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# Hard Vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance

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**Article**

**Hard vs. Soft Law: Alternatives,  
Complements, and Antagonists in  
International Governance**

**Gregory C. Shaffer and Mark A. Pollack†**

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There has been a prolific amount of scholarship regarding the use of “hard” and “soft” law in international governance. This law and social science literature assesses the relative functional attributes and deficiencies of hard- and soft-law instruments as alternatives for international governance.<sup>1</sup> It also examines how these instruments can be combined sequentially as mutually reinforcing complements to lead to greater international cooperation. This Article, in contrast, shows how hard and soft law can operate not only as alternatives and complements, but also as antagonists. It sets forth specific hypotheses as to how, and under what conditions, hard- and soft-law instruments interact in different ways in international governance, supported by empirical examples.

The existing law and social science literature on hard and soft law can be divided into three camps: legal positivist, rationalist, and constructivist. All three of these camps address how hard and soft law are used as alternatives, as well as how they can interact in complementary ways; but they each have different starting points. Legal positivists tend to favor hard law and view hard and soft law in binary terms. For them, hard law refers to legal obligations of a formally binding nature, while soft law refers to those that are not formally binding but may nonetheless lead to binding hard law. Rationalists, in contrast, contend that hard and soft law have distinct attributes that states choose for different contexts. They also find that hard and soft

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1. The literature discussed in this introduction is explored in greater detail in later sections of the Article. *See infra* Parts I, II, III.

law, in light of these different attributes, can build upon each other. Constructivists maintain that state interests are formed through socialization processes of interstate interaction which hard and soft law can facilitate. Constructivists often favor soft-law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation. Regardless of their views about the strengths and weaknesses of hard and soft law as alternatives, all three schools examine how hard and soft law can serve as mutually supporting complements to each other.

This Article's aim is not to adjudicate among these three views about the respective strengths and weaknesses of hard and soft law, although we can be viewed as rationalists in our focus on actors and their interests.<sup>2</sup> Rather, the Article's aim is to enhance understanding of *how hard and soft law interact under different conditions*. The Article finds that all three existing approaches to the study of hard and soft law have erred in focusing only on hard and soft law operating either as alternatives or as mutually supporting complements, thus presenting an inaccurate picture of how international law develops.

The Article makes three central claims. The first and primary claim is that international hard- and soft-law instruments (or, for that matter, any legal instruments that vary in their soft- and hard-law characteristics) serve not only as alternatives or complements, but often as antagonists. Hard and soft legal norms can be antagonistic in a conflict-of-laws sense. A proliferation of international legal norms can and (as this Article demonstrates) often does lead to inconsistencies and conflicts among these norms.

Such a formulation of hard- and soft-law interaction, however, can be misleading, since legal instruments are not actors exercising agency. The issue can therefore be fruitfully reframed in terms of agents, to ask whether states and nonstate actors design or use hard- and soft-law instruments to complement or to counter existing legal provisions. Thus, rather than saying, "soft law can elaborate and therefore complement hard law" (common in the existing literature), one can say, "states

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2. While both of us can be viewed primarily as rationalists because of our focus on actors and their interests, our approach takes seriously constructivist insights. See generally, e.g., MARK A. POLLACK & GREGORY C. SHAFFER, *WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS* (2009).

and other actors may adopt soft-law provisions to elaborate the provisions of existing hard law.” Similarly, rather than saying “hard and soft law can interact as antagonists,” one can say that “some states or other actors, unhappy with existing legal agreements, may promote the adoption of new legal provisions designed to obfuscate and undermine those arrangements.” It is primarily in this latter sense that we shall argue theoretically, and demonstrate empirically, the frequently antagonistic relationship of hard and soft law.

The Article’s second claim is that when actors promote a hard- or soft-law instrument to counter the other, this antagonistic interaction has particular implications in a fragmented international system. It can affect the very nature of international hard- and soft-law regimes and their purported advantages. The Article shows how, when actors promote countervailing hard or soft law, such antagonistic interaction 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. This result is more likely where there is distributive conflict between powerful states.

The Article’s third and final claim is that the interaction of hard and soft law is not a binary either/or question, but one of specifying the *conditions* under which actors are likely to employ hard and soft law as alternatives, complements, or antagonists. The existing literature is not wrong to suggest that hard and soft law may be employed as complements, but this literature tells only part of the story. This Article offers an analytic framework for understanding the conditions under which states and other actors choose to employ hard and soft law in different ways. It emphasizes the role of distributive conflict among states and the existence of regime complexes as conditions favorable for the use of hard and soft law as antagonists.

The Article proceeds in four parts. Part I provides an overview of the existing literature, its definitions of hard and soft law, its assessment of the relative attributes and deficiencies of hard and soft law as alternatives, and its examination of how hard and soft law can act as complements, leading to greater cooperation. Part II provides the theoretical background for assessing the conditions under which hard and soft law act as alternatives, complements, or antagonists, namely the importance of state power, the role of distributive conflict among

states, the challenges posed by international regime fragmentation, and the recursive processes generated by the implementation stage where actors resist complying with international law requirements. Part III presents our argument regarding the interaction of hard and soft law under different combinations of distributive conflict and regime complexes. It presents the dispute between the United States and European Union (EU) over genetically modified foods as an illustration of how hard and soft law are employed by state and nonstate actors as opposing tools aimed to counter each other's influence.

Part IV then sets forth five hypotheses regarding how hard- and soft-law instruments interact in international governance, specifying the conditions under which they work in a complementary or antagonistic manner. The first two hypotheses concern the impact of cooperation and rivalry among powerful states on the interaction of international hard- and soft-law regimes. Where powerful states agree on a common approach, in particular because distributive conflict between them is weak or absent, we contend that hard and soft law are most likely to be used as complements in an evolutionary manner, consistent with the existing literature. This pattern is illustrated in a number of cases of cooperation between the United States and the EU, which are the most powerful players in a number of international regulatory regimes. However, where powerful states disagree on policy, we maintain that hard and soft law are more likely to work in opposition to each other, especially where there are distributional consequences which spur these states to advance their perspectives in different international regimes. In light of the fragmented nature of the international system, states will attempt to advance their interests in those regimes that they find to be most favorable to their positions, consistent with the existing literature on "forum-shopping."<sup>3</sup> In such settings, we contend that soft-law regimes can be "hardened" through their links to other regimes, losing the purported soft-law advantages of flexibility and informality, while hard-law regimes can be "softened" by the lin-

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3. See Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1, 6 (2004) ("[D]eveloping countries and their allies are shifting negotiations to international regimes . . . more closely aligned with these countries' interests."); Joseph Jupille & Duncan Snidal, *The Choice of International Institutions: Cooperation, Alternatives and Strategies* 30 (July 7, 2006) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008945](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008945).

kage of existing hard law to new and emerging soft-law principles.

The third and fourth hypotheses concern the obstacles raised when powerful states, such as the United States and the EU, agree on a common policy, but where their agreement has distributive implications for third countries, affecting the dynamics of hard- and soft-law interaction in new ways. We maintain that even where powerful states like the United States and EU agree on a policy approach, smaller states also attempt to use international hard and (particularly) soft law to thwart these aims. Smaller states do so by choosing regimes more favorable to their positions in a fragmented international system. However, powerful states like the United States 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. Even where powerful states prevail in negotiations at the international level vis-à-vis third countries, however, they can nonetheless face severe difficulties in having an agreement implemented in third countries because different interests hold power in domestic settings. Purportedly weak developing-country actors may be, in fact, quite strong at the implementation stage where they operate on a different terrain.<sup>4</sup> Under such conditions, we argue in our fourth hypothesis, powerful states may seek to complement existing hard- and soft-law instruments with new ones as part of ongoing recursive attempts to affect regulatory practice until some settlement is reached (using hard and soft law as complements). In turn, we maintain that new politics may be catalyzed because of the greater publicity generated within countries at the implementation stage, so that the target governments (and nonstate actors allied with them) may attempt to create new international hard- and soft-law instruments to counter the status quo at the international level (using hard and soft law as antagonists).

The fifth hypothesis concerns actors' choice of legal instruments of a harder or softer law nature to counter existing international law. The Article examines the following four generic options for actors seeking to counter existing hard- and soft-law instruments: (1) new soft law aimed to counter existing hard law; (2) new hard law aimed to counter existing hard law; (3) new hard law aimed to counter existing soft law; and (4)

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4. Such weak implementation can, in practice, blur the line between hard- and soft-law regimes from a law-in-action perspective.

new soft law aimed to counter existing soft law. We hypothesize, on the one hand, that states will favor instruments with harder law characteristics where their interests are certain and where they can obtain sufficient support from third countries, including because they are sufficiently powerful to negotiate either multilateral or serial bilateral agreements to advance their aims. Absent these conditions, however, we hypothesize that both state and nonstate actors settle for the use of soft-law instruments to undermine existing hard law. Part IV provides policy examples relating to each alternative.

The Article concludes that scholars should recognize more explicitly that states often use hard- and soft-law instruments to counter each other in international relations because of underlying distributive conflicts that are manifested in a decentralized international system. Indeed, we contend, far from "filling in" the details of hard law, a growing body of soft law is promulgated in the hope of undermining the foundations of existing hard law. The Article finds that these conflicts, however, are not necessarily to be lamented. Rather, they reflect a maturation of international law in a pluralistic world in which multiple and overlapping regimes can signal to decision makers to take account of developments in other spheres of international law and politics.

## I. THE CANONICAL LITERATURE ON INTERNATIONAL HARD AND SOFT LAW

### A. DEFINITIONS OF HARD AND SOFT LAW

To assess how hard and soft law interact in international governance, we must first define these terms. There is considerable disagreement in the existing literature on their definitions. Many legal scholars use a simple binary binding/nonbinding divide to distinguish hard from soft law.<sup>5</sup>

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5. For a leading study that settles on this distinction, see COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000) [hereinafter COMMITMENT AND COMPLIANCE]. See also Jan Klabbers, *The Redundancy of Soft Law*, 65 *NORDIC J. INT'L L.* 167, 168 (1996) (advocating retention of the "traditional binary conception of law"); Wolfgang Reinicke & Jan Martin Witte, *Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords*, in COMMITMENT AND COMPLIANCE, *supra*, 75, 76 n.3 ("[S]oft' law as used herein means normative agreements that are not legally binding."); Francis Snyder, *Soft Law and International Practice in the European Community*, in THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL 197, 198 (Stephen Martin ed., 1994) ("[S]oft law' . . . mean[s] 'rules of conduct



Positivist legal scholars tend to deny the very concept of “soft law,” since law by definition, for them, is “binding.”<sup>6</sup> Rational institutionalist scholars respond that “the term ‘binding agreement’ [in international affairs] is a misleading hyperbole.”<sup>7</sup> They nonetheless find that the language of “binding commitments” matters because through it states signal the seriousness of their commitments, so noncompliance entails greater reputational costs.<sup>8</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 nonbinding “soft law” are illusory.<sup>9</sup> Interestingly, international relations realists take a related view regarding the existence and impact of “hard law” in interna-

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which, in principle, have no legally binding force but which nevertheless may have practical effects.”).

6. Jan Klabbers takes a positivist approach, arguing that law cannot be “more or less binding,” so that the soft law concept is logically flawed. Klabbers, *supra* note 5, at 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 well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.” Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 423 (1983). Klabbers later wrote that soft-law tools are “detrimental” because, among other reasons, they can provide smokescreens for the exercise of administrative power to the detriment of citizens. Jan Klabbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT’L L. 381, 383, 387–91 (1998).

7. Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 508 (1991).

8. See *id.* at 508–13; see also ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71–111 (2008) [hereinafter GUZMAN, RATIONAL CHOICE] (arguing that when states enter agreements they want their promises to be credible); Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579 (2005) [hereinafter Guzman, *Design*]. Guzman states that “an agreement is soft if it is not a formal treaty.” *Id.* at 591 n.56. He finds that states rationally choose soft law because they wish to reduce the cost to their reputation of potentially violating the soft law in light of uncertainty. *Id.* at 582; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 581–82 (2005) (distinguishing between form and substance in international agreements, as opposed to “hard law” and “soft law”).

9. See David Trubek et al., ‘Soft Law,’ ‘Hard Law’ and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 65, 67 (Gráinne de Búrca & Joanne Scott eds., 2006).

tional affairs from a rationalist perspective.<sup>10</sup> At the international level where centralized institutions are typically missing, most observers agree that “most international law is ‘soft’ in distinctive ways,” especially as compared to most domestic law.<sup>11</sup>

We take a pragmatic view that actors, working *ex ante*, use agreements having different characteristics to further particular aims. These different types of agreements can have unpredictable effects, *ex post*, leading to new cycles of international lawmaking. The definition of legalization in international relations adopted by Kenneth Abbott and Duncan Snidal in a special issue of *International Organization* provides a useful tool, in our view, for understanding actors’ *ex ante* choices about hard and soft law. Abbott and Snidal define legalization in international relations as varying across three dimensions—(i) precision of rules; (ii) obligation; and (iii) delegation to a third-party decision maker—which taken together can give laws a “harder” or “softer” legal character.<sup>12</sup> 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

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10. However, some working in this tradition in the United States are concerned that the United States may erroneously take international law seriously to its detriment. Cf. HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 3–5 (Kenneth W. Thompson ed., 6th ed. 1985) (stating that the primary currency of international politics is power: all international relations are subordinate to, or take place as exertions of, power calculated to advance the interests of the sovereign state); Charles Krauthammer, *The Curse of Legalism: International Law? It’s Purely Advisory*, *NEW REPUBLIC*, Nov. 6, 1989, at 44–46 (taking a neoconservative policy-making perspective and arguing that “[l]egalism starts with a naïve belief in the efficacy of law as a regulator of international conduct. . . . [Legalism] is not only naïve but dangerous.”). *But cf.* Richard Steinberg & Jonathan Zasloff, *Power and International Law*, 100 *AM. J. INT’L L.* 64, 64 (2006) (noting that the journal was founded on the belief that international law could “abolish . . . the role of power in world affairs”). We thank Kal Raustiala for drawing out this point.

11. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT’L ORG.* 421, 421 (2000).

12. Kenneth W. Abbott et al., *The Concept of Legalization*, 54 *INT’L ORG.* 401, 401 (2000); *see also* Abbott & Snidal, *supra* note 11, at 424. Abbott and Snidal work within a “rational design” approach to international institutions. *See* Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 *INT’L ORG.* 761, 761–62 (2001); *see also* Guzman, *Design*, *supra* note 8, at 580. For an almost simultaneous use of these three attributes to differentiate harder from softer international law, *see* Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 *INT’L L.Q.* 901, 901–13 (1999).

implementing the law.”<sup>13</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>14</sup>

By contrast with this ideal type of hard law, soft law is defined as a residual category: “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.”<sup>15</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 a 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 (along a third dimension) because there is no third party providing a “focal point” around which parties can reassess their positions, and thus the parties can discursively justify their acts more easily in legalistic terms with less consequence, whether in terms of reputational costs or other sanctions.<sup>16</sup>

The key difference, we believe, between scholars who evaluate hard and soft law in terms of a binary binding/nonbinding distinction and those who evaluate it based on characteristics that vary along a continuum depends on whether they address international law primarily from an *ex post* enforcement pers-

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13. Abbott & Snidal, *supra* note 11, at 421.

14. See discussion *infra* Part III. 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 noncompliance by the losing party. See Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. XXII, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

15. Abbott & Snidal, *supra* note 11, at 422.

16. Tom Ginsburg and Richard McAdams address how international litigation can construct “a focal point around which parties coordinate,” such that “third-party signals cause players to update their beliefs about the state of the world.” Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1236 (2004). Andrew Guzman and Timothy Meyer view the decisions of international tribunals as soft law because of their lack of stare decisis, but nonetheless note their ability to influence future state behavior because of their impact on a state’s reputation. Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT’L LAW 515, 516 (2009).

pective or an ex ante negotiating one. From an ex post enforcement perspective, legal positivists are right when they state that, to a judge, a given instrument is either legally binding or nonbinding.<sup>17</sup> However, from an ex ante negotiation perspective, actors have choices that, in practice, can render agreements relatively more or less binding in the ways Abbott and Snidal note.<sup>18</sup> We thus agree with the approach that hard and soft law are best seen not as binary categories but rather as choices arrayed along a continuum.

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>19</sup> They do so because of their opposition to a presumption among legal positivists and rational choice institutionalists that “hardness” means binding rules interpreted and enforced by courts. Their counterparts in interdisciplinary debates in international law and international relations—realist and rationalist institutionalist scholars—tend to discount the efficacy of soft law because it does not create binding obligation on states who can thus more easily ignore it in light of their interests.<sup>20</sup> Construc-

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17. That being said, a formally nonbinding instrument can normatively affect a judge's interpretation of the meaning of the terms of a formally binding instrument.

18. See *supra* notes 12–13 and accompanying text.

19. See, e.g., Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”: Richer Views of Law and Politics*, 55 INT'L ORG. 743, 743 (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 the hard/soft distinction captures 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.

20. For example, Richard Steinberg contends, from a realist perspective, that “most public international lawyers, realists, and positivists consider soft law to be inconsequential.” Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 340 (2002). 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.” Guzman, *Design*, *supra* note 8, at 611.

tivists, in contrast, explicitly address how international regimes can lead states to change their perceptions of their interests through transnational processes of interaction, deliberation, and persuasion.<sup>21</sup>

In our view, the typology used by Abbott and Snidal does not prejudge the relative value of hard- and soft-law instruments. Rather, the typology simply characterizes different instruments which actors may choose from an *ex ante* perspective 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 Abbott and Snidal definition of hard and soft law in this Article.

#### 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 particular advantages in different contexts. They are sometimes used alone and sometimes combined dynamically over time, resulting in a complex hybrid of hard- and soft-law instruments.

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. They 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 reputa-

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21. See John Gerard Ruggie, *What Makes the World Hang Together? Neoliberalism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 870 (1998). Ryan Goodman and Derek Jinks adopt an "acculturation" approach as to how international law has effects, incorporating sociological insights, and, in particular, those of the "world culture" theoretical and empirical projects of John Meyer and his collaborators. See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 624 (2004); see also Elizabeth Heger Boyle & John W. Meyer, *Modern Law as a Secularized and Global Model: Implications for the Sociology of Law*, 49 SOZIALE WELT 213, 213 (1998) (F.R.G.); John Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144-45 (1997).

tion where it is found to have violated its legal commitments.<sup>22</sup>

- Hard-law instruments are more credible because they can have direct legal effects in national jurisdictions (“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>23</sup>
- Hard-law instruments solve problems of incomplete contracting by creating mechanisms for the interpretation and elaboration of legal commitments over time.<sup>24</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>25</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>26</sup> To control for the risks of opportunism, they can create third-party monitoring and enforcement mechanisms, such as the system of committees, the Trade Policy Review Body, and dispute-settlement panels and the Appellate Body within the World Trade Organization (WTO). These monitoring and enforcement mechanisms reduce the transaction costs of subsequent interstate interaction by providing an ongoing forum for interpreting, applying, enforcing, and elaborating agreed rules.<sup>27</sup>

Yet hard law also entails significant costs. It can create formal commitments that restrict the behavior of states, in-

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22. States are arguably particularly concerned with their reputation for compliance. Andrew Guzman contends that states’ calculus over the reputational costs of noncompliance is the primary factor for explaining state compliance with international law. Guzman, *Design*, *supra* note 8, at 582; *see also* Abbott & Snidal, *supra* note 11, at 426–27; Lipson, *supra* note 7, at 508 (“The more formal and public the agreement, the higher the reputational costs of noncompliance.”); *cf.* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S108–09 (2002) (examining the development of segmented reputations).

23. *See* Abbott & Snidal, *supra* note 11, at 428.

24. *See id.* at 433.

25. *See id.* at 427.

26. *Id.* at 429.

27. *Id.* at 430.

fringing on national sovereignty in potentially sensitive areas. As a result, it can encourage states to bargain fiercely, and at length, over legally binding commitments.<sup>28</sup> Additionally, hard-law agreements can be more difficult to adapt to changing circumstances.<sup>29</sup> Hard law is particularly problematic, socio-legal scholars contend, where it presupposes a fixed condition when situations of uncertainty demand constant experimentation and adjustment, where it requires uniformity when a tolerance of national diversity is needed, and where it is difficult to change when frequent change may be essential.<sup>30</sup>

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.
- Soft-law instruments are directly available to nonstate actors, including international secretariats, state administrative agencies, sub-state public officials, and business associations and nongovernmental organizations (NGOs).<sup>31</sup>

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28. *Id.* at 434.

29. *Id.* at 433.

30. Trubek et al., *supra* note 9, at 67; *see also* Gráinne de Búrca & Joanne Scott, *Introduction*, 13 COLUM. J. EUR. L. 513, 513 (2007) (arguing that a lack of fixed conditions “necessitates a degree of experimentation with different kinds of public policy-making strategies”).

