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FOR SUSTAINABLE DEVELOPMENT



**Hard Law and 'Soft Law':
Options for Fostering International Cooperation**

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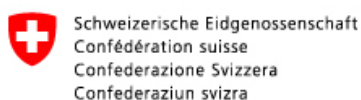
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ABSTRACT

Substantial literature has emerged in the past two decades on the meaning of “soft law”, its purposes, and its consequences for effective international cooperation. This paper argues that the distinction between “hard law” and soft law is not settled in the literature. One definition of soft law is “normative provisions contained in non-binding texts.” Some scholars argue that vagueness or imprecision in provisions—what in WTO parlance has sometimes been characterised as constructive ambiguity—is also a form of soft law. Yet others distinguish among notions of obligation, precision, and delegation as the dimensions around which the “softening” of law may occur. Some commentators seem to hold the view that any suggestion of murkiness in justiciability amounts to legal failure. Others see softening as a pragmatic response to the limits of hard obligations among sovereignties.

Implicit in that discussion the idea often lurks that soft law is a second-best alternative to hard law. However, it has been pointed out that hard and soft law can be alternatives, complements, or antagonists. This paper identifies examples of all three in the discussion that follows. The overarching question it seeks to answer here is whether the quality and content of international trade cooperation can be improved through additional initiatives—housed within the WTO’s institutional framework—that do not rely on legally enforceable obligations. The interest in doing this is perhaps most easily captured by the observation that a further prolongation of 15 years of WTO negotiating stasis under the Doha Round threatens the integrity and relevance of the institution. This puts a premium on creative thinking about how governments may be enticed once again to find a greater measure of common purpose.

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LIST OF ABBREVIATIONS

APEC	Asia-Pacific Economic Cooperation
CRTA	Committee on Regional Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized System of Preferences
MFN	most favoured nation
OECD	Organisation for Economic Co-operation and Development
PTA	preferential trade agreement
S&D	special and differential treatment
TBT	technical barriers to trade
TM	Transparency Mechanism
TPRM	Trade Policy Review Mechanism
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

INTRODUCTION

Substantial literature has emerged in the past two decades on the meaning of “soft law”, its purposes, and its consequences for effective international cooperation. This paper argues that the distinction between “hard law” and soft law is not settled in the literature. Nor is jurisprudence on the matter. As a means of advancing the discussion, however, a working distinction between the two might be that hard law is indisputably justiciable, while soft law is not.

The literature on soft law goes in several directions. A definition of soft law offered by Shelton (2000) is “normative provisions contained in non-binding texts.” Elias and Lim (1997) argue that vagueness or imprecision in provisions—what in World Trade Organization (WTO) parlance has sometimes been characterised as constructive ambiguity—is also a form of soft law. Abbott and Snidal (2000) distinguish among notions of obligation, precision, and delegation as the dimensions around which the “softening” of law may occur. Such softening can be written into provisions. Or it may flow from more or less implicitly agreed praxis—a kind of slippage indulged by the community.

Some commentators seem to hold the view that any suggestion of murkiness in justiciability amounts to legal failure. Others see softening as a pragmatic response to the limits of hard obligations among sovereignties. Implicit in that discussion the idea often lurks that soft law is a second-best alternative to hard law—a shelter against something worse when hard law cannot hold sway. Shaffer and Pollack (2009) blunt that assumption by arguing that hard and soft law can be alternatives, complements, or antagonists. This paper identifies examples of all three in the discussion that follows.

A crucial issue for the analysis, of course, is how the term soft law is defined. Following Elias and Lim (1997), a broad definition would seem to be called for that focuses less on precise definitional distinctions relating to form, and concentrates instead on the limits of state consent—that is, the willingness of governments to commit to various forms of cooperation, and to conform to those commitments.

A broad conception of “soft law”—going wider than the Shelton (2000) definition of “non-binding normative provisions”—is more useful in thinking about options for the WTO than a stricter definition that would narrow the range of options, short of hard-law commitments, for enhancing cooperation within the WTO and other international frameworks. Besides, establishing a clear dividing line among different modalities of non-justiciable but pre-committed action in the WTO in terms of their normative content would be tendentious.

