Shifting Sands: Power, Uncertainty and the Form of International Legal Cooperation

Timothy Meyer*

Abstract

This article argues that the form of international agreements – binding hard law agreements versus non-binding soft law agreements – can be partially explained by states’ interests in promoting renegotiation in the presence of uncertainty and shifting power. I make this argument in three steps. First, I explain that states regularly use unilateral non-compliance as a renegotiation strategy. Second, I argue that making an agreement soft facilitates this use of unilateral non-compliance. Third, I analyse the conditions – uncertainty characterized by common interests (but not uncertainty characterized by distributive concerns) and shifting power – under which facilitating renegotiation through soft law will appeal to states. In particular, I argue that in the presence of these conditions preventing renegotiation creates long-term costs for states that can inhibit short-term cooperation. In effect, under these conditions the shadow of the future can inhibit cooperation rather than support it, as is conventionally thought. These conditions are common to many major contemporary subjects of international cooperation in a way they were not during the latter half of the 20th century, partially explaining the increased importance of soft law to contemporary international governance.

1 Introduction

International legal governance appears to have stalled. The World Trade Organization (WTO) has not successfully completed a negotiating round since 1994. The Kyoto Protocol effectively lapsed in 2012, and no successor agreement binding on all major emitters is yet in force. After a brief resurgence, the United Nations Security Council has been unable to act under Chapter VII to address the humanitarian crisis in Syria. Sixteen years after the Rome Statute’s adoption and 12 years after it entered into force,
the International Criminal Court has produced only two convictions.\(^2\) Perhaps most tellingly, the global financial crisis of 2007–2008 did not produce a major multilateral treaty aimed at harmonizing financial regulation and curbing the risk of another global economic meltdown.

Given this parade of disasters, one could be forgiven for thinking that international law has reached the limits of its ability to coordinate state action to address truly global problems. Yet this grim picture tells only half the story. While states have failed to come up with formal, binding legal rules on issues ranging from climate change to financial regulation, they have been actively creating non-binding soft law rules that address these same problems. When a successor agreement to the Kyoto Protocol could not be immediately negotiated, states adopted the Copenhagen and Cancun Accords, which provide a non-binding framework for continuing cooperation on the reduction of greenhouse gas emissions. International financial rules have proliferated, dealing with everything from banking to money laundering. In short, we are living in an age in which soft law – non-binding rules that have legal consequences – is assuming an increasingly important place in international governance.

This article explains the turn towards soft legalization to deal with the world’s most pressing problems. The central argument is that soft law is optimal for situations (i) where states face uncertainty characterized predominantly by common interests, such as scientific uncertainty, or (ii) in which power is shifting among states. Contrary to the existing literature on renegotiation in international law, uncertainty can also push states towards hard law when it raises distributional issues. States prefer soft law in these two situations because soft law facilitates renegotiation through non-compliance. International law remains principally a negotiated system of law. Scholars in both law and political science have paid a great deal of attention in recent years to the factors that contribute to compliance with international law and, relatedly, to the judicialization of international law. This focus on assessing compliance risks missing the fundamental way in which international law operates – as an ongoing contestation of the terms of international cooperation, one in which non-compliance cannot be viewed independently from law-making. States regularly use non-compliance, not to cheat other states as the traditional compliance framework suggests, but, rather, as a strategy to renegotiate existing legal rules. By lowering the penalty for non-compliance, soft law encourages states to use non-compliance as a jurisgenerative act. Reduced penalties for non-compliance also increase states’ willingness to engage in non-consensual law-making.

When states face problems with uncertainty characterized by common interests, or when power is shifting, inhibiting renegotiation through hard law can prevent short-term cooperation. In the absence of institutional features facilitating renegotiation, states may be reluctant to agree today to rules that they expect to be suboptimal in the future, even when agreeing to those rules today creates short-term benefits. In other words, in the presence of these conditions, lengthening the shadow of the future can make cooperation more difficult, rather than easier. By contrast, where power is stable or where states

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face uncertainty that raises predominantly distributional issues, they are more likely to choose hard law. Put differently, uncertainty does not always make states more inclined to encourage renegotiation, as the literature predicts. In these circumstances, the shadow of the future operates as it is normally understood to: by providing states with a long-term incentive to enter into cooperative arrangements. Throughout this article, it is assumed that states act rationally in their own self-interest. In particular, they design international agreements and institutions to maximize their expected benefits.

These conditions explain why soft law has become so much more important today. While prior literature has examined the conditions under which states will prefer soft law to hard law, little scholarship has tied these conditions to overarching trends in international relations. During the Cold War, security and arms control were the areas of international cooperation that captured the most attention. On these issues, power, especially between the USA and the Soviet Union, was relatively stable. Moreover, states faced strategic uncertainty about each other’s motivations and capabilities. Under these conditions, states did not foresee significant benefits to renegotiation, especially the unilaterally driven renegotiation that soft law enables. Non-compliance – either as a renegotiation strategy or as simple cheating – was likely to be redistributive. States therefore designed their agreements to decrease the likelihood of non-compliance and, therefore renegotiation. They wished to constrain each other through hard law.

Today, neither of these conditions holds for many of the most pressing international governance challenges. Matters of international concern, such as climate change or health and safety measures that may restrict trade or investment, increasingly involve scientific uncertainty, such as whether genetically modified organisms are harmful or human activity contributes to climate change. Resolving these types of questions implicate common interests to a much greater degree than the security problems of the Cold War. Moreover, power is shifting. Rising states such as China, India and Russia are reluctant to lock themselves into agreements that they cannot change in the future. At the same time, nations still wish to cooperate on a range of issues. Soft law, precisely because it enables non-compliance as a renegotiation strategy, thus enables states to capture some of the gains from cooperation today while deferring longer-term contests over international rules. The softening of international legal governance is thus likely to accelerate until such time as the relationships between rising powers such as China, India and Russia and the established powers such as the USA and the European Union (EU) solidify and become predictable again.

2 Non-Compliance as a (Re)negotiation Strategy

In recent years, scholars working in international law and political science/ international relations have devoted much of their attention to compliance with international law. They have attempted to discern the conditions under which states will comply with international law. They have also worried that compliance data may say
relatively little about whether international law is ‘effective’ – that is, whether international law has changed a state’s behaviour from what it would have been in the absence of the law.\(^4\)

These studies are important and valuable, but, in my view, an excessive focus on compliance risks mischaracterizing how international law operates and also understates its effectiveness. It does so by creating the false impression that states relinquish control over the law’s content once they agree to it. In reality, international law remains primarily a negotiated system of law-making, and non-compliance is often an instrument of renegotiation.

In domestic legal systems, the average citizen has little, if any, control over his or her legal obligations. Laws come from the government. The citizen’s primary decision is whether and how to comply with the law. Law-making and compliance are separate processes, occurring in a sequential fashion and undertaken by different actors. Studies of international law’s effectiveness based on compliance with international law implicitly borrow this framework. They ask whether subsequent behaviour can be attributed to a prior rule. Causality runs from rule to behaviour, not from behaviour to rule, but this is not an accurate description of international law. States remain the primary authors and subjects of international law. Law-making and compliance are thus undertaken by the same actors and can occur simultaneously. Compliance studies remain critical to understanding how international law can change behaviour. But in studying how rules change behaviour, we must not lose sight of how behaviour can change rules.