31. For good discussions on the purported strengths of soft law, *see, for example*, John J. Kirton & Michael J. Trebilcock, *Introduction to HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT, AND SOCIAL GOVERNANCE* 3, 9 (John J. Kirton & Michael J. Trebilcock eds., 2004); Abbott & Snidal, *supra* note 11, at 434–54; Lipson, *supra* note 7, at 500–01, 514–27; Francesco Sindico, *Soft Law and the Elusive Quest for Sustainable Global Governance*, 19 LEIDEN J. INT’L L. 829, 832 (2006) (Neth.) (reviewing *HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT, AND SOCIAL GOVERNANCE, supra*); Trubek et al., *supra* note 9, at 73–74. *See also* Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT’L L. 499, 501, 504 (1999) (noting the “simpler procedures” at the

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.<sup>32</sup> They note how, in these contexts, “states can limit their legal obligation through hortatory language, exceptions, reservations and the like,” such as safeguarding and rebalancing clauses under the WTO.<sup>33</sup>

Advocates of soft law as an alternative contend that it can be more effective in practice than many formally binding treaties. As Kal Raustiala points out, we must distinguish between the concepts of compliance and effectiveness:<sup>34</sup>

[C]ompliance as a concept draws no causal linkage between a legal 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 behaviors or outcomes, which may or may not meet the legal standard of compliance.<sup>35</sup>

Advocates of soft law correspondingly focus on the effectiveness of the law-in-action from a sociological perspective.<sup>36</sup>

Both rationalist and constructivist scholars recognize the potential advantages of soft-law instruments, but they do so in different ways. Rationalist-oriented scholars focus on the reduction of contracting and sovereignty costs under soft law, while constructivist scholars stress how soft law can “facilitate constitutive processes such as persuasion, learning, argumen-

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international level “facilitating more rapid finalization,” and at the national level avoiding “cumbersome domestic approval procedures,” such as those required before the U.S. Senate).

32. See Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 50, 54 (Eyal Benvenisti & Moshe Hirsch eds., 2004).

33. *Id.*

34. See Kal Raustiala & David G. Victor, *Conclusions*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 659, 684–86 (David G. Victor et al. eds., 1998); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538, 538 (Walter Carlsnaes et al. eds., 2002); Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 *CASE W. RES. J. INT’L L.* 387, 398 (2000). On the “depth” of cooperation, i.e., cooperative agreements that require a greater change in state behavior relative to the status quo, see George W. Downs et al., *Managing the Evolution of Multilateralism*, 52 *INT’L ORG.* 397 (1998).

35. Raustiala, *supra* note 34, at 398.

36. See, e.g., Trubek et al., *supra* note 9, at 80–81.



tation, and sociali[z]ation.”<sup>37</sup> Similarly, rationalist scholars note the importance of soft-law instruments for generating information leading to common understandings in situations of uncertainty, while constructivist scholars contend that soft-law instruments can help states to develop common norms and a sense of a collective enterprise.

In sum, hard- and soft-law instruments offer particular advantages for different contexts involving a range of factors that actors consider. For these reasons, a growing number of scholars in law and social science advocate a pragmatic approach, contending that hard- or soft-law instruments should be selected depending on the characteristics of the issue and the negotiating and institutional context in question. As Abbott and Snidal write, while “soft law is sometimes designed as a way station to harder legalization, . . . often it is preferable on its own terms”—that is, as an alternative.<sup>38</sup>

### C. THE INTERACTION OF HARD AND SOFT LAW AS COMPLEMENTS

Although the respective costs and benefits of hard and soft law as alternatives remain subjects of contention, legal and political science scholars have moved increasingly towards a view that hard and soft international law can interact and 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 primary ways: (1) nonbinding 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 U.S. international law casebook introduces the concept of soft law by noting both that “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 that “treaties and state practice give rise to soft law

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37. *Id.* at 75. Similarly, David and Louise Trubek note how the proponents of soft law find that it is particularly appropriate where there is uncertainty and a vast amount of diversity among participants, requiring a need for experimentation, flexibility, and revisability in transnational processes of co-operation and coordination. David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 EUR. L.J. 343, 353 (2005).

38. Abbott & Snidal, *supra* note 11, at 423.

that supplements and advances treaty and customary norms.”<sup>39</sup> In the latter case, soft law is considered to provide a low-cost and flexible way to elaborate and fill in the gaps that open up when a standing body of hard law encounters new and unforeseen circumstances. In both cases, hard- and soft-law instruments serve as complements to each other in dynamic processes of legalization, leading to greater international cooperation and coordination over time.<sup>40</sup>

In their examination of hard and soft law acting as complements, scholars can again be divided into the same 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 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 initially available because of its costs; and (3) constructivist scholars who view soft law as a complement to hard law that can facilitate dialogic and experimentalist transnational and domestic processes which transform norms, understandings, and perceptions of state interests.

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39. JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 95 (2d ed. 2006).

40. See, e.g., Dinah Shelton, *Introduction: Law, Non-Law and the Problem of “Soft Law,”* in *COMMITMENT AND COMPLIANCE*, *supra* note 5, at 1, 10 (“In fact, it is rare to find soft law standing in isolation; instead it is used most frequently either as a precursor to hard law or as a supplement to a hard law instrument.”); C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 *INT’L & COMP. L.Q.* 850, 866 (1989).

**Table 1:**  
**Theories of Hard and Soft Law and Their Interaction**

	<b>Strengths and Weaknesses of Hard and Soft Law as Alternatives</b>	<b>Interaction of Hard and Soft Law as Complements</b>	<b>Interaction of Hard and Soft Law as Antagonists</b>
<b>Legal Positivism</b>	Hard law preferable; soft law either problematic or used as stepping stone to hard law.	Soft law, at most, can contribute to development or elaboration of hard law.	Does not address.
<b>Rational Choice Institutionalism</b>	Hard and soft law have different strengths and weaknesses; choice governed by factors such as certainty of state interest, transaction costs of bargaining, indication of credibility of state commitment, and desire for flexibility.	Abbott and Snidal's three pathways: (i) Binding framework agreement leads to greater substantive detail over time; (ii) Plurilateral agreement, membership grows over time; (iii) Nonbinding tools evolve into hard law. <sup>41</sup>	Does not address.
<b>Constructivism</b>	Neither hard nor soft law inherently preferable, but soft law can be particularly helpful in elaborating new and transformative norms.	Soft law can contribute to socialization and normative convergence, paving the way for hard law.	Does not address.

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41. See *infra* notes 49–51 and accompanying text.

Positivist legal scholars find that soft law is inferior to hard law because it lacks formally binding obligations which are interpreted and enforced by courts, and it thus fails to generate jurisprudence over time.<sup>42</sup> 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>43</sup> John Kirton and Michael Trebilcock, for example, in a volume regarding the use of hard and soft 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>44</sup> Francesco 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>45</sup>

These scholars tend to view soft law solely in terms of its *relationship* to a hard-law ideal. In a special volume on soft law organized by the American Society of International Law, for example, Christine Chinkin 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 nonbinding 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].

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42. See, e.g., Klabbbers, *supra* note 5, at 181.

43. See Klabbbers, *supra* note 6, at 382 (arguing sarcastically that “violations of soft law are by definition soft violations, which may give rise to soft responsibility which will, in turn, be enforced by means of soft sanctions”); Weil, *supra* note 6, at 414 (“[T]he fact remains that the proliferation of ‘soft’ norms . . . does not help strengthen the international normative system.”).

44. Kirton & Trebilcock, *supra* note 31, at 24–25.

45. Sindico, *supra* note 31, at 846. Sindico elaborates that soft law and voluntary standards “must be considered to be a step in the progressive development of international norms. . . . must be a phase in the normative creation of international rules. . . . [and can be seen as] constitut[ing] the first step towards the creation of hard law in the future.” *Id.* at 835–36.

(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>46</sup>

Wolfgang Reinicke and Jan Martin 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, facilitating and ultimately enhancing the effectiveness and efficiency of transnational policy-making.”<sup>47</sup> Similarly, Kirton and Trebilcock conclude that “[a]t best, [soft law] is a complement.”<sup>48</sup>

Abbott and Snidal, in contrast, take a rational institutional political economy approach and are agnostic as to whether hard or soft law is preferable. Because they focus on varying state interests in different contexts, they contend that states sometimes prefer hard law and sometimes prefer soft law to advance their joint policy aims. In their work on “pathways to cooperation,” Abbott and Snidal nonetheless define three pathways, two of which explicitly involve the progressive hardening of soft law.<sup>49</sup> The three pathways are: (1) the use of a framework convention which subsequently deepens in the precision of its coverage, (2) the use of a plurilateral agreement which subsequently broadens in its membership, and (3) the use of a soft-law instrument which subsequently leads to binding legal commitments.<sup>50</sup> 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>51</sup>

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46. Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE, *supra* note 5, at 21, 30–31 (“This categorization is problematic in that it defines soft law in terms of its distinction from hard law, and not in its own terms.”) (footnotes omitted). Chinkin’s fourth category has also been referred to as coregulation: a regulatory regime premised on both mandatory government regulation and voluntary self-regulation or regulatory measures with both binding and nonbinding elements. See, e.g., Kathryn Gordon, *Rules for the Global Economy: Synergies Between Voluntary and Binding Approaches* 11 (Organisation for Econ. Cooperation & Dev., Working Paper No. 1999/3, 2000), available at <http://www.oecd.org/dataoecd/57/25/1922674.pdf>.

47. Reinicke & Witte, *supra* note 5, at 76.

48. Kirton & Trebilcock, *supra* note 31, at 31.

49. Abbott & Snidal, *supra* note 11, at 51.

50. *Id.* at 55–61.

51. *Id.* at 80.

Constructivist-oriented scholars also focus on hard and soft law as complements. David Trubek and his coauthors, for example, contend that soft-law instruments can help to generate knowledge (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>52</sup> John Braithwaite and Peter Drahos address the role of modeling as a key mechanism for the creation of global business law, often involving epistemic communities of like-minded actors who work with both hard- and soft-law instruments.<sup>53</sup> Janet Levit, working in a legal pluralist framework, finds that international soft-law instruments generate normativity that affects both subsequent hard-law enactments and judicial decisions.<sup>54</sup> She finds that hard- and soft-law regimes engage in ongoing interactions in which each is reconstitutive of the other.<sup>55</sup> These authors contend that neither hard- nor soft-law provisions should necessarily be privileged because states and nonstate actors need flexibility to address situations that involve uncertainty and require experimentation.<sup>56</sup> Scholars working in an experimentalist “new governance” tradition sometimes go further, arguing that soft-law approaches should generally be privileged to promote responsive governance.<sup>57</sup>

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52. Trubek et al., *supra* note 9, at 89; *see also* Trubek & Trubek, *supra* note 37, at 355–59 (explaining how soft law can be a powerful tool to complement hard law).

53. *See* JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 532–33, 539 (2000) (finding that modeling was an important globalization mechanism in all of the thirteen domains that they studied); *id.* at 501 (“If regulations and procedural rules are the hardware of international regimes, the knowledge and discourses of epistemic communities of actors are its software.” (citation omitted)).

54. *See* Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 *HARV. INT’L L.J.* 65, 141 (2004) [hereinafter Levit, *Dynamics*]; *see also* Janet Koven Levit, *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, 15 *IND. J. GLOBAL LEGAL STUD.* 49, 56 (2008) [hereinafter Levit, *Bottom-up Lawmaking*] (“[B]ottom-up transnational lawmaking joins two interrelated subprocesses: 1) an informal process of norm creation and 2) a hardening process, whereby official legal systems embed such informal norms . . . . The drama in these bottom-up cases is how the informal, practice-based rules escape relatively confined groups and ‘bubble-up’ to become ‘law.’”).

55. *See* Levit, *Bottom-Up Lawmaking*, *supra* note 54, at 71, 73.

56. *See, e.g.*, Trubek et al., *supra* note 9, at 66–67.

57. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 *HARV. L. REV.* 1016, 1019–20 (2004);

Collectively, these scholars, coming from different traditions, theorize the various ways in which hard and soft law serve as alternatives and complements to each other. Yet these scholars have so far failed to address the conditions under which hard and soft law operate as antagonists. The next Part sets forth the theoretical background for such analysis.

## II. THEORIZING INTERNATIONAL HARD- AND SOFT-LAW INTERACTION: POWER, DISTRIBUTIVE CONFLICT, REGIME COMPLEXES, AND IMPLEMENTATION

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 theorizing the ways in which power, distributional conflict, regime complexes, and the challenge of implementation influence how hard- and soft-law regimes interact, and whether they do so in a mutually reinforcing manner. Indeed, we argue below that the harmonious, complementary interaction of hard- and soft-law approaches to international cooperation relies on a hitherto unspecified set of scope conditions,<sup>58</sup> including, 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 actors to use hard- and soft-law instruments in different ways, sometimes as alternatives, sometimes as complements, and sometimes as antagonists.

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Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 9, at 395, 396–403; William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US, *supra* note 9, at 37, 37–38.

58. “Scope conditions” refers to the conditions under which a particular event or class of events is likely to occur. For a good discussion, see Jeffrey T. Checkel, *International Institutions and Socialization in Europe: Introduction and Framework*, 59 INT’L ORG. 801, 803 (2005).

This Part lays out the theoretical foundations for our arguments about the reasons why, and the conditions under which, hard and soft law may also interact as antagonists. The analysis proceeds in four parts. First, we argue that students of both hard and soft law have undertheorized the importance of state (or, in the case of the EU, regional) power. Next, we argue that international cooperation is frequently characterized by intense distributional conflict in which various players may have sharply differing preferences over cooperative outcomes, such as over international regulations and standards, with each side attempting to export its own preferences and force the costs of adjustment onto others. Third, we examine the challenges of “regime complexes” and legal fragmentation, contending that states with divergent preferences will have strong incentives to engage in forum shopping to create “strategic inconsistency,” using the opportunities provided by competing legal fora to advance their substantive preferences. Fourth and finally, we examine the problem of implementing international agreements, arguing that implementation challenges set off recursive cycles of international lawmaking, with hard and soft law sometimes being used as complements and sometimes as antagonists. Parts III and IV of the Article then build upon this analysis, making the argument that under conditions of distributive conflict and regime complexes, actors will also deploy hard and soft law to interact not only as alternatives and complements, but also as mutually undermining antagonists.

#### A. THE CHALLENGE OF POWER

The canonical stories of hard and soft law, whether positivist, rational institutionalist, or constructivist, depict the adoption of hard and soft law as issues of choice.<sup>59</sup> This literature offers rich (if not always compatible) accounts of why states opt for harder or softer legal agreements, and how hard and soft law can affect their behavior and (possibly) their interests. With a few notable exceptions, however, this literature does not examine the issue of power, and, in particular, how power differentials among actors shape the adoption and implementation of hard and soft legal instruments. Similarly, the literature on international regulatory cooperation has devoted considerable attention to understanding the adoption of both hard- and soft-

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59. See, e.g., Giandomenico Majone, *Theories of Regulation, in REGULATING EUROPE* 28, 28–44 (Giandomenico Majone ed., 1996) (discussing notions of informed choice and public choice).



law regulatory agreements, but has seldom paid explicit attention to the role that power plays in determining regulatory outcomes. There is a tendency in much of the literature to view international regulation and standard setting as a technocratic process in which the guiding considerations are efficiency and coherence, and distributive concerns recede in importance.<sup>60</sup>

Increasingly, however, studies of international law, regulation, and governance acknowledge the significance of power in shaping international regulatory regimes and compliance with their requirements. Put bluntly, assessing the role of power and its significance is no longer (if it ever was) the exclusive province of realist theory in international relations. Rather, assessments of power in international governance is increasingly an element in other approaches to international relations and international law that examine the various ways in which power (in its material, institutional, and discursive forms) is manifested.<sup>61</sup> Indeed, the emerging picture of international regulatory cooperation is one in which differences in power matter greatly in the adoption and implementation of international legal rules. The work of Walter Mattli and Tim Büthe, and our own previous work, for example, have emphasized potential distributive conflicts among states that stand to gain differentially from various proposed standards, and have suggested that differences in power resources (and in particular market power and centralized institutions) can determine substantive standards and distributive outcomes in those cases.<sup>62</sup> Daniel Drezner goes further, arguing that agreement among economically powerful states—and in particular between the United States and the EU, the dominant economic players on the world

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60. See, e.g., Thomas A. Loya & John Boli, *Standardization in the World Polity: Technical Rationality over Power*, in CONSTRUCTING WORLD CULTURE 169, 182 (John Boli & George M. Thomas eds., 1999); Giandomenico Majone, *Regulatory Legitimacy*, in REGULATING EUROPE, *supra* note 59, at 284, 296.

61. See, e.g., BRAITHWAITE & DRAHOS, *supra* note 53, at 532–33; DANIEL W. DREZNER, ALL POLITICS IS GLOBAL 5–6 (2007); Michael Barnett & Raymond Duvall, *Power in Global Governance*, in POWER IN GLOBAL GOVERNANCE 1, 1–4 (Michael Barnett & Raymond Duvall eds., 2005); Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1, 40–42 (2003).

62. See Mattli & Büthe, *supra* note 61, at 4; Mark A. Pollack & Gregory C. Shaffer, *Transatlantic Economic Relations: Continuity Amid Discord*, 5 EUR. POL. SCI. 62, 66 (2006); see also Stavros Gadinis, *The Politics of Competition in International Financial Regulation*, 49 HARV. INT'L L.J. 447, 503 (2008) (“[T]he success or failure of international policy coordination depends on the strength of a competitive challenge facing the dominant center . . .”).

stage—is a necessary condition for any successful regulatory regime.<sup>63</sup> To these claims we add another, namely that the interaction of hard and soft law will be shaped primarily by the preferences of powerful states such as the United States and the EU and, to a lesser extent, by groups of other states that attempt to thwart the aims of powerful countries through the strategic deployment of international legal instruments, as we will document in Parts III and IV.

## B. THE CHALLENGE OF DISTRIBUTIVE CONFLICT

Although international regimes can foster international cooperation among states to achieve joint gains, international relations scholars have identified a number of potential obstacles to successful regime-based cooperation. The realist literature, for example, emphasizes 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.<sup>64</sup> By contrast, the impediments to cooperation that we identify here are of a more general nature, potentially afflicting cooperation even among states that care only about absolute gains, as in most rational choice institutionalist analyses. We focus in this Part on the problem of conflict over the distribution of the costs and benefits of cooperation.<sup>65</sup> Distributive conflicts between and within states reflect different configurations of interests, institutional procedures, and ideological

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63. DREZNER, *supra* note 61, at 5.

64. See ANDREAS HASENCLEVER ET AL., THEORIES OF INTERNATIONAL REGIMES 113–35 (1997) (describing Joseph Grieco’s “modern realist” criticism of neoliberal theory); David A. Baldwin, *Neoliberalism, Neorealism, and World Politics*, in NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE 3, 5–6 (David A. Baldwin ed., 1993); Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism*, 42 INT’L ORG. 485, 487 (1988). Subsequent work by neoliberal institutionalists, however, has found that international regimes can mitigate concerns about cheating, while concerns over relative gains emerge only under certain restrictive conditions. See, for example, HASENCLEVER ET AL., *supra*, at 125–34, for a discussion of the debate over the importance of relative gains. See also Robert Powell, *Absolute and Relative Gains in International Relations Theory*, 85 AM. POL. SCI. REV. 1303, 1316–17 (1991); Duncan Snidal, *International Cooperation Among Relative Gains Maximizers*, 35 INT’L STUD. Q. 387, 387–88 (1991).

65. In other words, the existence of distributive conflict—that is, conflict over the distribution of the gains of cooperation—should not be confused with a zero-sum game, in which one player’s gain is necessarily another’s loss. Instead, the game-theoretic models discussed below, such as Battle of the Sexes, are generally mixed-motive games where joint gains are possible, but states disagree about the distribution of those gains. See *infra* notes 73–74 and accompanying text.

and cultural perspectives at the domestic level, which in turn shape the preferences of states at the international level.<sup>66</sup>

International law theorists, taking from regime theory in international relations, too frequently point to the Prisoner's Dilemma (PD) game in assessing the role of international law.<sup>67</sup> In this way, they mirror the practice of legal scholars generally.<sup>68</sup> The distributive challenge to regime theory calls into question the appropriateness of the PD game as the proper model for most instances of international cooperation because it fails to capture the potential for distributive conflicts among the participants. The classic PD model assumes that states share a common interest in reaching a cooperative outcome, and that the primary impediment to successful cooperation is the fear that other states will cheat on their agreements.<sup>69</sup> In PD models of international relations, these problems are typically addressed by creating mechanisms for monitoring state behavior and sanctioning states that violate the terms of the agreement—i.e., international law. If the PD model is an accurate description of the situation facing states, then international regimes and international hard and soft law should indeed facilitate cooperation by monitoring compliance and (in the case of hard-law dispute-settlement bodies) providing for enforcement.

However, the PD game ignores another important obstacle to successful cooperation, namely conflicts among states with *different interests* over the *distribution* of the costs and benefits

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66. For a broader discussion, see POLLACK & SHAFFER, *supra* note 2, at 33–83.

67. To give one example, Andrew Guzman writes, “[i]t is in the context of [the prisoner’s dilemma] game that the theory is applied throughout most of [this] book.” GUZMAN, *RATIONAL CHOICE*, *supra* note 8, at 25. See also JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 6 (2008) (“[T]he most popular game [for modeling international cooperation and coordination problems] is the prisoner’s dilemma.”).

68. For example, in a recent study, Richard McAdams found that “[a] simple Westlaw search reveal[ed] a staggering 3000+ articles referring to the PD, which contrasts with only trivial attention to coordination games of equal legal significance.” Richard H. McAdams, *Beyond the Prisoners’ Dilemma: Coordination, Game Theory and the Law* 8 (John M. Olin Law & Econ., Working Paper No. 437 (2d series), 2008; Pub. Law & Legal Theory, Working Paper No. 241, 2008) (footnote omitted), available at <http://www.law.uchicago.edu/files/files/LE437.pdf>. Three other important games assessed by McAdams (Assurance, Hawk/Dove, and Battle of the Sexes) were respectively referenced in Westlaw only 121, 101 and 75 times, or “4%, 3%, and 2.5% as often as the PD game.” *Id.* at 12.

69. GUZMAN, *RATIONAL CHOICE*, *supra* note 8, at 31 (“The problem . . . [is] a classic prisoner’s dilemma. The best collective outcome [is] mutual cooperation . . . but the dominant strategy for each side [is] to cheat . . .”).

of cooperation.<sup>70</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, “[t]here is only one way to cooperate in prisoners’ dilemma; there are many ways to cooperate in the real world.”<sup>71</sup> In game-theoretic terms, there may be multiple equilibria—multiple possible agreements that both sides prefer to the status quo; states face the challenge of choosing among these many possible agreements.