Instead, within a broad definition of soft law, a typology of approaches to cooperation is developed. It is organised on the basis of an ordinal ranking designed roughly around the degree of explicit non-justiciable engagement involved. In this way, under the rubric of “soft law”, we can consider any formalised arrangement falling short of hard law, including vaguely worded formulations in hard-law agreements; non-justiciable normative provisions; best-practice texts; review mechanisms; and the exchange of information.

A former Director-General of the WTO, Pascal Lamy, has written, “As an institution we legislate and litigate, and I believe we do this reasonably well. But is there something of a ‘missing middle’ where we should be engaged more in fostering dialogue that can bolster cooperation?” (WTO 2007). Evenett (2009) has also referred to a missing middle in relation to efforts to bolster the WTO’s “non-negotiating, non-judicial, deliberative functions.”

The overarching question we seek to answer here is whether the quality and content of international trade cooperation can be improved through additional initiatives—housed within the WTO’s institutional framework—that do not rely on legally enforceable obligations.

The interest in doing this is perhaps most easily captured by the observation that a further prolongation of 15 years of WTO negotiating stasis under the Doha Round threatens the integrity and relevance of the institution. This puts a premium on creative thinking about how governments may be enticed once again to find a greater measure of common purpose.

The rest of the paper is organised as follows. Section 2 explores typology cooperation models with soft-law characteristics. The history, objectives, and instrumentality of the relevant provisions and practices are examined to determine their place and purpose in the wider WTO structure. The typology is organised around the soft-law features of hard law; normative best-endeavour provisions; best practices; review mechanisms; and information exchange. Section 3 offers conclusions.

AN EXPANDING GLOBAL TRADE ENVIRONMENT

The working assumption in this paper is that soft law is detectable along a spectrum from hard-law agreements to discursive processes designed to foster cooperation. This ample focus allows consideration of a larger set of possible

mechanisms that can smooth interaction among sovereign entities seeking mutual benefit and conflict avoidance. This means that the “do’s and don’ts” of non-litigious exchange are not always explicitly laid out. They may be present by inference. Weight can also be placed on implicit cooperation, and on learning through exchange and voluntary compliance within an evolving structure of shared aspirations and common perceptions of what is needed.

SOFT-LAW FEATURES IN WTO HARD LAW

The WTO is mostly about hard law. Its dispute settlement system is widely considered one of the most successful international resolution systems. In this environment it is not surprising that limited consideration has been given to the role of soft law in supporting the functions and promoting the core objectives of the organisation.

The main body of the WTO Agreement sets out justiciable laws and procedures, and in this sense is an international legal contract. However, it is very difficult to draw up a complete contract, not least because completeness would require perfect foresight in regard to all present and future eventualities. Intergovernmental contracts may encounter even more difficulty in this regard because political and commercial interests are blended and shape outcomes in ways that are less frequently encountered in private contracts.

Another factor is that even if the WTO dispute settlement system has justifiably earned a reputation for effectiveness, this is against a background where enforcement relies in no small part on state consent. Punishment mechanisms for non-compliance are largely limited to trade retaliation and the withdrawal of equivalent concessions. Retaliatory options are highly circumscribed in disputes between small and large countries because of the size disparity.

The argument here is that state consent is a key ingredient for the effectiveness of the global trade organisation, even in its own hard-law terms. To the extent that state consent is influenced by the effectiveness of communication and understanding among parties to the WTO Agreement, then soft law has a complementary role to play not only in facilitating negotiations but also in contributing to rule observance and dispute resolution.

A final observation is that because the WTO is an international agreement, even its hard-law texts contain certain forms of wording that locate them at the soft-law end of the spectrum, where effective litigation is difficult or impossible. To take a few examples from the General Agreement on Trade in Services (GATS), there are, in the text, phrases such as “as soon as practicable”; “within a reasonable period of time”; “afford adequate opportunity”;

and “give special priority”. A dispute panel might venture to make rulings on such phrases, but they are difficult to pin down with precision. In that respect they are little different from the General Agreement on Tariffs and Trade (GATT) Part IV “best-endeavours” wording such as “to the fullest extent possible”; “make every effort”; and “accord high priority”.