Non-compliant acts can be used to kick-start an iterative process of law-making. A rational state may very well calculate that acting in ways that others consider unlawful is necessary in order to change legal rules going forward. Unilateral action of this kind can disrupt the status quo and prompt renegotiation that would not have occurred through purely collective decision-making processes. The history of international trade negotiations illustrates this point. Under the 1947 General Agreement on Tariffs and Trade (GATT), the USA regularly engaged in unilateral enforcement of what it viewed as GATT violations through section 301 of the US Trade Act.\(^5\) This kind of behaviour irritated other states, which objected to US unilateralism and often disagreed with American interpretations of the GATT rules. Ultimately, however, US unilateralism prompted governments to agree to the automatic adoption of dispute rulings within the WTO. In short, controversial unilateral action prompted multilateral law-making.\(^6\)

Both traditional international legal scholarship and international relations scholarship engaging with international law often assume that international institutions should seek to deter non-compliance. Likewise, one might argue that international

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institutions should deter renegotiation and especially the use of unilateral non-compliance as a renegotiation strategy.\(^7\) If run of the mill non-compliance deprives states of the benefits of the bargain, surely renegotiation has the potential to do the same. Indeed, formal models of international agreements in political science sometimes go so far as to assume that renegotiation cannot occur.\(^8\)

These models fail to explain the fact that renegotiation is rampant and that states design legal institutions with this reality in mind. Those studies that have examined renegotiation often assume away distributive concerns—one of the chief reasons states renegotiate. In her seminal articles on renegotiation, for example, Barbara Koremenos ‘assume[s] that bargaining power and other factors that influence the division [of benefits] do not change over time’.\(^9\) She makes this assumption despite acknowledging that relative bargaining power does change over time and that we would expect renegotiated terms to reflect these changes in bargaining power.\(^10\) Instead, these models assume that renegotiation consists of re-establishing a previously agreed distribution of benefits from cooperation.\(^11\) In other words, these models assume away the possibility that states will act unilaterally to improve their own situation.

As I explain later in this article, once one allows states to renegotiate in light of changes in their circumstances, renegotiation becomes a more fraught enterprise, one in which the possibility of unilateral non-compliance as a vehicle for renegotiation plays a much more prominent role. Moreover, non-compliance is available as a renegotiation tactic in any agreement, regardless of whether it expressly contemplates renegotiation in some fashion.\(^12\) Non-compliance as a renegotiation strategy—and the way states design international agreements to facilitate or deter it—thus merits

\(^7\) Cf. Downs and Jones, ‘Reputation, Compliance, and International Law’, 31 Journal of Legal Studies (JLS) (2002) 95, at 106 (suggesting that one explanation for low penalties for non-compliance in international law is a reluctance to renegotiate).

\(^8\) See, e.g., Carnegie, ‘States Held Hostage: Political Hold-Up Problems and the Effects of International Institutions’, 108 American Political Science Review (2014) 54, at 58, n. 17: ‘In this model, there is no scope for the renegotiation of a long-term agreement, as a renegotiation would have to make both parties better off. This could not occur.’


\(^10\) Koremenos, ‘Loosening the Ties That Bind: A Learning Model of Agreement Flexibility’, 55 International Organization (2001) 289, at 296. Koremenos also assumes that states can only renegotiate to the original division of benefits and that states are risk averse. Ibid., at 293–294. This second assumption is common in international relations with respect to real world outcomes, such as the possibility of losing a war. This assumption makes little sense in the context of legalized relations, however. Because states can always violate legal commitments to avoid harsh real world consequences, the risks associated with legal agreements are considerably less severe and more diversified than the risks associated with, e.g., international security. See A.T. Guzman, How International Law Works (2008). These two assumptions drive Koremenos’s prediction that states will prefer to renegotiate when faced with uncertainty, rather than the more complicated picture I present in this article.

\(^11\) Koremenos, supra note 9, at 551: ‘The advantage that states derive from [renegotiation] is flexibility: the division of gains can be reset to the initial level at regular intervals. States choose to reset the division of gains to its original level because I assume that bargaining power and other factors that influence the division do not change over time.’

\(^12\) Koremenos, supra note 10; Koremenos, supra note 9; both texts focus, e.g., on the use of sunset or duration clauses in binding international agreements.
particular attention. The balance of this article focuses on one specific way in which international agreements enable renegotiation through non-compliance. The form of international agreements – hard or soft – influences the penalties states face for non-compliance. When these penalties are lower, as they are with soft law, states are more likely to engage in non-compliant action as a way to spur renegotiation. From an *ex ante* perspective, then, the choice between hard and soft law is in part a decision about whether states want to make it easier for dissatisfied states to contest existing international rules.

3 How Soft Law Facilitates Non-Compliance as a Law-making Strategy

The choice of form of an international agreement facilitates non-compliance as a law-making strategy by reducing the penalty for non-compliance. Scholars have identified several ways in which soft law does this. Most importantly, soft law reduces the reputational penalty states pay for violating a commitment.\(^{13}\) In entering into an international agreement, states create expectations about their future conduct. Violating an agreement disappoints those expectations and signals to other states that they should not trust the violating state. This is costly to the violating state because it limits the future value of cooperating with the violating state. Soft law, precisely because it is non-binding, creates less rigid expectations about future conduct. The penalty for deviating is therefore less.\(^{14}\) In addition to reputational penalties, soft law is also not subject to the law of treaties, which in some cases can authorize countermeasures as a means of enforcing binding commitments.

Many soft law agreements, of course, carry significant costs for violation that may not be related to the legal form of the agreement. Chris Brummer, for example, has argued that much of international financial law can be soft because markets discipline government behaviour as much as, or more than, legal form does.\(^{15}\) Likewise, some hard law agreements may be relatively costless to violate. In other words, compliance costs across agreements vary with many factors other than bindingness. Significantly, however, negotiators do not control most of these other factors. They do control whether the individual rule or agreement under discussion is binding or not. A negotiator wishing to encourage unilateral defection as a means of renegotiation has to work with the tools at hand. States may not be able to change how markets move capital across borders in response to government policies, but they can make renegotiation of financial rules marginally more likely – relative to the alternative, binding financial rules – by making them soft.

These reduced penalties for non-compliance ease renegotiation in at least three different ways. First, soft law reduces the cost of public, long-term violations of


international agreements – a form of non-compliance tantamount to exit and, unlike efforts to cheat on legal obligations, made public to provoke renegotiation. Second, soft law reduces the costs of creating conflict between international agreements, allowing states to use fragmentation as a renegotiation strategy. Third, by reducing the penalty for non-compliance, soft law also facilitates the use of non-consensual forms of law-making, which in turn reduces the burden of renegotiation. To be sure, these strategies can all be used to renegotiate hard law as well. My point here is merely that soft law makes these strategies less costly and, therefore, more likely, relative to hard law.

