

Franchising Hard Law and Soft Law

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Abstract

The terms “hard law” and “soft law” are used to define the characteristics, intentions, and instrumentalities of various laws and rules. Hard law and soft law can be defined using multiple approaches and often the definitions overlap. Legal positivists look at hard and soft law in binary terms, distinguishing the two based on whether the rules are binding or non-binding. Rationalists look to the distinct attributes, reputational costs, and seriousness of the state’s commitment to the rules to determine whether they are hard or soft laws. Constructivists view soft laws as weak legal obligations enshrined in hard laws. This chapter discusses hard law and soft law in relation to the three approaches—legal positivism, rationalism, and constructivism—and the impacts each approach has on the implementation of the laws and rules. This chapter explores the differences between hard law and soft law and describes the impact of hard and soft law in a franchise law context.

Franchise laws span the spectrum that exists from hard laws to soft laws. The code of ethics between various countries serves as an example of soft law, as it is followed by those countries but not binding in courts. Characteristics of soft laws can also be seen in the franchise agreements because of their inherent ambiguity and the lack of regulation after the signing of the agreement. Disclosure rules are disguised as hard laws, as they are express and binding; however, the disclosure requirements end up having characteristics of soft laws since they are so broad and therefore often misunderstood by the franchisee.

This chapter will detail the gray lines that characterize the definitions of hard law and soft law. It will also discuss hard and soft laws in various contexts, including as alternates, complements, and antagonists. In the franchise context, the different rules can be seen as all three of these possibilities. Hard laws may be preferable for franchises because they provide greater guidelines. However, soft laws offer more flexibility to the contracting parties. When working as complements, soft law in franchise relationships can often lead the way to hard law or elaborate on already existing hard law. Hard and soft laws can always act as antagonists, as is the case in the franchise discrimination and franchise termination context. In short, this chapter examines the myriad of possible definitions for the terms “hard law” and “soft law” and seeks to apply them to the topic of franchise relationships and laws.

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I. INTRODUCTION

A. Definitions of Hard Law and Soft Law

There is considerable disagreement over how to define hard law and soft law.¹ Three approaches address and distinguish the uses of hard law and soft law: (1) legal positivism, (2) rationalism, and (3) constructivism.²

On the one hand, under a strict definition, soft law is not law at all.³ Legal positivists, under a traditional approach, typically deny the concept of “soft law” altogether, since law, by their definition, is binding.⁴ Rather, positivists hold that soft laws are pledges.⁵ On the other hand, legal scholars posit that obligations are not simply *politics*.⁶ Rationalists thus find that the language of binding commitments matters because it signifies the seriousness of a state’s commitment, whereby noncompliance results in reputational costs.⁷ And finally, constructivists “focus less on the binding nature of law at the enactment stage, and more on the effectiveness of law at the implementation stage, addressing the gap

¹ Gregory C. Shaffer, Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 712 (2010).

² *Id.*

³ Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010).

⁴ Jan Klabbbers, *The Redundancy of Soft Law*, 65 NORDIC J. INT’L L. 167, 181 (1996); Jan Klabbbers, *The Undesirability of Soft Law*, 67 NORDIC J. INT’L L. 381, 383, 387-91 (1998); Shaffer & Pollack, *supra* note 1, at 713.

⁵ Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 586-87 (2005).

⁶ Guzman & Meyer, *supra* note 3 (considering language in the Universal Declaration of Human Rights, the Helsinki Final Act, and the Basle Accord on Capital Adequacy, for example, as impactful due to their quasi-legal character).

⁷ Shaffer & Pollack, *supra* note 1, at 713; see Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 508-13 (1991); ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 71-111 (2008) (arguing that states entering agreements desire credibility for their promises); Andrew Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579, 582, 596 n.56 (2005) (“[A]n agreement is soft if it is not a formal treaty” and states sometimes rationally choose soft law in order to lessen potential reputational harm from violating laws); Raustiala, *supra* note 5, at 581-82 (for international agreements, rather than referring to “hard law” and “soft law,” distinguishing instead between form and substance).

