actors like the US and the EU may have sharply differing preferences over regulatory outcomes, with each side attempting to export its own regulatory model and force the costs of adjustment onto others (section B). Finally, we examine the problems of “regime complexes” and legal fragmentation in international regulation, arguing that states with divergent preferences will have strong incentives to engage in forum shopping and “strategic inconsistency,” using competing legal fora to press their substantive preferences (section C). Parts III and IV will then build on this analysis, making the argument that under conditions of distributive conflict and regime complexes, hard and soft law can interact not as alternatives or complements, but as mutually undermining antagonists.

### **A. The EU, the US, and Power in International Regulatory Governance**

The United States and European Union collectively represent over 50 percent of global production, and over 40 percent in terms of purchasing power parity.<sup>60</sup> In 2006, EU gross domestic product was slightly larger than the United States’, but not by a significant extent. Because of the size of their markets, where the US and EU agree on a common regulatory policy, they are well-positioned to promote it globally. For example, as Germain contends in the area of financial regulation, the size of the international markets handled in New York, London and a few other major cities “empower their respective state authorities” to be leaders in global regulation.<sup>61</sup> Where they disagree, there is often deadlock, reflecting the equal size of their economies and markets. With the rise of the economies of China, India, Brazil and other developing countries, the US and EU have a long-term interest in exercising global regulatory leadership now in order to lock their preferences into international law and institutions, but conflicts between

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<sup>60</sup> See World Bank, at <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>, and <http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf> (EU GDP at 27.2% of world GDP in 2006, and at 20.6% in PPP terms; and US GDP at 24.6% of world GDP in 2006, and at 20% in PPP terms).

<sup>61</sup> Germain 1997: 163.

them may inhibit their ability to do so.

The US and EU have launched a series of initiatives to promote transatlantic collaboration in global governance which we have assessed in our earlier work. The creation of the New Transatlantic Agenda (NTA) and the Transatlantic Economic Partnership (TEP) during the 1990s were premised on the idea of joint gains from transatlantic economic integration and in particular from joint regulatory cooperation across a wide range of issue-areas.<sup>62</sup> Alongside the traditional processes of trade negotiation and trade dispute resolution, the transatlantic partners forged new mechanisms for cooperation among economic regulators in areas ranging from competition policy to data privacy, the environment, and food safety.<sup>63</sup> Among the goals of the NTA was to promote US and EU joint leadership in global economic governance. These goals have been reasserted during the second term of the George W. Bush administration, in particular with the creation, in 2007, of a Transatlantic Economic Council designed to lend high-level impetus to new and continuing efforts at transatlantic economic cooperation in various issue-areas.<sup>64</sup>

Although market size generally explains the growing role of the EU as a global actor in economic and regulatory fields, US and EU bargaining power can also be affected by each side's *institutional* characteristics. Where policy-making is reserved to a sub-federal level in the United States or a sub-EU level in the European Union, then the US or EU respectively will be in a weaker bargaining situation at the international level. The United States over time has more frequently been a global leader in regulatory domains because it has had greater institutional power at the federal level, combined with its great market power. However, in many regulatory areas, the US has fragmented authority over regulatory standard-setting, leaving it to US states within the federal

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<sup>62</sup> Pollack and Shaffer 2001.

<sup>63</sup> Bermann, Herdegen and Lindstreth 2001; Pollack and Shaffer 2001.

<sup>64</sup> See Framework for Advancing Transatlantic Economic Integration between the United States of America and the European Union, April 30, 2007, U.S. Dept of State Press Release (establishing a Transatlantic Economic Council), available at <http://www.state.gov/p/eur/rls/prsr/84004.htm>. The two sides created "a framework for advancing transatlantic economic integration," prioritizing cooperation for the protection of intellectual property, the assurance of secure trade, the reconciliation and accommodation of accounting standards, the support of innovation, and the removal of barriers to investment. *Id.* A central objective of the new initiative is to facilitate joint US and EU global leadership in international trade and regulatory governance. See Evenett and Stern 2008 (noting the establishment of joint EU-US approaches to commercial matters of global importance as one of the three broad objectives).

context or to private associations. As Walter Mattli and Tim Bütte write, “When standardization becomes an increasingly international process, the organizational characteristics of the European standardization system make for a more felicitous match between the national and international institutions than the characteristics of the largely anarchic American system.”<sup>65</sup> They conclude, “[t]he process of aggregating technical preferences and projecting consensus standards to a higher level is considerably more difficult in the decentralized and uncoordinated standards system of the U.S., where the nominal national representative for international standardization is a weak and contested institution.”<sup>66</sup>

As greater policy-making powers have been delegated within Europe to EU institutions over time, the EU has increased its negotiating clout internationally. Because of the size of the EU’s internal market, once the EU member states harmonize regulatory policies at the EU level and develop corresponding EU-level regulatory institutions, the EU is well-positioned to exercise economic clout as a global actor. To give an example, Elliot Posner addresses how the establishment of the EU’s regulatory competence and its extraterritorial reach are key explanations for the EU’s increased authority over financial services regulation.<sup>67</sup> Institutional developments in the EU have affected powerful US firms who, in turn, motivated the US Securities and Exchange Commission to work with EU authorities to accommodate and recognize EU standards in a number of areas. This development occurred following an extended period of benign (or malign) US neglect of European approaches to financial services regulation. As the EU assumes greater institutional power in Europe, it should also be able to exercise greater authority in international governance. In other words, the EU enhances its international authority both by widening (enhancing its market power through increasing EU membership) and by deepening (enhancing its institutional power through expanding the scope of EU authority to more policy areas).

Finally, the US and EU exercise considerable authority globally because of the regulatory expertise they have developed domestically. In their study of thirteen areas of

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<sup>65</sup> Mattli and Bütte 2003: 27.

<sup>66</sup> Mattli and Bütte 2003: 27.

<sup>67</sup> Posner 2005.

global business regulation, John Braithwaite and Peter Drahos conclude that “the fact that US and EU law are modeled more than others is not only because of their economic hegemony and the fact that weaker economies want to meet their terms for admission to the clubs they dominate. In the case of the US in particular, modeling is underwritten by the sheer depth of regulatory expertise Washington agencies can offer.”<sup>68</sup> They find that the US played a leading role in twelve of the thirteen areas they studied (all but for international labour regulation) and the EU played a leading role in nine of these areas.<sup>69</sup> Overall, they find that “the US is the biggest demander of new regulatory agreements as well as the strongest resister of regimes other states want.”<sup>70</sup> However, “the EC [European Community] is more important because of the way it dominates the US in agenda-setting in a few arenas — prescription drugs, food, automobile safety — and is nearly an equal partner to the US in agenda-setting for other regimes.”<sup>71</sup> As a result, they find that while “most global regulatory agendas are set by the US; if the EC vetoes those agendas, they go nowhere.”<sup>72</sup>

In sum, effective cooperation between the world’s two economic powers offers the promise of joint gains for both sides and more effective global leadership on regulatory matters. Yet a careful cross-sectoral analysis of transatlantic economic relations demonstrates that their cooperation varies significantly by issue area, limiting the two sides’ ability to exercise joint leadership in global governance.<sup>73</sup> This variation reflects the distributive implications of the governance alternatives respectively favoured by the US and EU. It is to these distributive issues that we now turn.

## **B. The Challenge of Distributive Conflict**

Despite the general promise of regimes in fostering international cooperation to achieve joint gains, international relations scholars have identified a number of potential

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<sup>68</sup> Braithwaite and Drahos 2000: 542.

<sup>69</sup> Id. at 476-477 (see chart).

<sup>70</sup> Id., at 478.

<sup>71</sup> Id., at 485.

<sup>72</sup> Id., at 485.

<sup>73</sup> Pollack and Shaffer 2005.

obstacles to successful regime-based cooperation.<sup>74</sup> We focus in this chapter on two such impediments: the problems of distributive conflict (discussed in this section) and of fragmented regime complexes (discussed in section C below). Distributive conflicts, we note immediately, need not arise from narrow economic or protectionist motives on the part of states, but can and do reflect different configurations of interests, institutional procedures and ideological and cultural perspectives at the national level — in other words, different interests, institutions and ideas – which in turn shape the regulatory preferences of states at the international level.<sup>75</sup>

International law theorists, taking from regime theory in international relations, often point to the Prisoner's Dilemma (PD) game in assessing the role of international law. To give one leading example, Andrew Guzman in his impressive book *How International Law Works*, writes, "It is in the context of [the prisoner's dilemma] game that the theory is applied throughout most of this book."<sup>76</sup> The distributive challenge to regime theory calls into question the appropriateness of the Prisoner's Dilemma game as the proper model for most instances of international cooperation because it fails to capture the potential for distributive conflicts among the participants. In the classic PD model, states are assumed to have a common interest in reaching a cooperative outcome, and the primary impediment to successful cooperation is the fear that other states will cheat on their agreements. In PD models of international relations, these problems are typically addressed by creating mechanisms for the monitoring of state behavior and the sanctioning of states that violate the terms of the agreement — i.e. international law. If PD is an accurate description of the situation facing states, then international regimes and international hard and soft law should indeed facilitate cooperation by monitoring

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<sup>74</sup> The realist literature, for example, has emphasized the dual challenges of (1) cheating and (2) relative gains as the primary obstacles to successful cooperation, focusing on concerns over national security and the balance of power. See Grieco 1988, Baldwin 1993, and Hasenclaver et al. 1997: 113-135. Subsequent work by neoliberal institutionalists, however, has demonstrated the ability of international regimes to mitigate concerns about cheating, while relative gains emerges in a careful analysis as a minor impediment to cooperation which operates only under certain restrictive conditions; see e.g. Powell 1991; Snidal 1991; Baldwin 1993; Hasenclaver et al. 1997: 125-134. We therefore focus on two other impediments to international cooperation – distributive conflict and regime complexes – which are both consistent with realist *and* institutionalist analyses, and particularly relevant for our question of the interaction of hard and soft law.

<sup>75</sup> For a broader discussion, see Pollack and Shaffer 2009, chapter 2.

<sup>76</sup> See e.g. Guzman 2008:25.

compliance and (in the case of hard law dispute-settlement bodies) by providing for enforcement.

However, the Prisoner's Dilemma game deemphasizes another important obstacle to successful cooperation, namely conflicts among states with *different interests* over the *distribution* of the costs and benefits of cooperation.<sup>77</sup> That is to say, when states cooperate in international politics, they do not simply choose between “cooperation” and “defection,” the binary choices available in PD games, but rather they choose specific *terms* of cooperation, such as the specific level of various tariffs in a trade regime, or the precise levels of greenhouse gas emissions in an environmental regime, and so on. As James Morrow notes, “There is only one way to cooperate in prisoners' dilemma; there are many ways to cooperate in the real world.”<sup>78</sup> In game-theoretic terms, there may be multiple equilibria – multiple possible agreements that both sides prefer to the status quo – and states face the challenge of choosing among these many possible agreements.