A Violation as Exit

Publicly exiting from an international agreement, or the threat thereof, forces a state’s partners to consider whether they wish to proceed without the exiting state or wish to change the law to accommodate the exiting state’s concerns. Exit as a way to contest the viability of public international law has become increasingly prominent in recent years. In other instances, states make public their intent to engage in long-term violations as a matter of policy. Such violations are tantamount to exit. These violations or exits can spur renegotiation. Two examples illustrate this point. In 1971, President Richard Nixon took the USA off of the gold standard, allowing the value of the US dollar to float, which was a violation of the par value system established by the Articles of Agreement of the International Monetary Fund (IMF) immediately after World War II. This violation, effectively a withdrawal from the IMF’s par value system, prompted five years of renegotiation that culminated in 1976 with the adoption of amendments to the Articles of Agreement of the IMF that permitted floating exchange rates. Similarly, in 2003, France, Germany, Portugal, Italy and Greece all violated the European Stability and Growth Pact (SGP), which required states, inter alia, to maintain a 3 per cent deficit to gross domestic product ratio. The violating members used their very public violations as a tactic to push for the renegotiation of the SGP. They were successful, as other EU member states agreed to suspend the SGP. In 2005, the EU issued a revised SGP that temporarily permitted deficits higher than the threshold and evaluated compliance with the threshold both over a longer horizon and under less strict criteria.


States regularly use non-compliance, or the threat thereof, to renegotiate soft law agreements. To give but one illustrative example, in 2005 the USA reached an agreement with India on normalizing civilian nuclear cooperation and trade. The agreement represented a threat of non-compliance with the Nuclear Suppliers Group Guidelines (NSG Guidelines), the soft law rules governing trade in nuclear technology. Notably, the USA did not attempt to first negotiate an exemption for India in the NSG Guidelines. Instead, the USA first announced its deal with India and then went to the NSG to persuade it to amend the Guidelines to allow civilian nuclear cooperation with India. In acting unilaterally outside of the NSG framework, the USA undoubtedly incurred a reputational cost. A number of countries criticized the Bush administration’s penchant for ‘going it alone’, both generally and within the context of the NSG specifically. Sweden, Denmark, Ireland, Austria and China all expressed concerns about the exemption for India that the USA had agreed to and for which it subsequently sought NSG approval. Despite the resistance to the US move, France quickly followed suit, concluding its own agreement with India on civilian nuclear cooperation in 2006. Faced with the rebellion by two of its key members, the NSG agreed in 2008 – three years after the American agreement with India and two years after the French – to amend its Guidelines to permit civilian nuclear cooperation with India.

B Fragmentation

Soft law also enables fragmentation through the creation of rival regimes, what Gregory Shaffer and Mark Pollack have described as hard and soft law operating as antagonists. The availability of soft law allows states to strategically create conflicts (or the possibility of conflict) between regimes that would be more difficult to create with hard law. Soft law enables these conflicts through the same mechanism through which it enables exit – by reducing the costs of violating one commitment. States can thus more easily establish rival regimes that put pressure on incumbent

24 See ‘France and India in Nuclear Deal’, BBC News (20 February 2006), available at http://news.bbc.co.uk/1/hi/world/south_asia/4731244.stm (last visited 6 February 2016). Like the US agreement, the France–India agreement was a framework agreement.
27 Ibid., at 744.
hard law regimes because the conflict between the two regimes does not give rise to the same kind of sanctions that it would if two hard law regimes conflicted.

Two examples illustrate this point. First, the International Whaling Commission (IWC) imposed a moratorium on commercial whaling in 1946 that remains in effect today.\textsuperscript{28} Traditional whaling nations, such as Iceland and Norway, oppose the moratorium on the grounds that it is not necessary to preserve whaling stocks.\textsuperscript{29} These nations, along with Greenland and several smaller whaling nations, formed the North Atlantic Marine Mammal Commission (NAMMCO) in order to undermine support for the moratorium (Canada, Russia and Japan have observer status).\textsuperscript{30} However, NAMMCO does not pursue this objective through the creation of binding legal quotas that might directly contradict the IWC’s moratorium. Instead, NAMMCO only provides non-binding recommendations and guidelines to its members on the harvesting of whales and small cetaceans.\textsuperscript{31} In this way, NAMMCO avoids creating hard law obligations that directly conflict with the IWC’s rules, while still challenging the IWC’s rules by providing a forum in which guidelines on topics such as the efficiency of rifle ammunition to hunt small whales can be developed.\textsuperscript{32} NAMMCO’s Scientific and Management Committees also collect data and make recommendations on conservation and management of stocks of whales and small cetaceans.\textsuperscript{33} Such recommendations aim to undermine the claim that the IWC’s moratorium is necessary for the preservation of whaling stocks.

Second, in the 2001 Doha Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Public Health, a soft law agreement, WTO member states ‘affirm[ed] that the [TRIPS] Agreement can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all.’\textsuperscript{34} The Doha Declaration need not be in direct conflict with the TRIPS Agreement; indeed, its text suggests that it should be read with the TRIPS Agreement as a guide. Nevertheless, as Shaffer and Pollack note, developing states used the Doha Declaration as the vehicle for renegotiating the TRIPS Agreement’s potentially harsh effect on the

\textsuperscript{30} See \textit{ibid.}, at 163–164.
\textsuperscript{31} \textit{Ibid.}, at 164–165.
ability of developing countries to obtain needed pharmaceuticals in a cost-effective manner.\textsuperscript{15}

\textbf{C Non-Consensual Law-Making}

Finally, reducing the penalty for non-compliance through soft law makes it more likely that states will accept non-consensual renegotiation procedures. If states do not face a steep a penalty for deviating from a future norm, they will be less concerned with having the veto over changes to the law that comes with international law’s consensual law-making paradigm. As a number of scholars have noted, non-consensual law-making procedures are historically rare in hard law regimes.\textsuperscript{36} Although to my knowledge no comprehensive study exists, a number of major soft law regimes permit amendment with less than the unanimity that hard law regimes usually require for amendment. For example, the Codex Alimentarius Commission, which sets food safety standards, adopts its standards by a simple majority vote. The Commission on Phytosanitary Measures, which promulgates non-binding standards for protecting plants from pests, can adopt standards by a two-thirds vote.\textsuperscript{37} A wide range of Conferences of the Parties can pass non-binding ‘recommendations’ as an alternative to formal amendments to their governing treaties, the latter of which almost always require each state to give consent prior to becoming binding on that state.\textsuperscript{38} A number of other soft law bodies, such as the Financial Action Task Force and the Basel Banking Committee, take their decisions through consensus – a decision rule that stops well short of the protections provided by the need for individual consent ordinarily associated with binding obligations.\textsuperscript{39} Even when soft regimes require unanimity for amendment, a reduced penalty for non-compliance may make a reluctant state more willing to assent.

Moreover, some scholars have argued that the decisions of international tribunals should be viewed as soft law.\textsuperscript{40} Such decisions are prospectively non-binding, yet clearly establish expectations about how states should behave. States are more willing to agree to the creation of international tribunals because they know that the non-consensual obligations arising from the tribunals’ decisions and interpretations are

\textsuperscript{15} Shaffer and Pollack, \textit{supra} note 26, at 780. The Doha Declaration was followed by a waiver to the relevant provisions of the TRIPS Agreement, the substance of which was submitted in 2005 to WTO members for ratification as an amendment to the TRIPS Agreement, \textit{supra} note 34.

\textsuperscript{36} Helfer, ‘Nonconsensual International Lawmaking’, 2008 \textit{University of Illinois Law Review} (2008) 71, at 85: ‘Only rarely do treaties permit a supermajority to adopt changes that are subject neither to ratification nor to objection by an individual party.’

\textsuperscript{37} International Plant Protection Convention (IPPC) 1951, 150 UNTS 67, Art. XL5.

