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Soft Law As Delegation

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Abstract

This article examines one of the most important trends in international legal governance since the end of the Cold War: the rise of "soft law," or legally non-binding instruments that are given legal effect through domestic law or internationally binding agreements such as treaties. Scholars studying the design of international agreements have long puzzled over why states use soft law. The decision to make an agreement or obligation legally binding is within the control of the states negotiating the content of the legal obligations. Basic contract theory predicts that parties to a contract would want their agreement to be as credible as possible, to ensure optimal incentives to perform. It is therefore odd that states routinely enter into agreements establishing international rules and regulatory standards in a wide range of subject areas, from banking to arms control to the environmental protection, that are not legally binding. I begin by proposing a new definition of soft. Although previous definitions have often distinguished soft law from hard law on the basis that only the latter is legally binding, no one has explained what distinguishes soft law from purely political arrangements. By contrast, this article defines soft law as those obligations that, while not legally binding, are given some legal effect through separate legal instruments. I then argue that states use soft law as a way to delegate authority over the content of legal rules and regulations to states that possess a particularly strong interest in those rules. Making an agreement non-binding lowers the penalty associated with deviating from the existing legal rules, and thus encourages states with a significant interest in the content of legal rules to unilaterally innovate. This oligopolistic approach to the evolution of legal rules can, under certain circumstances, lead to more efficient legal rules by avoiding the hold-up problem involved in renegotiating contracts in which every state effectively exercises a veto over potentially efficient amendments. As such, the choice between soft law and hard law implicates a tradeoff between the procedural equity inherent in the doctrine of sovereign equality, and the efficiency of legal rules. Soft law privileges the latter over the former.

SOFT LAW AS DELEGATION

*Timothy Meyer**

I. *INTRODUCTION*

On March 16, 2008, James Dimon, the head of the global investment bank J.P. Morgan Chase, announced that his bank was acquiring the beleaguered investment bank Bear Stearns for a price of roughly two dollars a share.[1] On Friday, a mere two days earlier, Bear Stearns' closing price was thirty dollars a share,[2] and three weeks earlier Bear Stearns was trading for eighty dollars a share.[3] The sudden demise of Bear Stearns, an event that heralded the end of the modern investment bank, wiped out the life savings of hundreds of employees and cost many more their jobs. And while the Securities and Exchange Commission blamed Bear Stearns' collapse on an old-fashioned bank run, others suggested that the problem lay in the way government agencies the world over regulate the amount of capital that banks have to keep on hand in the event of a downturn.[4] Because competition for financial resources is fierce between countries, there is enormous domestic pressure on governments to loosen regulatory restrictions on their banks.[5] In order to combat this "race to the bottom," governments have agreed on a set of capital adequacy standards that govern how national regulators do their jobs.[6] In other words, international regulatory

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1. *See* Eric Dash, *Rallying the House of Morgan*, N.Y. TIMES, Mar. 18, 2008, at C1.

2. *See id.*

3. *See* Floyd Norris, *Rescue Plans That Alarm Shareholders*, N.Y. TIMES, Mar. 21, 2008, at C1.

4. *See* Floyd Norris, *The Patient Is Healthy But Dead*, N.Y. TIMES, Apr. 4, 2008, at C1.

5. *See id.*

6. *See generally* BASEL COMMITTEE ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS (1988), www.bis.org/publ/bcbs04a.htm [hereinafter Basel Accord I]; BASEL COMMITTEE ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A RE-

standards circumscribe the freedom of national regulators in national markets. The source of these regulations: two legally non-binding agreements known as the Basel Accords.[7]

The Basel Accords (or Basel I and Basel II) are the work product of the Basel Committee on Banking Supervision, an institution created in 1974 by the central bank governors of the world's ten most financially developed nations.[8] The rise of institutions such as the Basel Committee and the significance—both in terms of subject matter and scope—of the non-binding regulatory standards produced by these institutions is arguably the most important trend in international legal governance since the end of the Cold War. Soft international law—quasi-legal international agreements that do not directly create binding legal obligations—pervades the international regulatory landscape, establishing international standards in areas such as banking,[9] trade,[10] arms control,[11] the environment,[12] and human rights.[13] There are free-standing soft law agreements, such as the Basel Accords or the Missile Technology Control Regime,[14] and there are soft law agreements that supplement or implement important sections of prior multilateral treaties, such as the Australia Group[15] or the Zangger Committee.[16]

Yet despite the pervasiveness and importance of soft law agreements, their role in international law and the international

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VISED FRAMEWORK (2004), http://www.bis.org/publ/bcbs107.htm [hereinafter Basel Accord II].

7. *See generally* Basel Accord I, *supra* note 6; Basel Accord II, *supra* note 6.

8. *See* BASEL COMMITTEE ON BANKING SUPERVISION, HISTORY OF THE BASEL COMMITTEE AND ITS MEMBERSHIP 1 (2007), http://www.bis.org/bcbs/history.pdf.

9. *See, e.g.*, Basel Accord I, *supra* note 6; Basel Accord II *supra* note 6.

10. *See, e.g.*, Asia-Pacific Economic Cooperation ("APEC"), http://www.apec.org (last visited Jan. 21, 2009).

11. *See, e.g.*, Nuclear Suppliers Group, http://www.nuclearsuppliersgroup.org; Australia Group—Chemical and Biological Weapons, http://www.australiagroup.net/en/index.html (last visited Jan. 21, 2009).

12. *See, e.g.*, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, U.N. Doc. A/CONF. 151/26 (Aug. 14, 1992).

13. *See, e.g.*, Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292 (1975).

14. *See generally* Basel Accord I, *supra* note 6; Basel Accord II, *supra* note 6; Missile Technology and Control Regime, http://www.mtcr.info (last visited Jan. 21, 2009).

15. *See generally* Australia Group, *supra* note 11.

16. The Zangger Committee, http://www.zanggercommittee.org (last visited Jan. 21, 2009).

regulatory landscape remains under-theorized. Scholars on one side of the soft law debate argue that soft law, because it is not legally binding, is really non-law.[17] Scholars on the other side believe that soft law does establish quasi-legal rules that can affect state behavior, but have failed to fully distinguish the decision to make an agreement non-binding from a variety of other legal devices that increase what is often termed the "flexibility" in an agreement.[18] These scholars generally presume that states wish to make their agreements more credible in order to maximize the joint surplus from cooperation.[19] Under this premise, the existence of soft law is a puzzle that is usually explained by arguing that commitment is sometimes too costly, that states sometimes prefer more flexible commitments, or that soft law is cheaper to produce as a matter of domestic or constitutional law. While each of these theories adds to our understanding of soft law, none fully explains why states—repeatedly and in areas of vital importance—choose to create international regulatory standards that have no independent legal effect.

This Article offers a theory of soft law that explains a range of soft law agreements left unexplained by prior theories. I begin by offering a more precise definition of soft law than is generally employed by scholars: soft legal obligations are those international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law. Most existing definitions, by contrast, either eschew any attempt to reconcile soft law with the doctrinal distinction between binding and non-binding obligations or, at the opposite extreme, focus exclusively on the doctrinal distinction. The doctrinal definition, which I adopt to explain the difference between hard and soft law, is incomplete because it neglects to explain what is "legal" about soft law, or in other words, what distinguishes soft law from purely political agreements.[20] While international law and politics are surely re-

17. *See, e.g.*, Anthony D'Amato, *International Soft Law, Hard Law, and Coherence* (Northwestern Public Research Paper No. 08-01, 2008), *available at* http://ssrn.com/abstract=1103915.

18. *See, e.g.*, Andrew T. Guzman, *The Design of International Agreements*, 16 EURO. J. INT'L L. 579, 591 (2005).

19. *See id.* at 588.

20. *See infra* Part II.C.

lated, they are not coextensive, and as lawyers we must be careful to police the analytical boundaries between the purely political and the legal and quasi-legal. My definition of soft law does just this by identifying the chief "legal" characteristic of soft law: the expectation that a non-binding rule will be incorporated into a binding agreement, either as an interpretation of an existing binding rule (at either the domestic or international level), or through the promulgation of a new set of binding rules (again, at either the domestic or international level) based on the non-binding rules.

Having resolved the definitional issue, I proceed to identify one of soft law's heretofore overlooked features: the fact that soft legal rules can more easily evolve in response to individual states' unilateral actions. That this attribute can sometimes be advantageous becomes obvious when one considers that few legal obligations would remain optimal if left unchanged for extended periods of time. Instead, certain rules are appropriate for certain conditions. As conditions change, states will wish to change the rules governing their behavior. Thus, states are constantly reevaluating the adequacy of the existing legal rules and seeking to create more favorable rules. Although it seems obvious, the fact that states may respond to adverse circumstances or changed conditions by seeking to change legal rules is often overlooked by international legal scholars. Legal scholars tend to treat international law as having two discrete phases: (1) states first act as legislators, crafting legal rules that will govern their future conduct,[21] and then (2) states, acting as subjects of international law, must decide going forward whether to comply with the rules to which they have agreed.[22] In reality, however, when faced with unpalatable rules states do not forego their roles as legislators. They retain the option of seeking to change international rules, just as they can choose to put themselves into temporary noncompliance with international rules. And precisely because states are aware of the possibility that they will wish to amend international rules, they will pay careful attention to the way in which the design of international agreements affects the costs of renegotiating and amending legal rules.

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21. *See* Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Re-Conciliation*, 95 AM. J. INT'L L. 757, 784 (2001).

22. *See id.*

Soft law's advantage, I argue, lies in its ability under certain conditions to enhance cooperation among states by allowing states to forego renegotiation in favor of a unilateral or market-leadership method of amending legal rules. The difficulty with renegotiation is that it is costly and frequently fails even when welfare-enhancing amendments are available. Renegotiation, after all, requires a Pareto-improving amendment to the agreement. And though in principle there always exist transfers sufficient to convert any agreement that increases overall welfare into a Pareto-improving arrangement, in practice such transfers may be frustrated by a variety of transaction costs, such as informational asymmetries or hold-outs.[23] Binding international agreements (i.e., treaties) often exacerbate the difficulties with renegotiation because unless a treaty provides otherwise, every party to a treaty exercises a veto over amendments. And while voting rules that permit amendment with less-than-unanimous consent can reduce such transaction costs, they cannot eliminate them. Moreover, majoritarian voting rules can create the possibility of cycling majorities, itself a transaction cost that can offset benefits from non-unanimous voting by making it difficult to settle on any single welfare-improving amendment.[24]

By making legal rules non-binding, soft law makes it more likely that states with a major interest in the content of a specific legal rule will unilaterally alter their behavior in response to changed circumstances; states can, in effect, more cheaply exit the existing soft law agreement. Such a unilateral departure from existing legal rules or norms differs from the mine run of violations of international law because it is not taken for opportunistic reasons or for immediate gain. Instead, it reflects a legal policy decision that a state's individual interests are best served by adhering to a completely different set of rules or norms. When a single state (or group of states) unilaterally announces a new legal policy pursuant to an international agreement, a rein-

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23. *See* Andrew T. Guzman & Beth A. Simmons, *To Settle or Empanel? An Empirical Analysis of Litigation and Settlement at the World Trade Organization*, 31 J. LEGAL STUD. 205, 206 (2002) (demonstrating that states find it more difficult to settle trade disputes when the issue in dispute has an "all-or-nothing" feature than when it is more of a continuum, suggesting that states find it difficult to construct compensatory transfers).

24. *See* Neil Siegel, Intransitivities Protect Minorities: Interpreting Madison's Theory of the Extended Republic (2001) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with UMI Dissertation Services).

terpretation of existing legal rules, or a new set of international regulatory standards to which it will adhere, other states must then choose whether or not to adjust their behavior and legal expectations accordingly.[25] Under certain conditions, the result is that individual states with a particularly significant interest in the content of a legal rule or rules can drive the evolution of those rules in a globally optimal way. And by choosing to reduce the costs of unilateral action by making an agreement soft, other states have effectively delegated authority for updating the content of the relevant legal rules to the state (or perhaps several states) that they expect to act unilaterally.

Thus, in contrast to many theories of flexibility in international agreements, under this theory the flexibility that is desirable is not necessarily flexibility in one's own commitments. Rather, flexibility in the commitments of others can increase the expected value of an agreement. It does so by allowing the agreement to evolve over time to take account of new circumstances without the costs associated with explicit renegotiation. In effect, the procedural equality in the creation of legal obligations that arises from the doctrine of sovereign equality is contracted away in order to capture the benefits that flow from the political reality that all states are not equally positioned with regard to political, economic, and geographic factors. Put differently, under certain conditions allowing states that are especially powerful or interested in a given issue area the flexibility to escape their obligations can actually work to the benefit of the relatively weaker or disinterested states.

This unilateral mechanism for driving the evolution of legal rules has costs. States can attempt to unilaterally change rules for their own benefit when such a change is not welfare-enhancing.[26] Furthermore, in trying to coordinate on legal rules a pure market-driven approach can result in the breakdown of coopera-

25. In some cases, this type of amendment will result in an actual amendment of the text of an agreement; in other cases, it will not. Because state expectations are the essence of legal agreements, it is the shifting of expectations that matters. *See* Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 161-63 (2006). Changing the text of an international agreement can help change expectations, but because multiple plausible interpretations of an agreement exist, announcing and implementing a new interpretation may in some circumstances be sufficient to shift expectations. *See, e.g.*, Laurence R. Helfer, Symposium, *Public International Law and Economics: Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 75 (2008).