Varying the terms of cooperation has 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. As a result, 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, for example, the mix of industrial and agricultural tariffs in our

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70. The distributive conflict to which we are referring here relates not to the problem of relative gains in relation to the balance of state power, but to the distribution of *absolute* gains from cooperation among two or more states. There are a range of views on the challenge of distributive conflict in international cooperation. See DREZNER, *supra* note 61, at 5 (“A great power concert is a necessary and sufficient condition for effective global governance over any transnational issue.”); LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* 275–78 (2000) (discussing the relationship between voluntary cooperation, power, and strategic interaction); James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT’L ORG. 269, 270 (1998) (arguing that international cooperation problems have a common strategic structure); Barbara Koremenos et al., *supra* note 12, at 761 (discussing rational design); Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336, 337 (1991) (“[T]he nature of institutional arrangements is better explained by the distribution of national power capabilities than by efforts to solve problems of market failure.”); Mattli & Büthe, *supra* note 61, at 18–28 (analyzing international standardization under an institutional complementarities approach); James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 INT’L ORG. 387, 418–19 (1994) (comparing different forms of cooperation within the limited-information model).

71. Morrow, *supra* note 70, at 395.

example.<sup>72</sup> 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 overlapping arguments regarding the limits of the current literature's focus on hard and soft law as alternatives and complements in international cooperation. Such a focus tells only part of the story for reasons we explain. We need a different framework than the PD framework for understanding the development and operation of international law.

*First, regime theory, with its emphasis on PD and collective-action models, has underemphasized both distributive conflict and the role of state power in determining the outcome of international negotiations.* This, in turn, has affected international law scholarship, 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 (Battle) game, in which different states have clear preferences for different international standards.<sup>73</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.

In the Battle game, both states agree on the least preferable outcome or outcomes to be avoided and coordinate their behavior to avoid such an outcome, but each one prefers a different specific outcome (equilibrium). 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. Any agreement in the Battle game

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72. See McAdams, *supra* note 68, at 23, 25 ("But the PD game does not capture these issues of distribution. . . . There is no normative complexity and no controversy.").

73. Krasner, *supra* note 70, at 339; see also Arthur A. Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, 36 INT'L ORG. 299, 304-11 (1982) (describing dilemmas of common interests and aversions).

is likely to be self enforcing once adopted, with little need for monitoring or enforcement mechanisms, since both players prefer either cooperative outcome to uncoordinated behavior. By contrast with the PD game, however, the Battle game is characterized by a strong distributive conflict over the terms of cooperation.

Put differently, the most important question is not whether to move toward the "Pareto frontier" of mutually beneficial cooperation, but rather *which point* on the Pareto frontier will be chosen. Under such circumstances, Krasner 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 (for 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, in order to change the payoff matrix for other states and induce those states to accept one's preferred standards.<sup>74</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 (who are forced to cooperate on terms favorable to others), and state power plays a key role in determining the shape of the regime and the standards adopted under the regime.

We should, therefore, predict the outcome of a Battle game to be determined in large part by powerful states, with weaker players being excluded from negotiations, 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, for example, smaller countries will be placed in a difficult situation when powerful players like the United States and the EU agree, as well as when they clash. When the United States and EU agree, smaller countries will be under considerable pressure to adapt to U.S. and EU standards. When the United States 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 U.S. and EU preferences.

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74. Krasner, *supra* note 70, at 340.

*Second, distributive conflict is not unique to the Battle game, 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>75</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 PD or a Battle game.<sup>76</sup> Rather, Fearon maintains:

[U]nderstanding problem[s] 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 various coordination games that have been studied) and next an enforcement problem (akin to a Prisoners' Dilemma game).<sup>77</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 sanctioning provisions necessary for enforcement.<sup>78</sup> Linking these two stag-

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75. In light of the problems with PD models, an increasing number of scholars turned towards a "situation-structural" approach to cooperation, in which different problems or issue areas are characterized in terms of distinct 2 x 2 games, of which PD is only one possibility. Several authors offer good overviews of the situation-structural approach. See, e.g., HASENCLEVER ET AL., *supra* note 64, at 8–22 (conceptualizing international regimes); LISA MARTIN, COERCIVE COOPERATION 16 (1992) (categorizing games into three cooperation problems); Duncan Snidal, *Coordination Versus Prisoners' Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 923 (1985) (arguing that an alternate coordination model complements and supplements the PD model); Duncan Snidal, *The Game Theory of International Politics*, in COOPERATION UNDER ANARCHY 25, 25 (Kenneth A. Oye ed., 1986) ("[T]he ultimate payoff of game theory is the use of game models to understand different aspects of international politics in terms of a unified theory."); Stein, *supra* note 73, at 300–11 (conceptualizing differing regimes given state dilemmas). For a critique of the approach, see Fearon, *supra* note 70, at 272–75. There has also been pioneering application to international law. See JACK GOLDSMITH & ERIC POSNER, THE LIMITS OF INTERNATIONAL LAW 38–40 (2005) (evaluating customary international law with basic behavioral models); cf. Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 563–64 (2006) (book review); Oona Hathaway & Ariel N. Lavinbunk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1404–07 (2006) (book review).

76. See Fearon, *supra* note 70, at 270.

77. *Id.*

78. *Id.*

es 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 non-compliance punished over the long haul. By the same token, however, a long shadow of the future can exacerbate distributive 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>79</sup> From this perspective, 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 reduce distributive conflicts in bargaining over the precise terms of cooperation.

*Third, the negotiation of international regulatory standards is particularly prone to distributive conflicts. International standard setting should be theorized as involving a coordination game (such as a Battle game) that can create incentives for parties to engage in strategic bargaining over the substance of the standard.* 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>80</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>81</sup> However, as Mattli and Bütte 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 interna-

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79. *Id.* at 270–71.

80. According to Arthur Stein, coordination games come in two variants. In the first and simpler variant, referred to variously as "common indifference" or "pure coordination" situations, states prefer to coordinate their behavior, but have no preference among the multiple possible equilibria. See Stein, *supra* note 73, at 309–11. In this type of coordination game, cooperation is relatively easy, since both actors are indifferent about the specific equilibrium outcome chosen, and need simply to decide between themselves on one of them. See *id.* More difficult are what Stein calls "[d]ilemma[s] of common aversions and divergent interests," also known as the Battle game. See *id.*

81. See, e.g., Loya & Boli, *supra* note 60, at 196–97.



tional level, minimizing their adaptation costs, while their trading partners and competitors are forced to adapt and adjust to a new and different standard.<sup>82</sup> Negotiating environmental and health and safety standards, for example, can be particularly difficult because of the distributional stakes where these standards have significant trade implications.

In sum, international negotiations typically involve conflicts over the distribution of the costs and benefits of cooperation. The specific terms of agreements affect such distribution. Where states or other actors find that such terms impose greater costs or offer fewer benefits than they would like (possibly in a manner different than they initially envisaged), and where they cannot convince other parties to change such terms, they have an incentive to create countervailing hard or soft law, possibly in a parallel international regime, to counter the existing terms.

### C. THE CHALLENGE OF REGIME COMPLEXES

So far, we have addressed how international cooperation and international lawmaking are likely to involve distributive conflict, the outcome of which is usually influenced in large part by powerful states. 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. Early formulations of regime theory largely ignored the challenge of multiple, overlapping regimes: indeed, the classic definition of regimes, offered by Krasner, identifies regimes as “principles, norms, rules and decision-making procedures around which actor expectations converge *in a given issue-area*.”<sup>83</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.”<sup>84</sup> As they state:

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82. See Mattli & Büthe, *supra* note 61, at 10–11.

83. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES* 1, 1 (Stephen D. Krasner ed., 1983) (emphasis added).

84. Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 *INT'L ORG.* 277, 279 (2004).

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>85</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.

First, negotiations in a given regime do not begin with a blank slate, but rather typically demonstrate "path dependence," taking into account developments in related international regimes. We will see this pattern, in particular, in relation to the WTO-trade regime. Second, individual states, responding to domestic political contexts and seeking to advance their interests, 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 or 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.

Third, the array of institutions in a given regime complex gives rise to legal inconsistencies among them. States may 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 attempt to create "strategic inconsistency," using one regime to create inconsistency with another in the hope of shifting the understanding or actual adaptation of the rules in that other regime in a particu-

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85. *Id.* Raustiala and Victor's empirical analysis focuses on the issue of plant genetic resources, which they argue exist at the intersection of intellectual property, environmental protection, agriculture, and trade. *See id.* at 278; *see also* Karen J. Alter & Sophie Meunier, *Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute*, 13 J. EUR. PUB. POL'Y 362, 362 (2006) (discussing the complexity of "nesting and overlapping" regimes); Helfer, *supra* note 3, at 34-35 (discussing plant genetic resources).

lar direction. Powerful states are likely to be particularly adept at such forum shopping.<sup>86</sup> More generally, the availability of multiple fora facilitates states' and other actors' ability to employ hard and soft law strategically, using soft-law provisions to undermine existing hard law or creating hard-law provisions to trump existing soft law.

The political science analysis of overlapping regimes is complemented by a growing legal literature about the "pluralism" and "fragmentation" of international law.<sup>87</sup> In 2006, the International Law Commission (ILC) issued a report from a Study Group concerning the topic "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law."<sup>88</sup> For many international lawyers, the result of such fragmentation is legal uncertainty and potential conflict between international legal regimes.<sup>89</sup> As the 2006 ILC report states:

What 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," [or] "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>90</sup>

Scholars disagree regarding the causes of such fragmentation and whether fragmentation is positive or negative for in-

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86. See DREZNER, *supra* note 61, at 5; Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 596-97 (2007).

87. See, e.g., Int'l Law Comm'n, Study Group of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 8, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) (finalized by Martti Koskenniemi) [hereinafter ILC 2006 Report]; see also Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1169 (2007) (discussing legal pluralism).

88. ILC 2006 Report, *supra* note 87, ¶ 1.

89. See, e.g., MIREILLE DELMAS-MARTY, GLOBAL LAW 102 (Naomi Norberg trans., Transnational Publishers, Inc. 2003) (1998); Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 796 (1999); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 553 (2002); Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1, 1 (2005).

90. ILC 2006 Report, *supra* note 87, ¶ 8.

ternational law, but they largely concur on its development.<sup>91</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>92</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 postmodernist, constructivist orientation that focuses on social diversity and informality more than on formal rules and hierarchic authority.<sup>93</sup>

Although theories of legal pluralism and 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>94</sup> These regimes are not “self-contained,”<sup>95</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. In a similar vein, this Article examines the interaction of “harder” and “softer” forms of international law within a regime complex.

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91. Compare Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT’L L. 69, 73 (1996) (contending that fragmentation is a positive development), and Koskenniemi & Leino, *supra* note 89, at 553, with Benvenisti & Downs, *supra* note 86, at 597–98 (contending that fragmentation is problematic), and Dupuy, *supra* note 89, at 792.

92. See Berman, *supra* note 87, at 1169–70; John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 38–39 (1986).

93. Roderick A. Macdonald, *Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism*, 15 ARIZ. J. INT’L & COMP. L. 69, 76, 80 (1998); see Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT’L L. 999, 1004–07 (2004). For an excellent application in the area of international business law, see Levit, *Dynamics*, *supra* note 54, at 133–34.

94. Macdonald, *supra* note 93, at 77.

95. Bruno Simma, *Self-Contained Regimes*, 16 NETH. Y.B. INT’L L. 111, 115 (1985).

This phenomenon of regime complexes, finally, is closely related to the problem of distribution, insofar as distributive conflict provides states with incentives to forum shop among different regimes within a regime complex or to create new regimes deliberately to support their own positions and undermine those of the other side. Indeed, we argue, it is precisely the effect of distributive conflicts among states, and in particular among powerful states, coupled with the coexistence of hard- and soft-law regimes within a regime complex, which is most likely to undermine the smooth and complementary interaction of hard and soft law depicted in so much of the literature. While distributive conflict creates incentives for actors to use hard and soft law as antagonists, the existence of fragmented regime complexes facilitates their ability to do so.

#### D. THE CHALLENGE OF IMPLEMENTATION

Finally, before returning to our discussion of hard- and soft-law approaches, we note that the effectiveness of both hard- and soft-law regimes is affected by the generic challenges of state implementation of international legal agreements. The central problem, we contend, arises from the differences in the actors and interests who negotiate international agreements, on the one hand, and those who are called upon to implement them, on the other hand. The challenge of implementation can provide greater leverage to less powerful actors, such as developing countries, than is frequently recognized in the international relations and international law literatures. By integrating in our analysis the relation of international law and domestic implementation, we integrate socio-legal analysis and, in this way, provide a richer understanding of international hard- and soft-law interaction.

The relationship between these two sets of actors has been theorized in international relations by Robert Putnam in his well-known “two-level games” model.<sup>96</sup> In Putnam’s model, all international negotiations take place simultaneously at two levels: (1) at the international level (Level 1), where chief negotiators (also known as statesmen, chiefs-of-government, or

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96. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 434–60 (1988); see also Andrew Moravcsik, *Integrating International and Domestic Politics: A Theoretical Introduction*, in *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* 3, 17–24 (Peter B. Evans et al. eds., 1993) (exploring Putnam’s theory in greater detail).

COGs) bargain with their foreign counterparts in an effort to reach mutually beneficial agreements; and (2) at the domestic level (Level 2), where the same chief negotiator engages in bargaining with her domestic constituencies who must ultimately ratify the contents of any agreement struck at Level 1.<sup>97</sup> Putnam's article provided a critical contribution of linking the domestic and international levels in the international relations literature. What Putnam's article did not fully address, however, is the gap between formal implementation and actual implementation—the domain of socio-legal scholars.

Implementation can be viewed, in practice, as a two-stage process—that of formal domestic ratification or enactment (the primary focus of two-level game theorists, as well as positivist legal scholars) and that of actual implementation, the law-in-action (the bread and butter of socio-legal theorists). Here we turn to the key insights from the work of Terence Halliday and Bruce Carruthers, who show how powerful actors may prevail in international negotiations and in the domestic-ratification process as well, but other players who may be quite weak (or unrepresented) in international-negotiating fora may be much more powerful at the stage of actual implementation. As Carruthers and Halliday write:

Local power manifests itself through the distinction between enactment and implementation. While the politics of the former favor powerful international actors, the latter favor nation-states. And since implementation in a global context involves two steps—from global norms to national enactments, and from national enactment to local implementation—there are two points where national actors can open up a gap between global and local . . . We observe that weak nations are stronger than they may appear and stronger than they may suppose.<sup>98</sup>

Carruthers and Halliday demonstrate how a key explanation for the gap between international and domestic lawmaking is “actor mismatch.” Those actors who wield power in the domestic implementation of international agreements are often not present at the international negotiation stage. However, if their interests are not taken into account, then the resulting agreement will likely not be implemented effectively, leading to

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97. Putnam, *supra* note 96, at 434; *see also* Moravcsik, *supra* note 96, at 23.

98. TERENCE C. HALLIDAY & BRUCE G. CARRUTHERS, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS 422 (2009).

recursive cycles of international lawmaking in response to the failure of domestic implementation in practice.<sup>99</sup>

This problem of implementation—or rather of nonimplementation of agreements by actors excluded from the negotiation process—affects not only soft-law understandings but also hard-law agreements, including international treaties and WTO rulings. For this reason, the purported advantages of hard law over soft law from legal positivist and rationalist perspectives—including more effective compliance and enforcement procedures—may be less evident in practice than in theory. In fact, socio-legal scholarship calls into question the very concept of “binding” hard law, once one considers implementation as part of the lawmaking process.

As shown in Part IV, the challenge of implementation can sometimes trigger the use of hard and soft law as complements and, at other times, as antagonists. In some cases, states will use hard- and soft-law instruments recursively over time as complements to attempt to overcome resistance to effective policy implementation.<sup>100</sup> In other cases, the distinct politics of implementation will catalyze greater awareness of the implications of existing international law, triggering efforts by state and nonstate actors to adopt new international hard- and soft-law instruments as antagonists to counter existing ones.

### III. HARD- AND SOFT-LAW INTERACTION AS ANTAGONISTS: THE EXAMPLE OF GENETICALLY MODIFIED FOODS

#### A. HARD- AND SOFT-LAW INTERACTION AS ANTAGONISTS

Having discussed the significance of power, distributive conflict, regime complexes, and the politics of implementation for international cooperation, we now return to the issue of how hard and soft law interact in the international realm. Given the traditional focus in the international relations field on states pursuing their self interests in an anarchic (or institutionally decentralized) world, it is surprising that the literature on hard and soft law has so far focused almost exclusively on how they serve as complements leading toward greater cooperation.<sup>101</sup> Important exceptions upon which this Article builds are the

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99. See Trubek et al., *supra* note 9, at 78.

100. See POLLACK & SHAFFER, *supra* note 2, at 133–34 (citing DUNOFF ET AL., *supra* note 39, at 95).

101. See *supra* notes 52–57 and accompanying text.

work of Raustiala and Victor concerning regime complexes<sup>102</sup> and the analysis of Laurence Helfer on forum-shifting strategies in international intellectual property lawmaking.<sup>103</sup> These works, however, do not assess the causal roles of asymmetric power, distributive conflict, and the politics of implementation. Moreover, they do not systematically address the interaction of hard and soft law and the effects of hard- and soft-law oriented regimes on each other.

Building on this work, 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.<sup>104</sup> More precisely, individual states (or other actors) 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 contend, are determined by the two central factors discussed in the previous section, namely distributive conflict and regime complexes. Where distributive conflict is low, states (or other actors) are likely to utilize 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 elaborating 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 (or other actors). States therefore have an incentive to use soft law to undermine hard-law provisions to which they object or to press for the adoption of hard-law provisions that will trump objectionable trends in emerging soft law.<sup>105</sup> Put differently, distributive conflict provides an incentive for states and other actors to contest, undermine, and possibly replace legal provisions—hard and soft—to which they object.

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102. See Raustiala & Victor, *supra* note 84, at 279–95.

103. See Helfer, *supra* note 3, at 6–10; Jupille & Snidal, *supra* note 3, at 15, 28–31.

104. Some international law positivists have earlier expressed concerns that soft law instruments may undermine the pursuit of a more effective international law system, but they do not address the mutual interaction of hard and soft law. See, e.g., Klabbers, *supra* note 6, at 168; Weil, *supra* note 6, at 414–15.

105. POLLACK & SHAFFER, *supra* note 2, at 134.



This Part focuses primarily on states to clarify the analysis. However, we note that nonstate actors can enroll states to act on their behalf or attempt to create their own private regimes that can, in turn, affect public law regimes.<sup>106</sup> There also may be differences within state bureaucracies so that states do not speak with uniform voices, leading to overlapping hard and soft law in different functional regimes.<sup>107</sup>

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 by a stable membership under stable institutional rules.<sup>108</sup> 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, different regimes are likely to be characterized by distinct 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 magnified substantially when states engage in conflict over the content of international rules which have significant distributive implications. In such instances, states are likely 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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106. See Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. (forthcoming 2010) (manuscript at 21), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1426302](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1426302).

107. See POLLACK & SHAFFER, *supra* note 2, at 134–36.

108. See Krasner, *supra* note 70, at 338 (noting that these opportunities are limited because strategic interactions between state parties have created this stability to their mutual benefit).

**Table 2:**  
**Distributive Conflict, Regime Complexes, and the Interaction of Hard and Soft Law**

	<b>Dist. Conflict Low</b>	<b>Dist. Conflict High</b>
<b>Single, Isolated Regime</b>	Complementary interaction of hard and soft law, as per existing literature.	Possible antagonistic interaction of hard and soft law within the regime, although opportunities are limited by invariant memberships, rules, and substantive content of the regime.
<b>Regime Complex</b>	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.

Our argument is summarized in Table 2, 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 attempt to undermine existing law, and hard and soft law are likely to interact and evolve in complementary ways, reflecting the views in the existing literature.<sup>109</sup> 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, as when an issue area comprises multiple functional domains. Here, we would not expect states to contest or undermine existing legal provisions, but we would anticipate some coordination problems among regimes with different memberships, decision rules, substantive foci, and predominant functional representation (as by different state ministries).<sup>110</sup>

109. See Krasner, *supra* note 70, at 337.

110. One means to address these coordination challenges is to have members of the secretariats of different international organizations sit as observers to each other's meetings. Many international organizations sit as observers to WTO Council and committee meetings and members of the WTO Secretariat sit as observers at meetings organized by other international bodies. See, e.g.,

Compare these two outcomes to those in the right-hand column of Table 2, where distributive conflict is high. Where states engage in distributive conflict within a single, isolated regime, as in the upper right-hand 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>111</sup> In fact, however, we would expect this scenario to be less frequent, for the simple reason that distributive conflict among states provides a strong incentive for those that are dissatisfied with a given regime to press for the creation or development of other regimes to compete with or undermine the existing regime, particularly insofar as the existing regime is resistant to change. Put differently, the choice to create new regimes is, 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, 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.

In such settings, we can imagine multiple combinations of overlapping and competing hard- and soft-law oriented regimes asserting jurisdiction over a given issue. Regardless of the specific combinations of hard- and soft-law provisions (addressed in Part IV), our central point here is that, in the presence of

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World Trade Org., *International Intergovernmental Organizations: Requests for Observer Status in the General Council Revision*, WT/GC/W/51/Rev.10 (Apr. 7, 2006), available at <http://www.wto.org.tw/SmartKMS/fileviewer?id=80705> (listing the IGOs granted observer status in the General Council). Documents similar to the one previously cited exist for the other WTO councils and committees. Interview with Secretariat Members of the Codex Alimentarius Comm'n, in Rome, Italy (Feb. 13, 2007); Interview with Secretariat Member of the Int. Plant Prot. Comm'n, in Rome, Italy (Apr. 24, 2007); Interview with Senior Counselor of the World Trade Org. Sanitary & Phytosanitary Measures Comm., in Geneva, Switz. (June 12, 2007).