\textsuperscript{38} E.g., the UN Framework Convention on Climate Change authorizes the Conference of the Parties (COP) to ‘[m]ake recommendations on any matters necessary for the implementation of the Convention.’ UN Framework Convention on Climate Change (UNFCCC) 1992, 1171 UNTS 107.

\textsuperscript{39} Indeed, at the UNFCCC COP in 2010, the Mexican foreign minister went so far as to adopt a proposal under a consensus rule despite the presence of an explicit objection. D. Bosco, ‘Foreign Policy: How Mexico Mastered Multilateralism’, \textit{National Public Radio} (15 December 2010), available at \texttt{www.npr.org/2010/12/15/132076505/foreign-policy-how-mexico-mastered-multilateralism} (last visited 6 February 2016).

\textsuperscript{40} See Guzman and Meyer, \textit{supra} note 13, at 171–172.
non-binding and, thus, less costly to deviate from. On this view, the rapid expansion of international tribunals in the late 20th century is part of the larger rise of soft law in international governance that occurred at the same time.

4 The Logic of Renegotiation

In this section of the article, two different kinds of renegotiation are distinguished: welfare-enhancing renegotiations and redistributive renegotiations. Ideally, legal institutions should encourage the former while deterring the latter. Encouraging welfare-increasing renegotiation through soft law or similar devices is especially important because transaction costs and distributive concerns can prevent beneficial renegotiations. If states worry that future renegotiation may be too costly, they may avoid beneficial short-term cooperation in order to avoid long-term cooperative costs. In other words, the shadow of the future may cause cooperation to unravel. States cannot, however, know ex ante whether a future renegotiation will be welfare increasing or redistributive. Thus, they must design agreements based on their expectations about the costs and benefits of renegotiation under the particular circumstances at hand.

A Welfare-Enhancing Renegotiation

When contract theorists speak of renegotiation, they often mean amending the terms of an existing agreement in a way that increases the net welfare of the parties to the agreement. There are two kinds of welfare-increasing renegotiations. Pareto-improving renegotiations are changes to the law that make no party worse off and make at least one party better off. In a legal system in which states, for the most part, cannot be bound without their consent, successful (re)negotiations must be Pareto improving or else states will not agree.

The second kind of welfare-enhancing changes to the law are those that increase overall welfare even if they impose losses on some parties – so-called Kaldor-Hicks improvements. Rational states will not agree to a change in the law that imposes losses upon them, but, happily, at least as a matter of theory, any Kaldor-Hicks improvement can be converted to a Pareto improvement through transfers among the parties. For example, environmental agreements such as rules on climate change increase global welfare but have the potential to impose restrictions on economic development in developing countries. To compensate developing states for this loss, developed states commonly offer financial and technological assistance. These assistance programmes are intended to redistribute the losses from welfare-increasing rules such that they become Pareto-improving rules.

At first blush, welfare-enhancing renegotiations might seem unproblematic. As long as an international agreement does not make any state worse off, no state has any reason to object. Moreover, given the uncomplicated nature of these renegotiations, the design of international agreements would play a minor role in the

likelihood of their success. Unfortunately, transaction costs and distributive concerns complicate this rosy picture. Transaction costs can prevent states from making the necessary transfers or side payments to convert Kaldor-Hicks-improving amendments into Pareto-improving ones, forcing states to do without welfare-enhancing renegotiations. For example, making a side payment to a state in order to induce it to agree to a welfare-enhancing change to a multilateral agreement is a public good. Think again of technology transfer or assistance provisions in international environmental agreements. Many states stand to benefit from the participation of developing states in environmental agreements, but only the states making the side payments bear the cost. As with all public goods, this creates a problem wherein states may be unwilling to make the necessary side payments because they are hoping another state will do it.

Negotiating over the allocation of cooperative benefits can also delay or even prevent agreement on Pareto improvements. States, after all, would rather have more than less. A state might therefore hold out for a greater share of the gains from cooperation, even if the proposal on the table makes it at least as well off (or perhaps even better off) than it would be under the status quo. Indeed, James Fearon famously demonstrated that reaching an agreement becomes more difficult as states come to believe the agreement they are negotiating is likely to endure.\footnote{Fearon, ‘Bargaining, Enforcement, and International Cooperation’, 52 International Organization (1998) 269.} Holding out for better terms can be a rational strategy the longer you expect to be bound by those terms.

The significance of this last point cannot be overstated. The shadow of the future is a sword that cuts both ways. In traditional international relations scholarship, the shadow of the future solves cooperative problems by giving states long-term incentives to cooperate in the face of short-term incentives to defect. In some situations, however, the shadow of the future can create long-term incentives not to cooperate in the face of short-term incentives to cooperate. In other words, the shadow of the future can unravel cooperation, rather than support it. The shadow of the future has this non-cooperative effect in situations in which cooperating today creates opportunity costs tomorrow. States may expect that the rules they would happily implement today will be suboptimal tomorrow. If states have this expectation, they may decline to cooperate today, even though doing so would be welfare enhancing, in order to avoid future costs associated with cooperating on suboptimal terms. The fifth section of this article discusses the conditions under which the shadow of the future can inhibit cooperation. The key point is that transaction costs and distributive concerns mean that welfare-enhancing renegotiations, even Pareto-improving ones, cannot simply be assumed. Instead, states may wish to encourage such renegotiations by lowering transaction costs through the use of soft law, exit clauses or other mechanisms that make unilateral action, and specifically non-compliance, easier as a law-making strategy.
B Redistributive Renegotiation

Of course, states must balance the possibility that renegotiation will be welfare increasing with the possibility that it will be purely redistributive. In general, states would like to deter redistributive renegotiations ex ante. In addition to fairness concerns, redistributive renegotiation can decrease overall welfare and deter states from entering into international agreements in the first place. To see why this is so, I turn to transaction costs economics, in which the key feature of an investment that makes opportunistic renegotiation possible is the fact that it has value only if the relationship between the parties continues as is. In economic parlance, this feature of an investment is usually referred to as ‘asset specificity’, although I will refer to it as the relationship-specific nature of an investment. Law and economics scholars have long understood that transactions differ in the extent to which they require states to make costly investments that are unique to the specific transaction. Some transactions are generic, in the sense that if another party to an agreement does not perform, the performing party has not incurred any loss. In a basic sale of goods context, for example, if a seller invests in making a widget for a buyer and then the buyer reneges on its commitment to buy the widget, the seller has not lost anything if it can simply resell the widget at the same price to another buyer. Put differently, the seller incurs no opportunity cost in investing in making the widget because the investment can be easily repurposed.

By contrast, if the buyer contracts with the seller to make a special widget suitable only for the individual buyer’s purposes, then the seller cannot easily resell the widget if the buyer backs out of the transaction. This situation exposes the seller to the possibility of redistributive renegotiation. After the seller has already invested in making the special item, the buyer can offer the seller whatever the price is at which the market values the item, rather than the greater price that induced the seller to make the special item. For example, imagine a situation in which a buyer agrees to pay a seller $100 for a specialized product. It costs the seller $60 to make the product, including its special features, and the market values the product at $50. Absent some means of enforcing the original bargain, a rational seller, after it has produced the product, would accept a price as low as $50 even though its gains from the transaction are thereby shifted to the buyer and, in fact, it suffers a loss. In this example, after manufacturing the product, the seller prefers to sell at the market price of $50, suffering a $10 loss. Forgoing the sale if the buyer attempts to renegotiate results in a $60 loss.