26. *See* Guzman, *supra* note 18, at 592.

tion because each state may commit to its own preferred rules.[27] Finally, soft law can reduce, relative to hard law, the incentive of states to invest in reliance on their partners' compliance with legal rules, thereby reducing the total value of the legal commitment.[28]

In choosing the form of an international agreement, states will trade the expected benefits from more efficient legal rules over time against these costs associated with greater flexibility. In considering whether permitting a more market-driven approach to the evolution of legal rules is efficient, states will consider three variables: (1) uncertainty over the future efficiency of legal rules; (2) the expected benefits from being able to more accurately rely on compliance; and (3) whether a single state or group of states enjoys a comparative advantage in terms of setting and enforcing legal rules. Where uncertainty is high, the benefits from investing in reliance are modest, and a single state or small group of states can act as a focal point for unilaterally adjusting legal and behavioral expectations, states are more likely to choose soft law over hard law.

I illustrate the theory with examples drawn from the area of arms control. Since the end of the Cold War, legal scholars have largely relegated arms control to the back burner.[29] Events of the last decade have placed arms control, and its legal regulation, firmly back in the political and legal spotlight. Beginning with the discovery at the end of the First Persian Gulf War that Iraq had a nuclear program far more advanced than experts had thought,[30] the nuclear nonproliferation regime has been under attack as inadequate and ineffective.[31] Subsequent events have reinforced this view: in 1998, India and Pakistan both conducted nuclear tests;[32] in 2003, North Korea withdrew from the Nuclear

27. *See id.* at 591.

28. *See id.* at 588.

29. Some notable exceptions include: Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT'L L. 271 (2007); David L. Sloss, *Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI. J. INT'L L. 39 (2003); Richard L. Williamson, *Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses*, 4 CHI. J. INT'L L. 59 (2003).

30. *See* Michael Wines, *U.S. Is Building Up a Picture Of Vast Iraqi Atom Program*, N.Y. TIMES, Sept. 27, 1991, at A8.

31. *See, e.g.*, Orde F. Kittrie, *Averting Catastrophe: Why the Nuclear Nonproliferation Treaty is Losing its Deterrence Capacity and How to Restore It*, 28 MICH. J. INT'L L. 337 (2007).

32. *See* John F. Burns, *Nuclear Anxiety: The Overview; Pakistan, Answering India, Car-*

Nonproliferation Treaty ("NPT")[33] and in 2006 tested a nuclear weapon;[34] in 2003, the United States invaded Iraq with the stated justification of enforcing Iraq's nonproliferation obligations;[35] and the United States and Iran are embroiled in a diplomatic contest over Iran's nuclear aspirations that has at times threatened to spiral into armed conflict.[36] Additionally, in the wake of the September 11th attacks fears of nuclear terrorism carried out by sub-state actors have captured the imagination of policymakers and the public at large.[37] In exploring how the theory of soft law presented in this Article explains the design of the nuclear nonproliferation regime and its evolution in response to the events of the last fifteen years, I also hope to refocus the attention of legal scholars on the importance of international legal and regulatory regimes to controlling the spread of weapons of mass destruction ("WMD").

Lastly, a brief word should be said about methodology. This Article employs an institutionalist framework and standard rational choice assumptions to explain states' decisions to employ hard law or soft law. State preferences are assumed to be exogenous and fixed, and states are assumed to be interested only in maximizing their own utility. States thus have no inherent preference for compliance with international law. These assumptions are standard in the international relations literature, and have become increasingly common in international legal schol-

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ries Out Nuclear Tests, N.Y. TIMES, May 29, 1998, at A6; John F. Burns, *Nuclear Anxiety in India*, N.Y. TIMES, May 16, 1998, at A5.

33. *See* Seth Mydans, *Threats and Responses: Nuclear Standoff; North Korea Says it is Withdrawing from Arms Treaty*, N.Y. TIMES, Jan. 10, 2003, at A1.

34. *See* David E. Sanger, *The North Korean Challenge*, N.Y. TIMES, Oct. 10, 2006, at A1.

35. *See* George W. Bush, U.S. President, 2003 State of the Union Address (Jan. 28, 2003) (transcript available at http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html).

36. *See, e.g.*, Roxana Vatanparast, *International Law Versus The Preemptive Use of Force: Racing to Confront the Specter of a Nuclear Iran*, 31 HASTINGS INT'L & COMP. L. REV. 783, 784 (2008) (supporting the proposition that conflict could ensue by highlighting President Bush's January 2008 statement that Iran was a sponsor of terrorism and that the United States was "rallying friends around the world to confront this danger before it is too late," and U.S. National Security Adviser Stephen J. Hadley's March 2006 statement that "[t]he doctrine of preemption remains sound . . . . We do not rule out the use of force before an attack occurs.").

37. *See, e.g.*, Seasons 1, 2, 4, 6, *24* (Fox Network). For example, seasons 2, 4, and 6 of the hit show *24* deal with nuclear terrorist attacks on U.S. soil. All but the first season deal with WMD-related terrorism. *See id.*

arship.[38] While adopting a rational choice approach has costs in terms of the level of detail incorporated into the theory, these costs in the present context are outweighed by benefits in terms of being able to generate a parsimonious theory. As always, rational choice models can and should be complemented by other approaches to similar problems.

The Article proceeds in six parts. Part II reviews the existing literature in both law and political science on flexibility in international agreements. Part III explains the positive theory of soft law outlined above. Part IV illustrates the theory with examples drawn from the nuclear nonproliferation regime. Specifically, I examine how nuclear export restraint, a broad and ill-defined obligation under the NPT, has been implemented through a series of soft law agreements, and how those agreements have evolved in response to changed circumstances. Part V contemplates the ramifications of this theory of soft law for traditional views of international law. I argue that the theory of soft law presented in this Article has ramifications for a dynamic versus a static interpretation of compliance with international law, as well as for the tradeoff between equity and efficiency. Part VI concludes.

II. *FLEXIBILITY IN INTERNATIONAL AGREEMENTS*

Scholars working in an institutionalist framework have begun in the last decade to examine the design elements that states incorporate into international agreements.[39] States have at their

38. *See, e.g.*, ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS (2008); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW (2006); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1 (1997); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989).

39. *See, e.g.*, Edward T. Swaine, *Reserving*, 31 YALE J. INT'L L. 307 (2006); Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005); Guzman, *supra* note 18; Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 303 (2002) [hereinafter Guzman, *Credibility*]; Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55

disposal a variety of ways in which to increase the flexibility of international agreements, as well as tools to increase the credibility of their substantive commitments. Examples of the former include escape clauses,[40] sunset provisions or planned renegotiation,[41] and soft law.[42] Examples of the latter include hard law, dispute resolution,[43] and monitoring and enforcement mechanisms.[44] I contend that different types of flexibility-creating mechanisms respond to different concerns. The purposes of creating flexibility and flexibility's effects on agreement implementation are thus not the same across different design mechanisms. The flexibility created by soft law is unique because it allows legal rules to evolve more easily in response to political realities and changed circumstances. This Section briefly will review the existing treatment of flexibility in international agreements.

INT'L ORG. 289 (2001); Alan O. Sykes, *Protectionism as a "Safeguarde": A Positive Analysis of the GATT "Escape Clause" with Normative Speculations*, 58 U. CHI. L. REV. 255 (1991).

40. *See generally* B. Peter Rosendorff & Helen V. Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 INT'L ORG. 829 (2001) (acknowledging that escape clauses increase flexibility of an international trade agreement by adding discretion for national policymakers); *see also* Sykes, *supra* note 39, at 282 (noting an agreement with an escape clause is more flexible).

41. *See* Koremenos, *supra* note 39, at 293 (explaining that planned renegotiation and realignment reduces *ex ante* uncertainty); *see also* Helen V. Milner, Peter B. Rosendorff & Edward Mansfield, *International Trade and Domestic Politics: The Domestic Sources of International Trade Agreements and Institutions*, *in* THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 216, 220 (Eyal Benvenisti & Moshe Hirsch eds., 2004) (highlighting that flexibility-enhancing devices which are often used include sunset provisions or anticipated renegotiations).

42. *See* Guzman, *supra* note 18, at 584 (noting that soft law has less of an impact on behavior than hard law); Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basel Accord?*, 5 J. INT'L ECON. L. 647, 650 (2002) (recognizing the difficulty of measuring compliance and enforcement of soft law because it is difficult to judge when there has been a violation).

43. *See* SCOTT & STEPHAN, *supra* note 38, at 31 (pointing out that enforcement of international law can be subject to enforcement mechanisms the parties design, like alternative dispute settlement procedures); Guzman, *supra* note 18, at 585 (adopting the conventional view of dispute resolution which assumes that it increases compliance incentives because it provides a mechanism for identifying violations and could specify formal sanctions).

44. *See* SCOTT & STEPHAN, *supra* note 38, at 31-39 (discussing types of enforcement mechanisms, including contractual and dispute resolution remedies); Kenneth W. Abbott, *"Trust, but Verify:" The Production of Information in Arms Control Treaties and Other International Agreements*, 26 CORNELL INT'L L.J. 1, 18, 24-25 (1993) (highlighting that parties might think it necessary to arrange for monitoring procedures and to provide assurance of compliance through enforcement mechanisms).

A. *Flexibility and Credibility*

One approach to explaining flexibility in international agreements emphasizes the difficulties of creating credible (i.e., inflexible) commitments in the international system, rather than the affirmative benefits of flexibility. Basic contract theory predicts that two parties negotiating over an agreement should maximize the value of their agreement by increasing the credibility of their commitments up until the point at which greater incentives to perform are inefficient.[45] Optimal contractual credibility can be created by imposing expectation damages on a breaching party.[46] Under a perfectly implemented rule of expectation damages, parties fully internalize the costs of breaching an agreement, and thus only breach when the individual benefits of breaching outweigh the global costs.[47] Credibility enhances the value of an agreement because it permits the parties to invest in reliance on the other party's performance. Uncertainty about whether the other party will perform reduces the expected return to investing in reliance, and thus reduces the overall incentive to create the agreement.[48] Thus, even while parties might wish at some point in time to violate an existing agreement, *ex ante* they wish to make their commitments credible so as to induce Pareto-improving agreements. Third party enforcement, in the form of, for example, court-imposed expectation damages, permits parties to solve this problem of "dynamic inconsistency," i.e., the problem of ensuring that at some

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45. *See* Guzman, *supra* note 18, at 587 (stating that parties will negotiate an efficient contract, one which generates the maximum possible joint surplus).

46. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 117-26 (4th ed. 1992); Steven Shavell, *Damage Measures for Breach of Contract*, 11 BELL J. ECON. 466, 471 (1980); John H. Barton, *The Economic Basis of Damages for Breach of Contract*, 1 J. LEG. STUD. 277, 283-89 (1972).

47. *See* Shavell, *supra* note 46, at 471-72.

48. *See* POSNER, *supra* note 46, at 117-28. In fact, a damages regime that shifted the risk of loss from investing in reliance from the relying party to the cooperating party would in many circumstances be inefficient because the relying party would have an incentive to over-invest in the cooperative venture. The efficiency of such a regime depends on the likelihood that the cooperating party will actually perform, or in other words on the credibility of the commitment. However, where the likelihood of performance is low *ex ante*, the party bearing the risk of loss from investing in reliance, whether it is the relying party or the cooperating party, stands to gain less from the agreement in expectation. That party, whichever it is, therefore is less likely to enter into the agreement in the first place. *See id.*

future point in time a party has the proper incentives to perform its part of a bargain.

Of course, as is familiar to all students of international law and international relations, international law lacks a third party enforcement mechanism.[49] While in the domestic setting, the administrative or procedural costs of dispute resolution and imposition of damages are subsidized by the state, and the state provides judges, law enforcement personnel, and indeed laws themselves, at minimal additional expense to those seeking to invoke the protection of the laws,[50] the creation and enforcement of international legal obligations is largely a self-help process. With no third party enforcer to sanction violators, states must either rely on direct sanctions, such as retaliation or reciprocal withdrawal of benefits, or on reputational sanctions, to induce compliance.[51] The imposition of direct sanctions will usually be costly to the state imposing the sanctions as well as to the target state, so states will be reluctant to use direct sanctions.[52] Furthermore, where the violation occurs in the context of a multilateral regime, all states benefit from the imposition of sanctions by one state. In such situations, retaliation is a public good, and as such is subject to a free-rider problem.[53] The result is that sanctions are undersupplied.

Alternatively, states can use decentralized mechanisms that bring a state's reputation for compliance with international law into play to increase the expected cost of violation.[54] Such mechanisms include dispute resolution provisions, monitoring provisions, and enforcement provisions. Because a reputation for compliance is valuable in the absence of third party enforcement, being perceived as violating international law is costly to

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49. *See, e.g.*, Robert E. Scott & Paul B. Stephan, Symposium, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 599 (2004) (highlighting the difficulty with using third-party coercion to enforce international agreements because of the lack of international entities capable of carrying out sanctions against those who violate international law).

50. Court filing fees, for example, do not even come close to approximating the costs the state bears in operating a court. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 254 (2004).

51. *See* Guzman, *supra* note 18, at 595-97.

52. *See id.*

53. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1971) (offering this insight about public goods).

54. *See* Guzman, *supra* note 18, at 596.

states.[55] Unlike direct sanctions, reputational sanctions are costless to impose.[56] They merely require observing states to update their estimate of the circumstances under which the violating state will comply with international law.[57] Nevertheless, like direct sanctions, reputational sanctions are negative sum, and are thus costly to include in international agreements.[58] Even though they are not costly to impose, neither are they compensation to the breached-against party, and they are costly to the violating party.[59]

Professor Guzman has suggested that in designing international agreements states will set the marginal expected sanction from violation equal to the benefit from the marginally deterred violation.[60] In his view, this tradeoff explains why states often fail to include credibility-enhancing devices, such as dispute resolution or monitoring provisions, in international agreements, and why they choose to structure some agreements as soft law rather than hard law.[61] At some point the cost to the parties of making an agreement more credible, and thus less flexible, outweighs the benefits. Under this theory, flexibility is a byproduct of the costliness of creating credibility in an environment in which sanctions are negative sum. As such, soft law might be construed as a second best alternative to hard law.