111. 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, United Nations General Assembly resolutions could be purposefully adopted to counter existing hard law, whether the hard law is created by the United Nations Security Council, the International Court of Justice, or another public international law tribunal.

distributive conflict and fragmented regime complexes, the interaction of hard- and soft-law oriented regimes is likely to be not complementary but rather antagonistic, with the strengths of each regime being weakened through such interaction. In such a setting, soft-law regimes are potentially “hardened,” losing some of the purported advantages of soft law, such as experimentation and flexibility as a result of their link to hard-law regimes. Hard-law regimes, by contrast, may be “softened,” as states, international courts, and tribunals are increasingly pressed 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, 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, and continue to do so over sustained periods.

#### B. A LEGAL REALIST THEORY OF JUDICIAL DECISION MAKING

Before turning to specific examples to support our arguments, we need to set forth our theoretical view of judicial decision making, which typically involves hard law along all three dimensions of obligation (applying binding rules), precision (including through judicial elaboration), and delegation (settling disputes through a third party). To understand the potential impact of soft-law provisions from one international regime on the judicial application of hard-law texts in another, we adopt a legal realist theory of judicial decision making, as opposed to a formalist one. Legal realism refers to a scholarly movement, first active in the 1920s and 1930s, which made significant inroads in the U.S. legal academy in responding to formalist modes of interpretation.<sup>112</sup> Legal realism thus should not be

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112. Legal realism has many variants and, in large part, can be viewed in terms of a scholarly reaction to classical, formalist legal theory and practice. See generally BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 1–8 (2007) (elaborating upon legal realism’s core claims); BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* 2, 8–10 (1997); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 608 (2007); Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50–66 (Martin P. Golding & William A. Edmundson eds., 2005); Joseph William Singer, *Legal*

confused with international relations realism, which addresses political relations among states, as discussed above.<sup>113</sup>

The core legal realist claim is that, in practice, judges decide cases in response to factual context and not simply in response to formal rules and legal doctrine. Judges are viewed as situated decision makers who respond to disputes in light of particular social, political, and historical contexts which shape their views of the facts of a particular case.<sup>114</sup> The texts of agreements are seen as having a degree of malleability (or incompleteness) that can be adapted (or filled out) in light of these contexts.<sup>115</sup> Some political scientists who study courts go further. For example, the “attitudinalist” school in political

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*Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE 1927–1960* (1986)) (“To some extent, we are all realists now.”). For assessments of new varieties of legal realism, see Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism*, 95 CORNELL L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1405437](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1405437).

113. See *supra* notes 111–17.

114. See, e.g., Catharine Wells, *Situated Decisionmaking*, 63 S. CAL. L. REV. 1727, 1728–31 (1990). See also William Eskridge and Philip Frickey’s concept of practical legal reasoning in statutory interpretation, eschewing “objectivist theories in favor of a mixture of inductive and deductive reasoning . . . seeking contextual justification . . .” William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 n.3 (1990).

115. Some law and economics scholars view international agreements as “incomplete contracts,” and view states as delegating the interpretation of these contracts to international tribunals because it is less costly to them than to negotiate more explicit terms up front. See Henrik Horn et al., *Trade Agreements as Endogenously Incomplete Contracts*, 99 AM. ECON. REV. (forthcoming 2009) (manuscript at abstract), available at <http://www.econ-law.se/Papers/HMS-07-21-08.pdf> (“We propose a model of trade agreements in which contracting is costly, and as a consequence the optimal agreement may be incomplete. . . . We argue that taking contracting costs explicitly into account can help explain . . . key features of real trade agreements.”); see also Warren F. Schwartz & Alan O. Sykes, *The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization*, 31 J. LEGAL STUD. 179, 180–204 (2002) (“The point of departure is the proposition that the WTO agreements are, in effect, contracts among the political actors who negotiated and signed them. As with all contracts, it is in the interest of the signatories to maximize the joint gains from trade, that is, to enable the signatories to attain their Pareto frontier. . . . [W]e will argue that the WTO provisions respecting renegotiation and the settlement of disputes over breach of obligations are carefully designed to facilitate efficient adjustments to unanticipated circumstances.”); Wilfred J. Ethier, *Punishments and Dispute Settlement in Trade Agreements* at abstract (Penn Inst. for Econ. Research, Working Paper No. 01-02, 2001), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=273212](http://papers.ssrn.com/paper.taf?abstract_id=273212) (“This paper interprets dispute settlement procedures and punishments as responses to the fact that trade agreements are incomplete contracts.”).

science has statistically shown the influence of politics and ideology on judging, in particular in the U.S. Supreme Court, as well as before U.S. appellate courts.<sup>116</sup> For legal realists, however, it is not as if legal texts and legal doctrine do not matter at all. Legal texts and doctrine are simply insufficient to understand judicial interpretation and outcomes in actual cases. Legal realism addresses the constitutive tensions between power and reason, and between context and doctrine, in its very concept of law.<sup>117</sup>

The legal realist perspective on judicial interpretation has both rationalist and constructivist dimensions. From a rationalist perspective, an international judicial body wishes to avoid conflict with other international bodies which could spur challenges to its legitimacy and authority. It thus has incentives to interpret and apply legal provisions in a way that accommodates conflicting provisions in another regime when it can, even while it explicitly writes that it is not doing so, especially in high-stakes disputes that generate significant publicity and possibly mass protests. From a constructivist perspective, a judicial body's interpretation and application of a text will be informed by history and political and social context. The judicial body will be part of a "community of interpreters" of that text.<sup>118</sup> The judicial body's interpretation of its meaning will change over time—as U.S. constitutional jurisprudence shows.

A prime example in international law is the decision making of WTO panels and the WTO Appellate Body, as illustrated further below. From a legal realist perspective, when WTO panels and the WTO Appellate Body interpret WTO texts, it is

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116. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 252–54 (1997). On the attitudinal model, see generally LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* xxvii–xxviii (4th ed. 2007); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 1–3 (2002); Nourse & Shaffer, *supra* note 112 (manuscript at 48, 53, 62).

117. See Dagan, *supra* note 112, at 626–27; see also Nourse & Shaffer, *supra* note 112 (manuscript at 64–66). As regards international law, see a similar articulation of this central tension in Nico Krisch, *International Law in Times of Hegemony: Unequal Power and Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 370–71 (2005).

118. See, e.g., STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 141 (1989) (providing a more radical constructivist approach to interpretation and interpretive communities). In international relations, see, for example, Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437, 443–44 (2003).

highly unlikely that they will formally declare that they are taking into account soft-law provisions and norms from a separate regime if they find that such provisions or norms are outside of their jurisdiction.<sup>119</sup> Yet a legal realist does not look only at what judicial bodies say formally, but also at what they do in terms of judicial outcomes.<sup>120</sup> In interpreting texts, panels and the Appellate Body always have some leeway.<sup>121</sup> As legal realists, we predict that soft-law provisions can indirectly inform the interpretation and application of existing WTO texts and thus shape the outcome of WTO panel and Appellate Body decisions. From a rationalist perspective, panelists or Appellate Body members may wish to limit the tension between the WTO and other regimes in a fragmented international law system, or seek to limit political backlash against their decisions that touch on environmental or social issues, the potential of which is reinforced and signaled by such other regimes.<sup>122</sup>

In doing so, panelists and the Appellate Body could facilitate greater acceptance of their decisions, reducing the severity of challenges to their legitimacy. Alternatively, from a constructivist perspective, WTO jurists may be persuaded by and internalize principles and norms from neighboring regimes, and incorporate those principles and norms into their reading

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119. *But see* JOOST PAUWELYN, CONFLICT OF NORMS IN INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW 1–3 (2003).

120. *See* Dagan, *supra* note 112, at 622–23 (noting that realists also focus on outcomes but, unlike formalists, believe that the outcome is couched in reason and power, not just power alone).

121. For an exploration of the multiple choices the WTO panel had in a series of WTO cases, see Gregory Shaffer, *A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case*, 41 N.Y.U. J. INT'L L. & POL. 1, 50–61, 75 (2008) [hereinafter Shaffer, *A Structural Theory*], regarding the *EU-Biotech* case; Gregory Shaffer & Yvonne Apea, *Institutional Choice in the Generalized Systems of Preferences Case: Who Decides the Conditions for Trade Preferences?: The Law and Politics of Rights*, 39 J. WORLD TRADE 977, 977–78 (2005), regarding the *EC-General Systems of Preferences* case; Gregory Shaffer, *Power, Governance, and the WTO: A Comparative Institutional Approach*, in POWER IN GLOBAL GOVERNANCE, *supra* note 61, at 130 [hereinafter Shaffer, *Power*], regarding the *U.S.-Shrimp-Turtle* case; Gregory Shaffer, *Recognizing Public Goods in WTO Dispute Settlement: Who Participates? Who Decides?: The Case of TRIPS and Pharmaceutical Patent Protection*, 7 J. INT'L ECON. L. 459, 460–61 (2004), regarding disputes over patent protection under the TRIPS Agreement.

122. *See* Guzman, *Design*, *supra* note 8, at 610–11.

and application of WTO texts out of conviction.<sup>123</sup> Sometimes the judicial body may be rather explicit, as the Appellate Body was in the famous *U.S.-Shrimp-Turtle* case, interpreting the meaning of WTO texts in a contemporary context that included soft-law environmental norms codified in treaties that it cited.<sup>124</sup> At other times, the judicial body may be silent, but still take account of those soft-law norms. We are not contending that WTO panels invariably change their decisions, directly or indirectly, to take account of soft-law norms in neighboring regimes. We rather contend that the opposing party will press them to do so, and, in some contexts, it will be successful.

### C. THE EXAMPLE OF GENETICALLY MODIFIED FOODS

We now illustrate our arguments through the case of agricultural biotechnology, an area of international regulation that has been subject to both distributional conflict and a well-developed regime complex. We then move in Part IV to articulate five hypotheses regarding the interaction of hard and soft law and examine a range of additional empirical cases.

As we have demonstrated at length elsewhere,<sup>125</sup> the United States and EU have taken distinct approaches to the regulation of agricultural biotechnology. They have attempted to export these different approaches at the global level, seeking allies among third parties, engaging in forum shopping to find

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123. Cf. Ruggie, *supra* note 21, at 866 (describing how ideas influence policy outcomes in the international political realm according to constructivist theory).

124. In interpreting General Agreement on Tariffs and Trade (GATT) Article XX(g), an article "crafted more than 50 years ago," the Appellate Body in the *U.S.-Shrimp-Turtle* case focused less on the context of "the overall WTO Agreement" than on the contemporary context in which it must render its politically sensitive decision. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 129, WT/DS58/AB/R (Oct. 12, 1998). Rather than analyze the "original intent" or drafting history of Article XX, the Appellate Body affirmed that the term "natural resources" is "not 'static' in its content or reference but is rather 'by definition, evolutionary.'" *Id.* ¶ 130 (emphasis added) (quoting Namibia (Legal Consequences), Advisory Opinion, 1971 I.C.J. 16, 31 (June 21)). The Appellate Body held that the words "must be read . . . in the light of contemporary concerns of the community of nations about the protection and conservation of the environment." *Id.* ¶ 129. As evidence of the contemporary context, the Appellate Body emphasized the reference in the preamble of the WTO Agreement to "the objective of sustainable development," a reference which did not appear in the original GATT. *Id.* The Appellate Body stated that "it is too late in the day" to limit Article XX(g) coverage to "the conservation of exhaustible mineral or other non-living natural resources," as the complainants desired. *Id.* ¶ 131.

125. POLLACK & SHAFFER, *supra* note 2, at 33–83.



hospitable regimes, and producing awkward compromises within, as well as inconsistencies among, various international regimes. In the process, hard- and soft-law mechanisms have not interacted in a complementary and progressive manner, but rather states have employed them to constrain and undercut each other. More flexible soft-law regimes, like the Codex Alimentarius Commission (Codex), 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 somewhat softened, being made more flexible and less predictable as the WTO judicial process has sought means to avoid deciding the substantive issues in dispute.<sup>126</sup>

The existing WTO regime, including the SPS Agreement, favored the United States' 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.<sup>127</sup> The WTO thus has been a favored forum for the United States regarding GM organisms (GMOs).<sup>128</sup> From the perspective of the EU, by contrast, 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 regula-

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126. *Id.* at 113–234; see also Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 76 (2001) (referencing WTO panels' avoidance of difficult questions); Michael Hahn, *A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law*, 9 J. INT'L ECON. L. 515, 551 (2006) (noting that the WTO "tries to avoid situations endangering its authority"); Ravi Afonso Pereira, *Why Would International Administrative Activity Be Any Less Legitimate?—A Study of the Codex Alimentarius Commission*, 9 GERMAN L.J. 1693, 1704 (2008) (stating that Codex standards may be undergoing a "hardening process").

127. See POLLACK & SHAFFER, *supra* note 2, at 145–52; Maria Julia Oliva, *The Cartagena Protocol on Biosafety and the Agreement on Sanitary and Phytosanitary Measures: What Will Decisions Regarding GMOs Have to Be Based on?*, 13 INT'L LEGAL PERSP. 22, 27 (2002) (noting U.S. emphasis on the science-based requirements of the SPS).

128. POLLACK & SHAFFER, *supra* note 2, at 152–53 (noting that, relative to alternative fora, the United States prefers GMO disputes to be arbitrated under WTO rules); Chidi Oguamanam, *Agro-Biodiversity and Food Security: Biotechnology and Traditional Agricultural Practices at the Periphery of International Intellectual Property Regime Complex*, 2007 MICH. ST. L. REV. 215, 239–40 (describing the WTO regime as more favorable to U.S. interests than the CBD regime).

tion of GM products.<sup>129</sup> In particular, it offered a forum within which the EU could press for an international environmental agreement supporting its precautionary approach to biotech regulation.<sup>130</sup> Thanks to EU entrepreneurship, countries adopted a new Biosafety Protocol to the CBD in September 2003, which has been ratified by 156 parties as of November 2009.<sup>131</sup>

The United States attempted to block adoption of the Biosafety Protocol, but was unsuccessful.<sup>132</sup> The United States nonetheless actively participated in the negotiations, including the drafting of a provision governing the relationship of the Biosafety Protocol to the WTO agreements.<sup>133</sup> The United States 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>134</sup> The United States obtained such a clause, but it failed to secure a clear reservation of its WTO rights.<sup>135</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 agree-

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129. Anais Kedgley Laidlaw, *Is it Better to Be Safe Than Sorry? The Cartagena Protocol Versus the World Trade Organisation*, 36 VICTORIA U. WELLINGTON L. REV. 427, 432–33 (2005) (N.Z.) (describing U.S. and EU positions in negotiations on the Cartagena Biosafety Protocol).

130. *Id.* at 434 (stating that the EU fought for and won the insertion of the precautionary principle in the Cartagena Biosafety Protocol).

131. Cartagena Protocol on Biosafety to the Convention on Biological Diversity: List of Parties, <http://www.cbd.int/biosafety/parties/list.shtml> (last visited Dec. 9, 2009) (showing states’ parties and dates of ratification).

132. POLLACK & SHAFFER, *supra* note 2, at 152; see also Jonathan H. Adler, *More Sorry Than Safe: Assessing the Precautionary Principle and the Proposed International Biosafety Protocol*, 35 TEX. INT’L L.J. 173, 191 (2000) (noting that the United States opposed “a stringent Protocol”).

133. POLLACK & SHAFFER, *supra* note 2, at 153–55; Julie Teel, *Regulating Genetically Modified Products and Processes: An Overview of Approaches*, 8 N.Y.U. ENVTL. L.J. 649, 700 (2000).

134. Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements*, 96 AM. J. INT’L L. 606, 613–14 (2002).

135. For useful overviews of the Biosafety Protocol and its relation to the SPS Agreement, see *id.* at 609–12; Gilbert Winham, *International Regime Conflict in Trade and Environment: The Biosafety Protocol and the WTO*, 2 WORLD TRADE REV. 131, 145–50 (2003).

ments.”<sup>136</sup> The next phrase, however, states that “the above recital is not intended to subordinate this Protocol to other international agreements.”<sup>137</sup> 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>138</sup> The EU, therefore, could point to the Biosafety Protocol as evidence of an international consensus involving 156 parties.<sup>139</sup> 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.<sup>140</sup> 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 much 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 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.<sup>141</sup> In particular, the Protocol has created new rules providing for the application of the precautionary principle in national decision making,<sup>142</sup> and the requirement of labeling Living Modified Organisms (LMOs) in conformity with an importing country’s requirements.<sup>143</sup> In addition, discussion continues regarding risk-assessment and risk-management principles, including taking into account “socio-economic considerations” in regulatory approvals,<sup>144</sup> as well as liability rules. In this way, the Protocol

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136. Cartagena Protocol on Biosafety to the Convention on Biological Diversity pmbl., Jan. 29, 2000, 2226 U.N.T.S. 208, 257 [hereinafter Biosafety Protocol].

137. *Id.*

138. POLLACK & SHAFFER, *supra* note 2, at 154.

139. See Cartagena Protocol on Biosafety to the Convention on Biological Diversity: Status of Ratification and Entry into Force, <http://www.cbd.int/biosafety/signinglist.shtml> (last visited Dec. 9, 2009).

140. See POLLACK & SHAFFER, *supra* note 2, at 197 (highlighting the EU’s argument that “WTO agreements should be interpreted both in light of the . . . Cartagena Biosafety Protocol . . . and of the precautionary principle”).

141. Biosafety Protocol, *supra* note 136, at 257.

142. *Id.*

143. *Id.* at 265–66.

144. Article 26 of the Protocol provides that parties “may take into account, consistent with their international obligations, socio-economic considerations

serves as a counterweight to the SPS Agreement's narrower focus on science-based justifications for SPS measures affecting trade.<sup>145</sup>

Both the United States and EU also attempted to export their policies to a third organization, the Codex Alimentarius Commission.<sup>146</sup> The Codex is an intergovernmental body established in 1963 by the United Nations 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.<sup>147</sup> It consists of 183 members.<sup>148</sup> Traditionally, the United States and EU have driven Codex agendas, each working to find allies for its own positions.<sup>149</sup>

The Codex traditionally represented a form of soft law, since the standards were not binding, and, by definition, there

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arising from the impact of [GMOs] on the conservation and sustainable use of biological diversity. . . ." Biosafety Protocol, *supra* note 136, at 270. The FAO has prepared a preliminary draft International Code of Conduct on Plant Biotechnology that addresses "possible negative socio-economic effects of biotechnologies," but, though they have existed for years, they have yet to be adopted. See LYLE GLOWKA, FOOD & AGRIC. ORG. OF THE UNITED NATIONS, LAW AND MODERN BIOTECHNOLOGY: SELECTED ISSUES OF RELEVANCE TO FOOD AND AGRICULTURE 36-37 (2003). In the United States' view, there is no reason to proceed further with them in view of the lack of consensus. Interview with Senior Policy Advisor, U.S. Dep't of Agric., in Rome, Italy (Apr. 29, 2007).

145. POLLACK & SHAFFER, *supra* note 2, at 156-57.

146. See *id.* at 166-71 (describing U.S. and EU efforts to persuade the Codex to adopt policies favorable to their respective agendas regarding the safety of foods from biotechnology, application of the precautionary principle, and the labeling and traceability of transgenic foods); Laidlaw, *supra* note 129, at 447 ("[T]he European Union is pushing for Codex to adopt the precautionary principle, and the United States is pushing for no such adoption."). See generally Sara Poli, *Setting Out International Food Standards: Euro-American Conflicts Within the Codex Alimentarius Commission*, in RISK REGULATION IN THE EUROPEAN UNION: BETWEEN ENLARGEMENT AND INTERNATIONALIZATION 125, 125-47 (Giandomenico Majone ed., 2003) (discussing the role of Codex in WTO law, focusing on the dispute between the EU and the United States over foods derived from biotechnology).

147. See Codex Alimentarius, Welcome, [http://www.codexalimentarius.net/web/index\\_en.jsp](http://www.codexalimentarius.net/web/index_en.jsp) (last visited Dec. 9, 2009).

148. See *id.* (explaining that membership consists of 182 member countries and one member organization).

149. See, e.g., POLLACK & SHAFFER, *supra* note 2, at 163 (stating that the EU and United States have driven Codex agendas); cf. Franz Seifert, *Divided We Stand: The EU as Dissonant Player in the Global Governance of Agro-Food Biotechnology* 20-21 (United Nations Univ. Inst. of Advanced Studies, Working Paper No. 146, 2006), available at [http://www.ias.unu.edu/resource\\_centre/Seifert.pdf](http://www.ias.unu.edu/resource_centre/Seifert.pdf) (describing the EU's attempts to strengthen its position within Codex).

was no need for a dispute-settlement system to enforce them.<sup>150</sup> That said, the process for producing Codex standards involves committees of experts that deliberate over the appropriate standards.<sup>151</sup> A designated Codex committee elaborates a draft standard or guideline subject to comments by member governments and interested international organizations.<sup>152</sup> Once the process is completed, standards are approved by the full Codex, which meets once every two years.<sup>153</sup>

Overall, the Codex became a sort of gentleman's club—or epistemic community—of food specialists, including strong representation from industry, 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 considerations override all other considerations, and (4) lack of sanctions in situations where [standards are] not followed.<sup>154</sup>

Those attending Codex meetings were (and the majority remain) food-safety experts, often with technical scientific backgrounds from national administrations and industry.<sup>155</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.<sup>156</sup>

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150. Much of the material in this subsection is from Chapters 4 and 5 of our book, MARK A. POLLACK & GREGORY C. SHAFFER, *WHEN COOPERATION FAILS: THE INTERNATIONAL LAW AND POLITICS OF GENETICALLY MODIFIED FOODS* (2009), which goes into much more detail regarding the international regimes covering the regulation of GMOs. Regarding the Codex, we note that where countries formally adopted the voluntary international standards, this “soft” law would have real legal effects.