Different terms of cooperation can have different distributive implications, affecting states' calculation of costs and benefits, both economically and politically. In an international trade agreement, for example, one side may prefer to drastically reduce tariffs on industrial goods, while another may place a stronger emphasis on reducing agricultural tariffs or agricultural subsidies. In this view, states face not only the challenge of monitoring and enforcing compliance with a trade agreement, as in the PD model, but also of deciding on the terms of cooperation. Yet PD models, with their binary choice of cooperation or defection and their emphasis on Pareto-improving outcomes, fail to capture these elements of international cooperation.

We therefore offer three specific, overlapping arguments that are most relevant to international regulatory cooperation and the use of hard and soft law instruments toward that end.

*First, regime theory, with its emphasis on PD and collective-action models, has under-emphasized both distributive conflict and the role of state power in determining the*

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<sup>77</sup> The distributive conflict to which we are referring here relates, not to the problem of relative gains, but to the distribution of *absolute* gains from cooperation among two or more states. For a range of views on the challenge of distributive conflict in international cooperation, see Krasner 1991, Morrow 1994, Fearon 1998, Gruber 2000, Koremenos et al. 2001, Mattli and Büthe 2003, and Drezner 2007.

<sup>78</sup> Morrow 1994: 395.

*outcome of regulatory conflicts*. This, in turn, has affected international law scholarship, much of which has welcomed regime theory for its validation of international law's role. In international politics, as Stephen Krasner argues, efforts at cooperation often take the form of a Battle of the Sexes game, in which different states have clear preferences for different international standards.<sup>79</sup> Even if all states benefit from a common standard, raising the prospect of joint gains, the distribution of those gains depends on the specific standard chosen, and the primary question is whether and how states can secure cooperation on their preferred terms.

Put differently, Krasner argues, the most important question is not whether to move toward the "Pareto frontier" of mutually beneficial cooperation, but *which point* on the Pareto frontier will be chosen. Under such circumstances, he suggests, outcomes are determined primarily by the use of state power, which may be employed in one of three ways: (1) to determine who may play the game (regime membership); (2) to dictate the rules of the game (or our purposes, whether through hard or soft law), including the possibility of a single state moving first and imposing a *de facto* standard on others; and (3) to employ issue-linkages, including through the application of threats and promises in related issue-areas, to change the payoff matrix for other states and induce those states to accept one's preferred standards.<sup>80</sup> Krasner views such coordination regimes as stable and self-enforcing, yet this self-enforcing nature of the regime should not obscure the fact that the regime produces winners (who secure cooperation on terms closer to their preferences) and losers (forced to cooperate on terms favorable to others), and that state power plays a key role in determining the shape of the regime and the standards adopted under the regime.

We should, therefore, expect the outcome of a Battle of the Sexes game to be determined in large part by powerful states, with weaker players being excluded from

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<sup>79</sup> In the Battle of the Sexes game, both states agree on the least preferable outcome or outcomes to be avoided, and both agree to coordinate their behavior to avoid such an outcome, but each one prefers a specific (equilibrium) outcome. The canonical example, from which the Battle game takes its name, is one in which two players (say, a husband and wife) agree that they want to take a vacation together, but disagree on the destination (he prefers the mountains, she the beach). In such a game, the primary challenge is not the threat of cheating (since both players prefer *some* joint vacation to being alone), but rather of deciding which of two possible equilibrium outcomes (the mountains or the beach) will be selected. Krasner 1991: 339; Stein 1982: 314.

<sup>80</sup> Krasner 1991: 340.

negotiations, or forced to accept a *fait accompli*, or induced to accept powerful states' terms through threats and promises in related issue-areas. In the global regulatory context, therefore, we would expect the United States and the European Union to play dominant roles in bargaining, with smaller countries being placed in a difficult situation when the US and the EU agree, as well as when they clash. When the US and EU agree, smaller countries will be under considerable pressure to adapt to US and EU standards. When the US and EU disagree, smaller countries may have a greater range of choices, on the one hand, but they may face considerable countervailing pressures on the other, caught between the US-EU conflict.

*Second, distributive conflict is not unique to Battle of the Sexes games, but emerges as a generic and nearly ubiquitous feature of all international cooperation.* By contrast with the approach of situation-structuralists in international relations theory who distinguish among different types of game contexts,<sup>81</sup> James Fearon has argued in a landmark article that it is misleading to attempt to characterize international cooperation over any given issue as *either* a Prisoners' Dilemma *or* a Battle game. Rather, Fearon maintains,

... understanding strategic problems of international cooperation as having a common strategic structure is more accurate and perhaps more theoretically fruitful. Empirically, there are always many possible ways to arrange an arms, trade, financial or environmental treaty, and before states can cooperate to enforce an agreement they must bargain to decide which one to implement. Thus, regardless of the substantive domain, problems of international cooperation involve first a bargaining problem (akin to the various coordination games that have been studied) and next an enforcement problem (akin to a Prisoners' Dilemma game).<sup>82</sup>

More specifically, Fearon models international cooperation as a two-stage game in which states first agree on the terms of cooperation, and then establish any monitoring and

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<sup>81</sup> For good overviews of the situation-structural approach, see e.g. Snidal 1985; Oye 1986; Martin 1992; and Hasenclaver et al. 1997. For a critique of the approach, see Fearon 1998: 272-275. For a pioneering application to international law, see Goldstein and Posner 2005, and the critiques in Guzman 2006, and Hathaway and Lavinbuk 2006.

<sup>82</sup> Fearon 1998: 270.

sanctioning provisions necessary for enforcement. Linking these two stages into a single game provides useful insights into the significant challenges of successful international cooperation. For example, a long “shadow of the future” can lessen problems of enforcement, by reassuring the players that the game is an iterated one and that compliance will be rewarded and noncompliance punished over the long haul. By the same token, however, a long shadow of the future can *exacerbate* distributional conflicts: If states know that the rules and standards they adopt will bind them and their successors for many years to come, they will have a greater incentive to bargain hard and to hold out for their preferred standard, knowing that it can shape the patterns of gains and losses well into the future.<sup>83</sup> In this view, enforceable, hard law agreements may increase the shadow of the future and hence make bargaining more difficult, whereas soft law instruments may make enforcement more problematic but alleviate distributional conflicts in bargaining.

*Third, the setting of international regulatory standards is particularly prone to distributive conflicts, and international standard setting can and should be theorized as a coordination game that often creates incentives for parties to engage in strategic bargaining.* Some standard-setting negotiations may take the form of a “pure coordination” game, in which the various participants are entirely indifferent among the possible standards to be adopted.<sup>84</sup> Indeed, the constructivist or “world society” literature depicts international standard setting as an essentially technocratic and deliberative process in which calculations of interest and power recede into the background.<sup>85</sup> However, as Walter Mattli and Tim Büthe have argued convincingly, almost any potential international standard is likely to have varying distributive implications for states and firms, and so we can expect actors to attempt to “export” their domestic standards to the international level, minimizing their adaptation costs, while their trading partners and competitors are forced to adapt and adjust to a new and different standard.<sup>86</sup> Negotiating environmental, health and safety standards where they have significant trade

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<sup>83</sup> Fearon 1998: 270-271.

<sup>84</sup> Stein 1982.

<sup>85</sup> Loya and Boli 1999.

<sup>86</sup> Mattli and Büthe 2003: 10-11.

implications, for example, can be particularly difficult because of the distributional stakes.<sup>87</sup>

### C. The Challenge of Fragmented Regime Conflicts

Thus far, we have argued that the making of international regulations, both hard and soft, is likely to be characterized by sharp distributive conflict, with outcomes being decided in large part by dominant economic powers such as the US and the EU. This distributive conflict, we now argue, may take a distinctive form in issue-areas that are characterized by a proliferation of hard and soft law rules and regimes. Preliminary formulations of the concept of international regimes identified regimes by specific issue-areas.<sup>88</sup> Yet an increasing number of real-world problems do not fall neatly within the jurisdiction of a single regime, but rather lie at the intersection of multiple regimes. These overlapping regimes result in a *regime complex*, which Kal Raustiala and David Victor have defined as: “an array of partially overlapping and nonhierarchical institutions governing a particular issue-area.” As they state,

Regime complexes are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in these elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules. Disaggregated decision making in the international legal system means that agreements reached in one forum do not automatically extend to, or clearly trump, agreements developed in other forums.<sup>89</sup>

Decision-making in these regime complexes is characterized by several distinctive features, of which we emphasize three in terms of their implications for hard and soft law interaction.

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<sup>87</sup> Bernauer and Sattler 2006: 8-9.

<sup>88</sup> Krasner 1983: 1.

<sup>89</sup> Raustiala and Victor 2004: 279. For important related work, see Helfer 2004, Alter and Meunier 2006.

First, negotiations in a given regime will not begin with a blank slate but will typically demonstrate “path dependence,” taking into account developments in related international regimes, and, in particular for our purposes, the WTO-trade regime. Second, individual states, responding to domestic political contexts and seeking to advance their interests, will engage in “forum shopping,” selecting particular regimes that are most likely to support their preferred outcomes. More specifically, states will select regimes based on characteristics such as their membership (e.g., bilateral, restricted or universal), voting rules (e.g. one-state-one-vote vs. weighted voting, and consensus vs. majority voting), institutional characteristics (e.g., presence or absence of dispute-settlement procedures), substantive focus (e.g. trade finance, environment or food safety), and predominant functional representation (e.g. by trade, finance, environment or agricultural ministries), each of which might be expected to influence substantive outcomes in more or less predictable ways.<sup>90</sup>

Third, the dense array of institutions in a given regime complex will create legal inconsistencies among them. States will respond to these inconsistencies with efforts either to demarcate clear boundaries among various regimes, or to assert the primacy or hierarchy of one regime over the others, in reflection of a state’s substantive preferences. States may engage in “strategic inconsistency,” attempting through one regime to create conflict or inconsistency in another in the hopes of shifting the understanding or actual adaptation of the rules in that other regime in a particular direction. Powerful states are likely to be particularly adept at such forum shopping.<sup>91</sup>

The political science analysis of overlapping regimes is complemented by a growing legal literature about the “pluralism” and “fragmentation” of international law.<sup>92</sup> In 2000, for example, the International Law Commission (ILC) included the topic “Risks ensuing from the fragmentation of international law” into its work program, and in 2002 it created a Study Group to make recommendations concerning the topic, renamed “Fragmentation of international law: difficulties arising from the diversification and

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<sup>90</sup> For an excellent discussion of forum-shopping in international relations, see Jupille and Snidal 2006.

<sup>91</sup> Benvenisti and Downs 2007; Drezner 2007.