B. *Flexibility as a Device to Promote Agreement*

Other scholars have suggested that a variety of flexibility-enhancing devices are available to states to promote agreement in situations in which the parties might otherwise be unable to reach an accord.[62] Like soft law, many of these flexibility-enhancing devices reduce the penalty for unilaterally altering or deviating from one's legal commitments. In this sense, flexibility-enhancing devices can be thought of as mechanisms that make law more responsive to political realities. They provide in-

55. *See id.*
56. *See* Guzman, *Credibility*, *supra* note 39, at 310-11.
57. *See id.* at 311.
58. *See* Guzman, *supra* note 18, at 595-96.
59. *See id.*
60. *See id.* at 582.
61. *See id.*
62. *See, e.g.*, Rosendorff & Milner, *supra* note 40; Koremenos, *supra* note 39; Sykes, *supra* note 39.

surance to some relevant actor, either the states themselves or the policymakers and politicians negotiating the agreement. By reducing the costs to changing one's legal obligations, states recognize that shifting political conditions will play a greater role in determining not only compliance, but also the evolution of the content of legal obligations.[63]

1. Escape Clauses

Several scholars have suggested that escape clauses are used to expand the number of possible agreements available to states.[64] Agreements that include escape clauses, such as Article XIX of the General Agreement on Tariffs and Trade ("GATT"),[65] give domestic political actors negotiating an agreement a greater incentive to agree by giving them a legal way to avoid their obligations in future situations in which domestic pressures would dictate a violation. For example, if two states were negotiating a free trade agreement, uncertainty over domestic political pressure might preclude an agreement if one side was worried that at some point in the future one of its domestic industries, say, steel, would demand protection from outside competition. By agreeing at the outset that the state can escape its obligations in such a situation, the parties reduce the expected costs associated with an agreement by eliminating the costs of violation in the specified circumstances.[66]

Of course, where states are able to anticipate the specific industry or lobbying group that will demand protection, they can engage in contingent contracting. In effect, they can design legal obligations specifically for the situations that they see arising in the future. In this example, the agreement might contain an exemption for the steel industry triggered by certain economic conditions. Where the uncertainty is more general, however, the inability to contract over all of the possible contingencies would preclude some agreements absent some insurance

63. *See, e.g.*, Rosendorff & Milner, *supra* note 40; Koremenos, *supra* note 39; Sykes, *supra* note 39.

64. *See* Rosendorff & Milner, *supra* note 40, at 843, 850-52; Sykes, *supra* note 39, at 283.

65. *See* Rosendorff & Milner, *supra* note 40, at 843, 850-52; Sykes, *supra* note 39, at 283.

66. *See* Sykes, *supra* note 39, at 259. They also reduce the *ex post* value of the agreement, but that reduction in *ex post* value is necessary to create an *ex ante* agreement. *See id.*

mechanism for the political actors negotiating the agreements. Thus, while escape clauses may lower the value of an agreement relative to some hypothetical agreement that did not include an escape clause, in practice they are a necessary concession to the domestic uncertainty faced by public officials.[67] They trade *ex post* inefficiency for *ex ante* agreement.[68]

2. Withdrawal Clauses

Similar to escape clauses, withdrawal clauses permit states to escape an agreement that has become excessively onerous. Unlike escape clauses, however, which are designed to accommodate only temporary changes in circumstance, withdrawal clauses represent a relatively permanent change in legal status. While certain states have attempted to use withdrawal provisions as a way to unilaterally modify their legal commitments, as when Trinidad and Tobago withdrew from, and then re-acceded to, the First Optional Protocol to the International Convention on Civil and Political Rights ("ICCPR")[69] with a reservation that would have eliminated the jurisdiction of the Human Rights Committee to review petitions from capital defendants,[70] generally withdrawal clauses can only be exercised to permanently alter a nation's legal status.[71] As such, exercising a right to withdraw is a strong signal about future behavior. It indicates an intention not to comply with the terms of the agreement being withdrawn from for the foreseeable future, and can result in a variety of costs to the withdrawing state, including loss of access to information sharing, dispute resolution mechanisms, and

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67. *See id.*

68. *See id.*

69. *See* Helfer, *supra* note 39, at 1642.

70. *See id.* This maneuver was ultimately unsuccessful. The Human Rights Committee declared the reservation incompatible with the object and purpose of the treaty, leading Trinidad and Tobago to denounce the Optional Protocol completely. *See id.*

71. *See id.* at 1583, 1620, 1626. I qualify the permanence of the withdrawal because there are situations in which the remaining states in a legal regime may wish to readmit the exited state. Examples include Iceland's re-accession to the International Whaling Convention, and the efforts led by the United States to induce North Korea to rejoin the Nuclear Nonproliferation Treaty ("NPT"). *See* Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 169 (2005); *see generally Contemporary Practice of the United States Relating to International Law: Use of Force and Arms Control: U.S. and Other Powers Reach Tentative Understanding on North Korea's Nuclear Program*, 99 AM. J. INT'L L. 914 (2005).

monitoring mechanisms.[72] And while in some cases the withdrawing state's intentions may have been clear anyway, in other cases, such as North Korea's withdrawal from the NPT or the American withdrawal from the Anti-Ballistic Missile Treaty,[73] this signal can have some value to the remaining parties by providing additional information about the withdrawing party's intentions.[74]

An additional benefit of withdrawal clauses is that they permit states to bring their legal obligations in line with their actions. Because, as noted above, sanctions are negative sum, when negotiating an agreement states will wish to create a mechanism by which to abrogate a legal commitment which they no longer intend to follow, and to which they have little intention of returning in the future. In effect, withdrawal clauses are a legal device by which the costs associated with undeterrable violations of law are reduced. While the legalization of withdrawal probably increases the number of withdrawals on the margin, where a withdrawal clause is present the expected benefits from permitting states to unilaterally align their legal obligations with their intentions outweighs the costs of permitting a few more withdrawals than might otherwise have occurred.

3. Planned Renegotiation

Another method to increase flexibility is to incorporate a planned renegotiation into an agreement.[75] Planned renegotiation typically comes in the form of duration or sunset provisions.[76] Agreements such as the NPT have initially included duration provisions that allow the parties to escape the agreement at the end of some specified time. Professor Koremenos has argued that the purpose of duration provisions or planned renegotiation provisions in treaties such as the Antarctic Treaty is to deal with uncertainty over the distribution of benefits under a specific cooperative policy.[77] At the time of initial negotiation,

72. *See* Helfer, *supra* note 39, at 1614.

73. *See id.* at 1608-09, 1614.

74. *See id.* The value of this informational signal can, of course, be overstated. Neither North Korea nor the United States was really attempting to hide its actions taken contrary to the substance of the agreements from which they were withdrawing. *Id.* at 1609.

75. *See generally* Koremenos, *supra* note 39.

76. *See id.* at 293.

77. *See id.* at 291.

the parties expect that the cooperative policy enshrined in the legal agreement they are negotiating will have a certain distribution, but they are unsure about whether in practice the distribution of benefits will mirror their expectations. Planned renegotiation, either in the form of sunset provisions or amendment procedures that reduce the cost of amending an agreement (by permitting a party to demand renegotiation, or by imposing an amendment rule other than unanimity), allows states to learn over time about the actual distribution of benefits under their chosen policy.[78]

Planned renegotiation, however, can be of limited value. Treaties with planned renegotiations do not permit states to address inefficiencies in legal rules during the time period in which an agreement is in force. While states can still demand a renegotiation, doing so outside of the rules for amendment prescribed by the agreement can be costly.[79] Under planned renegotiation, then, legal rules evolve according to a schedule or set of circumstances chosen *ex ante*. In some instances, adjusting legal rules according to an *ex ante* schedule will force states to abide by sub-optimal legal rules between opportunities to renegotiate.

Furthermore, simply introducing a planned or on-demand renegotiation does not guarantee that renegotiation will be possible. Renegotiation costs are affected not only by the legal rules governing amendment, but by the number of parties and the degree of tension that exists between their interests. Key member-states may hold *de facto* veto power, either because they are the median member between revisionist and status quo groups under a majoritarian amendment system, or because the agreement in practice cannot work without that particular state's participation. In other words, renegotiation can fail for all the same reasons that initial negotiations might fail.

4. Reservations

Reservations are also a device that introduces some flexibility into agreements. Reservations are a mechanism by which states can unilaterally tailor their legal commitments after nego-

78. *See id.* at 295.

79. *See generally* Barbara Koremenos, *Can Cooperation Survive Changes in Bargaining Power? The Case of Coffee*, 31 J. LEGAL STUD. 259 (2002).

tiation of the agreement has been completed, subject to the limitations on reservations imposed by the Vienna Convention on the Law of Treaties and any specific limitations included in the agreement.[80] As such, the flexibility introduced by reservations is more directly related to the initial allocation of legal obligations, rather than to the subsequent desirability of those obligations. Reservations permit states to convey information about their interpretation of their legal obligations, the circumstances under which they will comply with their agreements, and they can also permit agreement in situations in which officials negotiating an agreement underestimate the degree of domestic opposition to certain provisions.[81] However, because reservations generally must be submitted with ratification of a treaty, reservations do not permit states to deal with subsequent changes in conditions that make welfare-enhancing amendments available.

C. *Soft Law*

Soft law is another institutional element that is available to states to increase flexibility. While various scholars have analyzed the reasons that states employ or fail to employ soft law,[82] none have offered a theory that explains the full range of motivations states have for creating soft legal obligations.

1. What is Soft Law?

At the outset, there is a definitional issue. Soft law is sometimes used to refer to agreements with imprecise obligations.[83] Agreements with imprecise obligations are soft in the sense that a wide range of behavior can be considered compliant. Similarly, soft law is sometimes defined as those agreements that constrain states to a lesser degree either because the obligations are imprecise, or because authority to interpret and implement the law is not delegated to an international organization or dispute

80. *See* Swaine, *supra* note 39, at 307.

81. *See id.* at 311.

82. *See generally* Guzman, *supra* note 18; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991).

83. *See* Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 414 (1983).

resolution body.[84] Such a definition of soft law conceptualizes agreements that are less likely to induce behavioral change as "soft." Other scholars define soft law as those agreements that are not legally binding.[85] This definition focuses on an analytically clear and tractable distinction between hard and soft law, but fails to distinguish between soft law and non-legal obligations. Yet if soft law is to be a coherent analytical category, scholars must identify what is "legal" about soft law, or put differently, what differentiates soft law from purely political agreements. Indeed, the failure in the literature to convincingly identify the legal aspect of soft law has led Professor Raustiala to reject the labels "hard law" and "soft law," implying as they do an ill-defined range of quasi-legal agreements between those agreements that are purely political and those that are legally binding.[86]

In contrast to these existing definitions, this Article offers a new definition of soft law that identifies the legal aspect of soft law, and thus preserves soft law as a coherent analytical category. Soft legal agreements are those agreements that are not themselves legally binding but are created with the expectation that they will be given the force of law through either domestic law or binding international agreements. As I explain below, it is this relationship which provides soft law with its legal character—and more specifically with its connection to a state's reputation for compliance with its legal obligations. This definition thus excludes non-binding agreements that are purely hortatory, as well as purely political agreements. In order to be considered soft law, a non-binding agreement must be related to, derivative of, or the basis for a legal obligation in either domestic or international law. The key distinction, therefore, between soft law and hard law is that the latter is legally binding under international law (and is thus subject to rules that govern international treaties, such as those contained in the Vienna Convention on the Law of Treaties),[87] while the former is not. The key distinction between soft law and purely political agreements is that soft legal

84. *See* Abbott & Snidal, *supra* note 82, at 422.

85. *See, e.g.*, Christopher Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573, 642-43 (2005).

86. *See* Raustiala, *supra* note 82, at 751.

87. *See* Jeffery McGee & Ros Taplin, *The Asia-Pacific Partnership and the United States' International Climate Change Policy*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 179, 186-87 (2008)

obligations are the basis of "hard" legal obligations in other systems of law, such as domestic law, or may affect the way other "hard" international legal obligations are interpreted or implemented. Soft law, in effect, piggybacks on binding law. For example, soft law agreements may complement hard legal agreements by implementing vague rules contained in a hard agreement.[88] Examples of such an implementation would include the Zangger Committee, established to produce a list of technologies the export of which would trigger obligations under the NPT.[89] Alternatively, soft law agreements may trigger, or be the basis for, domestic legal obligations. Again, in the area of arms export control the dominant international agreements are soft law arrangements, but the guidelines produced at the international level are implemented in the United States by statute (The Arms Export Control Act)[90] and regulation (International Traffic in Arms Regulations).[91]

As with other flexibility-enhancing devices, the effect of structuring an obligation as soft is a reduction in the costs to deviating from legal expectations. This is true because a soft legal obligation only implicates a state's reputation for compliance indirectly—through the expectation that the non-binding rules will be given some binding effect in another legal instrument. To illustrate, consider a rule prohibiting the transfer of technology *X* to states classified as non-nuclear weapons states under the NPT. If written into a binding agreement, the violation of that rule would clearly generate reputational costs. Now imagine instead that the rule prohibiting the transfer of *X* is contained in a non-binding agreement, but that a related binding agreement contains a general prohibition on transferring sensitive technology. A violation of the rule prohibiting the transfer of *X* only results in a revised estimate of how a state will treat its legal obligations—a reputational sanction—if other states believe that the more specific non-binding rule interprets the general binding rule. Because the rule prohibiting the transfer of *X* is not directly binding, perceptions about the relationship between the two rules may vary, which has the effect of reducing the reputa-

88. *See* Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 321 (2006).

89. *See id.*

90. The Arms Export Control Act, 22 U.S.C. § 2778 (2000).

91. International Traffic in Arms Regulations, 22 C.F.R. §§ 120-130 (2006).

tional sanction for violating the soft law rule (because not all states will see a violation of the one as a violation of the other).[92] These reduced costs, in turn, make soft law more responsive to political realities over time. In other words, as it becomes less costly to depart from established legal expectations, states will be more likely to do so in response to changed conditions, such as shifts in military power or the development of adverse economic conditions.