151. See POLLACK & SHAFFER, *supra* note 2, at 164 (describing the process for producing Codex standards).

152. *Id.*

153. *Id.*

154. Frode Veggeland & Svein Ole Borgen, *Negotiating International Food Standards: The World Trade Organization's Impact on the Codex Alimentarius Commission*, 18 GOVERNANCE 675, 684 (2005).

155. See, e.g., Erik Millstone & Patrick van Zwanenberg, *The Evolution of Food Safety Policy-Making Institutions in the UK, EU and Codex Alimentarius*, 36 SOC. POL'Y & ADMIN. 593, 597 (2002), reprinted in *THE WELFARE OF FOOD: THE RIGHTS AND RESPONSIBILITIES IN A CHANGING WORLD*, at 38 (Elizabeth Dowler & Catherine Jones Finer eds., 2003); Telephone Interview with Official, U.S. Food & Drug Admin. (Jan. 29, 2008) (stating that the Codex was a “backwater” and as exciting as “watching the paint dry or the grass grow”).

156. POLLACK & SHAFFER, *supra* note 2, at 165.

The situation of 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.<sup>157</sup> 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.<sup>158</sup> Article 3.2 further states that a member's conformity with these international standards shall be presumed to comply with WTO law.<sup>159</sup> These SPS provisions have increased the significance of Codex standards, providing an impetus to harmonization activities, but also "hardening" Codex decision making by providing U.S. and EU negotiators with an incentive both to export and to protect their respective regulatory standards through Codex.<sup>160</sup>

The effect of Codex standards became clear in the U.S.-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>161</sup> It was hardly a consensus decision, but it was enough to establish a (so-called) "voluntary" international Codex standard under the organization's voting rules. Shortly afterwards, the United States initiated its WTO complaint

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157. *Id.*

158. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Attachment to Annex 5, art. 3.1, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 493 (1994) [hereinafter SPS Agreement].

159. *Id.* art. 3.2.

160. POLLACK & SHAFFER, *supra* note 2, at 165.

161. Codex Alimentarius Comm'n, *Report of the Twenty-first Session of the Joint FAO/WHO Codex Alimentarius Commission*, ¶ 45 ALINORM 95/37 (July 8, 1995) ("A majority of Member countries voted to proceed by the use of a secret ballot, as requested by the Delegation of the United States. As a result of the secret ballot, the Commission adopted the MRLs for growth-promoting hormones (33 votes in favour of adoption, 29 votes against adoption, and 7 abstentions."); see also Steven Charnovitz, *The World Trade Organization, Meat Hormones, and Food Safety*, 14 INT'L TRADE REP. 1781, 1786 (1997) (documenting the result of the panel's vote); David G. Victor, *The Sanitary and Phytosanitary Agreement of the World Trade Organization: An Assessment After Five Years*, 32 N.Y.U. J. INT'L L. & POL. 865, 899 (2000) (explaining the context of the United States' challenge).

against the EU, contending that the EU's ban was not "based" on an international standard (Codex) as required by the SPS Agreement.<sup>162</sup>

Because Codex principles and standards may be invoked in the decisions of WTO panels and the Appellate Body, the United States and EU have placed increasing importance on their negotiation.<sup>163</sup> As a EU representative before Codex concluded, "[i]n 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>164</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."<sup>165</sup> In an empirical study, Frode Veggeland and Svein Ole Borgen note an increase of such representatives to the Codex Committee on General Principles from ten in 1992, to thirty-two in 2000, to forty-one in 2001.<sup>166</sup>

The Codex process has encountered particularly severe difficulties in addressing issues that implicate risk management policy over transgenic varieties.<sup>167</sup> Three Codex subgroups 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).<sup>168</sup> Here, we find arduous negotiations between the United States and EU, each of which put forward distinctive and sharply opposed proposals for international standards and guidelines on issues that could directly bear on the application of the SPS Agreement to national regulatory measures and, in particular, in the WTO bio-

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162. See Panel Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 1.4, WT/DS26/R/USA (Aug. 18, 1997) [hereinafter Panel Report, *Meat Products*] (outlining the basis for the United States' complaint).

163. POLLACK & SHAFFER, *supra* note 2, at 165.

164. Veggeland & Borgen, *supra* note 154, at 683 (quoting a December 5, 2000 interview with an employee of the Directorate General for Consumer and Health Protection of the European Commission).

165. Veggeland & Borgen, *supra* note 154, at 689.

166. *Id.* at 687, 689.

167. POLLACK & SHAFFER, *supra* note 2, at 168. See generally *id.* at 113–76 (providing an extended discussion of the GMO issue in Codex).

168. *Id.* at 168.

tech case that the United States initiated in 2003, resulting in deadlock in the soft-law Codex regime.<sup>169</sup>

The results of these negotiations in the purportedly deliberative Codex forum have not produced consensus. Like the paragraphs of the Biosafety 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 it happens 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 WTO has constrained, and to some extent hardened, what was supposed to be a flexible, “voluntary” process for harmonized rulemaking 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 often more likely to see “dueling experts” reflecting U.S. adversarial legalism, than “independent expert panels” working collaboratively to “synthesize complex technical information.”<sup>170</sup> As Veggeland and Borgen add, we now see a “[r]eplication of WTO [c]oalition[s] and [p]ositioning [p]attern[s] in the Codex.”<sup>171</sup> An organization in which decision making was formerly based substantially on a “logic of arguing” or deliberation has been transformed to one more frequently based on “logic of consequentiality” or bargaining.

The United States was concerned with the spread of regulation in other countries restricting the growth and sale of GM products, which the Biosafety Protocol spurred and legitimated. In response, the United States finally brought a WTO complaint against EU regulatory measures in 2003, which the United States hoped would have significant implications for other countries’ practices.<sup>172</sup> After considerable delay, the WTO dispute-settlement panel finally issued its decision in September 2006.<sup>173</sup> The underlying conflict over the distinct U.S. and

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169. See *infra* notes 172–84 and accompanying text.

170. Victor, *supra* note 161, at 933.

171. Veggeland & Borgen, *supra* note 154, at 697–98.

172. See POLLACK & SHAFFER, *supra* note 2, at 179–82 (explaining why the United States delayed bringing its complaint).

173. See Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) [hereinafter Panel Report, *Biotech Products*]. For a detailed analysis of the WTO panel decision, see POLLACK & SHAFFER, *supra* note 2, at 177–234 and Shaffer, *A Structural Theory*, *supra* note 121, at 20–29.



EU regulatory approaches, as reflected in different instruments of international law, however, arguably affected the panel's decision.<sup>174</sup> 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.<sup>175</sup> 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. The linkage of the agricultural biotechnology issue to other substantive regimes helped to "soften" the effect of WTO hard law, which lost some of the defining characteristics of hard law in practice. As a result, the SPS Agreement was effectively made less binding in practice in this case.

Although the WTO panel's decision weighed in with over one thousand pages of text, the panel expressly avoided examining many crucial issues, most particularly the 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."<sup>176</sup> The panel did find in favor of the United States, but largely on procedural and not substantive grounds, with less hard-law substantive bite.<sup>177</sup> The panel was able to reach this decision by finding that the EU had never taken an actual "SPS measure" (a position that the United States had not even argued).<sup>178</sup> On this ground, the panel did not examine the EU's actions under any of the SPS Agreement's substantive provisions.<sup>179</sup> It thus avoided determining whether the EU had violated its obligation to base a decision on a risk assessment, whether any assessments showed greater risks of GM varieties than conventional ones, 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. Re-

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174. See POLLACK & SHAFFER, *supra* note 2, at 177–234 (detailing the decision of the dispute-settlement panel).

175. See *id.* at 224–29 (describing impact of panel's decision).

176. Panel Report, *Biotech Products*, *supra* note 173, ¶ 8.3.

177. See POLLACK & SHAFFER, *supra* note 2, at 187. For a close analysis of the case and the choices faced by the panel, see *id.* at 177–99 and Shaffer, *A Structural Theory*, *supra* note 121.

178. POLLACK & SHAFFER, *supra* note 2, at 191.

179. See *id.* at 222 (explaining that the panel was able to avoid examining the EU's SPS "measures" because the panel determined they were not actual "SPS measures").

garding measures adopted at the EU level, the panel only found that the EU had engaged in “undue delay” in its approval process.<sup>180</sup> As a result, the substantive application of SPS rules to the many GMO varieties in question that the EU had yet to approve remains unclear.

Regarding safeguards enacted by EU member states, the panel did find that all of them were “SPS measures,” and that these measures violated the EU’s substantive obligations under Article 5.1 of the SPS Agreement because they were “not based on a risk assessment.”<sup>181</sup> 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 own internal risk-assessment findings.<sup>182</sup> In this way, the EU’s own risk-assessment findings provided cover for the panel.

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.<sup>183</sup> Yet even with this formal finding by the panel, from a legal realist perspective, the panel still could implicitly take the Protocol into account through its appreciation of the political stakes of alternative interpretations and applications of WTO rules (from a rationalist perspective) and through the Protocol’s impact on framing social understanding of the issues (from a constructivist one). The existence of the Protocol, and the strong support for it, not only among the EU and most developing countries, but also among activist environmental NGOs, is part of the underlying context of the case. It is not in the interest of the WTO as an organization to take no heed of the content of an international environmental agreement, especially one having over 150 countries as parties, even if the United States is not one of them. The CBD’s Biosafety Protocol has created normative pressure for a WTO panel not to be too demanding in its scrutiny of risk assessments regarding agricultural biotechnology products. We cannot know precisely what affected panelists in shaping their decision. What we do know, however, is first, that the Biosafety Protocol

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180. *Id.* at 187.

181. *Id.* at 188.

182. *Id.* at 195.

183. *Id.* at 197; *see also* Cartagena Protocol on Biosafety to the Convention on Biological Diversity: Status of Ratification and Entry into Force, <http://www.cbd.int/biosafety/signinglist.shtml> (last visited Dec. 9, 2009) (showing that the United States has not ratified the Biosafety Protocol).

changed the background context in which the panel issued its decision, and second, that the panel found a means to avoid any direct conflict with it through finding that the EU had yet to adopt an “SPS measure,” which would have required the panel to make substantive findings under the SPS Agreement.<sup>184</sup>

WTO judges, both panelists and the members of the Appellate Body, have some independent agency.<sup>185</sup> They are more than interpreters and appliers of WTO legal provisions.<sup>186</sup> The pattern of their jurisprudence suggests that they also assume a mediating role.<sup>187</sup> 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 implementation.<sup>188</sup> In this way, they can shape their decisions, especially in hard cases, to facilitate amicable settlements, and thereby uphold the WTO legal system from normative challenges.<sup>189</sup>

In doing so, however, they render the WTO’s hard-law text less clear, less constraining in practice, and thus less “hard.” For example:

[By] finding that neither the EU[’s] 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, if ever. 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 . . .<sup>190</sup>

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>191</sup> The panel deci-

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184. See SPS Agreement, *supra* note 158, arts. 1, 2, 5, Annex A.

185. Shaffer, *A Structural Theory*, *supra* note 121, at 68.

186. *Id.*

187. *Id.*

188. *Id.* at 70; Shaffer, *Power*, *supra* note 121, at 137.

189. Shaffer, *A Structural Theory*, *supra* note 121, at 70.

190. POLLACK & SHAFFER, *supra* note 2, at 222.

191. 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 . . . .” Panel Report, *Biotech Products*, *supra* note 173, ¶ 7.3065. The panel repeated this same analysis verbatim in assessing whether a member state safeguard could be found to meet the requirements under Article 5.7 for provisional measures. *Id.* ¶ 7.3244. The panel further 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 applying . . . an

sion was not unique to the GMO case. 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>192</sup> The important Appellate Body decision of October 2008 in the U.S.-EU dispute over EU regulation of meat hormones, which overruled the panel and demanded much greater deference by it to the EU's SPS measures, continues this trend.<sup>193</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 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 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, there has been pressure on the quintessential hard-law regime of the WTO dispute-settlement system to be somewhat softened, as panelists and Appellate Body members are pressed to take into account not only political pressures from the member states,

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SPS measure which is stricter than the SPS measure applied by another Member to address the same risk." *Id.* ¶ 7.3065.

192. See POLLACK & SHAFFER, *supra* note 2, at 222 (noting that the panel's decision left the EU significant discretion).

193. See Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 733, WT/DS320/AB/R (Oct. 16, 2008) ("We found above that the Panel drew too rigid a distinction between the chosen level of protection and the 'insufficiency' of the relevant scientific evidence under Article 5.7 of the SPS Agreement. We also reversed the Panel's finding that, where international standards exist, a 'critical mass of new evidence and/or information that calls into question the fundamental precepts of previous knowledge and evidence' is required to render the relevant scientific evidence 'insufficient' within the meaning of Article 5.7. We found, moreover, that the Panel erred in the allocation of the burden of proof. Finally, we found that the Panel incorrectly interpreted and applied Article 5.7 in determining whether the relevant scientific evidence in relation to the five hormones was 'insufficient' within the meaning of that provision. In addition, we have found that the Panel's analysis was compromised because its consultations with Drs. Boisseau and Boobis infringed the European Communities' due process rights." (citations omitted)).

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. FIVE HYPOTHESES REGARDING THE INTERACTION OF HARD- AND SOFT-LAW INSTRUMENTS

##### A. WHERE POWERFUL STATES AGREE

*Hypothesis 1. Where powerful states agree on a common policy, hard and soft law are more likely to work as complements in an evolutionary manner.*

It is commonplace to argue that where powerful actors such as the United States and the EU agree on a particular policy or standard, it is much easier for them to promote it globally. Richard Steinberg, for example, writes regarding the Uruguay Round of trade negotiations that, “[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>194</sup> Daniel Drezner argues that, as a general rule, agreement between the United States and the EU is both a “necessary and sufficient condition” for successful international regulation.<sup>195</sup> We contend here that *the interaction of hard and soft law as complements, presented as a general rule in much or all of the existing literature on hard and soft law, in fact operates only under a restrictive set of conditions, namely a broad policy consensus among the most powerful actors within a given issue area.*

Many examples support this argument. One side (the United States or the EU) may initially be the primary entrepreneur behind the international regulatory initiative, eventually bringing the other side on board. The United States has often taken the lead in initiatives that have resulted in successful international regulatory cooperation, from international agreements to protect the ozone layer,<sup>196</sup> to the antibribery

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194. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 265 (2004).

195. See DREZNER, *supra* note 61, at 5 (“A great power concert is a necessary and sufficient condition for effective global governance over any transnational issue.”).

196. See Vienna Convention for the Protection of the Ozone Layer art. 11, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293.

convention,<sup>197</sup> to the Uruguay Round of trade negotiations.<sup>198</sup> In both the ozone protection and antibribery 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.<sup>199</sup> 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, from standard setting to climate change to financial regulation.<sup>200</sup>

Generally speaking, the success of international endeavors, from the Financial Action Task Force (FATF),<sup>201</sup> to the Basel Committee for banking regulation,<sup>202</sup> to export-credit soft-law arrangements, depends on the cooperation of the United States

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197. See Organisation for Econ. Co-operation & Dev. [OECD], Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1 (1998).

198. See WORLD TRADE ORG., THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS (1999). Braithwaite and Drahos cite the United States' successful use of forum shifting to the WTO in the global regulation of intellectual property and telecommunications, as well as the shifting of competition policy away from United Nations Conference on Trade and Development. BRAITHWAITE & DRAHOS, *supra* note 53, at 566–67.

199. See, e.g., DREZNER, *supra* note 61, at 77 (discussing the EU's ultimate support of antibribery hard law).

200. Braithwaite and Drahos 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 & DRAHOS, *supra* note 53, at 568. Elliot Posner makes this argument regarding financial services. See Elliot Posner, *Market Power Without a Single Market: The New Transatlantic Relations in Financial Services*, in THE FUTURE OF TRANSATLANTIC ECONOMIC RELATIONS: CONTINUITY AMID DISCORD 233, 233–36 (David M. Andrews, Mark A. Pollack, Gregory C. Shaffer, & Helen Wallace eds., 2005) (discussing the EU's growing importance in the regulation of financial services); cf. Andreas Nölke, *Transatlantic Regulatory Cooperation on Accounting Standards: A 'Varieties of Capitalism' Perspective*, in SYSTEMIC IMPLICATIONS OF TRANSATLANTIC REGULATORY COOPERATION AND COMPETITION (Simon J. Evenett & Robert M. Stern eds.) (forthcoming 2009) (contending that the EU has moved to an Anglo-Saxon liberal-market model, which has made transatlantic convergence and regulatory cooperation easier).

201. For further discussion of the FATF, see Maira Rocha Machado, *Financial Regulation and Criminal Policy: The Anti-Money Laundering System in Brazil and Argentina* (May 2008) (unpublished paper presented at Hauser Globalization Colloquium Fall 2008: Global Governance and Legal Theory), available at <http://ilj.org/courses/documents/Machado-FinancRegandIntlCrimPolicyBrazilandArgentina.pdf>.

202. See David T. Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 555–61 (2005) (discussing the function and structure of the Basel Committee on Banking Supervision).

and the EU or its members.<sup>203</sup> Private organizations may take the lead in developing self-regulatory *lex mercatoria* regimes. However, where these regimes become codified in international hard law, it is likely that private parties have enlisted the support of the United States or EU, directly or indirectly.<sup>204</sup> Indeed, we suggest that much of the existing literature on the complementary interaction of hard and soft law exhibits selection bias by drawing disproportionately from cases in which the United States and EU agree on the aims and terms of regulation because there are no, or only minimal, distributive conflicts between them.

## B. WHERE POWERFUL STATES DISAGREE

*Hypothesis 2. Where powerful states disagree on policy, we are likely to see hard and soft law work in opposition to each other. Powerful states are likely to engage in forum shopping in such situations, advancing their interests by pressing for the adoption of legal provisions, both hard and soft, in forums that are most favorable to their respective positions. These overlapping hard- and soft-law oriented regimes, in turn, may come into conflict, with the result that soft-law oriented regimes could lose some of their technocratic and flexible characteristics and hard-law oriented regimes could become somewhat less determinate.*

If agreement among powerful states is a necessary condition for successful cooperation, then intense distributive conflict among them is likely to inhibit such cooperation, providing incentives for them to either forum shop among existing international institutions or create new institutions that are more

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203. See Levit, *Dynamics*, *supra* note 54, at 141 (declaring that an informal export credit arrangement's success depended upon compliance among participating countries).

204. On enrollment of states and the creation of public-private networks, see BRAITHWAITE & DRAHOS *supra* note 53, at 482, 488–94. Janet Levit provides an excellent example in her study of the hardening of letter-of-credit rules. She provides a “bottom-up lawmaking tale that features private bankers, who have coalesced for decades under the auspices of the International Chamber of Commerce’s Banking Commission to ‘codify’ letter-of-credit practices in the form of the Uniform Customs and Practices (UCP).” Janet K. Levit, *Bottom-Up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit*, 57 EMORY L.J. 1147, 1147 (2007). The UCP’s private-order “rules” were then incorporated into UNCITRAL’s Convention on Independent Guarantees and Stand-by Letters of Credit, as well as the revised Article 5 of the U.S. Uniform Commercial Code, resulting in “mutual reinforcement.” *Id.* at 1187–95.

favorable to their substantive interests. This proliferation of overlapping and incompatible regimes, in turn, creates the conditions for hard and soft law to interact as antagonists.

We can illustrate this process by looking at the process of international economic regulation, in which the United States and EU emerge as the dominant powers in international standard setting. Given the relatively equal economic power of the United States 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. Where agreements are reached, the result will be either instruments containing general language that does not take a position either way, or competing international hard- and soft-law instruments. To give an example of the first scenario, competition law is an area where the United States and EU often have convergent policies, and the sides have collaborated in developing an International Competition Network to promote competition law globally through soft law.<sup>205</sup> However, the United States and EU disagree regarding the appropriate policies toward dominant firms, reflected in their different approaches to Microsoft's policies on product bundling.<sup>206</sup> As a result, the efforts of the working group on single-firm dominance within the International Competition Network have resulted in recommendations that are highly general.<sup>207</sup>

Where, however, an international regime already exists which favors the position of either the United States or EU, the disfavored party may attempt to advance its interests through a different, more favorable regime. The resulting tension among international regimes will generally apply in trade and social policy issues where the United States and EU take divergent positions. The WTO will lie at the center of such inter-

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205. See William E. Kovacic, *Competition Policy Cooperation and the Pursuit of Better Practice*, in *THE FUTURE OF TRANSATLANTIC ECONOMIC RELATIONS: CONTINUITY AMID DISCORD*, *supra* note 200, at 65, 68–70 (calling the International Competition Network a “significant step . . . providing insights for building a framework of global and regional cooperation”).

206. See William E. Kovacic, Chairman, U.S. Fed. Trade Comm'n, *Competition Policy in the European Union and the United States: Convergence or Divergence?* Remarks at the Bates White Fifth Annual Antitrust Conference 11–12 (June 2, 2008), available at [http://www.ftc.gov/speeches/kovacic/080602\\_bateswhite.pdf](http://www.ftc.gov/speeches/kovacic/080602_bateswhite.pdf) (discussing the United States' and EU's opinions of Microsoft).

207. Email from Spencer Waller, Professor, Loyola Univ. Chi. Sch. of Law, to author (June 8, 2008).



regime conflicts given its broad scope of coverage and its dispute-settlement system.<sup>208</sup> We have already shown how the United States and EU have attempted to export their policy approaches in the area of agriculture biotechnology to different international regimes. We provide a second example below.