<sup>92</sup> See e.g. International Law Commission (Koskenniemi) 2006; and Berman 2007.

expansion of international law.”<sup>93</sup> For many international lawyers, the result of such fragmentation is legal uncertainty and potential conflict between international legal regimes.<sup>94</sup> As the 2006 ILC report states:

[W]hat once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law,” “human rights law,” “environmental law,” “law of the sea,” “European law”... each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.<sup>95</sup>

Scholars disagree regarding the causes of such fragmentation and whether fragmentation is positive or negative for international law, but they largely concur on its development.<sup>96</sup> Many legal scholars view this development as a manifestation of the rise of a global legal pluralism, which refers to “the presence in a social field of more than one legal order.”<sup>97</sup> As a theory or analytic framework, legal pluralism differs from much of regime theory in that it challenges monist conceptions of the state and of state interests, and rather emphasizes the interaction between distinct normative orders — state and non-state — while deemphasizing the role of formal texts. In this sense, legal pluralism has a “radically heterogeneous” conception of law and social order, taking a

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<sup>93</sup> International Law Commission 2006.

<sup>94</sup> See e.g. Delmas-Marty 1998: 104 ; Dupuy 1999; Koskenniemi and Leinmo 2002; and Roberts 2004. On the WTO and public international law, see Marceau 2001; and Pauwelyn 2003.

<sup>95</sup> International Law Commission (ILC) 2006: 9.

<sup>96</sup> Compare, on the one hand, Charney 1996 and Koskenniemi and Leinmo 2002 (both contending that a positive development), and on the other, Benvenisti and Downs 2007 and Dupuy 1999 (contending that problematic).

<sup>97</sup> Griffiths 1986.

post-modernist, constructivist orientation that focuses on social diversity and informality more than on formal rules and hierarchic authority.<sup>98</sup>

Although legal pluralism and theories of regime complexes have quite different starting points, in particular regarding their conceptions of the role of states, they both raise the question of how legal regimes interact and potentially constrain one another where there is no central authority. As Roderick Macdonald writes from a legal pluralist perspective, “[d]ifferent legal regimes are in constant interaction, mutually influencing the emergence of each other’s rules, processes and institutions.”<sup>99</sup> These regimes are not “self-contained,”<sup>100</sup> in a way that some positivist legal commentators fear, but rather exercise normative pressure on each other, as we will demonstrate below. Lines of communication between regimes exist, but, crucially, there is no hierarchy imposing a particular discipline. We are interested in the *interaction* of “harder” and “softer” forms of international law within a regime complex, which calls into question much of the previous theorizing about them.

### **III. Hard and Soft Law Interaction as Antagonists**

Having discussed the significance of distributive conflict and regime complexes for international cooperation in general, we are now ready to return to the issue of how hard and soft law interact in the international realm. We contend that careful scrutiny of the interaction of hard and soft law instruments within a fragmented international law system demonstrates that they are not necessarily mutually supportive, but also can counteract and undermine each other under certain conditions. More precisely, individual states may deliberately use soft-law instruments to undermine hard-law rules to which they object, or vice-versa, creating an antagonistic relationship between these legal instruments. The scope conditions for such behavior, we argue, are determined by the two factors discussed in the previous section, namely distributive conflict and regime complexes. Where distributive conflict is low, we have argued, states are likely to utilize

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<sup>98</sup> See Macdonald 1998:76, 80; Fisher-Lescano and Teubner 2004: 1004-07; and Levit 2008.

<sup>99</sup> Macdonald 1998: 77.

<sup>100</sup> Simma 1985.

hard- and soft-law instruments selectively, adopting each type of instrument for its relative strengths, and utilizing those instruments in a complementary fashion, i.e. with soft law provisions either supplementing existing hard law or leading the way to new hard law in an evolutionary process. In situations of intense distributive conflict, however, the content of international norms and rules are fundamentally contested by states, which therefore have an incentive to use soft law to undermine hard law provisions to which they object, and vice-versa. Put differently, distributive conflict provides an incentive for states to contest, undermine, and possibly replace legal provisions – hard and soft – to which they object.

Within a single international regime, states are likely to enjoy limited opportunities to contest and undermine existing legal provisions, particularly if the new provisions are enacted under a stable membership and institutional rules. In a fragmented regime complex, however, the prospects for antagonistic interaction of hard and soft law increase dramatically. Even in the absence of sharp distributive conflict among states, different regimes are likely to be characterized by different memberships, decision rules, and substantive foci, creating tensions and inconsistencies among both hard and soft international norms and rules. These problems of coordination, however, are likely to be magnified substantially insofar as states engage in distributive conflict over the content of international regulations. In such instances, we may expect states to engage in the full range of forum-shopping strategies discussed in the literature on regime complexes and international law fragmentation, using hard or soft law provisions in favored regimes to counter or undermine legal developments in neighboring regimes. Put differently, if distributive conflicts provide states with an *incentive* to use hard and soft law instruments strategically, the existence of international regime complexes increases their *opportunities* to do so.

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 Insert Table 1 about here  
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Our argument is summarized in Table 1, which illustrates our expectations about the interaction of hard and soft law under different combinations of distributive conflict

and regime complexes. Where distributive conflict is low and regimes can be easily isolated, as in the upper left-hand cell, states have little incentive to undermine existing law, and hard and soft law are likely to interact and evolve in complementary ways, reflecting the existing literature. In the lower left-hand cell, we imagine a world in which distributive conflict is again low, but regime complexes coexist with no hierarchical structure, such as when an issue area comprises multiple functional domains. Here, we would not expect states to actively contest or undermine existing legal provisions, but we would anticipate some coordination problems among regimes with different memberships, decision rules, and substantive foci.

Compare these two outcomes to those in the right-hand column, where distributive conflict is high. Where states engage in distributive conflict within a single, isolated regime, as in the upper-right cell, states will have an incentive to undermine existing legal provisions, but their opportunities for doing so will be limited, in particular because most international organizations operate by consensus decision-making so that any state benefiting from existing law could block adoption of countervailing legal instruments.<sup>101</sup> In fact, however, we would expect this scenario to be relatively rare, for the simple reason that distributive conflict among states provides a strong incentive for states that are dissatisfied with a given regime to press for the creation or development of new regimes to compete with or undermine existing regimes, particularly insofar as the existing regime is resistant to change. Put differently, the choice to create new regimes is, at least in part, *endogenous* to the presence of distributive conflict, which would tend to push outcomes from the upper right-hand cell to the lower right-hand cell, where distributive conflicts are present and multiple regimes overlap in a single issue-area. In such cases, we argue, states enjoy both an incentive and an opportunity to act strategically, by forum shopping, favoring some regimes over others, and using hard- and soft-law instruments to advocate their preferred norms and rules and undermine those to which they are opposed.

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<sup>101</sup> However, where there are different bodies operating within a single organization, it is possible for hard and soft law to act as antagonists. For example, UN General Assembly resolutions could be purposefully adopted to counter existing hard law, whether the hard law is created by the UN Security Council, the International Court of Justice or another public international law tribunal.

In such settings, we can imagine multiple combinations of overlapping and competing hard- and soft- law regimes asserting jurisdiction over a given issue. For a state that is certain of its interests and intent on undermining an existing regime, for example, new hard law provisions would most likely be preferable, *ceteris paribus*, and we find some examples of states establishing such conflicting hard-law regimes below. In practice, however, states often choose instruments of a relatively softer law nature to counter existing hard law, as our examples will show. We can imagine several reasons for such a choice. One explanation may be that states do not wish to counter existing hard law directly for systemic reasons, but rather prefer to soften it indirectly, such as through affecting the interpretation of the existing hard law, and thus its precision and clarity. Thus, even when states choose a formally hard law instrument, the instrument may be soft along the dimension of delegation in order to avoid two judicial bodies pronouncing on a single issue in distinct regimes. Another explanation may be that the existing hard law is of a broad scope of coverage, such as the rules of the World Trade Organization, so that states do not wish to undermine the overall system, but merely affect the operation of some legal provisions within the existing regime. Another explanation may be, from a constructivist perspective, that the existing hard law exercises some normative pull so that states find it difficult to find a sufficient number of allied states to enter into a new hard law instrument that directly counters the existing one. Finally, it may be that some (revisionist) states, dissatisfied with existing regimes, do indeed press for conflicting hard law provisions, but are unable to secure the agreement of other (status-quo) parties on such provisions, and fall back on soft law agreements as a second-best alternative.

Regardless of the specific combinations of hard and soft law provisions, our central point is that, in the presence of distributive conflict and fragmented regime complexes, the interaction of hard and soft law is likely to be not complementary but antagonistic, with the strengths of each regime being undermined through such interaction. In such a setting, we contend, soft law provisions are likely to be “hardened,” losing many of the purported advantages of soft law such as experimentation and flexibility as a result of their link to hard law regimes. Hard law provisions, by contrast, may be “softened,” as states, international courts and tribunals are increasingly

forced to weigh the black-letter provisions of one regime against the competing normative provisions of neighboring regimes. This scenario, moreover, is more than simply a theoretical possibility: If distributive conflict over the terms of cooperation is ubiquitous, as we have argued above, and if a given issue is subject to multiple regimes in the ever-thickening web of international norms, rules, and institutions, then we may expect hard and soft law to interact antagonistically across a broad range of issues in international politics. To illustrate this argument empirically, we begin in this section with the case of agricultural biotechnology, an area of international regulation that has been subject to both distributional conflict and a well-developed regime complex, before moving in Part IV to articulate additional hypotheses and examine a range of additional empirical cases.

As we have demonstrated at length elsewhere, the US and EU have taken sharply divergent approaches to the regulation of agricultural biotechnology.<sup>102</sup> Simplifying only slightly, the United States has, since the 1980s, adopted a set of regulations that treated genetically modified (GM) foods as largely equivalent to their conventional counterparts, which contributed in turn to the early adoption of agricultural biotechnology by US firms and farmers. In the European Union, by contrast, regulators and publics have taken a far more cautious approach to genetically modified organisms (GMOs), treating genetically modified foods and crops as different from their conventional counterparts, and adopting increasingly strict and complex regulatory procedures for their approval and marketing. Unlike in the United States, GM foods and crops face considerable regulatory hurdles in the EU, including requirements for mandatory pre-approval of all GM products, as well as provisions on the mandatory labeling and traceability of all GM products, which have made it difficult and sometimes impossible for US farmers to export genetically modified foods to markets in Europe. They also face greater social resistance, with activists campaigning against GM foods and ripping up GM crops from fields, and public opinion far more mobilized over GM foods than in the United States. Reflecting this “regulatory polarization,” US and EU negotiators have demonstrated sharply divergent preferences over global GMO regulation, with each side consistently seeking to export its own

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<sup>102</sup> The analysis in this section draws in part on our forthcoming book, Pollack and Shaffer 2009.

approach to the global level. The level of distributive conflict in this area is, therefore, high.