NORMATIVE BEST-ENDEAVOURS PROVISIONS IN THE GATT/WTO

Perhaps the three most obvious examples of non-justiciable normative provisions are to be found in Part IV of the GATT, the Generalized System of Preferences (GSP), and some of the specific special and differential treatment (S&D) provisions negotiated in various agreements in the Tokyo Round, the Uruguay Round, and subsequently.

These provisions do not conform to the standard GATT/WTO structure of rights and obligations (that is, hard law). But they are precise and tend to be couched in formal legal language. The question is whether these soft law features attached to development-related provisions are supportive of hard law, or in Shaffer and Pollack’s (2009) terminology, alternative, complementary, or antagonistic in their implications for hard law.

GATT Part IV

By the mid-1950s it was becoming obvious that the GATT would be obliged to deal with a greater variety of economies and a more numerous membership. As post-war decolonisation proceeded, the lower-income countries that had been among the 23 founding signatories of the GATT were progressively joined by growing numbers of others facing similar development challenges. Before long, developing countries were organising and raising issues regarding obstacles to their trade. Terms of trade-driven reciprocal, most-favoured-nation (MFN)-based trade liberalisation negotiations among large countries focused on products of particular interest to them. Developing countries complained that labour-intensive manufactures and agricultural products were not on the negotiating table and continued to enjoy disproportionately high levels of protection in their major destination markets.

This may be explained, at least in part, by the fact that market access negotiations were based on a reciprocity principle. The combination of MFN and reciprocity made negotiated exchanges easier among parties of comparable size. Smaller countries could not offer larger ones the kind of reciprocity necessary to assuage the concerns of the latter regarding free-riding by other large players who were not party to the initial “reciprocal” bargain. In short, the combination of MFN and reciprocity created a disincentive for developed countries to enter into negotiations with developing countries.

Developing countries were active through the United Nations (UN), and discussions there led to the first United Nations

Conference on Trade and Development (UNCTAD) in 1964. The conference assumed the trappings of a permanent institution answerable to the UN General Assembly and became a sounding board and pressure group for developing countries in trade matters. Leading developed countries in the GATT responded to the birth of the UNCTAD by establishing the Trade and Development provisions in Part IV of the GATT (Articles XXXVI on principles and objectives; XXXVII on commitments; and XXXVIII on joint action).

For present purposes, the most notable feature of these provisions is their non-justiciability. The best-endeavours nature of Part IV meant no concrete legal standard of action was established. There were obligations on developed countries to adopt measures favourable to developing countries, but their content depended on the judgement of the country taking the measures, and not on a defined and binding standard. Developing countries also acquired rights to adopt particular policies that would otherwise be considered non-conforming, but many of these were quantified, and therefore potentially easier to subject to dispute settlement.

The Generalized System of Preferences

In parallel, individual developed countries established trade preference schemes for developing countries, which became the GSP. The system is inherently discriminatory and required a waiver from the GATT's MFN rule. The preferences are granted unilaterally and are product- and geography-specific, entirely at the discretion of the granting country. These features of the GSP make the exercise of legal rights by the putative beneficiaries of the measures impossible.

Special and differential treatment

In many respects, developments in the domain of the relationship between developed and developing countries from the mid-1970s onwards were more of the same. Legal cover for unilateral preferences and certain other forms of S&D became permanent (rather than subject to time-limited waivers) through the Decision Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries, also known as the Enabling Clause. But preferences were still granted, not negotiated, and difficult or impossible to challenge legally.

In the Tokyo Round and the Uruguay Round a range of agreements supplementary to the main GATT text were negotiated, and all of these had specific provisions on S&D. Such agreements elaborated on existing GATT provisions in areas including antidumping and countervailing duties; customs valuation; import licensing; and standards. Similar discretionary authority prevailed with respect to many S&D provisions that depended on action in favour of developing countries. They gave rights for departures from MFN to developed countries to take measures intended to favour the trade of developing and least developed countries. But the exercise of these rights was once again voluntary in the sense

of being of a best-endeavours nature rather than mandated. It was about possible action, not a firm obligation.