The United States and EU have long taken different positions regarding the regulation of trade in cultural products and, in particular, films and other media.<sup>209</sup> This issue was particularly contentious during the Uruguay Round in which the EU pushed for an express “cultural exception,” while the United States pressed for the liberalization of national policies.<sup>210</sup> Neither side was fully successful.<sup>211</sup> The 1995 WTO General Agreement on Trade in Services (GATS) provides that countries are not bound to open their markets to audiovisual services unless the countries make express commitments.<sup>212</sup> Although the United States failed to obtain any EU commitments to open its market to audiovisual services under the GATS, the United States set up a framework for future negotiations that could

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208. See Claire R. Kelly, *Power, Linkage and Accommodation: The WTO as an International Actor and Its Influence on Other Actors and Regimes*, 24 BERKELEY J. INT'L L. 79, 81–86 (2006) (discussing the scope and primacy of the WTO in light of its “highly legalized adjudication regime”).

209. See, e.g., Beverly I. Moran, *United States' Trade Policy and the Exportation of United States' Culture*, 7 VAND. J. ENT. L. & PRAC. 41, 43 (2004) (describing the U.S.-EU conflict over movies during the Uruguay Round); Lisa L. Garrett, Comment, *Commerce Versus Culture: The Battle Between the United States and the European Union over Audiovisual Trade Policies*, 19 N.C. J. INT'L L. & COM. REG. 553, 554–55 (1994) (discussing differences in how the EU and United States classify the audiovisual sector).

210. Cristoph Beat Graber, *The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?*, 9 J. INT'L ECON. L. 553, 554–58 (2006); see also Tania Voon, *UNESCO and the WTO: A Clash of Cultures?*, 55 INT'L & COMP. L.Q. 635, 635–36 (2006) (noting audiovisual products as particularly troublesome at the UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions).

211. Sandrine Cahn & Daniel Schimmel, *The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does It Affect or Is It Affected by the Agreement on TRIPS?*, 15 CARDOZO ARTS & ENT. L.J. 281, 297–304 (1997) (describing compromise between the United States and EU during the Uruguay Round).

212. The GATS commits WTO members to “successive rounds of negotiations . . . with a view to achieving a progressively higher level of liberalization.” General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, art. XIX, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

lead to such liberalization, and it was able to obtain commitments from some WTO members.<sup>213</sup>

The EU then turned to other, more favorable fora to advance its interests, first with a regional, soft-law instrument, and later with a more binding, global agreement—both of which were devised in large part to obscure and counter the justiciable hard law of the WTO. In 2000, the EU and other European countries negotiated a Council of Europe declaration on cultural diversity, a soft-law agreement that echoed EU internal law in proclaiming the value of cultural diversity and justifying trade-restrictive practices in the interest of maintaining such diversity.<sup>214</sup> This European declaration, in turn, helped to pave the way for the adoption, in 2001, of a global soft-law instrument, the Universal Declaration on Cultural Diversity, adopted under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO).<sup>215</sup> UNESCO then turned to the drafting of a binding convention, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Convention), which 148 countries signed in October 2005.<sup>216</sup> Only two countries opposed it, the United States and Israel.<sup>217</sup> The United States had rejoined UNESCO in large part to respond to the development of this Convention.<sup>218</sup> Within UNESCO, it then “vehemently opposed” the Convention throughout the negotiations, maintaining that it was protectionist and inappropriately implicated UNESCO in trade policy.<sup>219</sup> The Convention went into effect in March 2007.<sup>220</sup>

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213. Graber, *supra* note 210, at 555.

214. Eur. Comm. of Ministers, *Declaration on Cultural Diversity* (Dec. 7, 2000).

215. U.N. Educ., Scientific & Cultural Org. [UNESCO], *Universal Declaration on Cultural Diversity*, Nov. 2, 2001, 41 I.L.M. 57 [hereinafter UNESCO Declaration].

216. UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* pmbl., Oct. 20, 2005, 45 I.L.M. 269 [hereinafter UNESCO Convention].

217. Graber, *supra* note 210, at 558 n.24 (“Only the United States and Israel voted against the Convention.”).

218. *See id.* at 558 (characterizing the United States’ response as “strong opposition”).

219. *See id.* at 565 (“The principal reason for the vehement US opposition was that it does not wish UNESCO to be involved in trade policy.”).

220. The Convention entered into force on March 18, 2007. UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Entry into Force*, [http://portal.unesco.org/en/ev.php-URL\\_ID=31038&](http://portal.unesco.org/en/ev.php-URL_ID=31038&)

Although the Convention is formally binding, it can be viewed as a soft-law agreement masquerading as a convention, since it contains no real obligations and no binding dispute settlement. Rather, 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>221</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,”<sup>222</sup> that is, 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.”<sup>223</sup> Article 6 provides that “each [p]arty may adopt measures aimed at protecting and promoting the diversity of cultural expressions within its territory,” which include the provision of “public financial assistance” and the adoption of “regulatory measures.”<sup>224</sup> Article 8 goes further, maintaining that, “[p]arties may take all appropriate measures to protect and preserve cultural expressions in situations [where cultural expressions are in need of urgent safeguarding].”<sup>225</sup>

The Convention is of a soft-law nature along the dimensions of obligation and delegation. In contrast to its recognition of parties’ sovereign rights, the Convention only creates soft-law obligations, such as the parties’ commitments to further public awareness of cultural diversity’s importance (Article 10),<sup>226</sup> to acknowledge civil society’s role (Article 11),<sup>227</sup> and to generally exercise their “best efforts” to implement the Convention through cultural policy measures.<sup>228</sup> The Convention provides for dispute settlement, but it relies on “negotiation,”

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221. Graber, *supra* note 210, at 565.

222. UNESCO Convention, *supra* note 216, art. 1(g).

223. *Id.* at art. 5.

224. *Id.* at art. 6.

225. *Id.* at art. 8.

226. *Id.* at art. 10.

227. *Id.* at art. 11.

228. Graber, *supra* note 210, at 564.

“mediation,” and “conciliation.”<sup>229</sup> The conciliation system is nonbinding, and parties may opt out of it.<sup>230</sup>

The result of this series of cultural diversity agreements is that hard- and soft-law agreements once again operate as antagonists. Therefore, as with the Cartagena Biosafety Protocol examined in Part III, a key issue in the negotiations was the relationship of the Convention to other international treaties, 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.”<sup>231</sup> At the same time, the Article provides that “[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.”<sup>232</sup>

Article 20’s focus on the fostering of “mutual supportiveness”<sup>233</sup> among treaty regimes can be read as an attempt by the EU and its allies to soften the application of hard WTO rules to accommodate the Convention’s norms. The EU and other parties to the Convention can now refer to an international agreement that expressly proclaims 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,<sup>234</sup> could be viewed as emerging customary international law that applies to all nations except those nonsignatories who persistently object to it.<sup>235</sup> Within the cultural law and policy regime, hard- and soft-law instruments have acted as complements to place increasing normative pressure on a neighboring regime.

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229. UNESCO Convention, *supra* note 216, art. 25.

230. *Id.*

231. *Id.* art. 20.

232. *Id.*

233. *Id.*

234. UNESCO Declaration, *supra* note 215.

235. By November 2009, 103 countries had become members of the Convention. UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, <http://portal.unesco.org/la/convention.asp?ko=31038&language=E&order=alpha> (last visited Dec. 9, 2009).

These agreements, which lie in stark tension with WTO provisions that benefit the United States' position, could have an impact on future WTO negotiations and WTO cases involving cultural products, even where they involve a WTO member that is not a party to them, such as the United States. The Convention can be used, in particular, to attempt to constrain WTO jurisprudence so that WTO panels interpret and apply WTO rules in a manner that treads lightly in this area, with the result being 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 GATT obligations where a measure is "imposed for the protection of national treasures of artistic, historic or archaeological value,"<sup>236</sup> and Article XX(a) does the same for measures "to protect public morals."<sup>237</sup> These GATT exceptions had been considered to be of a limited nature, but the existence of the Convention could, from a legal realist perspective, affect their application. The result would be greater uncertainty and less predictability regarding WTO trade-liberalization commitments as regards to "cultural" products, and thus a potential softening of WTO law. We are not contending that this will necessarily happen in a specific dispute. Rather, we argue that it is the EU's aim for the emerging international law of cultural diversity to soften the application of WTO rules in this domain, and this potentially could happen because the overall context in which a WTO panel interprets and applies any ambiguities within a WTO text has changed.

In sum, in this case, as well as in the GMO case, the stark distributive differences between the United States and the EU, together with the tensions between the UNESCO cultural regime and the WTO trade regime, led to a "hardening" of bargaining over the UNESCO Convention to which the United States was vehemently opposed, and they could, in time, produce a softening of WTO law in this area. We argue, moreover, that where there is ongoing distributive conflict, the two regimes will not simply converge into a new synthesis, but rather will remain in conflict for a prolonged period.

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236. General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. XX(f), Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1153 (1994).

237. *Id.* art. XX(a).

### C. WHEN LESS POWERFUL STATES DISAGREE

*Hypothesis 3. Even where powerful states agree on a regulatory approach, smaller states that are adversely affected can use international hard- and soft-law strategies to attempt to thwart powerful states' aims, again choosing regimes more favorable to their positions in a fragmented international law system. The result, once again, is that hard and soft law act as antagonists, which can lead to the hardening of soft-law oriented regimes and the softening of hard-law oriented regimes. However, powerful states have significant advantages at the international level because of their market power and resources.*

Powerful states are not the only actors that can engage in the strategic use of hard and soft law. International law has distributional implications for developing countries as well, and intellectual property law is a prime example.<sup>238</sup> These distributional implications create incentives for developing countries to counter existing international law with new hard- or soft-law instruments. In practice, the weakness of small and developing countries, combined with the fact that they tend to exercise more voice in multilateral organizations that generate soft law (such as UN bodies),<sup>239</sup> generally leads these states to adopt counternorms in the form of soft-law provisions. In these situations, developing countries also use soft-law provisions in one regime to attempt to counter existing hard law in another regime. For example, in their article on regime complexes, Rautiala and Victor show how the United States and EU leveraged market power in trade negotiations under the Uruguay Round to create new rules under the Agreement on Trade-Related As-

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238. TRIPS Agreement requirements, for example, could result in higher prices for goods, restricted access to vital resources, and job losses in strong underground economies, without generating offsetting sources of revenue. See KEITH E. MASKUS, *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* 157 (2000) [hereinafter MASKUS, *GLOBAL ECONOMY*] (explaining that countries may experience short-term "net welfare" losses when implementing TRIPS by strengthening intellectual property rights); Keith E. Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471, 489 (2000) [hereinafter Maskus, *Economic Development*] (discussing the negative effects of implementing TRIPS by strengthening intellectual property rights on economic development in developing countries).

239. Developing countries can band together on account of their large numbers in such fora as the United Nations General Assembly, but its resolutions are not binding. U.N. Charter art. 10 (referring to General Assembly's power to "make recommendations"); see also J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 110 (Humphrey Waldo ed., 6th ed. 1963) (explaining that resolutions passed by the General Assembly do not bind member states).

pects of Intellectual Property Rights (TRIPS Agreement) that were closely modeled on U.S. and EU law<sup>240</sup> and favored U.S. and EU interests.<sup>241</sup> Among other matters, the TRIPS Agreement required the recognition of intellectual property rights in plant varieties.<sup>242</sup> Developing countries responded by attempting to reframe intellectual property protection in light of the environmental and development goals of the CBD.<sup>243</sup> As Raustiala and Victor write:

[S]tates at times attempt to force change by explicitly crafting rules in one elemental regime that are incompatible with those in another. For example, developing countries led the establishment of the original FAO Undertaking [of 1983] in a radical attempt to refocus the agenda toward a broad and controversial common heritage principle for all PGR [Plant Genetic Resources]. The CBD's rules on IP rights are another example—the CBD purposefully included language that could be construed to make IP rights subservient to environmental protection and development objectives, including benefit-sharing, all of which appeared to contravene the content of TRIPS.<sup>244</sup>

Developing countries' efforts led to the 2002 Treaty on Plant Genetic Resources (PGR),<sup>245</sup> with the aim of partly undercutting the TRIPS's rules.<sup>246</sup>

Helfer has likewise explored how developing countries can “engage in regime shifting,”<sup>247</sup> adopting “the tools of soft law-making.”<sup>248</sup> In doing so, they often work with nongovernmental groups who serve as allies to help generate counternorms that are development oriented.<sup>249</sup> Helfer showed 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 in-

240. Raustiala & Victor, *supra* note 84, at 291.

241. *Id.* at 284.

242. *See id.* at 297 (“TRIPS decreed that plant varieties must be protected by either patents or by an ‘effective sui generis system.’”).

243. *Id.* at 301–02.

244. *Id.*

245. For the text of the PGR Treaty, see International Treaty on Plant Genetic Resources for Food and Agriculture, Nov. 3, 2001, <ftp://ftp.fao.org/docrep/fao/011/i0510e/i0510e.pdf> [hereinafter PGR Treaty].

246. *See* Raustiala & Victor, *supra* note 84, at 301–02 (explaining that states attempted to create “strategic inconsistenc[ies]” through the PGR Treaty to conflict with TRIPS).

247. Helfer, *supra* note 3, at 17.

248. *Id.* at 32.

249. *See id.* at 32, 53–54 (explaining that these NGOs advance regime shifting to further their own agendas, which are generally in direct conflict with strong intellectual property interests).

volving the CBD,<sup>250</sup> World Intellectual Property Organization (WIPO),<sup>251</sup> and the WHO.<sup>252</sup> 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.<sup>253</sup> 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>254</sup>

For example, the Conference of the Parties to the CBD has created workshops, established working groups, and developed guidelines regarding compensation for the use of indigenous knowledge and the sharing of benefits from the use of genetic resources.<sup>255</sup> Concurrent efforts within the FAO gave rise to the PGR Treaty,<sup>256</sup> which recognizes “farmers’ rights,” “sovereign rights” over plant genetic resources, and equitable “sharing of the benefits arising from commercialization.”<sup>257</sup> This treaty constitutes hard law along the dimension of obligation (it is formally binding), but it is much softer than the TRIPS Agreement in its dispute-settlement provisions.<sup>258</sup> Once again, as in the agricultural biotechnology and cultural diversity examples discussed above,<sup>259</sup> countries have engaged in strategic ambiguity in defining the PGR Treaty’s relation to the TRIPS Agreement in light of the tension between the regimes.<sup>260</sup>

250. *Id.* at 28–30.

251. *Id.* at 59–61.

252. *Id.*

253. *Id.* at 3–4, 8.

254. *Id.* at 6.

255. *Id.* at 32–34.

256. *See id.* at 34–39 (explaining that developing countries’ efforts within the FAO framework gave rise to the PGR Treaty).

257. PGR Treaty, *supra* note 245, art. 9.

258. Article 22 of the PGR Treaty provides for a conciliation procedure unless the parties voluntarily accept compulsory arbitration or jurisdiction of the International Court of Justice. *Id.* art. 22.

259. *See* discussion *supra* Parts III.C., IV.B.

260. As regards the relation of the PGR Treaty to other international agreements, the PGR Treaty’s preamble provides that the parties:

*Recognize[]* that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security; *Affirm[]* that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements; *Understand[]* that the above recital is not intended to create a hierarchy between this Treaty and other international agreements.

PGR Treaty, *supra* note 245, pmb. (emphasis added).



The relation of intellectual property rights to the pursuit of health policy goals provides another example of attempts by developing countries to counter existing international trade and intellectual property law by reframing issues through the use of new soft-law instruments adopted in different fora, in this case, health policy and human rights fora. The United States has responded vociferously in these fora to defend its interests,<sup>261</sup> so that the processes exhibited less of the soft-law ideal-type advantages of deliberation and policy learning, as opposed to strategic bargaining. Developing countries have nonetheless been able to obtain support from many international bodies, such as various international human rights bodies and the WHO, using international soft-law instruments to promote the prioritization of human rights and health protection vis-à-vis pharmaceutical patent protection.<sup>262</sup> Helfer points to soft-law developments within the following human rights bodies that have been antagonistic toward the TRIPS Agreement: the Commission on Human Rights, its Sub-Commission on the Promotion and Protection of Human Rights, the UN High Commissioner for Human Rights, the Special Rapporteurs appointed by the Commission and Sub-Commission, and the Committee on Economic Social and Cultural Rights.<sup>263</sup>

These human rights and health policy bodies became involved in the conflicts over pharmaceutical patent protection following U.S. pressure on specific developing countries regarding their compliance with the TRIPS Agreement. For example, U.S. pharmaceutical companies, supported politically by the U.S. government, challenged a new South African law allowing

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261. See Heinz Klug, *Law, Politics, and Access to Essential Medicines in Developing Countries*, 36 POL. & SOC'Y 207, 236 (2008) (explaining that the United States advocated the pharmaceutical industry's point of view in a series of meetings between members of the TRIPS council, the WHO, NGOs, and pharmaceutical representatives); see also Helfer, *supra* note 3, at 43 (describing how the United States was opposed to the WHO taking a position that was even moderately critical of TRIPS).

262. See Helfer, *supra* note 3, at 32–34 (describing that the Convention of Parties within the CBD has relied on soft-law tools, e.g., gathering information, commissioning studies, and involving NGOs to promote its objectives).

263. *Id.* at 45–46. See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 844 (2008) (explaining how framing the issue affects intellectual property policy); John S. Odell & Susan K. Sell, *Reframing the Issue: The WTO Coalition on Intellectual Property and Public Health, 2001*, in NEGOTIATING TRADE: DEVELOPING COUNTRIES IN THE WTO AND NAFTA 85, 87 (John S. Odell ed., 2006) (discussing how parties critical of TRIPS have begun to frame the issue as a public health issue).

parallel importation of pharmaceuticals before the South African courts, including on the grounds that it violated South Africa's commitments under WTO law.<sup>264</sup> In response to developing country and NGO advocacy:

[T]he Executive Board of the World Health Assembly (WHA) recommended the adoption of the "Revised Drug Strategy," calling upon member states to "ensure that public health interests are paramount in pharmaceutical and health policies," as well as "to explore and review their options under relevant international trade agreements, to safeguard access to essential drugs."<sup>265</sup>

The WHO Executive Board adopted the strategy in January 1999, despite intense pressure exercised by the United States.<sup>266</sup>

The strategy was immediately referenced by South African officials in defense of South Africa's positions.<sup>267</sup> The U.S. government relaxed its pressure on South Africa and never initiated a WTO complaint, and U.S. pharmaceutical companies withdrew their complaint against the South African government, paying all costs.<sup>268</sup> Similarly, following the United States' initiation of a WTO complaint against Brazil regarding provisions in Brazil's patent law, fifty-two countries of a fifty-three

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264. See Peggy B. Sherman & Ellwood F. Oakley, III, *Pandemics and Patents: The World Trade Organization's Efforts to Balance Pharmaceutical Patents and Access to AIDS Drugs*, 41 AM. BUS. L.J. 353, 395 (2004) (explaining that in 1998, U.S. companies filed a lawsuit against South Africa in South Africa to have the law repealed and compel the country to comply with its TRIPS obligations).

265. Klug, *supra* note 261, at 236 (quoting World Health Org., *Revised Drug Strategy*, WHA52.19, A52/VR/9 (May 24, 1999)).

266. See *id.* (explaining that the strategy adopted by the WHO Executive Board conflicted with the position taken by the United States). Following behind-the-scenes pressure from the United States, the final resolution was nonetheless less critical of the TRIPS Agreement in its tone than the initial formulations. More specifically, the final resolution requested that the WHO "monitor[] and analy[ze] the pharmaceutical and public health implications of relevant international agreements, including trade agreements." Helfer, *supra* note 3, at 43.

267. See, e.g., Klug, *supra* note 261, at 236 (explaining that South Africa interpreted the Revised Drug Strategy as allowing for compulsory pharmaceutical licensing and parallel importation).

268. See Helfer, *supra* note 3, at 65 n.275 (explaining that the legal challenges were eventually withdrawn after pressure from public health NGOs); Sherman & Oakley, *supra* note 264, at 395-97 (explaining that intense pressure from both state and nonstate actors prompted South Africa to come to an understanding with the United States outside of the courtroom and led the pharmaceutical companies to drop their lawsuit and pay South Africa's legal fees as well); *Drug Companies Drop Case Against S. African Government*, INT'L CENTRE FOR TRADE & SUSTAINABLE DEV., Apr. 24, 2001, <http://ictsd.org/itp/39983/>.

member United Nations Commission on Human Rights endorsed Brazil's AIDS policy;<sup>269</sup> it also backed a resolution in 2001, sponsored by Brazil, that called on all states to promote access to AIDS drugs as a human right,<sup>270</sup> which the United States again vociferously opposed.<sup>271</sup> This UN resolution helped Brazil favorably settle the U.S. claim.<sup>272</sup> The United States indefinitely suspended its WTO complaint in June 2001,<sup>273</sup> and the Brazilian government afterwards has successfully pressed U.S. pharmaceutical companies to significantly lower prices on drugs under the direct or indirect threat of issuing a compulsory license.<sup>274</sup>

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269. Gregory Shaffer et al., *The Trials of Winning at the WTO: What Lies Behind Brazil's Success*, 41 CORNELL INT'L L.J. 383, 466 n.337 (2008).

270. Access to Medication in the Context of Pandemics such as HIV/AIDS, C.H.R. Res. 2001/33, ¶ 2, U.N. Doc. E/CN.4/RES/2001/33 (April 23, 2001) ("[C]alls upon states to pursue policies . . . which would promote: (a) the availability in sufficient quantities of pharmaceuticals and medical technologies used to treat . . . HIV/AIDS.").