Unlike other flexibility-enhancing devices, however, soft law reduces the cost associated with deviating from legal expectations at every point in time. This feature, I argue in the next Section, makes soft law optimal for a specific set of circumstances: (1) where uncertainty about the future efficiency of legal rules (but not necessarily uncertainty about the future desirability of a legal regime) is high; (2) where the marginal benefit in terms of credibility of moving from soft law to hard law is modest; and (3) where a single state or group of states enjoys a comparative advantage in setting legal rules and can act as a focal point for re-coordinating legal expectations under a soft law regime. The creation of a soft law agreement acts as a *de facto* delegation to the comparatively advantaged state(s) to adjust legal rules over time.

By contrast, escape clauses are optimal for situations in which states are relatively certain that the legal rules enshrined in a treaty are optimal in the long run, and thus not likely to require amendment, but wish to create temporary exceptions. At the opposite extreme, withdrawal clauses are optimal in situations in which the entire legal framework may become too onerous. The withdrawing state prefers to operate outside the existing legal framework or negotiate a new framework from scratch. Finally, planned renegotiation is optimal for situations in which unilateral amendment and *de facto* delegation is unattractive as a method of altering legal rules. Higher levels of tension between the interests of states-parties make renegotiation a superior method of amendment, as does the relative equality of state-parties.

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92. At its logical extreme, a rule that is, from a doctrinal standpoint, non-binding would effectively be hard law if all states understood it to interpret or be given effect through a binding legal rule, such as a rule of customary international law. A non-binding rule that no state believes is related in any way to a binding rule would be a purely political commitment.

2. Existing Theories of Soft Law as Facilitating Amendment

Previous work on soft law has suggested that the bureaucratic or administrative costs to renegotiating soft law agreements may be less than the cost of renegotiating treaties,[93] and that this is a possible reason that soft law may be relatively more efficient than hard law. However, there is no particular reason that negotiation or renegotiation costs should vary between hard and soft agreements. For example, the Nuclear Suppliers Group ("NSG"), a soft export control arrangement, has forty-five members and operates by consensus. Thus, amending the NSG Guidelines on export control is not formally easier than amending a multilateral treaty with a unanimity requirement.[94] Furthermore, because the Guidelines are implemented domestically, changes in the Guidelines require legal and administrative costs that would be the same whether the source of the obligation was a treaty or a soft law agreement.

Additionally, domestic ratification costs are not necessarily reduced by using soft law. As is well known to U.S. foreign relations law scholars, not all treaties under international law are treaties under U.S. constitutional law.[95] Indeed, most treaties under international law are not submitted for the advice and consent of the Senate.[96] In parliamentary systems domestic ratifications will prove to be even less of a constraint on renegotiation. The fact that treaties (in the international sense) can avoid going through cumbersome domestic ratification procedures suggests the gap in terms of domestic costs to approval of soft law and hard law is not as wide as might otherwise be thought. If renegotiation costs are not the salient difference between hard and soft law, we must explain soft law's advantages by reference to a different process of amendment.

III. *A THEORY OF SOFT LAW*

In this Section, I develop a theory of soft law. The theory suggests that in designing an international agreement, states will

93. *See* Abbott & Snidal, *supra* note 82, at 444; Lipson, *supra* note 82, at 500.

94. *See, e.g.*, Kesav Murthy Wable, *The U.S.-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime*, 33 BROOK. J. INT'L L. 719, 749 (2008).

95. *See, e.g.*, Oona A. Hathaway, *International Delegation and State Sovereignty*, 71 LAW & CONTEMP. PROBS. 115, 124-25 (2008).

96. *See* John C. Yoo, *Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements*, 99 MICH. L. REV. 757, 767 (2001).

prefer soft law to hard law when the benefits from encouraging unilateral legal innovation exceed the foregone benefits from a more credible commitment. This condition will hold when uncertainty over the future desirability of specific legal rules is high, or when the value of increasing the sanction for violations of a legal rule is modest. Finally, legal revisionism as a method of amendment requires that there be a state willing to unilaterally commit to new legal rules. I suggest that power asymmetries can be the type of comparative advantage that facilitates the ability of legal revisionism to function in the best interest of all states. In other words, where one state is more powerful in the relevant issue area than other states, that state may be more likely to challenge the legal status quo. Where the two conditions above are met, the presence of a power asymmetry suggests that a relatively more fluid legal environment may be more efficient than an entrenched system.

As applied to the arms control area, this is a somewhat counterintuitive result. Scholars working on the design of international legal institutions have generally thought that their models do not apply to arms control.[97] The rationale is that legal institutions have only a small effect on real-world outcomes, and that the stakes in arms control (national security) are sufficiently high that law cannot alter states' incentives. However, this analysis only makes sense if law is considered in opposition to purely political interactions. Where, as with soft law, agreements can capture some of the benefits of legalization while preserving more political or power-based interactions, law can enhance the ability of states' to cooperate even in high stakes areas such as arms control.

A. *A Theory of Soft Law*

While states can always choose to ignore international law, the essence of soft law is that the cost of reneging is less when an

97. *See* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1883 (2002) (noting that all else equal, international law will have limited compliance pull where large stakes are involved); George W. Downs, David M. Rocke, & Peter N. Barsoom, *Managing the Evolution of Multilateralism*, 52 INT'L ORG. 397, 409 (1998) (noting that their theory of sequential development of multilateral international institutions is not well-suited for the security area).

obligation is soft rather than when it is hard.[98] This is true because the reputational sanction states face for noncompliance depends on how likely they have indicated their future compliance is.[99] Because a reputation for compliance with its obligations is valuable to a state, allowing it to extract concessions during negotiations because other states will be able to more accurately rely on compliance, states have an interest in developing multiple signals that track the likelihood of compliance.[100] Distinguishing between different probabilities of future compliance allows states to preserve their reputational capital in situations in which, for whatever reason, compliance is less likely.[101] In effect, the fact that states deal with each other repeatedly over time creates a payoff to being honest about the likelihood of future compliance—and that likelihood is signaled in part through doctrinal distinctions, such as between binding and nonbinding agreements. Thus, when states choose to structure an agreement as a soft legal agreement, they implicitly recognize that states may in the future deviate from the established legal rules, and that the choice of soft law rather than hard law increases the likelihood that such a deviation will happen by reducing the penalty for deviating. It follows from this greater likelihood of deviation that the continued effectiveness of specific soft law rules depends to a greater extent on political realities, such as power relationships, than do harder legal rules. Soft law rules are less "entrenched," in the sense that it is easier for states to ignore them, and thus easier for states to incur the cost of ignoring them in order to modify them.

One can think of this aspect of soft law as creating a market for legal rules. Legal entrepreneurs that are willing to incur the cost of changing the legal rules can commit themselves either to new interpretations of existing legal rules, or to new policies under existing international arrangements. Other states can then either coordinate on the first state's legal revisions, effectively amending the existing legal status quo, or they can revert to non-cooperative behavior or demand a renegotiation. As a matter of theory, because both of the latter options are costly to

98. *Cf.* Lipson, *supra* note 82, at 509 (noting that informal agreements are less credible because there is less of a reputational stake).

99. *See generally* Guzman, *supra* note 18, at 598.

100. *See id.* at 599-601.

101. *See id.*

both the first movers and to the followers, unilateral legal revisionism (or market-driven coordination on legal expectations) should only occur in situations in which the followers prefer the amended legal rules to the cost of their next best alternative. This condition in turn places limits on the extent to which the first movers can modify legal rules. If the first moving state adopts legal rules that are so unpalatable to other states that they prefer either renegotiation or abrogation of the existing legal framework, then the first moving state will have incurred the costs of legal revisionism without reaping any of the benefits from amended legal rules.

Looked at a different way, soft law acts as a *de facto* delegation to states with certain comparative advantages to set legal rules. Because states are likely to have *ex ante* expectations about who the first movers will be, establishing a soft law regime recognizes that the benefits to permitting those states to update legal rules over time outweighs the costs in terms of an opportunistic updating of such rules, as well as opportunistic violations of the soft regime that could have been deterred by a hard regime. The following sections consider circumstances under which this condition will hold, or in other words situations in which states will prefer a soft legal obligation to a hard legal obligation.

B. *Uncertainty Over the Future Desirability of Legal Rules*

The desirability of legal rules depends on the conditions to which they are applied. Another way to state this point is that the same legal rules do not generate the same cooperative benefits under different conditions. At the same time, legal rules are not costless to produce. States expend considerable effort to generate agreement on the content of major multilateral agreements. These bureaucratic, political, and administrative costs create path dependence in the law. Parties to a legal agreement will only wish to amend a legal rule when the expected payoff to amending the rule, including all the associated costs, is greater than the expected payoff from continuing to operate under the existing legal rules. Thus, it is possible that while a better legal rule exists than that currently prevailing, the parties may choose not to renegotiate to put that rule in place because the marginal increase in global welfare is less than the costs of renegotiation. Crucially, however, the costs associated with amending legal

rules are at least partially endogenous—they are an outcome of the design of the agreement, meaning the parties exert control over those costs. Therefore, the parties' expectations about the future state of the world and the future desirability of the legal rules they create today are extremely relevant to understanding how states design international agreements.

If uncertainty about the future cooperative benefits associated with specific legal rules is sufficiently high, states will wish to create rules that are easier to modify. Where the parties negotiating an agreement anticipate that they are legislating in an area involving newly emergent threats or rapidly evolving challenges, their uncertainty about the challenges they will face tomorrow counsel insuring against bad developments by making it easier to amend legal rules. In such situations, states effectively exchange the benefits of credibility in their commitments today for the benefits of being able to more efficiently amend legal rules tomorrow. Although soft law is obviously not the exclusive mechanism for dealing with uncertainty,[102] it does provide one method for states to deal with pressing concerns of the present without mortgaging the future. By contrast, where states are confident that their environment is stable, there may be little to be gained from making legal rules easier to change.

Myriad different developments can cause existing legal rules to lose their value, including changed technological circumstances, or a change in the capabilities or activities of states not party to an agreement. For example, because international agreements are generally designed to govern the production of externalities, the increased production of an externality by a non-party can upset the delicate balance struck by the parties to an agreement. The rise of India, Pakistan, and North Korea as possible suppliers of nuclear technology operating outside the international framework governing the trade in nuclear technology illustrates this point.[103] The nuclear nonproliferation regime was predicated on the assumption that only five states would have nuclear weapons. The nonproliferation rules, adopted largely in the 1970s and 1980s, thus became considera-

102. *See generally* Koremenos, *supra* note 39.

103. *See generally* David S. Jonas, *Variations on Non-nuclear: May the "Final Four" Join the Nuclear Nonproliferation Treat as Non-nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005 MICH. ST. L. REV. 417, 421 (2005).

bly less valuable when the number of states possessing nuclear weapons programs nearly doubled in the 1990s and early twenty-first century, with many of the new suppliers lacking the commitment to the geopolitical order that the existing nuclear powers possessed.

Significantly, uncertainty about the future desirability of specific legal rules is not synonymous with uncertainty about one's future desire to comply. States may comply with a legal rule regardless of whether it is the optimal legal rule, but still prefer the optimal rule to a suboptimal rule. Previous discussions of uncertainty as a justification of soft law have focused on the ability of states to more readily violate or abandon their commitments when those commitments become excessively onerous.[104] However, where the emphasis is on compliance with legal rules over time, flexibility in an individual state's commitment comes at the cost of flexibility in every other member state's commitment as well.[105] In other words, from a compliance perspective, flexibility makes little sense because it undermines the value of the commitment. From an evolutionary standpoint, however, in which rules change over time to account for new conditions, flexibility can enhance global welfare over time, holding expected levels of compliance constant, by permitting adjustment of the legal rules and expectations.

C. *The Benefits of Reliance*

States' ability to use legal mechanisms to commit themselves to behavioral changes hinges on whether or not legal devices can deter opportunistic violations of legal norms. When states can accurately predict the behavior of other states, they can more efficiently allocate their own resources, which in turn increases the value to the states of the agreement. Greater credibility, in other words, generates greater predictability. For example, many parts of the world are, by treaty, nuclear-weapons free zones.[106] The knowledge that neighboring states will not develop nuclear weapons frees states that might otherwise invest in developing a nuclear weapons capability, such as Argentina or

104. *See* Lipson, *supra* note 82, at 518.

105. *See* Guzman, *supra* note 18, at 591-92.

106. *See, e.g.*, South Pacific Nuclear Free Zone Treaty, Aug. 6, 1985, 1445 U.N.T.S. 177 [hereinafter Treaty of Rarotonga]; Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 326 [hereinafter Treaty of Tlateloco].

Brazil, to devote those resources to other endeavors. Reliance benefits such as these suggest that states should increase the credibility of their international commitments up to the point at which the marginal expected costs from violation exceed the marginal expected benefits from greater credibility.[107]

Not all violations of international law are necessarily opportunistic, however. Unilateral amendment or legal revisionism is public by design because its goal is to recalibrate legal rules and expectations. Because unilateral amendment imposes a cost on the revisionist state (the violator), legal rules can deter unilateral amendments, which may be welfare enhancing, in the same way that they deter opportunistic violations, which are not. States thus have to trade off the value of deterring opportunistic violations against the cost of deterring welfare enhancing amendments. As the cost to violating legal rules increases, more of both are deterred. Because there is a tension between predictability and ease of amendment, how states value a marginal increase in predictability will in part determine their attitude towards soft law.

The value of deterring opportunistic violations can be thought of as the reliance benefits stemming from a marginal increase in the legal sanctions associated with violating a legal rule, such as that created by moving from soft law to hard law. Reliance benefits are thus a function of the violations that are deterred. In other words, they are a measure of how effective a legal rule is in changing non-cooperative behavior.[108] Legal rules that bring about larger changes in state behavior, as measured against non-cooperative behavior, will yield larger reliance benefits. In contrast, where violations are highly unlikely, or at the opposite extreme impossible to deter through legal sanctions, the reliance benefits resulting from the law will be quite small.