A further source of contention arose in the aftermath of the Uruguay Round. In the Tokyo Round, developing countries had the right not to sign the standalone agreements on non-tariff measures that were concluded in the negotiations. With the establishment of the WTO at the conclusion of Uruguay Round, a single undertaking provision required all members of the new global body to sign on to virtually all the Tokyo Round standalone agreements and similar new agreements that emerged from the Uruguay Round. The result was that dozens of developing countries assumed new obligations at the stroke of a pen. Many felt that due negotiating process had been short-circuited.

At the insistence of developing countries, this situation led to prolonged and difficult discussions in the post-Uruguay Round period, and under the Doha Round, on resetting the relationship between rich, less rich, and poor countries in the WTO. Long lists of S&D provisions have been examined, with little by way of concrete results to date.

BEST PRACTICES, GUIDELINES, AND VOLUNTARY STANDARDS

A higher degree of obligation without legal enforcement mechanisms is most commonly encountered in extra-WTO sectoral and geographically limited arrangements. The Asia-Pacific Economic Cooperation (APEC) and the Organisation for Economic Co-operation and Development (OECD) offer good examples, although this kind of activity is also undertaken by many other intergovernmental organisations. The APEC seeks to promote "free and open trade and investment" among its member economies. It does not attempt to establish justiciable commitments. It sets goals, such as the Bogor Goals of free and open trade and investment by 2010 for industrialised economies and by 2020 for developing economies. It also shares information on best practices and sometimes establishes best practices. Best-practice initiatives cover a wide range of activities, including in some cases capacity building as well as policy formulation and practice. Peer review is an important part of Individual Action Plans drawn up by the governments concerned and then reviewed and discussed by the membership. This model is not unlike the WTO's Trade Policy Review Mechanism (see below). The APEC's Collective Action Plans are aggregated from the individual plans and specify objectives, actions, and timetables for actions broadly agreed by the membership.

The APEC also sets specific targets on some occasions that all of its member economies are expected to meet by a certain date; the most notable one recently is the reduction of trade facilitation costs by a specified amount. A similar arrangement was agreed in respect of tariff reductions of a stated amount once an environmental goods agreement was implemented.

There are many examples of such commitments that are non-binding but promote market opening without too much negotiation and without litigation.

The OECD also has many instruments, for example, the Guidelines for Multinational Enterprises; the Guidelines on Corporate Governance of State-Owned Enterprises; and the Principles of Corporate Governance. The organisation sometimes assesses members' legislation against established guidelines and even suggests implementation strategies. All OECD countries may not be subject to such analysis in equal measure, and some element of consent from the member concerned is no doubt a prerequisite. Nevertheless, the degree of third-party involvement in such analyses is greater than what would be possible in APEC. This is because of the degree of similarity and like-mindedness among the parties concerned, and is of relevance to the WTO in thinking about the nature and purpose of soft-law-related initiatives.

A notable example of a best practice approach in the GATT/WTO is the Code of Good Practice for the Preparation, Adoption and Application of Standards, which is an Annex to the WTO Agreement on Technical Barriers to Trade (TBT). The TBT distinguishes between technical regulations that are mandatory and standards that are non-mandatory. Non-mandatory standards are voluntary, and set by different private and semi-public bodies. The TBT's Code of Good Practice is open for signature by governmental and non-governmental bodies. The WTO dispute settlement is unavailable as a remedy under the Code. This is an example of how the GATT/WTO has used soft law to influence outcomes where governments are not the sole actors. In this sense, the Code is a complement to hard law.

REVIEW MECHANISMS

The Trade Policy Review Mechanism (TPRM) and the Transparency Mechanism for Regional Trade Agreements (TM) are process-oriented. Treating them as soft law is justified by the argument that they are institutionalised mechanisms whose procedures and processes are linked to how the WTO conducts its core functions—many of which embody hard-law characteristics.