271. See Michael J. Dennis, *The Fifty-Seventh Session of the UN Commission on Human Rights*, 96 AM. J. INT'L L. 181, 191 (2002) ("[The provision] sparked substantial controversy among Commission members . . . because it called into question the impact of . . . TRIPs."); *UN Rights Body Backs Brazil on AIDS Drugs*, NEWS24.COM, Apr. 24, 2001, [http://www.news24.com/Content/SouthAfrica/AidsFocus/1058/1758d042414b4136a92267e011b12cb0/24-04-2001-12-16/UN\\_rights\\_body\\_backs\\_Brazil\\_on\\_Aids\\_drugs](http://www.news24.com/Content/SouthAfrica/AidsFocus/1058/1758d042414b4136a92267e011b12cb0/24-04-2001-12-16/UN_rights_body_backs_Brazil_on_Aids_drugs).

272. See Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1028–29 (2004) (explaining that the United States tabled its complaint after the Commission on Human Rights passed the Resolution); Shaffer et al., *supra* note 269, at 466 (describing how pressure from human rights organizations helped Brazil settle the U.S. claim).

273. See Gary G. Yerkey & Daniel Pruzin, *United States Drops WTO Case Against Brazil over HIV/AIDS Patent Law*, WTO REP., June 26, 2001, available at <http://www.bna.com/products/corplaw/wtor.htm> (search "United States Drops WTO Case Against Brazil").

274. See, e.g., Ellen 't Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 32 (2002) ("Brazil has also been able to negotiate lower prices for patented drugs by using the threat of production under a compulsory license."); Duncan Matthews, *WTO Decision on Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health: A Solution to the Access to Essential Medicines Problem?*, 7 J. INT'L ECON. L. 73, 81 (2004) ("[I]n many respects the real value of compulsory licensing can be found not in its actual use, but in the mere threat of its use—a mechanism used successfully by Brazil in negotiations with pharmaceutical companies to negotiate an affordable price for anti-retroviral drugs for the treatment of HIV/AIDS."); Paulo Prada, *Brazil Near Deal with Abbott for Price Cut on AIDS Drug*, N.Y. TIMES, Oct. 5, 2005, at C7 ("The pending agreement, which would lower the drug's price to 63 cents a pill from \$1.17, comes after months of negotiations and stern warnings from Brazil that it would disregard Abbott's patent and make a generic ver-

The struggle over the proper framing of the interaction of social welfare protection and intellectual property protection is ongoing. In September 2007, for example, the United Nations Special Rapporteur on Human Rights issued a draft report entitled "Human Rights Guidelines for Pharmaceutical Companies in Relation to Access to Medicines," which uses a human rights framework.<sup>275</sup> As Heinz Klug writes, the guidelines "argue that the pharmaceutical corporations have a responsibility to promote access to medicines" and represent "yet another effort to use normative pressure and standards to tackle the problem of access" to medicines.<sup>276</sup>

Developing countries and nonstate actors have, in short, used various soft-law instruments to attempt to soften WTO legal obligations and thus give developing countries greater flexibility to implement the TRIPS Agreement. They have done so both through attempting to renegotiate provisions of the TRIPS Agreement and through using countervailing soft-law norms to provide them with greater flexibility in practice in the shadow of the WTO and other international law. Regarding the TRIPS Agreement itself, the United States first compromised with developing countries, despite U.S. pharmaceutical company protestation, by agreeing to the 2001 Doha Declaration on the TRIPS Agreement and Public Health,<sup>277</sup> in which WTO members "affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."<sup>278</sup> The United States and other

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sion of Kaletra domestically if the company did not lower the price to a level it deemed affordable.").

275. See The Secretary-General, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical & Mental Health*, Annex, pmb., ¶ p, delivered to the General Assembly, U.N. Doc. A/63/263 (Aug. 11, 2008) (prepared by Paul Hunt) ("The present Guidelines are based on human rights principles enshrined in the Universal Declaration of Human Rights.").

276. Klug, *supra* note 261, at 239; see also Heinz Klug, *Campaigning for Life: Building a New Transnational Solidarity in the Face of HIV/AIDS and TRIPS*, in *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 118, 137 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) (explaining that human rights concerns have helped to change the intellectual property and trade regime so that health impacts are taken into greater account).

277. See, e.g., Klug, *supra* note 276, at 133 (describing that despite initial opposition, the United States eventually agreed that the TRIPS should be interpreted in a way that is supportive of public health).

278. World Trade Organization, Ministerial Declaration of 14 November

WTO members then agreed to grant conditional waivers in 2003 to paragraphs (f) and (h) of Article 31 of the TRIPS Agreement (Waiver Decision).<sup>279</sup> A formal amendment to the TRIPS Agreement based on the substance of the Waiver Decision was submitted to members in 2005,<sup>280</sup> although it is still awaiting ratification.<sup>281</sup>

Beyond the formal waivers of hard-law provisions of the TRIPS Agreement, soft-law counterinstruments are still being used to create normative pressure regarding future trade and intellectual property negotiations, as well as in bilateral dispute-settlement negotiations conducted in the shadow of WTO law. For example, both South Africa and Brazil successfully withstood intense U.S. pressure and used the threat of compulsory licensing to reduce prices charged by pharmaceutical companies on a number of drugs under patent.<sup>282</sup> It appears that the developing countries' intention is for TRIPS Agreement

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2001, WT/MIN(01)/DEC/2, 41 I.L.M. 746 (2002).

279. Council for Trade-Related Aspects of Intellectual Property Rights, *Draft Decision: Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, IP/C/W/405 (Aug. 30, 2003).

280. General Council, *Amendment to the TRIPS Agreement*, WTL/641 (Dec. 8, 2005).

281. At the time of this writing, the Council planned to extend the period of acceptance until December 31, 2011. See Council for Trade-Related Aspects of Intellectual Property Rights, *Annual Report (2009) of the Council for TRIPS*, ¶ 12, IP/C/52 (Nov. 5, 2009).

282. See Donald G. McNeil Jr., *As Devastating Epidemics Increase, Nations Take on Drug Companies*, N.Y. TIMES, July 9, 2000, at A8 (describing how South Africa obtained cheaper drug prices in part by threat of compulsory licensing); Michael Wines, *Agreement Expands Generic Drugs in South Africa to Fight AIDS*, N.Y. TIMES, Dec. 11, 2003, at A24 (describing an agreement negotiated by the South African government and two major pharmaceutical companies to "drastically lower prices" on anti-AIDS drugs); *supra* note 271; see also Peter Maybarduk & Sarah Rimmington, *Compulsory Licenses: A Tool to Improve Global Access to the HPV Vaccine?*, 35 AM. J.L. & MED. 323, 325 (2009) ("[Malaysia], Indonesia, Mozambique, Zimbabwe, South Africa, Eritrea and Zambia have each issued compulsory licenses to promote access to medicines."); Bryan Mercurio, *Health in the Developing World: The Case for a New International Funding and Support Agency*, 4 ASIAN J. OF WTO & INT'L HEALTH L. & POL'Y 27, 41 (2009) ("Several nations, including Brazil, South Africa and Kenya, have successfully reduced the price of several drugs by threatening to issue a compulsory license unless the patent holder reduced the price of the drug in question. In each instance, the patent holder eventually succumbed to the threat and either lowered the cost of the drug or issued a voluntary license to allow for others to manufacture the drug (in exchange for a royalty)."); Celia W. Dugger, *Thailand: Plan to Override Patent for AIDS Drug*, N.Y. TIMES, Dec. 1, 2006, at A12 (stating that Thailand would override Merck patent to lower the price of an AIDS drug from \$466 to about \$267 per patient per year).

provisions to become more “flexible,” less determinate, and thus less binding in their effects. They have attempted to use counternorms in the form of soft-law provisions to make an existing hard-law regime less determinate, undermining its purported ideal-type advantages of legal precision backed by judicial enforcement.

Eyal Benvenisti and George Downs nonetheless rightly question the efficacy of these strategies of using soft-law oriented regimes as antagonists to neighboring regimes in a fragmented international legal order.<sup>283</sup> They contend that powerful countries are best able to make use of fragmented international regimes through forum-shopping strategies to shape international law over time.<sup>284</sup> They find that fragmented regime complexes increase the transaction costs for participants, favoring those with greater resources.<sup>285</sup> They argue that “creating institutions along narrow, functionalist lines . . . limits the opportunities for weaker actors to build the cross-issue coalitions that could potentially increase their bargaining power and influence.”<sup>286</sup>

The counternorms mentioned by Helfer, for example, come from soft-law regimes compared to the TRIPS Agreement. Weaker states have adopted primarily reactive tactics in these soft-law venues. For example, Helfer, in fact, recognizes that:

[Governments] can attempt to diffuse those pressures [from domestic constituencies and international advocacy organizations] by taking action in regimes whose institutional structures or enforcement mechanisms are weak, thereby appeasing interest groups while avoiding action in other venues where rulemaking would have more far-reaching and less desirable consequences. . . .

. . . .  
. . . Indeed, regime shifting might actually serve industrialized states' interests by diverting attention and resources from potentially effective treaty-making efforts in WIPO or the WTO while simultaneously creating the appearance of sharing developing countries' concerns.<sup>287</sup>

Benvenisti and Downs note, in particular, how “powerful states” are increasingly using “serial bilateralism . . . to shape

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283. Benvenisti & Downs, *supra* note 86, at 625; *see also* DREZNER, *supra* note 61, at 5 (arguing that smaller states and nonstate actors “do not affect regulatory outcomes” and are only able to “affect the process through which coordination is attempted”).

284. Benvenisti & Downs, *supra* note 86, at 604.

285. *Id.* at 599.

286. *Id.* at 595.

287. Helfer, *supra* note 3, at 56–57.

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>288</sup> These bilateral agreements constitute hard law along all three dimensions defined by Abbott and Snidal.<sup>289</sup> Benvenisti and Downs find a similar process in the negotiation of investment protections through bilateral-investment treaties.<sup>290</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,<sup>291</sup> suggests that there are severe limits to weaker countries’ use of the countervailing soft-law option. Similarly, in the area of international accounting rates for telecommunications, an Organisation for Economic Co-operation and Development (OECD) interviewee explained, “[t]he US wanted to set the agenda by expanding bilateral agreements until its agenda is a *fait accompli*.”<sup>292</sup>

Braithwaite and Drahos come to a similar conclusion, although with greater ambivalence. On the one hand, they write, “[c]learly, 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-resourced can use.”<sup>293</sup> On the other hand, they nonetheless concede that “in some ways weaker players are better off in a world where there are multiple fora capable of dealing with similar agendas.”<sup>294</sup>

In sum, developing countries also attempt to use countervailing soft-law instruments in one regime as antagonists to hard-law instruments in another regime, illustrating our first contention. They face greater difficulties, however, in using

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288. Benvenisti & Downs, *supra* note 86, at 611.

289. See *supra* note 12 and accompanying text.

290. Benvenisti & Downs, *supra* note 86, at 611–12; see also Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 642 (1998) (explaining that both developing and developed countries prefer bilateral investment treaty agreements over customary international law even though they generally require more obligations from the host developing countries).

291. For a seminal examination of this period, see STEPHEN D. KRASNER, *STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM* 30–31 (1985).

292. BRAITHWAITE & DRAHOS, *supra* note 53, at 337.

293. *Id.* at 565.

294. *Id.*

them to soften such hard law. Nonetheless, they work to create such counter soft-law norms with this aim, and they can sometimes be successful. They can refer to the countervailing soft-law instruments to thwart pressure in the shadow of existing hard law, as shown by the South Africa and Brazil examples.<sup>295</sup> A major reason for the leverage that developing countries exercise is the distinct challenge of implementation, which is often overlooked in scholars' assessments of the making of international law as part of a recursive process.<sup>296</sup> We now turn to this key issue.

#### D. THE RECURSIVE IMPACT OF THE POLITICS OF IMPLEMENTATION

*Hypothesis 4. Even where powerful states prevail in negotiations at the international level vis-à-vis third countries, they will still have difficulty ensuring that the agreement is implemented in third countries because existing international law may be ambiguous and because different interests hold power in domestic settings at the implementation stage. States seeking effective implementation of agreements thus have incentives to develop further hard- and soft-law instruments to complement and promote the implementation of existing agreements. Additionally, the politics of implementation give rise to greater publicity regarding international law's implications. Actors aiming to frustrate the implementation of existing agreements can mobilize to seek the adoption of new international hard- or soft-law instruments designed to act as antagonists to existing ones.*

Even where multilateral or bilateral negotiations produce policy agreement at the international level, participating countries must still implement those agreements. Local actors and institutions, with different interests than those that negotiated the agreement, can, and often do, undermine its implementation. At the implementation stage, domestic actors, public and private, are best able to exploit their knowledge of local practice to frustrate changes negotiated at the international level.<sup>297</sup> The result, from an ex post perspective, is a blurring of the distinction between hard and soft law, as socio-legal-oriented scholars have argued.<sup>298</sup> Such "rear-guard battles" can erode the

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295. See *supra* notes 267–74 and accompanying text.

296. See discussion *infra* Part IV.D.

297. See HALLIDAY & CARRUTHERS, *supra* note 98, at 408.

298. See, e.g., Levit, *Dynamics*, *supra* note 54, at 116–17 (discussing the blurring of the line between hard and soft law).



fruits of negotiation,<sup>299</sup> undermining the effectiveness of even hard-law regimes with binding dispute-settlement provisions. At the implementation stage, international law hits home both institutionally (in terms of practice) and psychologically (in terms of public perceptions). The politics of implementation of an international law instrument can thus catalyze new international lawmaking in which the resulting instruments may act either as complements or antagonists to existing ones, as we now examine.

Terence Halliday and Bruce Carruthers's analysis of the International Monetary Fund (IMF) sponsored reforms to Indonesia's bankruptcy regime in the wake of the Asian financial crisis offers a particularly good example of new international soft law being used as a *complement* in response to the politics of implementation.<sup>300</sup> The need for new soft-law instruments arose from an implementation-stage battle waged by domestic interests who were neglected during the international negotiation and the formal domestic enactment processes. In February 1998, the World Bank, IMF, and other international financial institutions (IFIs) worked with Indonesia to develop an operational insolvency regime for the country.<sup>301</sup> Extremely vulnerable to pressure from the IFIs on account of its financial instability, Indonesia adopted wide-ranging corporate bankruptcy reforms as a condition to receiving future IMF funds.<sup>302</sup> Diagnosis of the problems and the prescriptions for reform were driven by the IFIs to the exclusion of local actors integral to the operation of the new regime—debtor corporations, commercial leaders, and many private banks. Once the IFIs' prescriptions were enacted at the domestic level, these parties were thus faced with a binding regime that they had no hand in designing, and with which they did not agree.<sup>303</sup>

Marginalized in the dialogue with IFIs and in the formal, domestic lawmaking process, these parties fought a battle at the implementation stage such that "for every two steps forward in formal lawmaking, implementation took at least one

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299. BRAITHWAITE & DRAHOS, *supra* note 53, at 538.

300. Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1154–62 (2007).

301. *Id.* at 1155.

302. *Id.* at 1156.

303. HALLIDAY & CARRUTHERS, *supra* note 98, at 416.

step back.”<sup>304</sup> Using the tools at their disposal—“great ingenuity, inertia, professional expertise, and raw financial power”—these actors were able to frustrate the changes envisioned by the IFIs and agreed to by the Indonesian government.<sup>305</sup> Bankruptcy reformers thus began new initiatives at the international level and turned to another international institution, the United Nations Commission on International Trade Law (UNCITRAL), which was viewed as more universal and thus more legitimate than the IFIs.<sup>306</sup> UNCITRAL adopted a new Legislative Guide on Insolvency Law in 2004.<sup>307</sup> These UNCITRAL rules provide greater choice in terms of bankruptcy law reforms, choices which can be (and are being) used by national reformers as models.<sup>308</sup> The challenges of implementation, in other words, recursively spur the creation of new soft-law instruments at the international level as *complements* in an attempt to enhance international law’s effectiveness.

The politics of implementation can also spur attempts to develop new hard- and soft-law instruments as *antagonists* to existing ones. Implementation battles often raise publicity over international legal requirements. These domestic implementation struggles catalyze domestic groups to push for changes at the international law level. These groups can lobby their governments and can form transnational networks to coordinate pressure on governments and international organizations to adopt amended or new international law instruments that counter existing ones.

The U.S.-EU dispute over the approval of genetically modified foods and crops is a vivid example of how the challenges of implementation can catalyze efforts within a powerful state to press for new hard or soft law to counter existing international law. Both during the WTO panel preceding and following the panel decision in the WTO *EC-Biotech* case, the European Commission sought to bring the EU into compliance and reduce pressure on the EU by restarting the process for the regular

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304. Halliday & Carruthers, *supra* note 300, at 1160.

305. *Id.* at 1161–62.

306. See Bruce G. Carruthers & Terence C. Halliday, *Negotiating Globalization: Global Scripts and Intermediation in the Construction of Asian Insolvency Regimes*, 31 L. & SOC. INQUIRY 521, 537 (2006); Halliday & Carruthers, *supra* note 300, at 1161–62.

307. Halliday & Carruthers, *supra* note 300, at 1185–86; see also U.N. COMM’N ON INT’L TRADE LAW, LEGISLATIVE GUIDE ON INSOLVENCY LAW at iii, U.N. Sales No. E.05.V.10 (2004).

308. Halliday & Carruthers, *supra* note 300, at 1186.

approval of GM crops found to be safe by the European Food Safety Authority.<sup>309</sup> In practice, however, the Commission encountered enormous public and governmental resistance, resulting in long delays before member-state committees and the Council of Ministers, and the queue of varieties awaiting approval grew.<sup>310</sup> Faced with such an implementation deficit, the Commission sought to shore up the EU's legal position by actively promoting both soft- and hard-law principles and rules, in fora such as the Codex and the CBD, to act as antagonists to existing WTO provisions in order to weaken the constraints of WTO law.<sup>311</sup>

The politics of implementation can likewise spur developing countries and constituencies within them to seek new international hard or soft law to counter existing international law. The challenges of implementation of the TRIPS Agreement regarding intellectual property protection of pharmaceuticals and plant varieties provide prime examples.<sup>312</sup> As Braithwaite and Drahos write:

Mass rallies attracted as many as 500 000 people into Indian streets in 1993 after the implications of the TRIPS agreement of the GATT became clear, but during the many years that this intellectual property agreement was being negotiated, there was no involvement from the Indian consumer movement, indeed no serious involvement from any national or international consumer movement. There were simply too few consumer movement antennae, already busy detecting too many other things.<sup>313</sup>

Following implementation struggles in which the United States pressured developing countries to implement their TRIPS commitments by bringing or threatening to bring WTO claims, developing countries and activist groups coordinated pressure to give rise to new international law instruments. They successfully promoted a new FAO Treaty on PGR and new declarations from the UN Human Rights Commission and WHO regarding pharmaceutical patents and public health.<sup>314</sup> They did so with the aim of countering existing hard law whose constraints they now understood better.<sup>315</sup>

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309. Council Regulation 1829/2003, arts. 5, 6, 10, 17, 2003 O.J. (L 268) 1, 7–16 (EC) (setting time limits for the processing of GMO applications).

310. See POLLACK & SHAFFER, *supra* note 2, at 245–61.

311. See POLLACK & SHAFFER, *supra* note 2, at 235–78; *supra* Part III.C.

312. See MASKUS, *Economic Development*, *supra* note 238, at 489–94.

313. BRAITHWAITE & DRAHOS, *supra* note 53, at 499.

314. See *supra* Part IV.C.

315. *Id.*

In short, by viewing national implementation challenges as part of the international law process, we build a better understanding of how international and transnational hard- and soft-law processes operate, involving hard- and soft-law instruments interacting as complements and as antagonists. We see that the politics of implementation can result not just in a one-way internalization of international law through iterated transnational legal processes in which hard- and soft-law instruments act as complements (although that often happens). The distinct politics of implementation can also catalyze new international lawmaking to counter existing international law, resulting in hard- and soft-law instruments acting as antagonists.

#### E. THE CHOICE OF HARD AND SOFT LAW AS ANTAGONISTS

*Hypothesis 5. There is a spectrum from which states may choose in using hard- and soft-law instruments to counter existing international law. They will favor instruments with harder-law characteristics (in terms of precision, obligation, and delegation), where their interests are certain, and when they can obtain sufficient support from third countries. Where their interests are less clear, or where other states are able to block the adoption of hard-law provisions, states are more likely to oppose existing international law provisions with new soft-law agreements. More powerful states are more likely to be able to obtain the adoption of new hard-law provisions, while less powerful states are more likely to rely solely on soft-law provisions in their attempts to counter existing international law.*

Hard- and soft-law instruments can interact in four generic ways, namely:

- new soft-law instruments can be used to counter existing hard law;
- new hard-law instruments can be used to counter existing hard law;
- new hard-law instruments can be used to counter existing soft law; and
- new soft-law instruments can be used to counter existing soft law.<sup>316</sup>

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316. Of course, there are different variants if one considers that hard and soft law are not binary choices, but rather that legal instruments vary in their hard- and soft-law characteristics along the dimensions of precision, obligation, and delegation to third-party dispute resolution.

We first put forward hypotheses as to when states choose hard- or soft-law instruments as antagonists to existing ones. We then give examples of the four situations.