This transatlantic dispute over GMO regulation, moreover, has played out against the backdrop of a regime complex comprising both soft law regimes, including the non-binding guidelines and recommendations issued by the OECD and Codex, alongside regimes having more hard law characteristics, such as the Cartagena Biosafety Protocol and the World Trade Organization, the latter of which combines relatively detailed, legally binding rules with a particularly strong system of third-party dispute settlement to interpret and enforce them. In this setting, both the US and the EU have attempted to export their different approaches to various international regimes, engaging in “forum-shopping” to find particularly hospitable regimes, and producing awkward compromises within, as well as inconsistencies among, various international regimes. In the process, soft and hard law mechanisms have not interacted in a complementary and progressive manner, as theorized in the existing literature, but rather served to constrain and undercut each other. More flexible soft law regimes like the Codex Alimentarius Commission have been “hardened” by concerns over the implications of their decisions in the hard law WTO regime, while the hard law WTO Agreement on Sanitary and Phytosanitary Standards (SPS Agreement) has been “softened,” being made more flexible and less predictable as the WTO judicial process has sought means to avoid deciding the substantive issues in dispute.

Let us explain how this has worked in some detail. The existing WTO regime favors the US position that any import restrictions of genetically modified (GM) products must be based on a scientific risk assessment, even if the regulatory restrictions apply equally to domestically produced and imported products. From the perspective of the EU, the 1992 Convention on Biodiversity (CBD), one of a series of framework agreements adopted at the 1992 Conference on Environment and Development at Rio de Janeiro, Brazil, offered a promising alternative forum for the regulation of GM products. In particular, it offered a forum within which the EU could press for an international environmental agreement supporting its precautionary approach to biotech regulation. Thanks to EU entrepreneurship, countries adopted a new Biosafety Protocol to the CBD in September 2003, which had been ratified by over 140 parties by early 2008.

The United States attempted to block adoption of the Protocol but was unsuccessful. The US nonetheless actively participated in the negotiations, including over the drafting of a provision governing the relationship of the Biosafety Protocol to the WTO agreements. The US demanded a “savings clause” to preserve WTO rights because otherwise there would be an argument under international law that conflicting provisions in a treaty signed last in time prevail over those in a prior treaty (known as *lex posteriori*).<sup>103</sup> The US obtained such a clause, but it failed to obtain a clear reservation of its WTO rights.<sup>104</sup> Rather, references to other “international agreements” were only made in the Protocol’s preamble, and these references are in tension with each other. The preamble provides that “this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements.” The next phrase, however, states that “the above recital is not intended to subordinate this Protocol to other international agreements.” As an EU representative stated, the two clauses effectively “cancel each other out,” leaving the legal relationship between the two regimes unclear and allowing both sides to claim a partial victory.<sup>105</sup> The EU, therefore, could point to the Biosafety Protocol as evidence of an international consensus (involving over 140 parties). It could (and did) modify its existing legislation to comply with its international commitments under the Biosafety Protocol, pointing to these international obligations in its defense against the United States’ WTO challenge to the EU’s biotech regime in 2003. From a legal positivist perspective, the Biosafety Protocol is a form of “hard” law as its rules are binding on the parties to it, but it is “softer” than the WTO regime along a hard-soft law continuum, since third-party dispute settlement is not central to its operation.

Overall, the EU has found a more favorable forum in the Biosafety Protocol to fashion international rules and norms that contain its “fingerprints,” coinciding with and supporting its regulatory approach to agricultural biotechnology. In particular, the Protocol has created new rules providing for the application of the precautionary principle in national decision-making, and the requirement of labeling of Living Modified

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<sup>103</sup> Safrin 2002: 613-14.

<sup>104</sup> For useful overviews of the Biosafety Protocol and its relation to the SPS Agreement, see Safrin 2002, Winham 2003.

<sup>105</sup> Inside US Trade 2000.

Organisms (LMOs) in conformity with an importing country's requirements. In addition, discussion continues regarding risk assessment and risk management principles, including the taking into account of "socio-economic considerations" in regulatory approvals, as well as liability rules. In this way, the Protocol serves as a counterweight to the WTO SPS Agreement's narrower focus on science-based justifications for SPS measures affecting trade.

Both the US and EU also attempted to export their policies to a third organization, the Codex Alimentarius Commission (Codex), an intergovernmental body established in 1962 by the UN Food and Agriculture Organization (FAO) and the World Health Organization (WHO) to facilitate international trade in food through the adoption of international food-safety standards, which consisted of 178 members by early 2008. Traditionally the US and EU have driven Codex agendas and still do so to a large extent. Each works to find allies for its own positions.

Codex traditionally represented a form of soft law, since the standards were not binding and, by definition, there was no need for a dispute settlement system to enforce them.<sup>106</sup> The process for producing Codex standards involves committees of experts which are established to deliberate over the appropriate standards. A designated Codex committee elaborates a draft standard or guideline subject to comments by member governments and interested international organizations. Once the process is completed, standards are approved by the full Codex Alimentarius Commission, which meets once every two years.

Overall, Codex became a sort of gentleman's club – or epistemic community – of food specialists, based on the following characteristics:

“(1) the position of Codex as relatively isolated from international hard law and politics, (2) the voluntary nature of Codex activities and output, (3) agreed-upon norms, which restrained members from both obstructing the process of elaborating new Codex standards and from letting trade

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<sup>106</sup> Once countries adopted them, however, this “soft” law clearly could have real legal effects.

considerations override all other considerations, and (4) lack of sanctions in situations where [standards are] not followed.”<sup>107</sup>

Those attending Codex meetings were (and the majority remain) food safety experts, often with technical scientific backgrounds from national administrations and industry.<sup>108</sup> Although only governments can vote, the process has often been driven by industry, which seeks to reduce compliance costs resulting from multiple national regulations.

The situation of the Codex, however, changed considerably with the creation of the WTO and the adoption of the SPS Agreement in 1995. Under the WTO’s SPS Agreement, implementation of a Codex standard creates a presumption of compliance with “harder” WTO law provisions, subject to binding dispute settlement. More precisely, article 3.1 of the SPS Agreement provides that WTO members shall base their food safety standards on international standards, guidelines and recommendations (specifying those of Codex), subject to certain exceptions. Article 3.2 further states that a member’s conformity with these international standards shall be presumed to comply with WTO law. These SPS provisions have significantly increased the significance of Codex standards, providing a significant impetus to harmonization activities, but also “hardening” Codex decision-making by providing US and EU negotiators with an incentive both to export and to protect their respective regulatory standards.

The effect of Codex standards became clear in the US-EU trade dispute over the EU’s ban on beef produced with growth hormones. In 1995, at the first Codex session following the creation of the WTO, the United States strategically “forced a vote and the adoption of Codex standards” covering five bovine growth hormones, winning the vote by a 33-29 margin, with seven abstentions.<sup>109</sup> It was hardly a consensus decision, but it was enough to establish a “voluntary” international Codex standard under the organization’s voting rules. Shortly afterwards, the U.S. initiated its WTO complaint against the EU, contending that the EU’s ban was not “based” on an international (Codex) standard as required by the SPS Agreement.

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<sup>107</sup> Veggeland and Borgen 2004: 684.

<sup>108</sup> See e.g. Millstone and van Zwanenberg 2002. Put another way, in the words of an FDA official, Codex was a “backwater,” as exciting as “watching the paint dry or the grass grow.” Shaffer telephone interview Jan. 29, 2008.

<sup>109</sup> Victor 2004: 899; and Charnovitz 1997: 1786.

Since then, the United States and European countries have placed increasing importance on the negotiation of new regulatory principles and standards within Codex, since these principles and standards may be invoked (and already have been invoked) in the decisions of WTO panels and of the Appellate Body. As a European Commission representative before Codex concludes, “In the past, if we disagreed with Codex standards or Code of Practice, we could ignore it and take our own legislation. Now we can’t.”<sup>110</sup> In response, states began sending more than food experts and food agency officials to Codex meetings, complementing them with “delegates from the diplomatic services and ministries of trade, industry, finance, and foreign affairs.” In an empirical study, Veggeland and Borden note an increase of such representatives to the Codex Committee on General Principles from 10 in 1992, to 32 in 2000, to 41 in 2001.<sup>111</sup>

The Codex process has encountered particularly severe difficulties in addressing issues that implicate risk management policy over transgenic varieties. Three Codex sub-groups have addressed them: the Committee on General Principles (regarding the use of the precautionary principle and “other legitimate factors” besides science in risk management); the Committee on Labeling (regarding the labeling of GM foods); and the Committee on Food Import and Export Inspection and Certification Systems (regarding the issue of traceability). Here, we find arduous negotiations between the US and EU, each of which put forward distinctive and sharply opposed proposals for international standards and guidelines on issues that could have a direct bearing on the application of the SPS Agreement to national regulatory measures, and in particular in the WTO biotech case that the US initiated in 2003, resulting in deadlock in the soft law Codex regime.<sup>112</sup>

The results of these negotiations in the purportedly soft law Codex forum have not produced consensus. Like the paragraphs of the Cartagena Protocol dealing with the relation between Cartagena and WTO law, much of these Codex texts simply paper over rather than settle the differences among the parties, potentially delegating clarification of these issues, if at all, to the WTO dispute settlement system. Rather than hard law and soft law working in coordination toward genuine “problem-solving,” the hard law of the

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<sup>110</sup> Quoted in Veggeland and Borgen 2005: 683.

<sup>111</sup> Veggeland and Borgen 2005: 689.

<sup>112</sup> For a detailed analysis of the negotiations over these provisions, see e.g. Poli 2003, and Pollack and Shaffer 2009: chapter 4.

WTO has constrained and to some extent “hardened” what was supposed to be a flexible, “voluntary” process for harmonized rule-making and guidance to facilitate trade in agricultural products. Strategic bargaining in defense of trade interests has often replaced technical discussions. As Victor writes, we are now more likely to see “dueling experts,” reflecting US adversarial legalism, than “independent expert panels” working collaboratively to “synthesize complex technical information.”<sup>113</sup> As Veggeland and Borgen add, we now see a “replication of WTO coalition[s] and positioning pattern[s] in the Codex.”<sup>114</sup> An organization in which decision-making was formerly based primarily on a “logic of arguing” based on deliberation has been transformed to one more frequently based on a “logic of consequentiality” based on bargaining.