43 Technically, all renegotiations must be Pareto improving or else states would not agree. However, they need not be Pareto improving relative to the status quo. If a state has the power to take the status quo off the table, a rational state might agree to a change that made it worse off to avoid an even worse outcome. See L. Gruber, Ruling the World: Power Politics and the Rise of Supranational Institutions (2000) (describing the power to remove the status quo as ‘go-it alone power’).


(the cost of manufacturing the item). Foreseeing this difficulty, the seller may refuse to enter into the agreement at all, depriving both the buyer and the seller of a potentially lucrative transaction.

This same basic distinction exists in international agreements. The ‘investment’ required by most international agreements comes in the form of concessions that states make to each other. A state agrees to lower its tariff barriers or impose certain capital reserve requirements on its banks, for example, in exchange for other states making similar concessions. Some concessions are relatively costless in the sense that making the concession does not leave a state any more vulnerable to redistributive renegotiation than it was prior to making the concession. Affording foreign diplomats the privileges and immunities required by the Vienna Convention on Diplomatic Relations, for example, does not require states to make significant policy changes that cannot be easily withdrawn.\(^\text{46}\) Rather, if one state violates its diplomatic obligations to another state, the second state can immediately withdraw the privileges and immunities afforded the violating state’s diplomats. Having granted immunity to the violating state’s diplomat in the past does not put the second state in any worse a position than if it had never cooperated with the violating state in the first place.

On the other hand, states often wish to make costly investments in reliance on the concessions made by their partners.\(^\text{47}\) A state may wish to invest in supporting a particular industry in reliance on market access concessions it has obtained.\(^\text{48}\) Or it may allocate its military resources based on its military alliances, choosing to respond to some threats while leaving allies to protect it from other threats. Unlike granting a foreign diplomat immunity, these kinds of concessions involve allocating scarce resources that cannot be easily repurposed once committed. Having made these costly investments, states are therefore subject to being held up for renegotiation by other states. For example, once a state has committed significant resources to developing a particular sector of its economy, other states may attempt to raise tariffs on that sector. The investing state cannot simply repurpose the resources it has already invested to another sector. Rather, absent some other deterrent on renegotiation, it may have to accept trade barriers in excess of those to which it initially agreed. Foreseeing this difficulty, states may hesitate to make international commitments and the resulting costly, but welfare-increasing, investments.

In line with conventional thinking about renegotiation and cheating, international agreements seek to deter this kind of redistributive renegotiation. Where renegotiations are more likely to be redistributive than welfare increasing, we would expect states to use institutional features that create greater costs to unilateral renegotiation strategies such as non-compliance. In other words, where agreements raise principally distributive concerns, they will tend to be hard law agreements.

\(^{46}\) Vienna Convention on Diplomatic Relations 1961, 500 UNTS 95.
\(^{47}\) Dunoff and Trachtman, ‘Economic Analysis of International Law’, 24 Yale Journal of International Law (1999) 1, at 40: ‘Any transaction in which one state advances consideration at a particular point in time and must rely on one or more other states to carry out their end of the bargain at a later point in time, or else experience a significant loss in its expected value, is asset specific.’
\(^{48}\) Cf. Carnegie, supra note 8.
5 Hard Law versus Soft Law

In designing international agreements, states thus face a balancing act. They wish to encourage welfare-enhancing renegotiation but deter redistributive renegotiation. Unfortunately, states cannot know *ex ante* whether future renegotiations will be welfare enhancing or redistributive. Thus, they have to balance the costs of the marginal redistributive renegotiation against the benefits of the marginal welfare-enhancing renegotiation. In this section, I explain two concerns that dominate this choice: uncertainty and shifting power. Although I discuss them separately, they create the same possibility – namely, that in light of changed circumstances an agreement negotiated in the future would be different than one negotiated today. As described below, the role of these two factors has changed since the end of the Cold War. Many of the most pressing 21st-century governance problems are plagued by scientific uncertainty, which is more likely to implicate common interests. The major issues of the Cold War concerned strategic uncertainty, where distributive issues are paramount. Moreover, power is shifting much more rapidly today, making renegotiation an attractive strategy for boosting participation in international agreements, even if future renegotiation is likely. The fact that uncertainty and power affect contemporary international governance challenges so differently from those issues that dominated the discourse during the Cold War partially explains the increased importance of soft law today.

A Uncertainty

It is tempting to argue that uncertainty always pushes states towards making agreements easier to renegotiate, including through the use of soft law. States may wish to learn from international cooperation and, thus, renegotiate in the future when they know more. Renegotiation, however, is only sometimes an answer to uncertainty. When common interests dominate over distributional concerns, uncertainty does indeed push states towards renegotiation. However, when uncertainty raises distributional concerns, states may prefer more rigid commitments even in the presence of uncertainty. More concretely, this notion suggests that governance problems involving scientific uncertainty – increasingly, a matter of international cooperation across trade, investment and environmental law – are more likely to be soft law since common interests will tend to dominate over distributional concerns. Strategic uncertainty, such as in the arms control context, primarily raises distributional concerns, pushing states towards hard law. The relative prominence of soft law in 21st-century governance can thus be explained in part by the increasing importance of scientific uncertainty relative to strategic uncertainty.

1 Uncertainty and Common Interests

Uncertainty can give rise to significant transaction costs when states are called upon to make concessions the value of which depends on the agreement remaining

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49 See Koremenos, *supra* note 9, at 553.
in force. If uncertainty calls into question the wisdom of making a particular concession, then states may be unwilling to enter into an agreement in the first place. In such situations, international agreements strive to minimize the costs from uncertainty. Consider international cooperation on nuclear non-proliferation. All but eight countries in the world (or nine, if one counts North Korea) have agreed to forego the development of nuclear weapons. A number of these countries – Germany, Japan, Brazil and South Africa – have what is sometimes called a latent nuclear capability, meaning that they could very quickly build a nuclear weapon if they wished. For these countries, the concession to forego nuclear weapons is relatively low cost, even given some level of uncertainty about other nations’ intentions. They can easily reverse their concession, and, thus, they do not require a hard law agreement. For other countries such as Iran or North Korea (when it was in the Treaty on the Non-Proliferation of Nuclear Weapons [NPT]), the concession is quite a bit costlier. Since they do not already have the technology to build a nuclear weapon, agreeing not to develop a nuclear weapon involves a significant opportunity cost. In other words, being a member of the NPT may be costly because it delays and impedes their ability to develop a nuclear weapon. Uncertainty about whether they will want a nuclear weapon in the future is thus much costlier for these countries.

States deal with uncertainty in the presence of costly concessions differently depending on whether common interests dominate over distributional considerations or vice versa. States have common interests, as I use that term, when they expect changes in the world to affect them (and, therefore, to affect their preferences over legal rules) in a similar fashion. Distributional considerations arise when states fear they will fare differently depending on how an uncertain issue is resolved. To see the difference, one can imagine a simple coordination game (Figure 1). Imagine two states, State 1 and State 2, trying to coordinate over two different legal rules, Rule A and Rule B. In the box below, the first number indicates State 1’s payoff and the second number indicates State 2’s payoff. The upper left and lower right boxes indicate situations in which an agreement is reached and, thus, coordination is achieved. In the lower left and upper right boxes, the states do not reach an agreement and so receive payoffs of 0.