Hard- and soft-law instruments which address a common issue may arise because of strategic behavior or because actors develop them in one forum largely unaware of developments in another forum.<sup>317</sup> When states strategically develop international hard- or soft-law instruments to counter existing ones, we hypothesize that they choose them in light of a series of factors. On the one hand, we contend that hard law is more likely to be chosen as a function of two factors: (1) the certainty of state interests; and (2) the ability of a state to influence third states to join with it, including through the exercise of persuasion and coercion.<sup>318</sup> First, for a state that is certain of its interests and intent on countering an existing regime, new hard-law provisions would most likely be preferable. Second, more powerful states will be best positioned to press for the development of new countervailing hard law in an effort to trump undesirable trends or developments in soft law. They alone, for example, are able to negotiate serial bilateral agreements with third countries, as discussed above.<sup>319</sup>

Despite the advantages of hard law, states, in practice, often choose instruments of a relatively soft-law nature to counter existing hard law. In large part, we hypothesize, this choice reflects variation in the certainty of state interests and/or the ability of states to secure allies. With respect to the former, states that are genuinely uncertain of their interests in a given issue area may prefer to avoid hard-law commitments that will be difficult to change at a later time, preferring the flexibility of soft-law instruments instead. With respect to the latter, states with clear and certain interests may prefer to adopt new hard-law provisions to counter existing hard law, but will be constrained in doing so by the need to secure the agreement of other states, particularly in multilateral fora. Large states have an advantage in this regard, since they are able to provide incentives to other states in multilateral fora or engage in serial bilateralism. However, even large states will not always be suc-

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317. See *supra* Part III.A.

318. See Goodman & Jinks, *supra* note 21, at 633–38 (discussing the influences of coercion, persuasion, and acculturation). States can exercise coercion by using sticks or carrots. They can, for example, threaten to curtail market access (a stick), or they can offer to provide foreign aid or foreign investment (a carrot). See *id.* at 633–34.

319. See *supra* notes 288–89 and accompanying text.

cessful in securing the necessary agreement from other states to adopt new hard-law provisions and must settle instead for soft-law instruments.

States, and nonstate actors, may also be reluctant to promote new hard-law provisions and fall back instead on soft-law instruments, for four other reasons, which can be labeled as: (1) systemic, (2) issue specific, (3) stickiness, and (4) nonstate actor constraints. First, states may not wish to counter existing hard law directly for systemic reasons in order to avoid direct conflict among international law regimes which could weaken the overall international legal order; they rather may prefer to soften the other legal regime indirectly, such as through affecting the interpretation and application of its existing hard law. For example, we have seen how even when states choose a countervailing hard-law instrument in terms of obligation, the instrument may be soft along the dimension of delegation to avoid having two judicial bodies pronounce on a single issue in distinct regimes. Second, existing hard law may be of a broad scope of coverage, such as the rules of the WTO, so that states do not wish to undermine the overall agreement (or set of agreements), but merely want to affect the operation of particular issue-specific legal provisions within it. Third, existing hard law can exercise some "stickiness" or normative pull, including through providing a focal point (as respectively predicted by historical institutionalist, constructivist, and rationalist theories), 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. Fourth, nonstate actors often rely on soft law because only the making of soft law is directly available to them. Although they can indirectly enroll states to advance their goals through hard- or soft-law instruments, if they work independently, they must use soft-law instruments. For all these reasons, existing hard-law provisions are, in practice, most often confronted by competing soft-law provisions in neighboring regimes.

We turn now to examples of the four generic alternatives as an initial exploration of these hypotheses:

#### 1. New Soft Law to Counter Existing Hard Law

For the reasons we just outlined, we maintain that this pattern of hard-soft law interaction is to be found most frequently. We have encountered it in a number of examples in which states adopted new soft-law instruments to counter ex-

isting hard-law agreements, frequently involving responses to obligations under WTO law. In the GMO case, the EU and other countries pressed, with mixed success, for new soft-law provisions under the Codex that would support their positions on the use of the precautionary principle and “other legitimate factors” besides scientific risk assessment in the regulation of GM foods.<sup>320</sup> In this way, they hoped to affect the application by panels and the Appellate Body of WTO law. The EU acted similarly in the cultural diversity case, responding to potential WTO-related litigation by adopting first a regional Council of Europe declaration, followed in 2001 by a nonbinding Universal Declaration on Cultural Diversity adopted under the auspices of UNESCO.<sup>321</sup> We have also seen weaker and less-developed countries employ similar strategies, promoting soft-law counternorms with respect to various aspects of international intellectual property law.<sup>322</sup>

## 2. New Hard Law to Counter Existing Hard Law

We contend that we are least likely to find examples of the situation where two hard-law instruments (along all three dimensions of obligation, precision, and delegation) directly oppose each other. We have indeed encountered a few cases in which countries use new instruments with hard-law characteristics in an attempt to counter existing law that is of a hard-law character, with the aim of softening its effects. However, these other instruments have been soft along at least one of the three specified dimensions, such as delegation of dispute-settlement functions. We maintain that states are more likely to choose instruments with hard-law characteristics where their interests are certain and they can obtain requisite third-country support. In some cases, they will build toward new hard law through first using a soft-law instrument.

For example, in the case of cultural measures, the EU and other countries first obtained the adoption of nonbinding declarations in the Council of Europe and UNESCO.<sup>323</sup> Only then, in 2005, did they sign a new instrument with hard-law characteristics, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.<sup>324</sup> However, the dispute-

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320. *See supra* Part III.C.

321. *See supra* Part IV.B.

322. *See supra* Part IV.C.

323. *See supra* Part IV.B.

324. *See id.*

settlement provisions of the UNESCO Convention remain weak (providing only for voluntary conciliation) compared to those of the WTO, so the Convention remains soft along this dimension.<sup>325</sup> Similarly, in the agricultural biotechnology case, countries created a formally binding Biosafety Protocol to attempt to counter provisions of the WTO SPS Agreement.<sup>326</sup> Once again, however, they were only able to agree on relatively weak provisions for delegated dispute settlement.<sup>327</sup>

These cases suggest that powerful actors (in both cases, the EU) may be able to press successfully for new, legally binding provisions to challenge existing hard law (in both cases involving provisions of WTO law). Nevertheless, in the above cases, efforts to proceed further down the hard-law continuum and to include delegation of binding dispute settlement or a clear declaration of the priority of the new treaty in respect of its specific subject matter were blocked by parties favoring the hard-law status quo. The new legal instrument, acting as an antagonist, was softer along the dimension of delegation than the existing one. We maintain that examples of new hard law in one regime being used to counter existing hard law in another regime will appear least frequently of the four generic alternatives for the reasons set forth above, particularly the systemic ones.

### 3. New Hard Law to Counter Existing Soft Law

It is also possible for states to adopt new instruments that have hard-law characteristics (such as being formally binding) to counter or trump existing instruments with soft-law characteristics (such as being formally nonbinding). This option poses fewer systemic challenges than the previous one because of the soft-law nature of the international legal norms under challenge. The impact of the WTO on the development of the precautionary principle is an example of this phenomenon. For

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325. See Voon, *supra* note 210, at 640–41 & n.53.

326. See Safrin, *supra* note 134, at 615 (“Behind the scenes, however, a few countries unofficially admitted that they hoped the Protocol would give them room possibly to avoid certain WTO obligations.”).

327. See *id.* The Protocol only includes, through the Convention on Biodiversity, weak voluntary dispute-settlement provisions. The parties to the Protocol deferred creating a dispute-settlement system until a subsequent Conference of the Parties. See Biosafety Protocol, *supra* note 136, art. 34. Thus the dispute-settlement provisions of the Convention on Biodiversity apply, which require the parties to a dispute to seek resolution through negotiation followed by mediation. See Convention on Biological Diversity art. 27, June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818 (1992).



years, environmental NGOs have attempted to define and promote the recognition of the precautionary principle through soft-law instruments. The UN General Assembly's resolution adopting the World Charter for Nature in 1982 was the first proclamation of the precautionary principle by an international body.<sup>328</sup> The Charter's statement was followed in 1992 by the Rio Declaration on Environment and Development, whose Principle 15 provides, "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."<sup>329</sup>

The United States and other countries have attempted to use the rise of the hard WTO legal system (created in 1995)<sup>330</sup> to put brakes on the development of the precautionary principle into hard international law, in particular, through the potential recognition of the principle as a rule of customary international law. When the precautionary principle has been raised as a defense to trade restrictions in a number of WTO cases, and in particular the *EC-Meat Hormones* and the *EC-Agricultural Biotech* cases, the United States has vigorously opposed its recognition.<sup>331</sup> In both cases, the panel refused to determine whether the precautionary principle constituted customary international law.<sup>332</sup> In the *EC-Agricultural Biotech* case, the panel followed the Appellate Body's lead in the *EC-Meat Hormones* case by declining to "take a position on whether or not the precautionary principle is a recognized principle of general or customary international law."<sup>333</sup> The panel rather noted that there has "been no authoritative decision by an international court or

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328. World Charter for Nature, G.A. Res. 37/7, ¶ 11(b), U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

329. Conference on Environment and Development, June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 15, U.N. Doc. A/CONF.151/26 (vol. 1) (Aug. 12, 1992).

330. Marrakesh Agreement Establishing the World Trade Organization art. 1, Apr. 15, 1994, 1867 U.N.T.S. 154 (1994) (establishing the WTO).

331. See Rebuttal Submission of the United States, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 19, WT/DS291/R, WT/DS292/R, WT/DS293/R (July 19, 2004); Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, ¶ 43, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998); John S. Applegate, *The Taming of the Precautionary Principle*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 13, 14 (2002) (noting the United States' vigorous opposition to the precautionary principle).

332. See Panel Report, *Biotech Products*, *supra* note 173, ¶¶ 7.86–89; Panel Report, *Meat Products*, *supra* note 162, ¶ 8.157–58.

333. Panel Report, *Biotech Products*, *supra* note 173, ¶ 7.89.

tribunal” which so recognizes the precautionary principle and that legal commentators remain divided as to whether the precautionary principle has attained such status.<sup>334</sup> It thus “re-frain[ed] from expressing a view on this issue,” other than declining to apply any such international law principle, if it exists, to the panel’s interpretation of the relevant WTO agreements and, in particular, to the SPS Agreement.<sup>335</sup> By responding to arguments to decline to apply the principle, and by finding that the EU measures in question violated the WTO SPS Agreement, WTO panels have arguably curtailed the development of this principle from a soft-law norm to a binding principle of customary international law.

Other examples of this pattern of hard law and soft law interaction are in the fields of international investment and intellectual property law. In the area of investment law, there have been several efforts to pass soft-law guidelines regarding the payment of compensation in the event of an expropriation. Developing countries passed a number of resolutions in the UN General Assembly in the 1970s in their attempt to establish a New International Economic Order that recognized their sovereign right to determine the amount of compensation.<sup>336</sup> In 1992, the World Bank issued Guidelines on the Treatment of Foreign Direct Investment that tightened protections of expropriated property but nonetheless created an exception “in case of comprehensive non-discriminatory nationalizations effected in the process of large scale social reforms under exceptional circumstances.”<sup>337</sup>

The United States, however, has signed over forty hard-law bilateral investment treaties since the early 1980s that go much further in guaranteeing protection of investors.<sup>338</sup> The

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334. *Id.* ¶ 7.88.

335. *Id.* ¶ 7.89.

336. See Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 2, ¶ 2(c), U.N. Doc. A/9631 (Dec. 12, 1974) (“In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed by all States concerned that other peaceful means be sought . . . .”); Permanent Sovereignty over Natural Resources, G.A. Res. 3171 (XXVIII), ¶ 3, U.N. Doc. A/9030 (Dec. 17, 1973) (“[E]ach State is entitled to determine the amount of possible compensation.”).

337. WORLD BANK, GUIDELINES ON THE TREATMENT OF FOREIGN DIRECT INVESTMENT pt. 2, ¶ 10 (1992), <http://ita.law.uvic.ca/documents/WorldBank.pdf>.

338. See Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 235 & n.11 (2006); see also U.S. Dept of State, U.S. Bilateral Investment Treaties (Mar. 16, 2005),

United States has thus attempted to use bilateral hard-law instruments to counter the development of any soft-law exceptions to a requirement of full and effective compensation for expropriations.<sup>339</sup> In a similar fashion, the United States has successfully negotiated a series of new bilateral treaties that contain stronger intellectual property rights protections than those provided under the TRIPS Agreement, despite efforts of developing countries to reframe international intellectual property law through soft-law human rights instruments, and despite their success in blocking U.S. efforts to further increase intellectual property protection under the WTO.<sup>340</sup>

For a powerful state with the leverage and the diplomatic resources to negotiate serial bilateral agreements, this strategy has substantial advantages. It can not only avoid the potential veto of adversaries in multilateral fora, but can also counter developments that it opposes in these fora. For smaller and weaker states, by contrast, such bilateral hard-law responses remain effectively out of reach.

#### 4. New Soft Law to Counter Existing Soft Law

Given the proliferation of soft-law instruments generally, it should be no surprise that soft-law instruments can also be used to counter other soft-law instruments. Many nonstate actors, such as international organizations, business trade associations, and “public interest” NGOs, have created rival soft-law instruments to advance their aims. Only soft-law instruments are directly available to these actors, which is why we frequently see the proliferation of rival soft-law instruments today—a time of economic and cultural globalization in which nonstate actors have become increasingly active in transnational governance initiatives. These nonstate actors sometimes

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<http://www.state.gov/e/eeb/afd/bit/117402.htm> (listing current U.S. bilateral treaties).

339. See, e.g., Guzman, *supra* note 290, at 651–58. In response to the creation of the International Criminal Court (ICC), the United States negotiated over 100 bilateral treaties exempting U.S. forces from liability. See, e.g., SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 429–30 (2006) (discussing U.S. reservations to the ICC Rome Statute).

340. Cf. MASKUS, *GLOBAL ECONOMY*, *supra* note 238, at 196; Todd Allee, *The Triumph of Bilateral and Regional Approaches to the Governance of Foreign Direct Investment* 24 (Feb. 6, 2009) (unpublished paper presented at Trade-and-?: The World Trade Organization’s Fuzzy Borders at the Graduate Institute of International and Developmental Studies, on file with the Minnesota Law Review) (describing the United States’ “near-insistence” on performance requirements in its bilateral treaties).

enroll states to adopt new soft law, and they sometimes create their own soft-law instruments. We first give an example of rival standards promoted by different international organizations to address transnational corporations' duties toward labor and then turn to examples of purely private standard setting involving accounting standards and social and environmental labeling.

Both the OECD and UN organizations have developed standards for transnational corporations' treatment of labor.<sup>341</sup> In doing so, they have responded to different constituencies involving state and nonstate actors. Those favoring more stringent regulation of transnational corporations have gone to UN human rights bodies, such as the UN Commission on Human Rights' Sub-Commission on the Promotion and Protection of Human Rights. In 2003, the Sub-Commission adopted norms stating that "[s]tates have the primary responsibility to promote, secure the fulfil[ment] of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights."<sup>342</sup> The norms use mandatory language, providing, for example, that "[t]ransnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining."<sup>343</sup> In contrast, the OECD Guidelines for Multinational Enterprises adopted in 2000 use

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341. We do not treat the International Labor Organization (ILO) here, but it should be noted that it has enacted numerous international agreements that constitute hard law along the dimension of obligation, although many of these agreements are signed by only a few parties and, in any case, the agreements do not include a binding dispute-settlement mechanism. See, e.g., *Developments in the Law—Jobs and Borders: Legal Tools for Altering Labor Conditions Abroad*, 118 HARV. L. REV. 2202, 2205 (2005) ("The ILO's traditional approach was to adopt conventions that created legally binding obligations and supported a comprehensive program of labor standards."); Frank Emmert, *Labor, Environmental Standards and World Trade Law*, 10 U. CAL. DAVIS J. INT'L L. & POL'Y 75, 108 (2003) ("At the bottom line, the primary instrument of coercion available against unwilling member countries [for noncompliance with ILO conventions] is the mobilization of peer pressure and shame."); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 538 (2001) ("[T]he overall record of the ILO on ratification and implementation of its conventions is rather poor . . .").

342. U.N. Econ. & Soc. Council, Sub-Comm'n on the Promotion and Prot. of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, ¶ 1, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003).

343. *Id.* ¶ 9.

language that is explicitly “voluntary.”<sup>344</sup> The OECD Guidelines also show deference to national law by stating that the they are to be applied “within the framework of applicable law, regulations and prevailing labour relations and employment practices” in the foreign country in question.<sup>345</sup> Multinational companies exercised greater leverage in the drafting of the OECD Guidelines both because only developed countries are members of the OECD and because multinational companies are formally represented through the Business and Industry Advisory Committee to the OECD.

Business groups and nonprofit, nongovernmental groups have also promoted competing standards through purely private organizations. For example, the accounting field has seen its prominent private bodies, the International Accounting Standards Board (IASB) and the U.S. Financial Accounting Standards Board (FASB), back rival standards governing global accounting and financial-reporting practices.<sup>346</sup> Similarly, business and NGOs have promoted rival transnational labor rights and environmental-labeling programs. For example, the code of conduct of the Fair Labor Association (formerly named the Apparel Industry Partnership) contains more lenient rules than that of the Worker Rights Consortium (which was promoted by student activists before university administrators).<sup>347</sup>

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344. OECD, *The OECD Guidelines for Multinational Enterprises*, at 6, DAF/IME/WPG(2000)15/FINAL (Oct. 31, 2001).

345. *Id.* § 4.

346. See, e.g., André Sapir, *Europe and the Global Economy*, in FRAGMENTED POWER: EUROPE AND THE GLOBAL ECONOMY 1, 13 (André Sapir ed., 2007) (“The [International Financial Reporting Standards] are a rival to the Generally Accepted Accounting Principles (GAAP) used by the US and other systems of national standards in major countries, such as India and Japan, where the IFRS are currently not permitted.”); David Tweedie & Thomas R. Seidenstein, *Setting a Global Standard: The Case for Accounting Convergence*, 25 NW. J. INT’L L. & BUS. 589, 601 (2005) (documenting the differences in accounting standards and the “serious challenges” faced by the FASB and IASB if they are to be eliminated).

347. Compare Fair Labor Ass’n, FLA Workplace Code of Conduct, [http://www.fairlabor.org/about\\_us\\_code\\_conduct\\_e1.html](http://www.fairlabor.org/about_us_code_conduct_e1.html) (last visited Dec. 9, 2009), with Worker Rights Consortium, Model Code of Conduct, [http://www.workersrights.org/university/WRC\\_Model\\_Code\\_%20of\\_Conduct.pdf](http://www.workersrights.org/university/WRC_Model_Code_%20of_Conduct.pdf) (last visited Dec. 9, 2009). See also Tim Bartley, *Certifying Forests and Factories: States, Social Movements, and the Rise of Private Regulation in the Apparel and Forest Products Fields*, 31 POL. & SOC’Y 433, 456–58 (2003) (describing the rise of private certificate associations for the apparel and forest product industries); Lance Compa, *Assessing Assessments: A Survey of Efforts to Measure Countries’ Compliance with Freedom of Association Standards*, 24 COMP.

As Errol Meidinger writes regarding global environmental governance, “[a] common scenario is that the establishment of an NGO-sponsored program is countered by the establishment of an industry-sponsored program (or several).”<sup>348</sup> In these and other cases, private actors, working independently through state representatives and international organizations, promote rival soft-law instruments to shape international law and domestic practice over time.

In sum, states and other actors have the option of pursuing new hard- or soft-law provisions to attempt to counter existing international law that they find to be unfavorable. We maintain that states are most likely to opt for hard-law provisions where their interests are most clear, where they are able to obtain the support of a critical mass of other states, and where they independently have the leverage to engage in a policy of serial bilateralism. We have, however, also put forward reasons why states more frequently turn to countervailing soft-law instruments. We believe that they do so because of systemic concerns, because they wish to modify the interpretation of issue-specific provisions, and because of the stickiness and normative pull of existing regimes. Moreover, nonstate actors tend to rely more on soft law because only soft law is directly available to them.

### CONCLUSION

In this Article, we contend that hard and soft law sometimes interact in a complementary and mutually reinforcing, evolutionary fashion, as predicted in the canonical literature, but *only under certain conditions*. Specifically, where there is little distributive conflict between powerful states, such that they agree on the aims and terms of international cooperation, international hard and soft law are most likely to complement each other in the ways discussed by Abbott and Snidal, Chinkin, and others, so as to promote greater cooperation. However, in the presence of distributive conflict among states, we predict, and indeed have seen in many concrete instances, that states and other actors will strategically use different hard- and soft-law instruments to advance their respective aims in the international arena. In these cases, hard- and soft-law oriented re-

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LAB. L. & POL'Y J. 283, 301–03 (2003) (addressing the multiple public and private fora engaged in this area).

348. Errol Meidinger, *Competitive Supragovernmental Regulation: How Could It Be Democratic?*, 8 CHI. J. INT'L L. 513, 518 (2008).

gimes may be placed in opposition to each other, with soft-law oriented regimes potentially taking on more of the "hard bargaining" characteristics of hard-law oriented regimes, while the terms of hard-law oriented regimes may become more flexible, uncertain, and "soft," insofar as policymakers and adjudicators tread more lightly in deciding cases with implications in neighboring regimes.

We do not maintain that the resulting conflicts between international hard- and soft-law instruments are necessarily undesirable. The current pluralistic international legal order also offers many advantages. In particular, it permits one regime to signal to decision makers in another regime to take account of developments in other spheres of international law and politics, of which those decision makers might otherwise be unaware. Our point is rather a positive one regarding how international law develops and operates in a fragmented international law system. Our aim is to provide a more complete and accurate depiction of how international hard and soft law work.

Ultimately, we find that the relationship between international hard- and soft-law instruments cannot be characterized in a universal or invariant fashion. Rather, we contend that the interaction of hard and soft law depends on 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 depicted in the existing literature on hard and soft law is not a myth; but that relationship holds only under a set of scope conditions, including broad agreement between powerful states 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 existing literature depicts. Understanding the varied interactions of hard and soft law is critical for understanding how, and under what conditions, international law develops.