The United States was concerned with the spread of regulation in other countries restricting the growth and sale of GM products, which was spurred and legitimated by the Biosafety Protocol. In response, the United States finally brought a WTO complaint against EU regulatory measures in 2003, which the US hoped would have significant implications for other countries’ practices. After considerable delay, the WTO dispute-settlement panel finally issued its decision in September 2006. The underlying conflict over the conflicting US and EU regulatory approaches, however, arguably affected the panel’s decision. The impact of the panel’s decision would be felt outside the trade regime, in both domestic law and politics and in the international regimes regulating other aspects of agricultural biotechnology. As a result, we contend, the WTO hard law dispute settlement system adopted a cautious approach in its interpretation and application of the SPS Agreement, providing less clarity as to members’ SPS commitments, arguably reducing their credibility. In effect, we argue, the linkage of the agricultural biotechnology issue to other substantive regimes helped to “soften” the effect of WTO hard law, which lost several of the defining characteristics of hard law in practice. As a result, we find that the SPS Agreement was effectively made less binding in practice in this case, for reasons that we now explain.

Even though the panel’s decision weighed in at over one thousand pages of text, the panel expressly avoided examining many crucial issues, most particularly the

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<sup>113</sup> Victor 2004: 933.

<sup>114</sup> Veggeland and Borgen 2005: 698.

questions “whether biotech products in general are safe or not” and “whether the biotech products at issue in this dispute are ‘like’ their conventional counterparts.” The panel did find in favor of the United States, but largely on procedural and not substantive grounds, with less hard law substantive bite. As a result, the substantive outcome and application of SPS rules remain unclear. As regards measures adopted at the EU level, the panel only found that the EU had engaged in “undue delay” in its approval process. The panel found that because of this delay, the EU had never taken an actual “SPS measure.” On these grounds, the panel did not examine the EU’s actions under the SPS Agreement’s substantive provisions. It thus avoided determining whether the EU had violated its obligation to base a decision on a risk assessment, or whether any assessments showed greater risks of GM varieties than for conventional plant varieties, or whether the EU was consistent in its application of food safety regulations, or whether the EU could adopt regulations that are less-trade restrictive while accomplishing its safety objectives. Regarding safeguards enacted by EU member states, in contrast, the panel found that all of them were “SPS measures” that violated the EU’s substantive obligations under article 5.1 of the SPS Agreement because they were “not based on a risk assessment.” However, the panel only reached this conclusion by looking to risk assessments already conducted at the EU level, finding that the member-state bans were inconsistent with the EU’s internal risk assessment findings.

Even though the WTO biotech panel found that the Biosafety Protocol’s provisions did not apply because the United States is not a party to the Protocol, panelists can implicitly take the Protocol into account. They can do so through their appreciation of the political stakes of alternative interpretations of WTO rules (from a rationalist perspective), and through the Protocol’s impact on the framing and broader social understanding of the issues (from a constructivist one). The existence of the Protocol can affect the interpretation of WTO legal provisions and the appreciation of the underlying facts of the case to which WTO law is applied. Moreover, it is simply not in the interest of the WTO as an organization to ignore the content of an international environmental agreement, especially one having over 140 parties. In the context of agricultural biotechnology regulation, the CBD’s Biosafety Protocol has created normative pressure for a WTO panel not to be too demanding on the risk assessment requirement.

WTO judges, both panelists and the members of the Appellate Body, have some independent agency. They are not only interpreters and appliers of WTO legal provisions. The pattern of their jurisprudence suggests that they also assume a mediating role. The WTO Appellate Body and judicial panels at times have an incentive to write opinions that are slightly ambiguous, leading to different interpretations as to how they can be implemented. In this way, they can shape their decisions, especially in hard cases, to facilitate amicable settlement, and thereby uphold the WTO legal system from normative challenge.

In doing so, however, they render the WTO's hard law text less clear, and thus less binding in practice. For example, through finding that neither the EU general nor product-specific moratoria were "SPS measures," the panel left a WTO decision over the crucial substantive issue of whether EU-level decision-making was based on a scientific risk assessment for another day. As regards the member state safeguard measures, the panel found that they were inconsistent with the EU's substantive WTO commitments to base SPS measures on a risk assessment, but did so by relying on risk assessments conducted by the EU itself. The panel even indicated a means for the EU to comply with SPS requirements, including for member state safeguards, in a manner that would enhance EU discretion.<sup>115</sup> The panel decision was not unique to the GMO case. As we have discussed elsewhere, even before the panel's GMO decision, the jurisprudence of the Appellate Body indicated a willingness to provide significant discretion to domestic regulators regarding SPS measures.<sup>116</sup>

Under the panel's reasoning, only once the EU actually makes a decision which results in an "SPS measure" regarding a GM variety may a complainant bring a substantive claim. In such case, the complainant would have to restart the process from scratch. A panel would have to be formed and experts consulted. The actual delay in the

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<sup>115</sup> The panel stated that "if there are factors which affect scientists' level of confidence in a risk assessment they have carried out, a Member may in principle take this into account." It declared that "there may conceivably be cases where a Member which follows a precautionary approach, and which confronts a risk assessment that identifies uncertainties or constraints, would be justified" in adopting a stricter SPS measure than another member responding to the same risk assessment. The panel repeated this same analysis verbatim in assessing whether a member state safeguard could be found to meet the requirements under 5.7 for provisional measures. See Panel Report, at ¶¶ 7.3065 & 7.3244-7.3245. We thank Sara Poli for pointing this out.

<sup>116</sup> Pollack and Shaffer 2009, chapter 4.

panel making a decision on the substance of EU decision-making will thus be much longer than the three and half years that the case formally took (not to count subsequent procedures regarding the EU's implementation of the ruling), if indeed a new claim is ever filed. The panel thereby effectively parried deciding on the substance of EU decision-making. The panel's delay can be viewed in socio-legal terms. The panel was not anxious to make a substantive decision on EU procedures regarding the politically controversial issue of GMOs, resulting in a softening of the binding nature of the WTO commitments in question.<sup>117</sup>

In sum, the intense politicization of the issue, and the entrenchment of two sharply divergent regulatory systems governing the world's two largest economies meant that the various multilateral negotiations on agricultural biotechnology resembled a Battle of the Sexes game, in which each side sought common international standards *on its own terms*. These various regimes have interacted, but the result has been some "hardening" of the soft law regimes like Codex, and to some "softening" (and more flexibility and less predictability) of the hard law WTO dispute-settlement system. The Codex has lost some of its traditional advantages as a soft law regime, growing more contentious, more difficult, and less deliberative over time because states are concerned about how its decisions can be used in the hard law WTO dispute-settlement system. By contrast, the quintessential hard law regime of the WTO dispute settlement system has been softened somewhat, as panelists and Appellate Body members need to take into account not only political pressures from the member states, but also the growing overlaps, tensions, and conflicts between the WTO legal order and the provisions – both hard and soft – of neighboring international regimes.

#### **IV. Hypotheses as to the Interaction of Hard and Soft Law Instruments**

As we have now shown, although hard and soft law mechanisms can complement each other, they do not necessarily interact in a complementary, mutually reinforcing manner. We advance three hypotheses as to how these tools operate in international

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<sup>117</sup> For a detailed, step-by-step analysis of the decision, see Shaffer 2008.

governance. In each case, we refer to policy examples. We offer these arguments as conjectures subject to further testing.

*1. Where the US and EU agree on a regulatory approach, we are more likely to see hard and soft law work as complements in an evolutionary manner.*

Because of US and EU collective market power, where the US and EU agree on a policy, it is much easier for them to promote it globally. As Richard Steinberg writes regarding the Uruguay Round of trade negotiations, for example, “[f]rom the time the transatlantic powers agreed to [a common] approach in 1990, they definitively dominated the agenda-setting process, that is, the formulation and drafting of texts that would be difficult to amend.”<sup>118</sup>

We have seen many examples of this process.<sup>119</sup> One side may initially be the primary entrepreneur behind the international regulatory initiative, eventually bringing the other side on board. The US has often taken the lead in initiatives that have resulted in successful international regulatory cooperation, from international agreements to protect the ozone layer to the anti-bribery convention to the Uruguay Round of trade negotiations. In both the ozone protection and anti-bribery cases, the initial instruments were of a soft law nature, and hard law agreements were reached once EU members were convinced of the benefits of a hard law approach. Yet with the increased institutionalization and harmonization of European regulation at the EU level, the EU may likewise play an increasingly important entrepreneurial role in global governance.<sup>120</sup> Generally speaking, the success of international endeavors, from the International Organization of Securities Commissions (IOSCO), to the Basel Committee, to the export credit soft law arrangement, depends on the cooperation of the US and the EU or its members.<sup>121</sup> Indeed, we suggest that much of the existing literature on the complementary interaction of hard and soft law exhibits selection bias by drawing

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<sup>118</sup> Steinberg 2002 See also Drezner 2007, arguing that US/EU agreement is both a necessary and sufficient condition for global regulatory cooperation.

<sup>119</sup> Braithwaite and Drahos cite the United States’ successful use of forum-shifting in the global regulation of intellectual property and telecommunications to the WTO, respectively from WIPO and the ITU, as well as competition policy, away from UNCTAD. They also cite the EU’s successful “initiative of establishing the international Conference on Harmonization as an alternative forum to WHO” for the regulation of pharmaceutical drugs. Braithwaite and Drahos 2000: 566-568.

<sup>120</sup> Elliot Posner makes this argument regarding financial services. See Posner 2005.

<sup>121</sup> See Levit 2008; Raustiala 2002; Zaring 2005.

disproportionately from cases in which the US and EU agree on the aims and terms of regulation because there are no, or only minimal distributive conflicts between them.

*2. Where the US and EU disagree on a regulatory approach, i.e., where there are distributive conflicts between them, we are more likely to see hard and soft law work in opposition to each other, especially where the issue in question is governed by multiple, overlapping regimes. Given the fragmented nature of the international system, the US and EU will attempt to advance their interests in those regimes – both hard and soft law – that they find to be most favorable to their respective positions.*

Given the relatively equal economic power of the US and EU, where the two sides disagree on a policy position, they are relatively well-positioned to use their market power to offset each other's efforts to export their own regulatory practices to the international level. In these struggles, they look for allies to advance their aims, whether in an existing forum or a new one. In many cases, the result of US-EU conflict will be either international instruments containing general language that does not take a position either way or competing international hard or soft law instruments. For example, competition law is an area where the US and EU often have convergent policies and the sides have collaborated in a soft law International Competition Network in promoting competition law globally. However, the US and EU disagree regarding the appropriate policies toward dominant firms, reflected in their different approaches to Microsoft's policies. As a result, the International Competition Network working group efforts on single firm dominance have resulted in recommendations that are at a high degree of generality because of disagreements between the US and Europe on these issues.<sup>122</sup>

We have shown how the US and EU have attempted to export their policy approaches in the area of agriculture biotechnology to different international regimes. Although the US formally won the WTO case, it has often appeared that the EU has been winning the struggle on the ground, since most countries signed the new Biosafety Protocol and have begun to implement domestic legislation to restrict the import and production of GM products, and to create stringent labeling requirements. However, the

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<sup>122</sup> See also Kovacic 2008. We also thank Professor Spencer Waller for his email of June 8, 2008 on this point.