between the law-in-the-books and the law-in-action.”⁸ This view defines soft law as weak legal obligations enshrined in hard law; as such, if – for example - a treaty has no substantive requirements, then, regardless of the formal nature of the treaty, the instrument is soft law.⁹ Of course, that same reasoning could apply to contracts, such as in franchising, where a so-called duty to behave fairly is not really much of a duty (a soft law, at most) if there is no concrete structure undergirding that duty – no specific obligations, as interpreted by courts, of the parties’ duties under the contract. Under this interpretation, soft law may be, or may at least lead to, unclear law.¹⁰ Thus, lawyers, professors, courts, regulators, and the franchise parties themselves may engage in a definitional “best practice” of discovering or simply declaring specific conduct as being acceptable or unacceptable, per the franchise relationship. This may, for example, be seen in attempts to delineate the actual franchisee behavior that does or does not constitute franchisor “good cause” to terminate a franchise.¹¹

1. Binary Distinctions

Critics of the legal positivist approach to categorizing soft law as nonbinding and hard law as binding argue that this oversimplifies soft law.¹² Some scholars have argued

⁸ Shaffer & Pollack, *supra* note 1, at 713; See David Trubek et al., ‘Soft Law,’ ‘Hard Law’ and EU Integration, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 65, 67 (Gráinne de Búrca & Joanne Scott eds., 2006).

⁹ See R.R. Baxter, *International Law in “Her Infinite Variety”*, 29 INT’L & COMP. L.Q. 549, 554 (1980); C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 851 (1989). Thus, under this conception, “hard law” can be “soft” in whole or in part. Sandeep Gopalan, *A Demandeur-Centric Approach to Regime Design in Transnational Commercial Law*, 39 GEO. J. INTL. L. 327, 354 (2008).

¹⁰ Gopalan, *supra* note 9.

¹¹ Robert W. Emerson, *Franchise Terminations: “Good Cause” Decoded*, 51 WAKE FOREST L.REV. 103 (2016).

¹² Shaffer & Pollack, *supra* note 1; see COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000) (arriving at this binary distinction between binding hard law and non-binding soft law). See also Klabbbers, *supra* note 4, at 168 (arguing for the retention of the “traditional binary conception of law”); Francis Snyder, *Soft Law and International Practice in the European Community*, in THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NOËL 197, 198 (Stephen Martin ed., 1994) (“[S]oft law’ ... mean[s] ‘rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects.’”).

that soft law is an international law lacking enforceability.¹³ Others view this definition as too simplistic, because international agreements lacking direct enforcement can still become binding in some form.¹⁴ For example, in the U.S. franchising context, statements made by a franchisee outside of its franchise operations that are protected by the United States Constitution's First Amendment may still impact the franchising relationship, even if seemingly unrelated. In recent years, franchisors Chick-fil-A, Denny's, Papa Johns, and Citgo each became embroiled in public relations battles related to political or otherwise controversial statements made by individuals associated with the brand or franchise.¹⁵ Although these situations are rarely specifically covered in the franchise agreement – perhaps because it is not a prime focus of most franchise arrangements and because, even when considered, it may be difficult to anticipate the situations in which such circumstances arise. courts tend to favor the franchisor in these disputes based upon the franchisor's interest in protecting its trademark and brand.¹⁶

Although not rising to the level of implemented soft law, unenforceable pledges and non-binding committal statements can be found in the franchising law context as well. Prospective franchisees may be lured into purchasing a franchise store based off of the franchisor's incorrect representations with respect to the profits the franchisee is likely to derive from the arrangement, the efforts needed to operate a franchise, the true nature of

¹³ Baxter, *supra* note 9; Gopalan, *supra* note 9, at 355.

¹⁴ Gopalan, *supra* note 9, at 355. An example of this is the UNIDROIT Principles of International Commercial Contracts. *Id.*; See Soc'y of Pub. Teachers of Law in Gr. Brit. And N. Ir., RESPONSE TO COMMUNICATION FROM THE EUROPEAN COMMISSION ON EUROPEAN CONTRACT LAW COM 398 FINAL (2001), available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/5.21.pdf.

¹⁵ Robert W, Emerson & Jason R. Parnell, *Franchise Hostages: Fast Food, God, and Politics*, 29 J. L. & POLITICS 353, 358 (2014).