Common interests are akin to pure coordination problems, in which states all prefer the same rule and institutions merely try to facilitate their ability to coordinate on that rule. In Figure 1, a pure coordination game is one in which \( x = y \). In that situation, states are indifferent to whether the legal rule selected is A or B. By contrast, as \( x \) becomes bigger than \( y \), states play a distributional game (one that corresponds to the anachronistically named Battle of the Sexes). As long as \( x \) and \( y \) are positive,

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50 Where agreements do not involve relationship-specific investments, uncertainty does not affect the negotiation of international agreements. The value of an investment does not hinge on the agreement remaining intact in the future, and, therefore, renegotiating in light of changed circumstances, including new knowledge, does not affect the value of an agreement made today. Williamson, supra note 45, at 59.


52 Treaty on the Non-Proliferation of Nuclear Weapons (NPT) 1968, 729 UNTS 161.
states prefer coordination (agreement) to a failure to coordinate. However, as the gap between $x$ and $y$ rises, states care more about obtaining favourable terms. States may fail to reach agreement in an effort to prevail on their preferred rule. Coordination issues can thus be very difficult negotiation problems.\(^{53}\)

When states perceive themselves to have common interests at the time of agreement, uncertainty is likely to affect them in similar fashion. In such situations, uncertainty coupled with costly investments push states towards soft law. As common interests come to dominate over distributional considerations, the possibility of unilateral action aimed at triggering a renegotiation becomes less costly for other states. A non-compliant act may be the trigger for a renegotiation that helps everyone. Moreover, initiating a renegotiation through non-compliance entails costs, such as the costs that flow from breaching or exiting from an agreement, even when an agreement is soft. When interests are aligned, states may wish to renegotiate, but they prefer that some other state incur these first-mover costs.

Renegotiation thus may be particularly attractive in situations in which uncertainty is high, common interests dominate over distributional considerations and there is an obvious first mover in the event of a renegotiation. Soft law operates to effectively delegate to these prospective first movers – states that have a particularly strong interest in a set of rules and the ability to act as agenda setters for renegotiation.\(^{54}\) The amendment of the NSG Guidelines to permit civilian nuclear cooperation with India illustrates this point. NSG members have a common interest in ensuring that the weapons technology they each possess does not proliferate to new states. As potential suppliers of nuclear technology, NSG members also face distributional pressures. States, such as the USA and France, which possess not only the relevant technology but also large industries that would profit from relaxed trade rules, would like to compete with each other for a larger share of global civilian nuclear trade. Those states with less interest in the commercial aspects of nuclear technology view such trade as a cost to their security interests. Despite these distributional considerations, however, the common

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\(^{53}\) See Fearon, supra note 42. By contrast, coordination problems are relatively easy compliance problems. Once states know which rule they are coordinating on, there is no reason to defect. See Guzman and Meyer, supra note 13, at 176–177.

interest in non-proliferation has driven NSG negotiations. The NSG Guidelines are thus soft law rules more easily subject to renegotiation.

As the distributional considerations become more important, renegotiation becomes less appealing even in the presence of uncertainty. Designing agreements to facilitate renegotiation, especially through a first mover, invites self-interested behaviour that does not serve the interests of states as a whole. Powerful states will use the ability to renegotiate to redistribute the gains from cooperation in their favour. Indeed, in some situations, powerful states can use unilaterally driven renegotiation to force legal rules that make other states worse off than they would be under the incumbent regime, even if overall welfare increases. The NPT example above illustrates this point. States face uncertainty about whether their neighbours or rivals intend to acquire a nuclear weapons capability as well as uncertainty about whether technological change may make such an acquisition easier. Unlike trade in nuclear technology, however, distributional considerations are much more important than common interests. Changing the rules as to which states are allowed to possess nuclear weapons would force states into destructive arms races, could destabilize global politics and would privilege states inclined towards militarization in the first place. In short, it would create winners and losers on a grand scale. Consequently, states have opted to make the NPT a hard law agreement, even while governing other aspects of the non-proliferation regime where common interests are more significant, such as the rules on trade, through soft law.

2 Types of Uncertainty

Uncertainty comes in a variety of different stripes. I discuss two different kinds of uncertainty here: scientific and strategic. States, of course, face other kinds of uncertainty, such as political uncertainty. This discussion is not meant to be exhaustive or to create sharp lines. Rather, I focus on scientific and strategic uncertainty for two reasons. First, each is more likely to be dominated as a category by either common interests or distributional concerns. Second, the major issues in international legal cooperation have shifted from ones plagued by strategic uncertainty to ones in which scientific uncertainty plays a greater role.

Much of modern international law tries to grapple with the difficulties posed by scientific uncertainty – a lack of knowledge about the relationship between humans and their environment, either physical or social. The most obvious examples of scientific uncertainty come from international environmental law. The climate change regime, for example, has grappled over the years with the question of whether climate change is occurring, whether human activity contributes to it and, more recently, over what kinds of policy responses might effectively mitigate the damage from climate change.

Although scientific uncertainty is perhaps most clearly identified with environmental law, it also pervades modern economic law. Issues such as how risk travels through

55 The NPT contains a sunset clause, which enables renegotiation but not through unilateral action. Because states ultimately preferred not to renegotiate the NPT, they extended it indefinitely in 1995. See Koremenos, supra note 9.
international financial institutions and what kinds of policy responses can mitigate this risk are matters of scientific uncertainty. Of course, these questions are not ones about the physical world in the same way that health and environmental risks are. Nevertheless, they call for an understanding of the interaction between human behaviour and its social and physical environment. Not surprisingly, international financial regulation is predominantly soft law, most notably the Basel Accords.\(^{56}\)

The role of uncertainty in the trade regime is most evident in the legal rules governing permissible health and environmental measures. The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) provides, *inter alia*, that ‘Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations’.\(^{57}\) It provides that these international standards should be developed by intergovernmental organizations: in the area of food safety, the Codex Alimentarius Commission; for animal health, the International Office of Epizootics; for plant health, the Secretary of the International Plant Protection Convention; and such other international organizations as the WTO shall specify.\(^{58}\)

Thus, while the rules governing the use of SPS measures (that is, the specific rules in the SPS Agreement) are hard law, the actual SPS measures that the WTO prefers are soft law rules. The Codex Commission, for example, is an intergovernmental body that issues non-binding standards that receive legal effect because the SPS Agreement creates a safe harbour for states that regulate based on the Codex Commission’s standards – classic soft law. WTO members could, of course, negotiate binding rules on what kinds of SPS measures members may impose. Doing so, however, would require that all WTO members agree to any change in the rules. This consent requirement is widely associated with binding agreements in general and prevails at the WTO specifically.\(^{59}\) Instead, the SPS Agreement requires that standards, which can be quite detailed, be developed by international organizations open to all WTO members.\(^{60}\) Since these agreements are soft law created outside the WTO, they can be negotiated without the burdensome consent requirement associated with changing binding agreements, in general, or the SPS Agreement, in particular.\(^{61}\) Incorporating soft law standards developed in another institution, in other words, reduces renegotiation costs in the event that the scientific understanding of a problem changes.

Indeed, in 1997 – a few short years after the SPS Agreement named norms worked out under the International Plant Protection Convention’s (IPPC) framework as the relevant international standards for plant health – states amended the IPPC to create the Commission on Phytosanitary Measures.\(^{62}\) As noted above, the Commission can adopt standards by a two-thirds vote. Thus, states choose a non-consensual soft law-making body with control over plant health standards, rather than a binding treaty

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\(^{57}\) Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) 1994, 1867 UNTS 493, Art. 3.1.