US has actively provided technical assistance around the world to develop local constituencies for the promotion of agricultural biotech. The US has been somewhat successful as plantings have rapidly risen in the largest developing countries, and in particular in China, India, Brazil and Argentina.<sup>123</sup> A number of these countries are members of the Biosafety Protocol. Efforts under the Protocol to adopt more stringent labeling requirements have run into obstacles in the last years, as agricultural ministries have realized the potential impact of these requirements on agricultural trade.<sup>124</sup> In the case of voluntary soft law-making in Codex, the US-EU conflict regarding risk management policies has given rise to hard bargaining resulting either in no agreement or, where some agreement is reached, in general compromise language that papers over the US-EU differences.

We posit that the tension among international regimes will generally apply in trade and social policy issues where the US and EU take divergent positions, and that the WTO will lie at the center of inter-regime conflicts given its broad scope of coverage and its implications because of its hard law dispute settlement system.<sup>125</sup> We provide a second example here. The US and EU have long taken different positions regarding the regulation of trade in cultural products, and in particular films and other media. This issue was particularly contentious during the Uruguay Round in which the EU pushed for an express “cultural exception,” while the US pressed for the liberalization of national policies.<sup>126</sup> Neither side was fully successful. The 1995 WTO General Agreement on Trade in Services (GATS) provides that countries are not bound to open their markets to audiovisual services unless they make express commitments, but it set up a framework for future negotiations that could lead to such liberalization, and the US was able to obtain commitments from some WTO members. The US ultimately failed, however, to obtain any EU commitments to open its market to audiovisual services under the GATS.<sup>127</sup>

The EU then turned to a more favorable forum to advance its interests, the United Nations Educational Scientific and Cultural Organization (UNESCO). In 2000, the

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<sup>123</sup> James 2006.

<sup>124</sup> Pollack and Shaffer 2009: chapter 4.

<sup>125</sup> See also Kelly 2006.

<sup>126</sup> Graber 2006. See also Voon 2006.

<sup>127</sup> Graber 2006: 554

Council of Europe adopted a declaration on cultural diversity. This European declaration helped to pave the way, in 2001, for UNESCO's adoption of a Universal Declaration on Cultural Diversity, a soft law instrument. UNESCO then turned to the drafting of a binding convention, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which 148 countries signed in October 2005. Only two countries opposed it, the United States and Israel. The United States "vehemently opposed" the convention throughout the negotiations, maintaining that it was protectionist and inappropriately implicated UNESCO in trade policy.<sup>128</sup> The convention went into effect in March 2007.

Although the convention is formally binding, its core provisions are defensive. As Christophe Beat Graber writes, "the principal role of the [Convention] will be to act as a counterpart to the WTO whenever conflicts between trade and culture arise."<sup>129</sup> Article 1(g) of the convention, for example, provides that one of its objectives is "to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning" — as opposed to having value only in economic terms. Article 5 of the convention then affirms the sovereign right of the parties "to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve [such] purposes." Article 6 provides that each party "may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory," including "financial assistance" and other "regulatory measures." Article 8 goes further, maintaining that, "Parties may take all appropriate measures to protect and preserve cultural expressions in situations [where cultural expressions are] in need of urgent safeguarding."

Much of the rest of the convention is of a soft law nature. In contrast to its recognition of parties' *rights*, the convention only creates soft law *obligations*, such as for parties to further public awareness of cultural diversity's importance (article 10), to acknowledge civil society's role (article 11) and to generally exercise their "best efforts"

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<sup>128</sup> Graber 2006: 560, 565.

<sup>129</sup> Graber 2006: 565.

to implement the convention through cultural policy measures.<sup>130</sup> The convention provides for dispute settlement, but it too is of a soft law nature, relying on negotiation, mediation and conciliation.<sup>131</sup> The conciliation system, moreover, is non-binding, and parties may also opt out of it.

A key issue thus became the relationship of the convention to other international treaties, and particularly the WTO agreements. The convention provides another example of strategic ambiguity in this respect. Article 20 of the convention states that, “without subordinating this convention to any other treaty,” the parties “shall foster mutual supportiveness” with other treaties and “take into account the relevant provisions” of the convention “when interpreting and applying ... other treaties” and “when entering into other international obligations.” At the same time, the article provides that “nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”

Article 20’s focus on the fostering of “mutual supportiveness” among treaty regimes can be read as an attempt to soften WTO rules to accommodate the convention’s norms. The EU and other parties to the convention can now refer to an international convention that expressly notes their sovereign rights under international law to take measures, including trade measures, to protect their cultural diversity. As the number of countries ratifying the convention grows, the convention, together with the 2001 UNESCO Universal Declaration, could be viewed as emerging customary international law which applies to all nations except those non-signatories who persistently object to it.<sup>132</sup>

The UNESCO convention could thus have an impact on future WTO negotiations and on future WTO cases involving cultural products, even where they involve a WTO member that is not a party to it. The UNESCO convention can be used, in particular, to attempt to constrain WTO jurisprudence so that WTO panels interpret WTO rules in a manner that treads lightly in this area, with the result that the application of WTO agreements to cultural products will be softened. Article XX(f) of the General Agreement on Tariffs and Trade (GATT) 1994, for example, creates an exception to

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<sup>130</sup> Graber 2006: 564.

<sup>131</sup> Article 25 of the Convention.

<sup>132</sup> By May 1, 2008, 81 countries had become members of the convention.

GATT obligations where a measure is “imposed for the protection of national treasures of artistic, historic or archaeological value,” and Article XX(a) does the same for measures “to protect public morals.” The interpretation of these or other GATT provisions could be influenced by the UNESCO convention, creating greater uncertainty as to the extent of WTO commitments as regards cultural products.

In sum, in this case as in the case of agricultural biotechnology regulation, the potential link between the UNESCO cultural regime and the WTO trade regime, together with the stark distributive differences between the US and the EU, have led to a “hardening” of bargaining over the UNESCO convention, and could, in time, produce a softening of WTO jurisprudence in this area.

*3. Even where the US and EU agree on a regulatory approach, smaller states can use hard and soft law strategies to attempt to thwart US and EU aims, again choosing regimes more favorable to their positions in a fragmented international system. However, the US and EU have significant advantages because of their market power and resources.*

The US and EU are not the only actors that can engage in strategies of deliberate countering of one hard or soft law instrument through activities in a separate regime resulting in distinct hard and soft law instruments. International law can also have distributional implications for developing countries, with intellectual property law being a prime example.<sup>133</sup> In their article on regime complexes, Raustiala and Victor show how the US and EU leveraged market power in trade negotiations under the Uruguay Round to create new rules under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which were closely modeled on US or EU law, requiring the recognition of intellectual property rights in plant varieties. Developing countries responded by attempting to reframe intellectual property protection in light of environmental and development goals under the 1992 Convention on Biodiversity. Their

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<sup>133</sup> Maskus 2000.

efforts led to a 2002 Treaty on Plant Genetic Resources (PGR), which partly undercuts TRIPS rules.<sup>134</sup>

Laurence Helfer has also explored how developing countries “engage in regime shifting,” adopting “the tools of soft lawmaking.”<sup>135</sup> In doing so, they often work with non-governmental groups who serve as allies to help generate counter norms that are development-oriented.<sup>136</sup> Helfer shows how developing countries have attempted to counter the creation of hard intellectual property rights under the TRIPS Agreement and bilateral TRIPS-plus agreements through forum-shifting tactics involving the CBD, World Intellectual Property Organization (WIPO) and the World Health Organization (WHO). They have attempted to do so regarding an array of issues involving biodiversity, plant genetic resources for food and agriculture, public health, and human rights. They aim to generate “new principles, norms and rules of intellectual property” within these institutions which “are more closely aligned with these countries’ interests.”<sup>137</sup> For example, the Conference of the Parties to the CBD has created workshops, established working groups and developed guidelines to address the issues of indigenous knowledge and the sharing of benefits from the use of genetic resources.<sup>138</sup> Concurrent efforts within the FAO gave rise to the 2002 Treaty on Plant Genetic Resources (PGR) which recognizes “farmers rights,” “sovereign rights” over plant genetic resources, and equitable “sharing of the benefits arising from commercialization.”<sup>139</sup> This treaty constitutes hard law in that it is formally binding, although it is much weaker than the TRIPS Agreement in its dispute settlement provisions. Once again, countries have engaged in strategic ambiguity in defining the PGR Treaty’s relation to the TRIPS Agreement.

Eyal Benvenisti and George Downs nonetheless question the efficacy of these strategies.<sup>140</sup> They contend that powerful countries are best able to make use of fragmented international regimes through forum-shopping strategies to shape

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<sup>134</sup> Raustiala and Victor 2004: 301-302; International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 4, 2002.

<sup>135</sup> Helfer 2004: 17, 32.

<sup>136</sup> Helfer 2004: 32, 53-54.

<sup>137</sup> Helfer 2004: 6.

<sup>138</sup> Helfer 2004: 32-34

<sup>139</sup> PGR Treaty, at Art. 9.

<sup>140</sup> Benvenisti and Downs 2007. See also Drezner 2007.

international law over time. They find that fragmented regime complexes increase the transaction costs for participants, favoring those with greater resources. They argue that “creating institutions along narrow functionalist lines ... limits the opportunities that weaker states have to build cross-issue coalitions that could potentially increase their bargaining power and influence.”<sup>141</sup> The counter-regimes mentioned by Helfer, for example, are soft law regimes compared to the TRIPS Agreement, and weaker states have adopted tactics that are primarily reactive in these soft law venues. Benvenisti and Downs note, in particular, how “serial bilateralism is being used with increasing frequency by powerful states to shape the evolution of norms in areas such as intellectual property protection and drug pricing where they have vital interests at stake and where their position on issues is far different from those of the vast majority of states.”<sup>142</sup> These bilateral agreements constitute hard law along all three dimensions defined by Abbott and Snidal. Benvenisti and Downs find a similar process in the negotiation of investment protections through bilateral investment treaties.<sup>143</sup> The earlier failure of developing countries to create a “new international economic order” in the 1970s, including through the United Nations Conference on Trade and Development as a rival institution to the GATT, suggests that there are severe limits to weaker countries’ use of this option.<sup>144</sup>

## V. Conclusions

Taken together, our hypotheses suggest that hard and soft law *may* interact in a complementary and evolutionary fashion, as predicted in the canonical literature, but *only under certain conditions*. Specifically, where the US and the EU, as the dominant players in global regulation, agree on the aims and terms of regulation, soft and hard law may complement each other in the ways discussed by Abbott and Snidal, Shelton, and

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<sup>141</sup> Benvenisti and Downs 2007: 595

<sup>142</sup> Benvenisti and Downs 2007: 611.

<sup>143</sup> Benvenisti and Downs 2007: 611-612. See also Guzman 1998.