¹⁶ *Id.*

the franchisor's actual business, the duties and obligations of each party, or some other aspect of the relationship.¹⁷ When the franchisee finds itself slighted by the franchisor's misrepresentations, the franchisee may be left without recourse to amend the franchise relationship. This is due to the fact that franchise agreements are commonly referred to as contracts of adhesion, which are written by the dominant party, in this instance, the franchisor, and offered on a "take it or leave it" basis. This often leaves the franchisee with no claim for breach of contract when its expectations are shattered.¹⁸ However, despite these issues, the franchise relationship remains in place because of the funds and energy the franchisee already invested in the venture.¹⁹

Additionally, by virtue of the fact that the franchise relationship grants the franchisor certain control over the franchisee's business operations and merchandising, the franchisor also may have recourse if the franchisee engages in speech or conduct that harms the brand name or lowers sales.²⁰ Although not "hard law" by statute or as written in the

¹⁷ See generally Robert W. Emerson & Uri Benoliel, *Are Franchisees Well-Informed? Revisiting Debate over Franchise Relationship Laws*, 76 ALBANY L. REV. 193-216 (2013); Robert W. Emerson & Uri Benoliel, *Can Franchise Associations Serve as a Substitute for Franchisee Protection Laws?*, 118 PENN ST. L. REV. 99 (2013); Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 119 (2004). These problems may be found worldwide. See Robert W. Emerson, *Franchisees as Consumers: The South African Example*, 37 FORDHAM INT'L L. REV. 455 (2014).

¹⁸ Contracts of adhesion are contracts that are prepared by one party in a more powerful position and signed by a weaker party, such as a consumer, who is in no position to change the terms of the contract. BLACK'S LAW DICTIONARY 366 (10th ed. 2014). Such contracts leave no room for negotiation and are essentially offered on a "take it or leave it" basis. Examples include agreements found in the shrink wrap of a box for a product like a computer, or a circumstance in which a contract is signed and a full list of terms is provided at a later point in time, such as is the case with software end user license agreements.

¹⁹ Even if franchise contract clauses may be labeled *in terrorem*, the very nature of those clauses, combined with the "terrorized" party's (the franchisee's) lack of business acumen and other resources (e.g., legal counsel) (see Emerson, *Fortune Favors the Franchisor: Survey and Analysis of the Franchisee's Decision Whether To Hire Counsel*, 51 SAN DIEGO L. REV. 709, 720 (2014)) may contribute to these, perhaps unenforceable, clauses being left unchallenged, to the franchisor's benefit. Robert W. Emerson, *Franchising Covenants Against Competition*, 80 IOWA L. REV. 1049, 1057 (1995).

²⁰ Emerson & Parnell, *supra* note 15.

parties' contract, the franchisee may find itself legally liable when it makes a statement – usually, political in nature – that affects the franchise system.

2. Soft Law as Residual, Imprecise, Non-Binding Principles or Duties

Soft law is often seen as a residual category,²¹ which is most commonly defined to include hortatory, rather than legally binding, obligations. A large body of soft law in the international franchising context is the codes of ethics developed by various countries and institutions to govern the franchise relationship. These codes are considered soft law because they are not legally binding in the international courts. For example, the International Franchise Association (“IFA”) Code of Ethics is described as “the ideals to which all IFA members agree to subscribe in their franchise relationships.”²² Accordingly, this type of code of ethics is intended to be self-regulating through franchise agreements. The Australian Competition and Consumer Commission (“ACCC”) has also implemented its own Franchising Code of Conduct.²³ In either instance, franchise members – typically, the franchisors – may become members of these institutions by pledging to uphold the code of ethics that have been adopted.²⁴ Thus, the codes cannot fully govern the franchise relationship as hard law could.

In essence, then, soft law does not formally bind states and is defined as obligations (law-like promises or statements) that fall short of international law (hard law).²⁵ This definition presents challenges because it is vague with respect to the distinction between

²¹ Guzman & Meyer, *supra* note 3 (finding that soft law is defined in opposition to clearer categories rather than on its own terms).

²² *Our Mission Statement, Vision & Code of Ethics*, INT’L FRANCHISE ASS’N, available at <http://www.franchise.org/mission-statementvisioncode-of-ethics>.

²³ *Franchising Code of Conduct*, AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, available at <https://www.accc.gov.au/business/industry-codes/franchising-code-of-conduct>.