\(^{58}\) Ibid., Annex A(3).

\(^{59}\) See section 3.C in this article.

\(^{60}\) SPS Agreement, *supra* note 57, Annex A(3)(d).

\(^{61}\) To be sure, changing standards through the Codex Commission can still be difficult. My point is a relative one about changing soft law standards versus hard law standards.

\(^{62}\) IPPC, *supra* note 37.
amendment process under either the WTO or the IPPC. They went out of their way to create one once the SPS Agreement elevated the legal significance of IPPC norms.

In all of these areas – finance, climate change, health and safety – states have significant common interests in how uncertainty is resolved (the gap between $x$ and $y$ in Figure 1 is small). If genetically modified organisms (GMOs) are harmful to humans, this affects people everywhere. If regulators discover that certain financial practices create risks that can disrupt the financial sector globally, all states have an interest in adopting rules to curb these practices. This is not to deny, of course, that distributional concerns arise in dealing with problems of scientific uncertainty. The dispute over GMOs highlights this point. The American food industry relies on GMOs, while the European food industry generally does not. Thus, rules limiting trade in GMOs have distributional implications and have been opposed by the USA in the Codex Commission where the soft law standards governing GMOs are initially developed as well as through the WTO disputes process.\footnote{See M.A. Pollack and G.C. Shaffer, When Cooperation Fails: The International Law and Politics of Genetically Modified Foods (2009).} From an \textit{ex ante} perspective, however, these are areas where states are relatively more likely to find common ground when faced with new information.

On the other hand, states may face strategic uncertainty arising from asymmetric information about how other states are behaving. Strategic uncertainty is perhaps most clearly seen in the security context, as in the NPT example above or the bilateral arms control agreements between the USA and the Soviet Union during the Cold War. Strategic uncertainty – for example, whether another state has certain weapons capabilities – is highly distributional and, thus, much more likely to be hard law. If the USA had successfully developed and deployed a ‘Star Wars’ missile defence system in the 1980s, it would have disrupted the strategic balance between the USA and the Soviet Union. Both states were uncertain whether such a system was possible, but banning it through a hard law agreement made sense since whichever state resolved the uncertainty would have done so to the detriment of the other state.

Although it remains significant in the security and arms control context, strategic uncertainty is diminishing in relative importance within the overall context of global governance. Many of today’s most pressing problems – from climate change to the regulation of GMOs and the management of systemic financial risk – deal with uncertainty about the social or physical world rather than with uncertainty about another state’s intentions, capabilities or actions. The growth in soft law is driven by international law’s expansion into, and the increased importance of, new areas of cooperation such as these. This expansion, in turn, has at its roots increased economic and technological interdependence, coupled with a more expansive notion of what constitutes an appropriate subject of international cooperation. International law, in short, has become more engaged with the physical world and sub-state, transnational interactions. These objects of regulation change faster, and more unpredictably, than the historically traditional subjects of international law, such as military or diplomatic cooperation. This suggests that soft law in areas of scientific uncertainty is likely a
permanent feature of international legal relations, rather than one that is subject to the reformalization for which some scholars have called.  

B Shifting Power

States are also more likely to make agreements soft when power is shifting. A state is powerful, as I use that term, when it prefers not to cooperate with ‘status quo’ states under the prevailing legal rules. As a state becomes more powerful, it expects to be able to negotiate better terms. ‘Revisionist’ states – states that are becoming more powerful over time – will thus defer international agreements unless they are given the opportunity to renegotiate in the future when they can extract better terms. To see why shifting power pushes states towards soft law, consider that in the absence of an agreement each state gets its payoff from whatever its next best alternative is, what might be called its ‘outside option’.

As a state’s outside option improves, it becomes more powerful because it needs existing cooperative arrangements less. Moreover, a state with a superior outside option expects to be able to negotiate better terms. A state will not enter into an agreement that makes it worse off than its outside option, so the outside option sets a lower boundary on what a state will accept from an international agreement.

Power shifts when states’ outside options change over time. For example, China’s greenhouse gas emissions are rising, both as an absolute matter and as a percentage of total global emissions. In 2007, China passed the USA as the world’s largest emitter, and the US Department of Energy reports that China’s emissions were over 26 per cent of global emissions as of 2010. As its emissions as a share of global emissions rise, China becomes more powerful in climate change negotiations. Other states increasingly need China’s participation in order to meaningfully reduce global greenhouse gas emissions, so China will expect to be able to negotiate better terms in the future. In the meantime, China is able to cash in on the economic development that drives its growth in emissions.

When power is shifting in a state’s favour, the state may be unwilling to accept terms that reflect its present bargaining power if accepting that agreement today means forgoing the opportunity to negotiate better terms tomorrow. The reason is that as a state becomes more powerful, locking in terms for the future in the present becomes increasingly costly. A simple numerical example illustrates this point. Imagine a game in which two states, State 1 and State 2, negotiate an agreement dividing a surplus of 10 per period. In the first period, each receives zero in the absence of an agreement. From the second period on, however, State 1 receives eight in the absence of an agreement. This change reflects an improved outside option – that is, a power shift in State 1’s favour. In the absence of an agreement (and for simplicity’s sake, assuming no discounting for the future):

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\[ U_1 = 0 + 8 + 8 + 8 \ldots = 8(n-1) \] where \( n \) equals the number of periods.

As is readily apparent, any agreement that gives State 1 less than eight in each period costs State 1 the difference between eight and what it receives under the agreement in each period after the first. Consider the situation if the states agree to a five/five split in the first period in which neither gets anything in the absence of an agreement. State 1 comes out five ahead in the first period, but three behind for every subsequent period. The game only has to be three periods long for State 1 to prefer no cooperation. With the agreement:

\[ U_1 = 5 + 5 + 5 = 15 \]

With no agreement:

\[ U_1 = 0 + 8 + 8 = 16 \]

Shifting power thus inverts the usual logic of international cooperation. Normally, the shadow of the future is a necessary condition to promote international cooperation. Defecting today yields greater benefits than cooperating today, but it is costly in the future. In the presence of shifting power, the opposite can be true. Cooperating today can be costly in the future if the terms of cooperation are costly to renegotiate. As a consequence, hard law agreements that prevent renegotiation can also prevent international cooperation. Soft law agreements, by permitting renegotiation, can boost overall welfare.\(^67\)

In this stylized example, the multi-period deal corresponds to a hard law agreement without renegotiation. In reality, of course, states can renegotiate hard law agreements as well as soft law agreements. The difference is that hard law agreements are costlier for revisionist states to renegotiate. Hard law represents a relatively more credible commitment by revisionist states to forgo the ability to renegotiate in light of an improving outside option. Hard law accomplishes this by reducing what a state receives if it pursues its outside option. A state wishing to exit or strategically violate an agreement must pay the requisite costs. To return to the example above, if State 1 had agreed to a five/five division in the first period, it would exit the agreement unless it received at least eight in each subsequent period. An agreement could deter this exit by imposing a penalty of three for each round the game lasts.\(^68\)

At first glance, these greater costs may seem attractive. Even if they cannot prevent renegotiation, they can give an advantage to status quo states in renegotiations. This advantage, however, is not free. Foreseeing the likelihood of paying these costs in the future, revisionist states will demand one of two things: better substantive terms beyond what the state might expect to receive based only on its current status or formal provisions that make renegotiation less costly. To see this more clearly, consider our three-period game above in which exiting before the second period costs State 1 six

\(^67\) This can be true even when states expect a future renegotiation to be redistributive. As explained below, in the presence of shifting power permitting renegotiation is welfare enhancing by permitting cooperation in the present, even if the terms of cooperation are adjusted in the future.