Reliance benefits can thus be thought of as a measure of the

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107. *See* Guzman, *supra* note 18, at 582.

108. *See generally* George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 INT'L ORG. 379 (1996). The effectiveness of a legal regime is sometimes put in terms of the depth of cooperation. Deep cooperation requires a larger departure from non-cooperative behavior. Where a legal agreement fails to induce behavioral changes, or by contrast in pure coordination games where any means of stipulating a focal point would generate cooperation, then cooperation is not said to be deep. *See id.*

degree of tension that exists between the parties to a legal agreement. In pure coordination games, there are no reliance benefits because once an agreement has been reached, there is no incentive to deviate from it. Thus, while states may still enter into treaties, either for domestic political reasons,[109] or because they anticipate that a coordination game might become some other type of game over time,[110] in these situations the ability to effectively rely on behavioral changes induced by the legal obligation itself is not a primary motivation for entering into a treaty.

Of course, as Professors Ginsburg and McAdams note, most games have elements of both coordination and tension in them.[111] This is certainly the case in arms export control, where each state would prefer export rules that permit trade with states they do not deem threatening. By way of example, for many years neither Russia nor the European Union was willing to cut off nuclear trade with Iran.[112] The economic benefits, in their estimation, outweighed the security costs. The United States, on the other hand, with its military presence in the Middle East and historical animosity towards Iran, bore a considerably greater proportion of the security costs from nuclear trade with Iran.[113] Thus, while both sets of states preferred restrictions on the trade in nuclear technology, the United States preferred trade rules that forbade exchange with Iran, while the European Union and Russia favored trade restrictions that exempted Iran.[114]

D. *Power Asymmetries*

Having explained how soft law can increase the value of legal rules over time by encouraging market-like innovation in their substance, it remains to be explained which states will act as

109. *See, e.g.*, Raustiala, *supra* note 82 (noting that domestic constituencies provide a demand for international agreements, and specifically for "contracts," or hard international law); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegations in Postwar Europe*, 54 INT'L ORG 217 (2000) (claiming the newly-established democracies wanted to lock-in domestic political rights by entering into international human rights agreements).

110. *See generally* Guzman, *supra* note 18.

111. *See* Ginsburg & McAdams, *supra* note 38, at 1245.

112. *See* Jamie Lang, *International Sanctions: The Pressure on Iran to Abandon Nuclear Proliferation*, 6 J. INT'L BUS. & L. 141, 141-42, 156-62 (2007).

113. *See id.* at 141-54.

114. *See id.* at 141-42, 156-62.

first movers. Plainly, if all states attempted to establish new rules in response to the sub-optimal nature of existing rules, the result would be chaos. Each state would follow its own proposed rule, likely the rule most favorable to itself, when in fact all states would prefer to coordinate on the same rule. This is the essence of the game anachronistically known as battle-of-the-sexes.[115] Players strictly prefer coordination, but there is tension over which outcome to coordinate on. Once an outcome is chosen, it is self-enforcing, in the sense that no player has an incentive to deviate, but procedures will vary in the extent to which they are good at generating coordination in the first place.

Soft law in combination with asymmetries in power among the agreement members is one possible way to solve this problem. State power is frequently an omitted variable in studies of international law.[116] Yet the fact that power plays a major role in shaping the formation and implementation of international legal obligations can hardly be denied. The most obvious example is peace treaties. These treaties are negotiated in the shadow of an ongoing conflict. Where one state or group of states has gained an advantage in armed conflict, they negotiate from a position of strength. The Treaty of Versailles, the treaty that concluded World War I between the Allies and Germany, is a case in point.[117] Although the Allies had never invaded Germany, the settlement reflected the expectation of the parties that if the war continued, Germany would be decisively defeated and occupied.[118] In the trade context, the United States and European Union decision to withdraw from the GATT and accede to the World Trade Organization ("WTO") in order to force developing nations to negotiate across a broader set of issues was a negotiating tactic predicated on the combined economic power of Europe and the United States.[119]

Finally, in the international regulatory context, American economic power has driven convergence on American port se-

115. *See, e.g.*, GOLDSMITH & POSNER, *supra* note 38, at 33-34.

116. *But see* Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 339 (2002); Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POLITICS 336, 336 (1991).

117. *See* MARGARET MACMILLAN, PARIS 1919, at 157-59 (2003).

118. *See id.* (noting that once its armies were in full retreat, Germany was willing to accept peace at any price despite not having been invaded or occupied).

119. *See* Steinberg, *supra* note 116, at 339.

curity standards. For example, the Container Security Initiative ("CSI") is an American initiative designed to boost the security of cargo containers being transported to the United States. Using agents and advanced technologies deployed overseas, containers bound for the United States are screened for illicit cargo before they embark.[120] The result of the imposition of these standards on trade coming into the United States is an ongoing internationalization of American port security standards. In June 2005, the World Customs Organizations ("WCO") unanimously passed a resolution calling for its 166 Member-States to adopt a *Framework of Standards to Secure and Facilitate Global Trade,* which is based on American port security standards.[121] On April 22, 2004, the European Union and the U.S. Department of Homeland Security reached an agreement designed to expand CSI throughout the European Union.[122] As U.S. Customs and Border Patrol Commissioner Robert Bonner said, the United States has "better secured the movement of cargo to the U.S. in ways that have improved the efficiency of trade. But these same principles can—and should—be applied wherever in the world that trade moves . . . ."[123] Given the significance of trade with the United States, it should come as little surprise that other nations are willing to embrace port security standards based on U.S. standards. In effect, the United States acts as a focal point for cooperation.

In the aforementioned examples, power is significant primarily in determining the *content* of legal obligations. In the decision between hard law and soft law, however, power can be important in determining the *form* of a legal agreement. Specifically, where one member state, or a group of states, is more powerful in the relevant issue area than other member states, the cost/benefit ratio to challenging the legal status quo may dictate that only the most powerful state legally innovate. If only

120. *See generally* CONTAINER SECURITY INITIATIVE: 2006-2011 STRATEGIC PLAN (2006), http://www.cbp.gov/linkhandler/cgov/trade/cargo_security/csi/csi_strategic_plan.ctt/csi_strategic_plan.pdf.

121. *See World Customs Organization Adopts Standards for Secure Trade,* INT'L EXP. CONTROL OBSERVER, Oct. 2005, at 12.

122. *See In Brief,* KANSAS CITY STAR, Apr. 23, 2004, at A14.

123. *See* Remarks by Robert C. Bonner, Supply Chain Security in a New Business Environment, Miami, Fla. (Apr. 21, 2005), *available at* http://www.customs.gov/xp/cgov/newsroom/commissioner/speeches_statements/archives/2005/apr21_2005_miami.xml.

one state, or at most a small group of states, have a positive incentive to innovate, then the number of possible first-movers is greatly reduced. In effect, the costs imposed on states challenging the legal status quo, in conjunction with variations in state power, determines which states will act as legal innovators, and which states will follow suit. This mechanism thus helps solve a coordination problem: by limiting the number of possible first movers, the likelihood of multiple states implementing their own preferred legal rules is reduced.

The cost/benefit ratio for powerful states can differ from weaker states in two respects. First, one potential proxy for power is the expected cost to unilaterally attempting to adjust legal rules. This expected cost is very similar to the expected cost to violating existing legal rules. Unilateral legal innovation is a departure from settled legal norms, and can thus be perceived as a violation, with the possible result of sanctions. While the mechanisms for sanctioning violating parties may formally operate in the same way for all members of an agreement, various factors may mitigate the effect of those sanctions on certain states. For example, if the United States violates a free trade agreement with a minor trading partner, that state may be entitled to respond with a reciprocal withdrawal of benefits. However, the cost to the United States of trade sanctions from a minor trading partner may be small compared with the benefits of such a violation because of the relative importance of the trading relationship to each state. In the military context, the threat of military action against the United States in response to violations of international law is largely not credible due to the military advantages that the United States enjoys relative to every other state. In contrast, regional powers such as Iraq, Iran, or North Korea must consider the prospect of military reprisals from a more powerful state as a legitimate possibility.

Where reputational sanctions are concerned, the relative importance of the relationship to each state can dictate the effect of reputational sanctions. It seems unlikely that all states draw equally strong inferences about a state's future compliance based on compliance or violation of an agreement with another state. For example, the United Kingdom or Canada likely does not attach great importance to American violations of agree-

ments with South American states.[124] American violations of such agreements contain little information about future American actions with respect to relatively more important cooperative partners. Thus, reputational sanctions should be most effective in situations when the specific relationship in which a compliance decision is being made is significant, or when the relationship with similarly-situated partners is important. It follows that reputational sanctions can be different for two parties violating the same agreement. One party may be relatively unaffected because the breached-against party is only a minor partner, while the other party would be seriously penalized for breaching because its reputation for complying with agreements it makes with the more powerful state (or similarly situated states) is of great value to it.

Second, due to disparate bargaining power, powerful states often receive a greater share of the distribution of benefits from cooperation than do weak states.[125] Where this is the case, Pareto-inefficient legal rules will likely hurt powerful states more than weak states. In other words, even if the cost to challenging the legal status quo were the same for a weak and a powerful state, the powerful state may have more to gain from revising sub-optimal legal rules. This distributional element makes it more likely that powerful states will be the only states willing to act in a revisionist fashion, thus helping to solve the coordination problem.

To sum up, the significance of power differentials to the theory of soft law presented in this Article turns on the costs and benefits of unilateral legal revisionism. In order for it to be in the individual interest of a state to seek to revise existing legal rules, the penalty that state suffers for doing so must be less than the expected benefit that they receive. The *ex ante* likelihood of this situation occurring is high when one state is more powerful than its cooperative partner(s) in the relevant issue area. In effect, being relatively more powerful than one's partners can reduce the costs and/or increase the benefits of offering a unilateral amendment.

A consequence of this feature of unilateral amendment is that over time legal rules subject to this process of revision will

124. *See* GOLDSMITH & POSNER, *supra* note 38, at 100-04.

125. *See, e.g.*, Steinberg, *supra* note 116, at 339; Krasner, *supra* note 116, at 336.

increasingly favor strong states. Where tension exists between the parties, each time the powerful state amends the legal rules, it has an opportunity to move the legal rules closer to its preferred rule. In some cases, this fact could lead relatively weaker states to press for a binding agreement. The marginal sanction associated with a treaty could constrain this type of opportunistic amendment on the part of powerful states.

Notice, however, that even in soft agreements there is a built-in check on the opportunism of the powerful. Revisions to the legal status quo must also be less costly to non-revisionist states than their alternative (either complete abrogation of the existing legal regime, renegotiation, or attempting to force the revisionist party to accept the status quo). If the non-revisionist state does worse under the unilaterally amended legal rules than under renegotiation, the state will refuse to recalibrate its legal expectations to fit the unilateral amendment. Thus, unilateral amendment is not coercive from an *ex ante* perspective. Weak states agree to soft law agreements in situations in which a *de facto* delegation to powerful states is a superior outcome for the weaker states. Where the *ex ante* tension between the parties is so great that unilateral adjustment of the rules will unacceptably affect the non-revisionist state, the parties should instead opt for a treaty. By doing so, they can capture any reliance premium, as well as reduce the costs from a powerful state mistakenly believing that it can offer a unilateral amendment to which the other state will agree.

The overall result is that soft law will be superior to hard law in situations in which delegating limited responsibility for the substance of legal rules to the more powerful members of an agreement is more efficient from a global perspective than forcing states to renegotiate as welfare-enhancing amendments become available. In short, the benefits in terms of welfare-enhancing legal rules outweigh the costs in terms of opportunism by the powerful in certain situations.

IV. *THE NUCLEAR NONPROLIFERATION REGIME*

The nonproliferation regime, with its collection of treaties, soft law agreements, and counterproliferation initiatives,[126] illus-

126. *See* Wei Luo, *Research Guide to Export Control and WMD Non-Proliferation Law*, 35 INT'L J. LEG. INFO. 447, 472-73 (2007).

trates the wide variety of formality that international law can take, as well as the ways that soft law can complement hard law. After the end of the Cold War, legal scholars by and large turned their attention away from the nonproliferation regime and its importance to the international legal and political landscape.[127] However, recent events have placed nonproliferation back in the spotlight. Alleged possession of WMD's in violation of international law served as the justification for the American invasion of Iraq in 2003.[128] In that same year, North Korea withdrew from the NPT and announced that it was in possession of a nuclear weapon.[129] In 2006, North Korea tested a nuclear device,[130] the first such test since India and Pakistan tested weapons in 1998.[131] Diplomatic attempts to induce North Korea to disarm have absorbed much of the Bush administration's efforts during its second term.[132] Iranian attempts to develop a nuclear weapon have greatly increased tensions in the Middle East. Perhaps of most concern, the proliferation of nuclear material to these so-called "rogue" states has increased fears of nuclear or WMD-related terrorism.[133]

This Section describes the evolution of the legal rules associated with the nuclear nonproliferation regime. Specifically, the section describes the development of two soft law regimes, the NSG[134] and the Proliferation Security Initiative ("PSI"),[135] in response to the political developments of the last decade. These two regimes are "export control regimes," meaning that they seek to regulate trade in nuclear technology, material, and equipment. As such, the development of these legal regimes im-

127. *But see, e.g.*, Beard, *supra* note 29, at 271-72.

128. *See* Michael N. Schmitt, *U.S. Security Strategies: A Legal Assessment*, 27 HARV. J.L. & PUB. POL'Y, 737, 752-54 (2004).

129. *See* Brent Snowcroft & Arnold Kanter, *A Surprising Success On North Korea*, N.Y. TIMES, May 1, 2003, at A35.