<sup>144</sup> Krasner 1985. Braithwaite and Drahos come to a similar conclusion, writing: “Clearly, very few actors in the context of global regulation have the capacity to run strategies of forum-shifting.... Forum-shifting is a strategy that only the powerful and well-resource can use.” Yet they also concede that, “in some way weaker players are better off in a world where there are multiple fora capable of dealing with similar agendas,” thus providing smaller states with a slightly increased ability to resist US and EU efforts to set global standards.

others, so as to promote greater [regulatory] cooperation. However, in the absence of such an agreement, or in the presence of distributive conflict between the US and the EU and third countries, we can predict, and indeed we have seen in several concrete instances, that states will strategically use different hard and soft law regimes to advance their respective aims in the international arena. In these cases, hard and soft law regimes may be placed in active opposition to each other, with soft law regimes taking on the “hard bargaining” characteristics of hard law regimes, while the terms of hard law regimes may become increasingly flexible, uncertain and “soft,” insofar as policymakers and adjudicators tread softly in deciding cases with implications in neighboring regimes.

None of our analysis is to suggest that either hard or soft law is inherently flawed or not worth pursuing. Where the scope conditions are right, hard and soft law *can* interact productively, as discussed above. Furthermore, even where particular issues are characterized by distributive conflicts and fragmented international regimes, both hard and soft law regimes can play a positive role in encouraging cooperation, provided that our expectations of these regimes remain realistic. Even in these situations, while regimes can be expected to lose some of their traditional law advantages — such as flexibility and deliberative, technocratic decision-making in soft law regimes and legal certainty in hard law regimes — they nevertheless offer useful fora in which states may *bargain* over the adoption of international standards and attempt to address their implications. More generally, multilateral regimes, while subject to distributive conflicts and to forum-shopping and inconsistency across regimes, can still provide their traditional functions of lowering the transaction costs of negotiations, providing a common vocabulary for the parties, clarifying at least some of the mutual understandings and obligations of the parties, and contributing to regulatory capacity building in less-developed countries.<sup>145</sup>

In addition, we suggest, tensions and even conflicts among hard and soft international law regimes should not necessarily be lamented. The tensions we observe simply reflect underlying differences among states and state constituencies, and in particular among powerful ones, in a diverse, pluralist world. In such a context, overlapping, fragmented regimes can also provide a service to each other, signaling states

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<sup>145</sup> See e.g., the environmental regime case studies in Haas, Levy and Keohane 1993.

and international decision-makers to tread softly in applying their particular rules, taking account of developments in other spheres of international law and politics.<sup>146</sup> For example, they can prompt internal responses within the WTO regime to preserve its own political legitimacy. In the context of agricultural biotechnology regulation, the CBD's Biosafety Protocol has provided a counter-voice which can protect the WTO system from the WTO dispute settlement system's relative insularity from global politics. These agreements, we contend, will interact, and over time, they can operate recursively. In doing so, they can help stabilize conflict and reduce the likelihood of trade wars. They can also facilitate states' mutual accommodation of regulatory difference at least to a greater extent than in the absence of such institutions.

Ultimately, we contend, the relationship between international hard law and soft law instruments cannot be characterized in a universal or invariant fashion. Rather, we have argued, the interaction of hard and soft law depends in the first instance on the broader context of international cooperation, including the respective power of the key players, the degree of distributive conflict among them, the constellation and character of regimes within a given regime complex, and the distinct politics of implementation. The canonical, complementary and evolutionary relationship between hard and soft law is not a myth, we maintain, but that relationship holds only under a set of scope conditions, including broad agreement between the US and the EU on the aims and terms of international law. Where these conditions fail to hold, the interaction between hard and soft law can be far more adversarial than the canonical literature suggests. Understanding the varied interactions of hard and soft law in a wider set of cases, we believe, represents the next major challenge in this field of study.

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<sup>146</sup> For a related concept of "dialectical review" involving the interaction of international and national courts, see Ahdieh 2004.

**Table 1: Distributive Conflict, Regime Complexes, and  
The Interaction of Hard and Soft Law**

	<b>Dist. Conflict Low</b>	<b>Dist. Conflict High</b>
Single, Isolated Regime	Complementary interaction of hard and soft law, as per existing literature.	Possible antagonistic interaction of hard and soft law within the regime, although opportunities limited by invariant memberships, rules, and substantive content of regime.
Regime Complex	Possible complementary interaction of hard and soft law, although differing memberships, rules and substantive foci may render coordination difficult even in the absence of major distributive conflicts.	Likely antagonistic interaction of hard and soft law between regimes with different decision-making rules, memberships and substantive foci.

## References

Abbott, Kenneth W., Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal (2000). "The Concept of Legalization," *International Organization*, Vol. 54, No. 3, pp. 17-35.

Abbott, Kenneth W., and Duncan Snidal (2000). "Hard and Soft Law in International Governance," *International Organization*, Vol. 54, No. 3, pp. 421-456.

Abbott, Kenneth W., and Duncan Snidal (2004). "Pathways to Cooperation," in Eyal Benvenisti and Moshe Hirsch, eds., *The Impact of International Law on International Cooperation: Theoretical Perspectives* (New York: Cambridge University Press), pp. 50-84.

Ahdieh, Robert (2004). "Between Dialogue and Decree: International Review of National Courts," *New York University Law Review*, Vol. 79, pp. 2029-2163.

Alter, Karen J., and Sophie Meunier (2006). "Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute," *Journal of European Public Policy*, Vol. 13, No. 3, pp. 362-82.

Baldwin, David A. (ed.) (1993). *Neorealism and Neoliberalism: The Contemporary Debate* (New York: Columbia University Press).

Benvenisti, Eyal and George W. Downs (2007). "The Empire's New Clothes: Political Economy and the Fragmentation of International Law," *Stanford Law Review*, vol. 60. Available at SSRN: <http://ssrn.com/abstract=976930>, accessed on 3 January 2008.

Berman, Paul (2007). "Global Legal Pluralism," *Southern California Law Review*, Vol. 80, pp. 1155-1237.

Bernauer, Thomas, and Thomas Sattler (2006). "Dispute-Escalation in the WTO: Are Conflicts over Environment, Health and Safety Regulation Riskier?" Center for Comparative and International Studies Working Paper, Zurich, No. 21.

Braithwaite, John and Peter Drahos (2000). *Global Business Regulation* (New York: Cambridge University Press).

Brunnee, Jutta and Stephen J. Toope. (1997). "Environmental Security and Freshwater Resources: Ecosystem Regime Building," *American Journal of International Law*, Vol. 91, pp. 26-59.

Búrca, Gráinne de (2006). "EU Race Discrimination Law: A Hybrid Model?," *Law and New Governance in the EU and the US*, Gráinne de Búrca and Joanne Scott (eds) (2006).

Charney, Jonathan I. (1996). "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea," *American Journal of International Law*, Vol. 90, pp. 69-75.

Chayes, Abraham, and Antonia Handler Chayes (1993). "On Compliance," *International Organization*, Vol. 47, No. 2, pp. 175-205.

Chinkin, Christine (1989). The Challenge of soft law: development and change in international law. *International and Comparative Law Quarterly*, Vol. 38, pp. 851-55.

Delmas-Marty, M. (1998). *Trois défis pour un droit mondial* (Paris: Seuil).

Downs, George W, David M. Rocke and Peter N. Barsoom (1996). "Is the Good News About Compliance Good News About Cooperation?" *International Organization*, Vol. 50, No. 3, pp. 379-406.

Drezner, Daniel W. (2007). *All Politics is Global: Explaining International Regulatory Regimes* (Princeton University Press).

Dunoff, Jeffrey, Steven Ratner and David Wippman (2006). *International Law: Norms, Actors, Process: A Problem-Oriented Approach*, 2<sup>nd</sup> edition (Aspen Law and Business Publishers).

Dupuy, Pierre-Marie (1999). "The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice," *NYU Journal of International Law and Politics*, Vol. 31, pp. 791-808.

Edelman, Murray (1964). *The Symbolic Uses of Politics* (Illinois: University of Illinois Press).

Evenett, Simon and Robert Stern (2009 forthcoming). "Condemned to Cooperate," in *Systemic Implications of Transatlantic Regulatory Cooperation and Competition*, eds. Simon Evenett and Robert Stern.

Fearon, James (1998). "Bargaining, Enforcement, and International Cooperation," *International Organization*, Vol. 52, No. 2, pp. 269-305.

Finnemore, Martha, and Stephen J. Toope (2001). "Alternatives to 'Legalization': Richer Views of Law and Politics," *International Organization*, Vol. 55, No. 3, pp. 743-758.

Fisher-Lescano, Andreas, and Gunter Teubner (2004). "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law*, Vol. 25, pp. 999-1046.

Franck, Thomas M. (1990). *The Power of Legitimacy Among Nations* (New York: Oxford University Press).

Germain, Randall (1997). *The International Organization of Credit* (New York: Cambridge University Press).

Goldsmith, Jack and Eric Posner (2005). *The Limits of International Law* (New York: Oxford University Press).

Goodrich, Peter (2000). "Law-Induced Anxiety: Legalists, Anti-Lawyers and the Boredom of Legality," *Social and Legal Studies*, Vol. 9, pp. 143-163.

Gordon, Kathryn (1999). "Rules for the Global Economy: Synergies between Voluntary and Binding Approaches", *OECD Working Paper on International Investment*, Vol. 3.

Graber, C., (2006). "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?" *Journal of International Economic Law*, Vol. 9, No. 3, 553-574.

Grieco, Joseph (1988). "Anarchy and the Limits of Cooperation," *International Organization*, Vol. 42, No. 3, pp. 485-507.

Griffiths, John (1986). "What is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law*, Vol. 24, pp. 1-55.

Gruber, Lloyd (2000). *Ruling the World: Power Politics and the Rise of Supranational Institutions* (New Jersey: Princeton University Press).

Guzman, Andrew (1998). "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" *Virginia Journal of International Law* Vol. 38, pp. 639-688.

Guzman, Andrew (2005). "The Design of International Agreements", *The European Journal of International Law*, Vol. 16, No. 4, pp. 579-612.

Guzman, Andrew (2006). "The Promise of International Law," *Virginia Law Review*, Vol. 92, No. 3, pp. 533-564.

Guzman, Andrew (2008). *How International Law Works: A Rational Choice Theory* (Oxford University Press).

Hasenclaver, Andreas, Peter Mayer, and Volker Rittberger (1997). *Theories of International Regimes* (New York: Cambridge University Press).

Hathaway, Oona, and Ariel N. Lavinbunk (2006). "Rationalism and Revisionism in International Law," (Book Review), *Harvard Law Review*, Vol. 119, No. 5, pp. 1404-1443.

Held, David, et al. (1999). *Global Transformations: Politics, Economics and Culture*.

Helfer, Lawrence (2004). "Regime Shifting: The TRIPS Agreement and New Dynamics of Intellectual Property Lawmaking," *Yale Journal of International Law*, Vol. 29, pp. 1-83.