\(^68\) Eight minus five is three, so a penalty of three for each round the game lasts leaves State 1 indifferent between staying in the agreement and renegotiating.
(three for each of the last two periods). This penalty sets State 1’s utility from renegotiating the agreement \((5 + (8 – 6) + 8 = 15)\) equal to its utility from not renegotiating \((5 + 5 + 5 = 15)\). It thus looks as if we have guaranteed a 50/50 division of cooperation between the two states.

The difficulty is that State 1 will not enter into this agreement. The agreement fails to satisfy what political scientists refer to as the ‘participation constraint’. Recall from above that its utility over three periods from no agreement is 16. State 1 thus does better from forgoing cooperation entirely under our hypothetical hard law agreement, leaving State 2 with zero in each period. State 2 thus has to either sweeten the substantive terms of the agreement to give State 1 at least one more over the three periods, or it has to reduce the penalty from renegotiation to achieve the same effect. Either way, the fact that power will shift in the future requires State 2 to make a concession to State 1 in order to get cooperation today, even though cooperation benefits both sides immediately. In principle, status quo states might be indifferent between improving the substantive terms and offering an agreement that facilitates renegotiation. In reality, however, there are many reasons states might prefer soft law to improving substantive terms. First, expectations about shifting power may not be communicable to domestic audiences. Especially in democracies, this difficulty may mean that governments pay a political price for agreeing to substantive terms that are better than what the state might expect based on its current power.

The issue of whether to require developing states such as China to accept binding emissions reductions under the Kyoto Protocol illustrates these audience costs. In 1997, the United States Senate passed a resolution, known as the Byrd-Hagel Resolution, indicating that the Senate would not give its advice and consent to ratification of an agreement that did not include binding emissions reductions for developing countries. Several years earlier, the Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC) voted in the Berlin mandate not to require binding commitments from developing countries in the agreement that would become the Kyoto Protocol. This decision reflects in part the reality that countries such as China and India strongly opposed emissions limits for developing countries, such as themselves, undergoing rapid economic development.

In recognition of this bargaining power, the parties to the Kyoto Protocol opted for a hard law agreement that gave better substantive terms (no binding emissions reductions commitments) to developing states. But developed countries paid a steep price for this concession. The Clinton administration could not submit the treaty to the US Senate for advice and consent to ratification because of its sure defeat. The US inability to ratify the agreement, in turn, forced costly concessions to Russia and other states in order to ensure the Protocol could enter into force at all.

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70 A more formal model of this logic can be found at Meyer, supra note 51, at 408–409, n. 126.
Second, states may prefer soft law over improved substantive terms because they may not have similar estimates about the likelihood that power will shift. As in litigation in which both parties are optimistic about their chances for success, when both states are optimistic about their future prospects the space for an agreement shrinks.\textsuperscript{73} The revisionist state will be unwilling to agree to high exit costs and substantive terms that reflect the current bargaining power because it views such an agreement as giving away its future leverage. For its part, the status quo state will be unwilling to offer significantly better substantive terms than are justified by the other state’s current outside option. Soft law or some other mechanism making renegotiation less costly offers a solution to this problem.

It is not a coincidence that the 21st century has seen both dramatic fluctuations in state power and a relative increase in the importance of soft law. The increasing power of China, India, Russia and Europe across a number of different issue areas at the expense of the USA has made hard law less attractive. States have therefore turned to soft law as an alternative, allowing them to capture some benefits from cooperation in the interim. The turn towards soft law in the climate change architecture illustrates this point most clearly. As noted above, the economic growth and rising emissions of countries such as India and China means that power in climate negotiations is shifting in those nations’ favour. Emissions reductions commitments would have to be very favourable to China and India to be hard law. Such rules are not politically palatable in countries such as the USA.\textsuperscript{74}

Nations, therefore, began negotiations towards non-binding emissions reductions commitments. The Copenhagen and Cancun Accords effectively transitioned the climate change regime from a hard law regime to one with significant soft law elements. The Durban Platform, agreed in 2011, acknowledges this shift, calling for the negotiation by 2015 of a ‘protocol, another legal instrument or an agreed outcome with legal force’.\textsuperscript{75} This process culminated in December 2015 when parties to the UNFCCC announced the Paris Agreement, a legally binding instrument containing soft law emissions reductions commitments – so-called ‘nationally determined contributions’.\textsuperscript{76}

Unlike soft law that is driven by scientific uncertainty, however, soft law driven by shifting power need not be a permanent feature of the international system. If power relations stabilize between major nations, one might expect to see a decline in the relative importance of soft law in certain areas. The shadow of the future would again


\textsuperscript{74} In 2010, I argued that no hard law agreement on climate change could be reached until the relative share of global emissions – the proxy for power – stabilized. See Meyer, \textit{supra} note 52, at 423–425.


offer the benefits of long-term cooperation normally associated it, rather than the opportunity costs revisionist states face. If one might hypothesize, international relations tend to move in cycles – during periods of stability, international relations tend towards legalization; during periods of shifting power, they drift towards soft law. Both, of course, would continue to be used in individual circumstances, but, at the margins, macro conditions tip the relative importance of soft and hard law one way or the other.

6 Conclusion

Scholars in both political science and law have sometimes treated hard law, and the observance thereof, as sacrosanct. States do not share this veneration. Instead, states design international agreements to accommodate their needs, and, unsurprisingly, these needs change with time. During the Cold War and the period immediately following it, nations embarked on a project of multilateral institution building and legalization. This legalization project, however, rested on conditions that no longer hold to the same degree today – stable power relationships and efforts to deal with distributive concerns created by uncertainty.

Today, states face a different environment. Power is shifting across many of the most important areas of cooperation, making long-term international agreements less attractive to rising powers. These countries – China, Russia, Brazil, India and even the EU vis-à-vis the USA in some instances – want the flexibility to obtain better cooperative terms in the future. Major international agreements reflect this fluctuating power through an increasing use of soft law. Properly understood, this turn to soft law does not represent a retreat from cooperation. Rather, it reflects an effort to cooperate under conditions that make long-term agreements difficult to reach. Soft law is, in other words, the best available option in many cases.

At the same time, scientific uncertainty has become increasingly important as states expand cooperation into environmental, health and safety areas. Soft law allows for more effective cooperation in these circumstances because unilateral non-compliance as a renegotiation strategy can produce welfare benefits for states more generally. Even when states expect the resolution of uncertainty to affect them in the same way, transaction costs can defeat efforts at welfare-enhancing renegotiations. A single state may hold out for a greater share of the benefits from cooperation, or a small minority of states may stand to lose from an overall beneficial change in the law. Since international law does not permit, for the most part, non-consensual changes to the law, welfare-enhancing renegotiation could be stymied. Soft law harnesses unilateral action to solve this problem. Non-compliance can disrupt the status quo and force a renegotiation that otherwise might not occur. More generally, studying legalization requires a greater understanding of the conditions in which it occurs. We cannot understand how international law (or international institutions more broadly) constrains state behaviour if we do not have a theory of how states design those laws and institutions.