130. *See* David E. Sanger, *North Korea Says It Tested a Nuclear Device Underground*, N.Y. TIMES, Oct. 9, 2006, at A1.

131. *See id.*

132. *See, e.g.*, Mark Mazzetti & William J. Broad, *The Right Confronts Rice Over North Korea Policy*, N.Y. TIMES, Oct. 25, 2007, at A10; David E. Sanger, *U.S. Said to Weigh A New Approach On North Korea*, N.Y. TIMES, May 18, 2006, at A1.

133. *See* Remarks by Stephen Hadley, National Security Advisor to the Center for International Security and Cooperation, Stanford, Cal. (Feb. 8, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/02/print/20080211-6.html.

134. *See generally* Nuclear Suppliers Group, *supra* note 11.

135. *See generally* CRS REPORT FOR CONGRESS: THE PROLIFERATION SECURITY INITIATIVE (2006), www.fas.org/sgp/crs/nuke/RS21881.pdf.

plicates a fundamental tradeoff between national security and international trade. While there are a variety of soft law export control arrangements including the Missile Technology Control Regime,[136] the Coordinating Committee ("COCOM"), which was supplanted by the Wassenaar Arrangement,[137] the Australia Group,[138] PSI, and others, I focus on the nuclear export controls for reasons of expositional clarity, as well as the high degree of political salience.

A. *Overview*

In 1968, the Nuclear Non-Proliferation Treaty opened for signature.[139] The NPT was an attempt by the world's nuclear powers to arrest the spread of nuclear weapons to nations beyond the five that tested a weapon prior to January 1, 1967.[140] The major nuclear powers expected that in the coming years a variety of industrially developed nations could develop the technology necessary to make a nuclear weapon. The NPT was a response to this concern, designed to legally deter states from using their technological capabilities to pursue a nuclear device.[141] Initially set to expire after twenty-five years, the NPT was indefinitely extended in 1995.[142] With Cuba's accession in 2002, only three countries (Israel, Pakistan, and India) remained outside the treaty.[143] Along with a series of other multilateral treaties, including the Limited Test Ban Treaty,[144] the Comprehensive Test Ban Treaty,[145] the series of treaties creating nuclear weapons-free zones,[146] the Chemical Weapons Convention,[147] and the

136. *See generally* Missile Technology Control Regime, http://www.mtcr.info/english/index.html (last visited Jan. 21, 2009).

137. *See generally* Wassenar Arrangement, http://www.wassenaar.org (last visited Jan. 21, 2009).

138. *See generally* Australia Group, *supra* note 11.

139. *See* Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

140. *See id.* art. IX(3) (defining a nuclear weapons state as "one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967.").

141. *See generally id.*

142. *See* Jonas, *supra* note 103, at 421.

143. *See id.* at 422. North Korea subsequently withdrew. *See id.* at 429.

144. *See* Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

145. *See* Comprehensive Test Ban Treaty, Sept. 24, 1996, 35 I.L.M. 1439.

146. *See generally* Treaty on the Southeast Asia Nuclear Weapon-Free Zone, Dec. 15

Biological Weapons Convention,[148] the NPT sought to make illegal the acquisition or use of WMD's.

The NPT creates a number of legal rules; most notably, it limits the right to possess nuclear weapons to the United States, the United Kingdom, the Soviet Union (now Russia), France, and China, and explicitly prohibits nuclear weapons from being transferred to or received by non-nuclear weapons states.[149] Amendment of the NPT's rules is governed by Article VIII of the NPT,[150] which requires that each party to the treaty ratify the amendment before it becomes binding on that party.[151] Thus, formal amendment can effectively only occur with unanimous consent. This accorded with the belief of many major powers that there were no conditions under which the acquisition of nuclear weapons by additional states would be beneficial.[152] In terms of the theory presented in this Article, uncertainty about the future desirability of a legal ban on the acquisition (or assistance in acquiring) a nuclear weapon was quite low.

By contrast, the NPT deferred the implementation of concrete export control rules to related soft law agreements.[153] Arti-

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1995, 1981 U.N.T.S. 129 [hereinafter Treaty of Bangkok]; Treaty of Rarotonga, *supra* note 106; Treaty of Tlateloco, *supra* note 106.

147. *See generally* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800.

148. *See generally* Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Mar. 26, 1975, 26 U.S.T. 583, 1015 U.N.T.S. 163.

149. *See* NPT, *supra* note 139, arts. I-III.

150. *See id.* art. VIII.

151. *See id.* art. VIII(2). Article VIII of the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") actually requires that the amendment first be approved by a majority of the parties to the treaty, including "all nuclear-weapon States Party to the Treaty" and all parties to the treaty sitting on the Board of Governors of the International Atomic Energy Agency at the time the amendment is circulated. The result is that any party can prevent an amendment from binding it, but a subset of states have the individual ability to veto an amendment for the entire membership of the treaty. These arrangements virtually preclude amendment). *Id.*

152. *But see* KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS 180-83 (1979).

153. *But see* Richard L. Williamson Jr., *International Regulation of Land Mines, in* COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 517 (Dinah Shelton ed., 2000) (reasoning that export control is a distinct area from arms control and claiming that "[t]here are no non-binding instruments negotiated by the relevant parties that would constitute a soft law arms control instrument."). By contrast, I consider both export controls and traditional arms control treaties to be part of the legal regulation of arms. The difference is that export controls tend to be supply-side legal obligations, while the promises to refrain from acquiring or

cle III of the NPT provides the legal basis for nuclear export controls.[154] It provides that parties shall not transfer nuclear equipment or material that can be used to produce or process fissionable material unless the transfer occurs under safeguards.[155] However, the technology necessary to support a nuclear weapons program could not be expected to remain static, and thus greater flexibility in amending the rules governing technology transfers was desirable.[156] Enshrining concrete rules for export control in the NPT itself would subject those rules to Article VIII's onerous amendment procedures.[157] The soft law agreements that implement Article III of the NPT include the Zangger Committee and the NSG,[158] both of which provide export control guidelines to states that export nuclear technology. These regimes, which date from the 1970s, might be termed the first generation of export control measures.

The second generation of export controls, active counterproliferation measures, evolved to enforce nonproliferation norms in the wake of the end of the Cold War and the fears about the acquisition of WMD by rogue states and substate actors.[159] To the extent that the two ideas are distinct, counterproliferation can be seen as different from nonproliferation in that counterproliferation involves the active enforcement of nonproliferation obligations. Nonproliferation obligations, in contrast, are passive obligations to refrain from proliferating.

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retaining certain types of weapons that are embodied in traditional arms control treaties are demand-side obligations. *See* James Fry, *Dionysian Disarmament: Security Council WMD Coercive Disarmament Measures and Their Legal Implications*, 29 MICH. J. INT'L L. 197, 285 (2008).

154. *See* NPT, *supra* note 139, art. III. Article III(2) of the NPT provides:

> Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.

See id.

155. *See id.* art. III(2).

156. *See id.* art. IV.

157. *See id.* art. VIII.

158. *See* David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 159, 188-89 (2006).

159. *See generally* Jack I. Garvey, *The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative*, 10 J. CONFLICT & SEC. L. 125 (2005).

The centerpiece of cooperative international counterproliferation efforts is PSI.[160] While PSI has been criticized by some as a departure from principles of legality in the regulation of the spread of WMD,[161] PSI is more appropriately viewed in a dynamic legal context as a challenge to existing legal rules that make counterproliferation more difficult.[162]

B. *India and the Nuclear Suppliers Group*

In 1974, India detonated a nuclear device in what it termed a "peaceful nuclear explosion."[163] Following this event, the major nuclear supplier countries determined that export controls, which at the time were covered by the Zangger Committee's "Trigger List" of items the transfer of which required safeguards,[164] needed to be strengthened. The result was the creation of the NSG, which currently has forty-five members.[165] The NSG promulgates guidelines for member states that govern trade in nuclear-related technology,[166] and operates by consensus, meaning that negotiating an amendment to the NSG guidelines is not necessarily any easier than amending a forty-five State treaty that requires unanimity.[167]

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160. *See* Daniel H. Joyner, *The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law*, 30 YALE J. INT'L L. 507, 509-11 (2005).

161. *See generally* Samuel E. Logan, *The Proliferation Security Initiative: Navigating the Legal Challenges*, 14 J. TRANSNAT'L L. & POL'Y 253 (2005).

162. *See* Joyner, *supra* note 160, at 546.

163. Nobuyasu Abe, *Existing and Emerging Approaches to Nuclear Counter-Proliferation in the Twenty-First Century*, 39 N.Y.U. J. INT'L L. & POL. 929, 931 (2007).

164. *See* Int'l Atomic Energy Agency, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology*, IAEA Doc. INFCIRC/254/Rev.6/Part 1 (May 16, 2003). Safeguards are procedures that are put in place through an agreement between a state and the International Atomic Energy Agency to ensure that nuclear and nuclear-related materials are not diverted from peaceful uses into a weapons program. *See id.* ¶ 3. Article III of the NPT creates an obligation for non-nuclear weapons states to accept safeguards. Nuclear weapons state may voluntarily accept safeguards, but are under no obligation to do so. *See* NPT, *supra* note 139, art. III.

165. *See* Nuclear Suppliers Group, *supra* note 11.

166. *See* Int'l Atomic Energy Agency, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology*, IAEA Doc. INFCIRC/254/Rev.8/Part 1 (Mar. 20, 2006) [hereinafter Guidelines for Nuclear Transfers Part I]; Int'l Atomic Energy Agency, *Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology*, IAEA Doc. INFCIRC/254/Rev.7/Part 2 (Mar. 20, 2006) [hereinafter Guidelines for Nuclear Transfers Part II].

167. *See* Wable, *supra* note 94, at 749.

Following the discovery of Iraq's advanced nuclear program in 1992, the NSG expanded its guidelines to cover dual-use equipment, material, and technology.[168] This extension was a recognition of the fact that the technological environment heading into the twenty-first century was not the same as the environment that the architects of the NPT had contemplated. Most nuclear technology could now be used either for civilian or military purposes.[169] One effect of the controls placed on dual-use technology was to preclude trade in civilian nuclear technology with countries that operated outside the NPT.[170] This prohibition follows from the NSG Guidelines, which require states not to authorize transfers to a non-nuclear weapons state for use in an "unsafeguarded nuclear fuel cycle activity."[171] Thus, civilian nuclear cooperation with nations such as India and Pakistan, states that are outside the NPT and thus under no legal obligation to accept safeguards, is prohibited by the NSG guidelines.[172] These soft legal prohibitions initially made at the international level resulted in considerably more rigorous law and regulation at the domestic level. In the United States, for example, the Atomic Energy Act,[173] the Arms Export Control Act,[174] and associated regulations implement the export control guidelines that the United States has agreed to at the international level.[175]

Despite the existence of these soft legal rules that had been incorporated into American domestic law, on March 2, 2006, President Bush announced that the United States and India had reached an agreement that would permit the United States to cooperate with India in the area of civilian nuclear technology.[176] The agreement followed a Joint Statement of July 18,

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168. *See* MICHAEL D. BECK ET AL., TO SUPPLY OR TO DENY: COMPARING NONPROLIFERATION EXPORT CONTROLS IN FIVE KEY COUNTRIES 5 (2003).

169. *See id.*, at 2.

170. *See Foreign Relations Law—Nuclear Nonproliferation—Congress Authorizes the President to Waive Restrictions on Nuclear Exports to India*, 120 HARV. L. REV. 2020, 2024-25 (2007).

171. *See* Guidelines for Nuclear Transfers Part II, *supra* note 171, ¶ 1.

172. *See* Joseph G. Silver, *The Global Partnership: The Final Blow to the Nuclear Nonproliferation Regime*, 21 N.Y. INT'L L. REV. 69, 92 (2008).

173. *See* The Atomic Energy Act of 1954, 42 U.S.C. § 2011 (2000).

174. *See* Control of Arms Exports and Imports, 22 U.S.C. § 2778 (2000)

175. *See* The Atomic Energy Act of 1954 § 3(e); Control of Arms Exports and Imports § (a)(2).

176. *See* Jim VandeHei & Dafna Linzer, *U.S., India Reach Deal on Nuclear Cooperation*, WASHINGTON POST, Mar. 3, 2006, at A1.

2005, which had provided a framework for negotiations.[177] Because the United States had implemented the relevant parts of the NSG guidelines as part of its domestic law, the U.S.-India Nuclear Cooperation Pact required changes to the Atomic Energy Act.[178] On December 18, 2006, President Bush signed into law a bill that would permit the President to waive with respect to India relevant restrictions contained in the Atomic Energy Act upon a presidential determination that several conditions had been met.[179] Among these conditions was that the NSG amend its guidelines to permit the transfer of nuclear technology.[180] On September 6, 2008, the NSG did indeed amend its rules to allow nuclear trade with India.[181]

The deal represented a direct challenge to the status quo soft legal rules. In effect, the U.S.-India nuclear pact,[182] and the subsequent American legislation making the agreement possible,[183] represented a proposed amendment by the U.S. to the NSG guidelines. The U.S. sought to make India an exception to the NSG rules that transfers can only be made to non-nuclear weapons states that have accepted safeguards on all of their nuclear operations (India, like the nuclear weapons states, would not put safeguards on its military nuclear operations).[184] The method of the proposed amendment is what is unconventional. Rather than first negotiating for a proposed change within the institutional confines of the NSG, the United States chose to act unilaterally in an attempt to force the NSG to change its guide-

177. *See* Joint Statement Between George W. Bush and Prime Minister Manmohan Singh, Office of the Press Secretary, The White House (July 18, 2005), http://www.whitehouse.gov.news/releases/2005/07/20050718-6.html.

178. *See* Steven R. Weisman, *Q&A: U.S.-India Nuclear Pact*, N.Y. TIMES, July 20, 2005.

179. *See* M.M. Ali, *Bush Signs U.S.-India Nuclear Agreement*, WASH. REP. ON MIDDLE E. AFF. Mar. 1, 2007, at 39.