²⁴ Joseph Y. Adler, *The Ethics of Franchising: How Codes of Ethics Compare and What to Consider in Deciding Whether to Subscribe to Them*, 29 FRANCHISE L.J. 74 (2009).

²⁵ Thus, soft law includes a written exchange of promises between states. Guzman & Meyer, *supra* note 3.

soft law and the absence of any obligation.²⁶ Thus, scholars believe that soft law is best understood as a continuum, or spectrum, running between fully binding treaties and completely political positions.²⁷ The second challenge presented by soft law is its breadth, because seemingly anything that is law-like can be described as a form of soft law.²⁸

To combat these two challenges, Guzman and Meyer define soft law as “nonbinding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct.”²⁹ Thus, although soft law consists of nonbinding rules, it perpetuates legal consequences because it shapes states' expectations as to what constitutes compliant behavior.³⁰ Over time, as the moral concepts are increasingly accepted, society moves toward willing these rules to become enforceable hard law.³¹

A different definition of soft law does not emphasize the doctrinal question of whether a rule is binding on states, but focuses on the extent to which the obligations imposed are clear or whether the various aspects of an agreement are otherwise likely to constrain state behavior.³² In the franchise context, there is a vast set of disclosure obligations imposed upon franchisors, although the disclosures actually cause more confusion for franchisees instead of providing the transparency the lawmakers had intended to create. Franchisees find themselves swamped with information at a quantity they may

²⁶ *Id.* at 172-73.

²⁷ *Id.* at 173.

²⁸ *Id.*

²⁹ This definition preserves the doctrinal distinction between binding and nonbinding norms, but also tracks an intuitive difference between quasi-legal rules and purely political rules. *Id.* at 174.

³⁰ *Id.* at 175; *See also* ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 25 (New York: Oxford University Press 1994).

³¹ John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 162 (2009).

³² *Id.* at 174.

not have the time or ability to comprehend. Thus, the inherent confusion surrounding these disclosure requirements transforms them into hard law that acts like soft law.

Soft law instruments may also be viewed as those that create imprecise obligations under which a wide range of activity might be considered compliant.³³ These kinds of soft laws can also be found in franchising agreements themselves. For example, franchise agreements are broadly written so that unclear obligations and duties are imposed upon the franchisee. This gives the franchisor the ability to terminate its franchisee for “good cause,” which can encompass numerous activities that were not expressly reflected in the franchise agreement.³⁴

3. Nudging, International or Comparative Law, and the Urge to Bind

Nudging, law that focuses on providing incentives to encourage efficient behavior, is an example of flexible soft law. Often referred to as a form of “libertarian paternalism,” nudging uses predictable cognitive biases to encourage behavior that the state deems beneficial, but ultimately leaves the decision in the hands of individuals.³⁵ In New York City, officials experimented with nudging by limiting the size of soda cups sold at movie theaters.³⁶ While this is a hard restriction on the size of the cup, legislators did not limit the amount of soda an individual can drink; rather, they merely disincentivized large amounts

³³ *Id.* (citing Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000)); W. Michael Reisman, *The Concept and Functions of Soft Law in International Politics*, in 1 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS - Vol. I - Contemporary, 135, 135-36 (Emmanuel G. Bello, & Bola A. Ajibola, 1992).

³⁴ For an empirical analysis of how the U.S. courts interpret good cause, see Emerson, *supra* note 11.

³⁵ Ryan Calo, *Code, Nudge, or Notice*, 99 IOWA L. REV. 773, 783-84 (2014) (citing RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 4-6, 107-09 (2008)).

³⁶ Brian Galle, *Tax, Command . . . or Nudge?: Evaluating the New Regulation*, 92 TEX. L. REV. 837, 885-87 (2014).

of soda by requiring refills to obtain them.³⁷ Accordingly, although the ultimate decision is left in the hands of the individual, only certain behavior is encouraged.³⁸