A sharp difference exists between the TPRM and the TM in terms of their origins and status as soft law. The TPRM was established as an additional feature of the WTO machinery in order to improve the effectiveness of the institution and allow discussion of national trade policy among members without any presumption of the potential for legal action arising from such discussions. It may be noted in passing that the WTO Secretariat's capacity building and technical cooperation can be compared to the TPRM insofar as it contributes to the ability of members to benefit from the work of the global trade body.

The TM, however, was established in the context of the inability and/or unwillingness of the WTO membership to address preferentialism within a hard-law framework. The TM therefore represents a retreat from hard law.

Trade Policy Review Mechanism

The TPRM was introduced in 1989, during the Uruguay Round, with an avowedly constructivist intent. The mechanism was to "contribute to improved adherence by all Members to rules, disciplines and commitments". It aimed to ensure a smoother functioning of the trading system and to ensure greater transparency. It was not to serve as a basis for enforcement, dispute settlement, or as a means to seek new commitments from members. The remit of the mechanism in terms of the policy areas to be covered was expanded to cover services and intellectual property issues following the completion of the Uruguay Round, so as to keep up with the wider mandate assigned to the WTO.

The TPRM is a successful transparency platform that provides an opportunity for non-litigious deliberations that can contribute to deeper mutual understanding among trading partners, and thus to improved cooperation. It has also served as a capacity-building vehicle for some governments by raising awareness of interactions among an array of domestic policies that influence trade.

Transparency Mechanism for Regional Trade Agreements

The Transparency Mechanism for examining preferential trade agreements (PTAs) stands as a monument to the unwillingness of the GATT/WTO membership to create an adequate legal framework to regulate PTAs. The rules are incomplete; procedural requirements have frequently been honoured in the breach; and dispute settlement findings have been indulgent to the point of undermining hard-law aspirations (Low 2014). In short, the decision in 2006 to establish a TM was predicated on hard-law failure.

In successive rounds of multilateral trade negotiations efforts were made to improve the rules on PTAs. These exercises yielded no significant results. At the end of the Uruguay Round a Committee on Regional Trade Agreements (CRTA) was established. Its mandate was to assess preferential agreements in terms of their compliance with GATT/WTO rules and to examine the systemic implications of preferentialism. Little progress was made on either front, and so the TM was established on a provisional basis (as early harvest from the Doha Round).

The mechanism seeks early announcement of PTAs not yet in force. A new agreement must be notified as early as possible—and no later than immediately after its ratification—by the parties concerned. The WTO Secretariat is charged with providing a factual presentation of the details of new PTAs, prepared in consultation with the parties concerned but under the responsibility of the secretariat. This factual description cannot be used in dispute settlement or as a basis for further

negotiations on rights and obligations, but it does serve as the basis for a consideration of the agreement in question by the CRTA. Any subsequent changes affecting the implementation or operation of a PTA must also be notified in a timely manner.

An interesting question is whether the next step is for the WTO to settle down with a soft-law approach and regard this as the optimal institutional outcome in the increasingly important area of PTAs. Or should the organisation use a soft-law approach as a vehicle to build experience, trust, and fresh ideas before restoring provisions on preferential trade to their hard-law, justiciable status. Given the nature of trade preferentialism in terms of its implications for non-discriminatory trade relations, and the well-documented proliferation of PTAs, many would prefer that the soft-law option be considered a vehicle, not a solution.

EXCHANGE OF INFORMATION AND CONSULTATION

Information is the raw material of comprehension. All cooperation requires a willingness to share information. Information exchange enables parties to build confidence; anticipate outcomes; influence decisions; adjust to new realities; and participate in shared decisions. The way in which information is built upon is, in part, a function of underlying prior objectives, but also an exercise in the art of the possible. More or less formal arrangements for the exchange of information abound. They are found at all levels of government and in all bilateral, plurilateral, and multilateral arrangements. The degree to which they result in consultation and modified behaviour turns ultimately on the notion of state consent and perceptions of shared interest.