180. *See* United States and India Nuclear Cooperation, 22 U.S.C.A. 8001 (Dec. 18, 2006).

181. *See* Somini Sengupta & Mark Mazzetti, *Atomic Club Votes to End Restrictions on India*, N.Y. TIMES, Sep. 7, 2008, at A6. Following Nuclear Suppliers Group ("NSG") approval, the U.S. Congress then approved the actual agreement between the United States and India. *See generally* Peter Baker, *Senate Approves Indian Nuclear Deal*, N.Y. TIMES, Oct. 2, 2008.

182. *See generally* VandeHei & Linzer, *supra* note 176.

183. *See generally* The Atomic Energy Act of 1954, 42 U.S.C. § 2011 (2000).

184. *See generally* Weisman, *supra* note 178.

lines.[185] It reached an agreement with India *before* making serious efforts to change the NSG Guidelines, and it altered its domestic laws to make nuclear trade with India possible from a domestic legal standpoint.

In acting unilaterally, the United States no doubt incurred, at the very least, a reputational cost. Other members of the NSG were initially very critical of the United States, both in the specific context of India, and more generally of the Bush administration's penchant for "going it alone."[186] Countries such as Sweden, Denmark, Ireland, and Austria expressed reservations about an exception to the NSG Guidelines for India.[187] China, too, expressed concerns about the U.S.-India Pact.[188] Yet this cost was not as high as it could have been if the legal rules in question had been "hard" legal rules. Under a reputational theory, the reputational sanction for so directly challenging the legal status quo would be higher for a treaty, precisely because a treaty represents a relatively greater pledge of reputational capital.[189] Treaties are also more likely to come with sanctioning mechanisms, such as dispute resolution or provisions permitting retaliatory sanctions or reciprocal withdrawal of benefits that are not called into play by the NSG.

The deliberate decision not to include these mechanisms in the NSG reduces the cost of opportunistic violation, but it also reduces the cost to unilaterally attempting to revise the legal status quo. In effect, it permits both a market leadership mechanism through which legal change can occur—the tactic employed by the United States[190]—as well as a more conventional negotiation-based platform for amending legal rules. Research in economics has found that such a relatively thinly institutional-

185. *See generally* S. Nihal Singh, *Manmohan's Foreign Policy Coup Almost Rivals Indira's*, THE ASIAN AGE, Nov. 13, 2008.

186. *See generally* Strobe Talbott, *Good Day for India, Bad for Nonproliferation*, DAILY TIMES, July 25, 2005.

187. *See, e.g.*, Mark Hibbs, *U.S. to Face Some Opposition if it Seeks Consensus NSG Rule on India*, NUCLEONICS WEEK, Sept. 29, 2005, *noted in* CRS REPORT FOR CONGRESS, U.S. NUCLEAR COOPERATION WITH INDIA: ISSUES FOR CONGRESS 16 (Jan. 12, 2006).

188. *See China Hopes US-India Nuclear Cooperation Abides by Non-Proliferation Rules*, PEOPLE'S DAILY ONLINE, July 29, 2006, at 1 (quoting Chinese Foreign Ministry spokesman Liu Jianchao as saying that any nuclear cooperation should "abide by international regulations").

189. *See generally* Guzman, *supra* note 18.

190. *See* Daniel H. Joyner, *Restructuring the Multilateral Export Control Regime System*, 9 J. CONFLICT & SEC. L. 181, 206-07 (2004).

ized approach to achieving regulatory harmonization can in fact be superior to both a pure market mechanism, and a purely negotiation-driven method of achieving cooperation.[191] In the case of India and the NSG guidelines, the American example was quickly followed by France, which concluded a similar civilian nuclear cooperation agreement with India in 2006,[192] and eventually by the NSG itself, which, as noted, amended its Guidelines to comport with U.S.-India Pact.[193]

The comparative advantage of soft law, then, lies in the fact that the reduced sanction for non-compliance permits states to unilaterally amend legal rules in a range of situations in which amendment might have been precluded under a harder regime. This advantage suggests that soft law will be appropriate in situations in which a market for legal rules or a hybrid market-negotiation model outperforms a strictly unanimity-based or consensus-based approach to developing international law. Where states creating an agreement expect a single state to have a comparative advantage in setting legal rules, it may be beneficial for all states to want to reduce the cost to that single state of offering unilateral amendments. Such unilateral amendments can be welfare-enhancing in a global sense, even if they are not Pareto-improving.

To return to the example of the NSG, export control rules implicate a fundamental tradeoff between security and trade. Restricting the sale of nuclear material and technology reduces a state's security, as well as other states' security, but it also provides economic benefits to the state trading.[194] Because the sale of weapons technology causes a negative externality (the harm to other states' security interests), it is in other states' interest to cooperate on the legal restriction of arms sales. However, the restriction of arms sales does little good if there are suppliers

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191. *See generally* Joseph Farrell & Garth Saloner, *Coordination Through Committees and Markets*, 19 RAND J. ECON. 235 (1988).

192. *See France and India in Nuclear Deal*, BBC NEWS, Feb. 20, 2006, http://news.bbc.co.uk/1/hi/world/south_asia/4731244.stm. Like the earlier U.S. announcement, the France-India agreement was a framework agreement, with details deferred pending the outcome of U.S.-India negotiations. *See id.*

193. *See generally* Varghese K. George, *After 34 Yrs, India to Buy First Foreign Reactors, From France*, HINDUSTAN TIMES, Sept. 30, 2008.

194. *See* Alan O. Sykes, *The Economics of Public International Law* 23-31 (Chicago John M. Olin Law & Econ., Working Paper No. 216, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=564383.

outside of the legal regime that are capable of providing the same technology that is available from those inside the legal regime.

India's existence as a stable nuclear power outside of the legal nonproliferation regime created just such a supply of technology, material, and equipment. The rise of a nuclear India suggested a possible need to amend the legal rules governing international nuclear trade. In effect, the magnitude and source of the security externality had increased, and the legal rules needed to be adapted to deal with this difficulty. However, as the NPT's experience attests, modifying a legal regime requiring unanimity can be extremely difficult precisely because states' interests are in some tension with each other. China, for example, is considerably more wary of a nuclear India than is Germany because of its history as a neighbor and rival of India.[195] This tension in interests can create costs to amendment that preclude welfare-enhancing amendment because they are not Pareto-improving (and because states are unable to devise transfers sufficient to convert the amendment into one that is Pareto-improving).

A more market-driven amendment process, however, means that amendments do not necessarily have to be Pareto-improving. Unilateral action can secure global improvements in welfare in cases in which "harder" legal institutions would have blocked the changes. In the case of India and the NSG, the importance of the United States to the success of the nonproliferation regime generally, and export controls specifically, mitigated the cost to the United States of challenging the legal status quo. The United States is the world's largest exporter of arms,[196] and so to be successful, any restrictions on trade would have to be restrictions by which the United States is willing to abide. American economic power in this area thus alters the American cost/benefit ratio to unilateral legal revisions, and makes the U.S.-preferred rule (trade with India) a natural focal point for cooperation.

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195. *See generally* Siddarth Srivastava, *Beijing Blusters Over India's Nuclear Deal*, ASIA TIMES, Nov. 5, 2005.

196. *See* Stephen D. Goose & Frank Smyth, *Arming Genocide in Rwanda*, 73 FOREIGN AFF. 86, 95 (1994).

C. *Proliferation Security Initiative*

Just shortly after the NPT reached its peak in membership in 2002, President Bush announced the creation of the PSI.[197] PSI was created following an incident in 2002 in which Spanish Special Forces, acting at the behest of American naval and intelligence personnel, boarded an un-flagged North Korean ship, the So San, carrying missile parts to Yemen.[198] American military personnel subsequently boarded the vessel as well to verify that the equipment being transported was for use in SCUD missiles.[199] Following a formal protest by the Yemeni government, the United States deliberated for two days before determining that there was no justification under international law for seizing the missile parts. Without any legal authority, the United States released the ship with its cargo,[200] but began searching for a way to expand its legal authority to conduct similar interdiction operations.

The United States' answer, PSI, was specifically designed to avoid the constraints of multilateral treaties such as the NPT.[201] States commit to a "Statement of Interdiction Principles," pledging in effect to harness their national political and legal apparatus to halt the proliferation of illicit materials.[202] However, unlike the multilateral treaties that preceded it, adherence to the "Statement of Interdiction Principles" is voluntary. A commitment to support PSI, and indeed active support for PSI's objectives in the form of participation in PSI conferences or joint interdiction exercises,[203] do not create binding future legal obligations. PSI has no associated international organization, and thus no delegation whatsoever to a supranational body. PSI members

197. *See* Elisabeth Bumiller, *The President in Europe: Alliance; Praising Alliance, Bush Asks Europe to Work with U.S.*, N.Y. TIMES, June 1, 2003, at 11.

198. *See* Joyner, *supra* note 160, at 508.

199. *See id.*

200. *See id.* at 509.

201. *See generally* U.S. DEPARTMENT OF STATE, THE PROLIFERATION SECURITY INITIATIVE (2006), *available at* http://www.state.gov/t/isn/60896.htm.

202. *See generally* U.S. DEPARTMENT OF STATE, PROLIFERATION SECURITY INITIATIVE: STATEMENT OF INTERDICTION PRINCIPLES (2003), *available at* http://www.state.gov/t/isn/rls/fs/23764.htm.

203. *See, e.g.*, U.S. DEPARTMENT OF STATE, SINGAPORE HOSTS PROLIFERATION SECURITY INITIATIVE (PSI) INTERDICTION EXERCISE (DEEP SABRE) (2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/51032.htm.

have conducted joint interdiction operations,[204] aimed at stopping the spread of WMD-related material and technology, but because the "Statement of Interdiction Principles" is so vague, activities undertaken pursuant to PSI are organized on an ad hoc basis.[205] This stands in contrast to the NSG Guidelines, which while technically not legally binding, are nevertheless quite detailed. PSI is thus an even more thinly institutionalized effort at export control than is the NSG.

Yet it would be a mistake to conclude that PSI does not have important legal aspects to it. First, as an export control regime, PSI's purpose is to enforce international nonproliferation obligations by making it more difficult to acquire sensitive technology, material, and equipment. Second, PSI includes a number of subsidiary treaties called reciprocal boarding agreements.[206] These treaties, between the United States and states such as Panama and Liberia that have large and unregulated shipping registries,[207] permit the United States to board and search ships flying the flag of the other nation.[208] These treaties, in effect, internationalize to some extent national jurisdiction over ships in international waters. More precisely, they resemble a delegation from states that cannot seriously police ships flying their flag to a more powerful state, the United States, to enforce international legal obligations. Third, PSI is a challenge to international maritime law. It is an attempt by PSI members to limit the legal effects of national sovereignty on the high seas and in international airspace. This reduction in sovereignty reduces the legal costs to counterproliferating nations of enforcing nonprolifera-

204. *See* U.S. DEPARTMENT OF STATE, THE PROLIFERATION SECURITY INITIATIVE (PSI): A RECORD OF SUCCESS (2005), *available at* http://www.state.gov/t/ac/rls/rm/47715.htm.

205. *See generally* THE PROLIFERATION SECURITY INITIATIVE, *supra* note 201.

206. *See, e.g.*, Proliferation Security Initiative Ship Boarding Agreement with Liberia, U.S.-Liber., Feb. 11, 2004, *available at* http://www.state.gov/t/isn/trty/32403.htm.

207. *See generally* Proliferation Security Initiative Ship Boarding Agreement with Liberia, *supra* note 206; The United States and Panama Proliferation Security Initiative Ship Boarding Agreement, U.S.-Pan., May 12, 2004, *available at* http://www.state.gov/r/pa/prs/ps/2004/32414.htm.

208. *See generally* Proliferation Security Initiative Ship Boarding Agreement with Liberia, *supra* note 206; The United States and Panama Proliferation Security Initiative Ship Boarding Agreement, *supra* note 207. As the name suggests, the obligation is actually reciprocal. In other words, Panama could in theory attempt to board and search a U.S.-flagged ship using the same procedures that the United States would use to board and search a Panamanian ship. *See generally* The United States and Panama Proliferation Security Initiative Ship Boarding Agreement, *supra* note 207.

tion norms by waiving background legal rules that counter-proliferating nations would otherwise have to violate in order to pursue their objectives.

Previous analysis of PSI has focused on existing legal justifications for interdictions conducted under the umbrella of PSI.[209] Such analyses have concluded that there is authority for interdiction activity conducted in areas of exclusive national sovereignty and territorial sea areas, but that interdictions in international waters and airspace are on considerably narrower legal footing. Generally, the 1982 Law of the Sea Convention ("LOS Convention"), as well as customary international law, prohibit the search and seizure of vessels at sea, unless the state in which the ship is flagged has approved the search.[210] Some have speculated that Article 110 of the LOS Convention, which provides for interdiction authority "where acts of interference derive from powers conferred by treaty,"[211] may provide justification for PSI-related interdictions.[212] Similarly, United Nations ("U.N.") Security Council Resolution 1540, binding on all U.N. members, creates export control obligations for states, and admonishes states to take cooperative action to prohibit the illicit transfer of WMD-related material.[213] These obligations, however, are sufficiently vague that scholars have continued to doubt whether there is legal authority for PSI-related activities conducted in international territory.

Such analyses of the legality of PSI are illuminating in the sense that they provide a way to think about the legality of state action at any given point in time. As American observance of international law in the case of the So San highlights, international law can effectively restrain even the most powerful states. The United States certainly had the ability to seize the cargo of the So San, but chose not to because of its legal obligations. At the same time, such static analyses also miss the dynamic aspect of international law. Creating conflictual legal norms can be

209. *See, e.g.*, Joyner, *supra* note 160; *see generally* Michael Byers, *Policing the High Seas: The Proliferation Security Initiative*, 98 AM. J. INT'L L. 526 (2004).