Hillgenberg, Hartmut (1999). "A Fresh Look at Soft Law", *European Journal of International Law*, Vol. 10, pp. 499-515.

International Law Commission (2006). *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, para. 8, U.N. Doc. A/CN.4/L/682 (Apr. 13, 2006) (finalized by Martti Koskenniemi).

James, Clive (2006). ISAAA Brief 35, Executive Summary, Global Status of Commercialized Biotech/GM Crops: 2006, <http://www.isaaa.org/Resources/Publications/briefs/35/executivesummary/default.html>, accessed on 8 January 2008.

Jupille, Joseph, and Duncan Snidal (2006). "The Choice of International Institutions: Cooperation, Alternatives and Strategies," unpublished paper, <http://sobek.colorado.edu/~jupille/research/20060707-Jupille-Snidal.pdf>, accessed on 15 January 2008.

Kelly, Claire (2006). "Power, Linkage and Accommodation: The WTO As An International Actor And Its Influence On Other Actors And Regimes," *Berkeley Journal of International Law*, Vol. 24, pp. 79-128.

Klabbers, Jan (1996). "The Redundancy of Soft Law," *Nordic Journal of International Law*, Vol. 65, pp. 167-182.

Klabbers, Jan (1998). "The Undesirability of Soft Law." *Nordic Journal of International Law*. Vol. 67, pp. 381-391.

Koh, Harold (1998). "The 1998 Frankel Lecture: Bringing International Law Home," *Houston Law Review*, Vol. 35, pp. 623-81.

Koskenniemi, Martti, and Päivi Leinmo (2002). "Fragmentation of International Law. Postmodern Anxieties?" *Leiden Journal of International Law*, Vol. 15, No. 3, pp. 553-579.

Koremenos, Barbara, Charles Lipson, and Duncan Snidal (2001). "The Rational Design of International Institutions." *International Organization* Vol. 55, No. 4, pp. 761-800.

Kovacic (2008). "Competition Policy in the European Union and the United States: Convergence or Divergence?" (Bates White Fifth Annual Antitrust Conference Washington, D.C. June 2, 2008), available at <http://www.ftc.gov/speeches/kovacic/080602bateswhite.pdf>.

Krasner, Stephen D. (ed.) (1983). *International Regimes* (Ithaca: Cornell University Press).

Krasner, Stephen D. (1985). *Structural Conflict: The Third World Against Global Liberalism* (Berkeley: University of California Press).

Krasner, Stephen D. (1991). "Global Communications and National Power: Life on the Pareto Frontier," *World Politics*, Vol. 43, No. 3, pp. 336-356.

Levit, Jane (2008). "Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit," *Emory Law Journal*, Vol. 57, pp. 101-xx.

Lipson, Charles (1991). "Why Are Some International Agreements Informal?" *International Organization*, Vol. 45, No. 4, pp. 495-538.

Loya, Thomas, and John Boli (1999). "Standardization in the World Polity: Technical Rationality over Power," in John Boli and George Thomas, eds., *Constructing World Culture: International Nongovernmental Organizations Since 1875* (Stanford: Stanford University Press), pp. 169-197.

MacDonald, Roderick A. (1998). "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism," *Arizona Journal of International and Comparative Law*, Vol. 15, No. 1, pp. 69-91.

Marceau, Gabrielle (2001). "Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties," *Journal of World Trade*, Vol. 35, No. 6, pp. 1081-1131.

Martin, Lisa (1992). *Coercive Cooperation* (Princeton: Princeton University Press).

Maskus, Keith E. (2000). *Intellectual Property Rights in the Global Economy* (Washington, DC: Institute for International Economics).

Mattli, Walter, and Tim Büthe (2003). "Setting International Standards," *World Politics*, Vol. 56, No. 1, pp. 1-42.

Millstone, Erik, and Patrick van Zwanenberg (2002). "The Evolution of Food Safety Policy-making Institutions in the UK, EU and Codex Alimentarius," *Soc Pol. & Admin*, Vol. 36, No. 6, pp. 593-609.

Morrow, James (1994). "The Forms of International Cooperation," *International Organization*, Vol. 48, No. 3, pp. 387-423.

Oye, Kenneth, ed. (1986). *Cooperation under Anarchy* (Princeton: Princeton University Press).

Pauwelyn, Joost (2003). "The Role of Public International Law in the WTO: How Far Can We Go?" *American Journal of International Law*, Vol. 95, pp. 535-578.

Poli, Sara (2003). "Setting Out International Food Standards: Euro-American Conflicts within the Codex Alimentarius Commission," Giandomenico Majone, ed., *Risk Regulation in the European Union: Between Enlargement and Internationalization* (Florence: European University Institute), pp. 125-147.

Pollack, Mark A. and Gregory C. Shaffer, eds. (2001). *Transatlantic Governance in the Global Economy* (Lanham, MD: Rowman & Littlefield).

Pollack, Mark A. and Gregory C. Shaffer (2009, forthcoming). *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford: Oxford University Press).

Posner, Elliot. (2005). "Market Power Without a Single Market: The New Transatlantic Relations in Financial Services," in *The Future of Transatlantic Economic Relations*, edited by David M. Andrews et al. (Florence: Robert Schuman Centre for Advanced Studies).

Powell, Robert (1991). "The Problem of Absolute and Relative Gains in International Relations Theory," *American Political Science Review*, Vol. 85, pp. 1303-20.

Raustalia, Kal. (2000). "Compliance and Effectiveness in International Regulatory Cooperation," *Case Western Reserve Journal of International Law* Vol. 32, pp. 387, 398.

Raustiala, Kal. (2002). "The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law," *Virginia Journal of International Law*, Vol. 43, No. 1, pp. 1-92.

Raustiala, Kal (2005). "Form and Substance in International Agreements," *American Journal of International Law*, Vol. 95, pp. 581-614.

Raustiala, Kal. and Anne-Marie Slaughter (2002). "International Law, International Relations, and Compliance," in Walter Carlsnaes, Thomas Risse, and Beth A. Simmons, eds., *Handbook of International Relations* (New York: SAGE Publications, 2002), pp. 538-558.

Raustiala, Kal, and David G. Victor (1998). "Conclusions," in David G. Victor, Kal Raustiala, and Eugene B. Skolnikoff, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge: MIT Press), pp. 659-707.

Raustiala, Kal. and David G. Victor (2004). "The Regime Complex for Plant Genetic Resources," *International Organization*, Vol. 58, No. 2, pp. 277-309.

Reininke, Wolfgang and Jan Martin Witte (2000). "Interdependence, Globalization and Sovereignty: The Role of Non-binding International Legal Accords," in *Commitment and Compliance*, edited by Dinah Shelton (New York: Oxford University Press).

Report from the Commission to the Council and the European Parliament on the Implementation of EC No. 1829/2003 of the European Parliament and of the Council on Genetically Modified Food and Feed, COM (2006) 626 final (Oct. 25, 2006).

Roberts, Simon (2004). "After Government: On Representing Law without the State," *Modern Law Review*, Vol. 68, No. 1, pp. 1-24.

Robilant, Anna (2005). "A Genealogy of Soft Law", *American Journal of Comparative Law*, Summer.

Rubin, Edward L. (1993). "Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4," *Loyola LA Law Review*, Vol. 26, pp. 743- 787.

Ruggie, John Gerard (1998). "What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge," *International Organization*, Vol. 52, No. 4, pp. 855-885.

Sable, Charles and William Simon (2006). "Epilogue: Accountability without Sovereignty," in *Law and New Governance in the EU and the US*, Gráinne de Búrca and Joanne Scott (eds).

Safrin, Sabrina (2002). "Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements," *American Journal of International Law*, Vol. 96, No. 3, pp. 606-628.

Scott, Joanne and Grainne de Burca (2006). *Law and New Governance in the EU and the US* (Oxford, Hart Publishing).

Shaffer, Gregory (2008). "A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case," forthcoming *NYU Journal of International Law and Politics*.

Shelton, Dinah (2000). *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press).

Simma, Bruno (1985). "Self-Contained Regimes," *Netherlands Yearbook of International Law*, Vol. 16, pp. 111-xx.

Simmons, Beth (2000). "International Efforts Against Money Laundering." In *Commitment and Compliance*, edited by Dinah Shelton (New York: Oxford University Press).

Simon, William (2006). "Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes," in *Law and New Governance in the EU and the US*, Gráinne de Búrca and Joanne Scott (eds).

Sindico, Francesco (2006). "Soft Law and the Elusive Quest for Sustainable Global Governance," *Leiden Journal of International Law*, Vol. 19, No. 3, pp. 829-846.

Snidal, Duncan (1985) "Coordination Versus Prisoner's Dilemma: Implications for International Cooperation and Regimes," *American Political Science Review*, Vol. 79, No. 4, pp. 923-942.

Snidal, Duncan (1991). "International Cooperation Among Relative Gains Maximizers," *International Studies Quarterly*, Vol. 35, No. 4, pp. 387-402.

Stein, Arthur (1982). "Coordination and Collaboration: Regimes in an Anarchic World," *International Organization*, Vol. 36, No. 2, pp. 399-324.

Steinberg, Richard H. (2002). "In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO", *International Organization*, Vol. 56, No. 2, pp. 339-374.

Susskind, Lawrence, and Connie Ozawa (1992), *Negotiating More Effective International Environmental Agreements*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS* 147 (Andrew Hurrell & Benedict Kingsbury eds.).

Trubek, David M., Patrick Cottrell, and Mark Nance. (2006). "Soft Law, Hard Law, and European Integration: Toward a Theory of Hybridity." In Scott, Joanne and Gráinne de Búrca (eds.) *New Governance and Constitutionalism in Europe and the US*. Oxford: Hart Publishing Ltd., pp. 65-94.

Veggeland, Frode, and Svein Ole Borgen (2004). "Negotiating International Food Standards: The World Trade Organization's Impact on the *Codex Alimentarius* Commission," *Governance*, Vol. 18, No. 4, pp. 675-708.

Victor, David G. (2004). "The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years," *New York University Journal of International Law and Politics*, Vol. 32, No. 4, pp 865-937.

Voon, Tania. (2006). "UNESO and WTO. A Clash of Cultures?" *International and Comparative Law Quarterly*, Vol. 55, No. 3, pp. 635-651.

Weil, Prosper (1983). "Towards Relative Normativity in International Law?" *American Journal of International Law*, Vol. 77, 413-442.

Winham, Gilbert (2003). International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO,” *World Trade Review*, Vol. 2, No. 2, pp. 131-155.

World Bank, at

*<http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>*, and

*<http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf>*

Zaring, David T. (2005). “Informal Procedure, Hard and Soft, in International Administration,” *Chicago Journal of International Law*, Vol. 5, pp. 547-603.