In the WTO, key commitments on notification and consultation exist across all legally binding agreements. Their underlying objective is to provide a basis for achieving compliance on formally contracted and justiciable obligations. But information-related provisions are also to be found in less binding contexts, where best-efforts commitments preclude legal action. Perhaps the most obvious place these are encountered in a soft-law context is in most S&D provisions in the vast majority of WTO agreements, including the GATS. They are also in Part IV of the GATT.

In sum, the exchange of information and consultation functions of the WTO is part of hard-law structures as well as non-justiciable, non-binding aspects of the organisation's operations. In the former guise, they are perhaps more accurately thought of as monitoring and surveillance functions, aimed at sustaining formal legal obligations. But even in this connection, these procedures can also support more collegial or constructivist objectives that facilitate hard-law cooperation without directly being part of it—in other words, hard law with some soft-law characteristics. In their pure form, where they stand as the sole objective of

an arrangement, exchange of information and consultation activities may only seek to serve constructivist ends, with any possibility of leading to higher levels of obligations remaining, at best, implicit.

CONCLUSION

The notion of soft law adopted here encompasses any consequential, formalised engagement among WTO members that falls short of hard law. Hard-law infringements are actionable through dispute settlement. Soft law is non-actionable.

No automatic assumption is made that hard-law structures are always feasible, and that soft-law manifestations can only be seen as a shortcoming. On the other hand, soft law may serve as a journey of discovery and alignment, a pathway to hard law. Alternatively, soft law may indeed be escapist, the consequence of failed hard-law disciplines where these are needed for the integrity of the system.

The broad definition of soft law adopted here is versatile. Just as soft power can be deployed in different ways and to different ends, so too can soft law. An expansive definition of soft-law forms allows consideration of an ample array of options for strengthening the WTO. It also facilitates analysis of situations where soft law can act in the opposing direction.

Another reason for playing up the options for cooperation short of hard law in the WTO is that justiciable hard law rests on fragile foundations because the law is international, not national. It applies among sovereignties. Enforcement mechanisms are circumscribed and rely heavily on state consent. In that world, the reinforcing contribution of non-justiciable provisions and processes that solidify the basis for cooperative action should not be underestimated.

In examining the various manifestations of soft law identified in the paper, the Shaffer and Pollack (2009) approach of seeing soft law as potentially substitutable, complementary, or antagonistic to hard law provides a useful framework. The framework can also be used in a more dynamic way to consider directional pull. Is soft law a pathway to hard law? Or is it a retreat? In both cases a hard-law outcome would be desirable. Or is soft law in some instances a natural construct, a stable equilibrium that supports the objectives of the institution?

When it comes to supporting development objectives inside the GATT/WTO, certain soft-law features of existing arrangements have been the source of long-running

disagreement. A soft-law approach for accommodating varied needs and priorities among the membership has been seen as a source of imbalance. The absence of more robust legal foundations for key elements of S&D treatment has raised issues of effectiveness in the minds of many. Soft law in these instances has been seen as an antagonistic substitute for something better, as opposed to a complement or pathway towards an appropriate balance of rights and obligations.

For the most part, the approach of developing codes of conduct, best practices, and behavioural guidelines has been seen as a positive use of soft law. Where a high degree of coalescence exists around these instruments, they may serve as useful pathways to higher levels of formal obligation and justiciability. Where differences are too wide, the approach is still valuable as a mechanism for deliberative exchanges that may change behaviour over time.

The WTO's review mechanisms, notably the TPRM and the TM, tell different stories. While the former was always intended as a supportive soft law mechanism for communicating information and deepening understanding, the latter represents a retreat from hard law. The TPRM can doubtless be improved in terms of its own functions, but it is clearly a complementary mechanism supporting the WTO's hard-law functions. Considering the prominence and continued development of discrimination in trade, however, it is difficult not to conclude that the soft-law orientation of the TM is anything other than a soft option. Greater discipline and accountability is called for here, in the name of systemic coherence and the future relevance of the multilateral trading system.

The overall message from this analysis is that soft law has an important role to play in the WTO, but it can also be a threat to the integrity and sustainability of one of the most historically successful hard-law-based international institutions. Soft law must be complementary and supportive, sometimes a halfway house to hard law, but never a mechanism that substitutes antagonistically for something better.

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