210. *See* U.N. Convention on the Law of the Sea art. 110, Dec. 10, 1982, 1833 U.N.T.S. 397. Article 110 provides for several exceptions to exclusive flag jurisdiction, including reasonable grounds for suspecting that the ship is engaged in piracy, the slave trade, or unauthorized broadcasting. *Id.*

211. *See id.*

212. *See* Joyner, *supra* note 160, at 536-37.

213. *See* S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

used to change international law over time.[214] One way soft law can do this is by creating state practice in support of an emerging norm of customary international law.[215] A second way is by causing states' views of their existing legal obligations to change. Soft law, by challenging existing law or providing a framework for interpreting vague provisions of existing law, can alter the substantive meaning of international legal obligations.

Within the context of the theory of soft law advanced in this Article, PSI displays the three characteristics that make counterproliferation an ideal area for soft legal governance. As the incident with the So San highlights,[216] international legal rules can become less valuable in the face of new challenges. The American decision to abide by international law[217] underscored the less than optimal nature of maritime laws that privileged national sovereignty at the expense of the enforcement of nonproliferation obligations. States intent on trafficking in WMD-related materials were able to hide violations of their nonproliferation obligations by resorting to claims of national sovereignty in international territory.[218] Similarly, smugglers were able to avoid detection by hiding behind the national sovereignty of states that lacked the ability to monitor the trade being conducted by the ships in their national registries.[219] Rules designed to address these developments had the possibility of creating welfare enhancements.

Second, the reliance benefits from having an additional sanction associated with counterproliferation obligations undertaken pursuant to PSI are relatively small. While there is some tension among the interests of PSI members, generally all PSI members are interested in pursuing the objectives of counterproliferation. Thus, the cooperative gains from better legal rules regarding counterproliferation, and more effective coordination of counterproliferation resources, outweigh any increase in the

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

215. *See* Byers, *supra* note 209, at 528.

216. *See* Joyner, *supra* note 160, at 508.

217. *See id.* at 509.

218. *See* Ja Young Elizabeth Kim, *The Agreement After the Six-Party Talks: Are There No Alternatives to the "Modified" Version of the 1994 Geneva Agreed Framework?—An Analysis of the Newly-Adopted Framework and Its Significance For the Nuclear Proliferation Issues Relating to North Korea*, 21 TEMP. INT'L & COMP. L.J. 177, 200 (2007).

219. *See generally* THE PROLIFERATION SECURITY INITIATIVE, *supra* note 201.

supply of counterproliferation that would come as a result of greater sanctions for violating PSI's soft obligation to cooperate. What tension there is in states' interests comes in two forms. The first is that certain states may not see specific interdiction activities or revisions of maritime law as in their interest. An example is South Korea's decision to participate in PSI only as an observer.[220] This reluctance to fully commit is motivated by its special relationship with North Korea, one of PSI's primary targets.

The second source of tension is a familiar collective action problem. All member states would prefer to free ride on the enforcement activities of other states, rather than pay the costs of participation themselves. In some cases, specific PSI activities may not be worth contributing to for certain members. Thus, European States may be hesitant to commit resources to interdiction efforts in the Far East, as opposed to the Middle East.

This tension is alleviated by the third factor, the presence of a relatively more powerful state, the United States, that can more efficiently update and coordinate counterproliferation obligations. The United States, as a global superpower, has the incentive to contribute to counterproliferation activities around the world. In effect, because it internalizes a larger share of the benefits from counterproliferation generally than do regional powers, it has an incentive to update the rules and supply counterproliferation. The United States clearly enjoys a comparative advantage in terms of national apparatus available for enforcement of nonproliferation obligations. Similarly, the United States may enjoy an advantage in terms of information about the transport of illicit materials derived from its intelligence services. These types of comparative advantages suggest that the United States is the ideal nation to act as a focal point for counterproliferation norms. Moreover, within limits it is in the interest of all other counterproliferating states to delegate *de facto* rulemaking and coordinating authority to the United States. Because the United States will be the largest contributor to counterproliferation efforts, rules that are closer to the U.S.-preferred rule will lead to an increase in the American contribution to counterproliferation. This increase in the supply of counterproliferation is a

220. *See generally* Park Song-wu, *South Korea to Observe PSI Exercise*, KOREA TIMES, Jan. 25, 2006.

public good that in some measure offsets the cost to other states of accepting their less-preferred counterproliferation rules.

D. *The ABM Treaty and Opportunistic Legal Revisionism*

Of course, unilateral legal revisionism can be deployed opportunistically. A reduction in the cost to states of challenging the legal regime also increases the ability of states to do so for their own personal gain. In choosing the form of a legal agreement, it is this tradeoff between encouraging welfare-enhancing legal innovation and deterring opportunistic revisionism that will determine whether states choose a hard legal regime or a soft one.

An example of the opportunistic use of unilateral legal revisionism is the Reagan administration's decision to proceed with its Strategic Defense Initiative[221] ("SDI" or "Star Wars") despite the fact that SDI was rather plainly prohibited by the Anti-Ballistic Missile ("ABM") Treaty.[222] Between the conclusion of the ABM Treaty in 1972 and the Reagan administration's decision to proceed with SDI, there had been a dramatic shift in power between the United States and the Soviet Union.[223] Gone were the days of *détente*. The Soviet Union was rotting under the weight of its centrally-planned economy and decaying economic infrastructure, and in less than a decade would cease to exist. This shift in power meant that the prevailing legal regime no longer mirrored the underlying distribution of bargaining power. Rather than attempting to renegotiate the ABM Treaty, the United States simply announced what might be termed an "interpretative amendment."[224] It announced, in other words, that its plans for SDI were consistent with its interpretation of the treaty.[225] While the Soviet Union protested that SDI was not in fact consistent with the ABM Treaty,[226] there was little that the

221. *See* Gary M. Buechler, *Constitutional Limits on the President's Power to Interpret Treaties: The Sofaer Doctrine, the Biden Condition, and the Doctrine of Binding Authoritative Representations*, 78 GEO. L.J. 1983, 1983 (1990).

222. *See id.*

223. *See generally* Carmel Davis, Power vs. Threat: Explanations of United States balancing against the Soviet Union after 1976 (Sept. 2004) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with the University of Pennsylvania).

224. *See* Harold Hongju Koh et al., Symposium, *Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts*, 43 U. MIAMI L. REV. 101, 102 (1988).

225. *See id.*

226. *See id.*

Soviet Union could do short of exiting the treaty completely. They *de facto* acquiesced to the American reinterpretation of the ABM Treaty, and the ABM Treaty operated for almost another two decades with legal expectations having been readjusted by the American action.

Notice that the ABM Treaty involved the reinterpretation of a treaty, rather than a soft law regime. This is significant because it illustrates that unilateral challenges to legal rules within an existing legal framework are not confined to soft legal obligations. However, such challenges are considerably more likely to occur in soft legal environments precisely because the cost to legal revisionism is lower. In the case of the ABM Treaty, the decay of Soviet power likely meant that there was no possible agreement that could deter the Americans from embarking on their preferred policy course. The American decision to reinterpret the treaty, rather than withdraw from the treaty as the United States did in 2002,[227] and the Soviet decision to tolerate this reinterpretation indicate that a *de facto* amendment to the existing legal framework was viewed by both parties as being superior to scrapping the legal framework entirely.

E. *Conclusions*

This section has drawn on examples from the nuclear nonproliferation regime to illustrate the most important elements of the theory of soft law presented in this Article. The examples illustrate the fundamental tradeoff that states face in choosing the form of legal agreement. Hard law will deter opportunistic violations as well as opportunistic legal revisionism, but at the expense of deterring welfare-enhancing legal revisionism. In the area of export control restraint, the rise of additional nuclear suppliers altered the value of existing legal rules. Unilateral American action has sought to change those rules to take into account the new global conditions. Similarly, active export control, or counterproliferation, has required both the creation of loose counterproliferation obligations, as well as the modification of rules that make counterproliferation more costly. Again,

227. *See* Manuel Perez-Rivas, *U.S. Quits ABM Treaty*, CNN.COM, Dec. 14, 2001, http://archives.cnn.com/2001/ALLPOLITICS/12/13/rec.bush.abm/.

The United States announced its withdrawal in December 2001, but per Article XV of the ABM Treaty, the withdrawal was not effective for six months. *See id.*

the United States has been out in front acting as a legal entrepreneur. American enforcement power makes U.S.-preferred policy a natural focal point for cooperation.

V. *SOFT LAW AND GLOBAL WELFARE*

Up to this point, this Article has focused on analyzing the variables that affect the decision to choose soft law over hard law. The enterprise has been primarily positive, describing the processes through which these variables can affect states' decision to structure an agreement as soft as opposed to hard. However, the positive theory has implications for how scholars, policymakers, and critics think about soft law and its role in promoting international cooperation.

Scholars and activists have at times decried incidents in which states have opted for non-binding accords rather than formal agreements.[228] The assumption underlying this claim is that a less formal commitment means that the cooperative project is necessarily less deep or effective than it would otherwise be. By contrast, Professor Raustiala has argued that this desire on the part of domestic constituencies to create binding agreements can actually reduce the depth of cooperation.[229] In making an agreement binding, states reduce the depth of their commitment in order to offset the increased formality.[230] This can lead to an undersupply (in the economic sense of an inefficiently low amount) of more detailed, deeper soft law agreements.

The theory presented in this Article builds on this work by suggesting a specific mechanism through which soft law can have beneficial effects on cooperation over time. Similarly to Professor Raustiala, I argue that soft law can under certain conditions actually *enhance* cooperation relative to binding legal agreements. In contrast, however, I argue that the mechanism through which soft law enhances cooperation is dynamic. Soft law is superior to hard law in cases in which soft law leads to more valuable legal rules over time.

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228. *See* Richard H. Speier, *A Nuclear Nonproliferation Treaty for Missiles?*, *in* FIGHTING PROLIFERATION (Henry Sokolski ed., 1996). For example, commentators have occasionally advocated turning the Missile Technology Control Regime ("MTCR") into a binding treaty because the perception is that overall compliance would be increased by making the MTCR's obligations legally binding. *See id.*

229. *See* Raustiala, *supra* note 82, at 603.

230. *See id.*

This dynamic view of international law is important to how scholars think about international law and departures from settled legal norms. The consensual nature of international law under traditional formulations, in which state consent is required to create or adjust international obligations, can block the evolution of international law in response to changing political circumstances. A single necessary state can block welfare-enhancing changes to international law if that state personally does not benefit, or if it wishes to hold out for a larger share of the surplus from cooperation. This can even be the case when states negotiate rules that create non-unanimous procedures for amending legal rules. In such situations, intransitivity or holdouts can still prevent welfare-enhancing changes to legal rules.

Unilateral action that causes states to re-coordinate their legal expectations can solve this problem. Viewed dynamically, challenges to the legal status quo can actually be beneficial over time because they lead to a more efficient process of amendment and welfare-enhancing changes in legal rules. This conclusion suggests that in critiquing departures from legal norms, scholars should take not only a static approach—analyzing state action under existing law—but also a dynamic approach, looking for possible beneficial changes to the legal regime as a result of a market leadership approach to coordinating legal expectations.[231] In particular, where the legal status quo being challenged is codified in a non-binding accord, scholars should consider the possibility that soft law was chosen precisely to encourage such legal innovation. Of course, because unilateral action can be used opportunistically, commentators should consider the specific welfare effects of new legal rules. While the costs associated with deviating even from soft legal obligations will deter some opportunistic revisionism, they will permit more than under hard law.

In addition to the distinction between assessing state action under a dynamic or a static view of international law, this paper also has implications for thinking about the efficiency of international law as measured against the equity. Specifically, this Article has argued that where a certain state enjoys a comparative

231. This argument has been made as applied to customary international law. *See, e.g.*, Roberts, *supra* note 21, at 784. This Article's contribution is to extend this analysis to explicit agreements and the violation thereof.

advantage, such as being more powerful than its partners on some relevant dimension, that state may have an incentive to unilaterally innovate, creating a focal point for re-coordinating legal expectations. Where the parties' interests are not in too much tension, sacrificing procedural equity in terms of legal modifications can result in increases in global welfare. In such situations, the *de facto* inequality of states can actually serve *ex ante* to benefit not only those who are comparatively advantaged, but those not comparatively advantaged as well. In other words, legal institutions can be designed to harness the benefits of differences in state power, and ameliorate the negative effects when states' interests are in too much tension.

This is not to argue that power differentials between states are a net positive for international law. More extensive study of how power affects both the design, and particularly the implementation, of international law is necessary. This Article does suggest, however, at least one instance in which power differentials can be beneficial to the operation of international law: when power differentials reduce the number of possible legal innovators in a soft law regime, thus allowing states to capture some of the benefits, in terms of credibility, of legalizing cooperative rules as well as the welfare gains from having a market leadership mechanism through which legal rules can be modified over time.

VI. *CONCLUSION*

I have argued that non-binding agreements (or soft law) can be created by states in response to a specific set of circumstances: (1) when states are uncertain about the future efficiency of legal rules; (2) when the marginal benefit in terms of compliance from moving from soft to hard law is modest; and (3) when a single state or small group of states enjoys a comparative advantage, such as being more powerful on some relevant dimension, that allows it to act as a focal point for re-coordinating legal expectations by acting unilaterally (i.e., as a market leader). This theory of soft law contributes to the growing literature on the design of international agreements. Specifically, international agreements can incorporate flexibility in a variety of ways and for a variety of reasons. I argue that soft law can be a response to the three conditions above, and creates a specific type of flexibil-

ity that can lead to the evolution of international law in response to changing political circumstances. Finally, I have illustrated the theory with examples from the area of arms control. Arms control has resumed a central place in today's geopolitical landscape, and it is time that international legal scholars once again begin to examine how law operates in this vital area.