Legislators can implement a nudge by changing the default rule, such as creating opt-out, rather than opt-in, standards. Understanding that individuals are less likely to deviate from the status quo, the government can set the default as the preferred behavior.³⁹ In the franchise context, default rules regarding the franchise agreement could nudge both franchisees and franchisors to make more efficient decisions. For example, a default rule awarding goodwill to the franchisee and construing ambiguity in favor of franchisees could combat the bargaining power that favors franchisors.⁴⁰ Such a policy does not require franchise agreements to include goodwill provisions, but instead incentivizes parties (mainly franchisors) to include such provisions in their contracts.⁴¹ Soft law may be seen as more than a complete absence of commitment, but less than full-blown international law.⁴² States generate soft law more indirectly through international organizations such as the United Nations, the International Labor Organization, and the Organization for Economic Cooperation and Development.⁴³ UNIDROIT and UNCITRAL, two of the major international governmental organizations tasked with producing commercial law

³⁷ *Id.*

³⁸ *Id.*

³⁹ Calo, *supra* note 35, at 785.

⁴⁰ See Robert W. Emerson, *Franchisees in a Fringe Banking World: Striking the Balance between Entrepreneurial Autonomy and Consumer Protection*, 46 AKRON L. REV. 1 (2013); Robert W. Emerson, *Franchise Goodwill: Take a Sad Song and Make It Better*, 46 U. MICH. J.L. REFORM 349 (2013).

⁴¹ See Emerson, *supra* note 40. Alternatively, if franchise goodwill is presumed to belong to the trademark owner, then that default rule could induce franchisor-franchisee planning and negotiations and lead to systemic growth, including protection of both parties (franchisor and franchisee) for (1) what they brought to their relationship, and (2) what they created and justly expected to be theirs in terms of a right to the fruits of a sustained and developing franchise relationship. This default rule could deter litigation, create consistency within franchise networks and in case holdings, and even encourage innovation.

⁴² Guzman & Meyer, *supra* note 3, at 180.

⁴³ *Id.*

instruments, tend to favor soft laws over hard laws.⁴⁴ UNIDROIT has promulgated several soft law programs, including principles and rules of transnational civil procedure and model franchise disclosure law.⁴⁵ UNCITRAL's soft law publications include the model laws on international commercial conciliation.⁴⁶ These organizations prefer soft law constructs due to the freedom soft laws provide from the restraint of prior laws.⁴⁷

On the other hand, drafters can use the flexibility of soft laws to interpret existing rules through principles and restatements. The Restatements, drafted by the American Law Institute, often guide common law courts on particular issues and/or areas of law and influence their holdings, thereby ultimately having the same effect as a hard law.⁴⁸ International tribunals' decisions and standards promulgated by international organizations – international common law - are also soft law.⁴⁹ A tribunal or international organization can issue a decision that expounds on a binding legal rule without the consent of all states subject to that rule. While said decision is not binding, it shapes the expectations of all states bound by the underlying obligation. In franchise law, the analogy is to any franchisor decision that may bind the network as a whole. Rulings as to the impact on the franchisees may focus on whether the franchisor decision focuses on the welfare of the network as a whole (even if there are negative consequences for some franchisees), versus more

⁴⁴ *Id.*; Henry Deeb Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of Unidroit, Uncitral, and the Hague Conference*, 34 BROOK. J. INT'L L. 655, 659–60 (2009).

⁴⁴ Guzman & Meyer, *supra* note 3, at 180; Gabriel, *supra* note 44.

⁴⁵ See INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, ADOPTED TEXTS, MODEL LAWS, at <http://www.unidroit.org> (last visited Aug. 18, 2015); see also Curtis R. Reitz, *Globalization, International Legal Developments, and Uniform State Laws*, 51 LOY. L. REV. 301, 313 (2005).

⁴⁶ INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, *supra* note 45.

⁴⁷ Guzman & Meyer, *supra* note 3, at 180; Gabriel, *supra* note 44.

⁴⁸ INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW, *supra* note 45; Gabriel, *supra* note 44, at 668.

⁴⁹ Guzman & Meyer, *supra* note 3, at 178; Robert W. Emerson, *Franchise Savoir Faire*, 90 TUL. L. REV. 589, 590-92 (2016) (discussing franchising cases in the Quebec and Ontario courts, with the franchisor expected to adhere to certain standards for the network as a whole).

arbitrary decision-making that may reflect bias or simple negligence or franchisor lethargy in the wake of market changes.

Traditionally, soft law is not viewed as “real” international law,⁵⁰ but rather perceived to be less “law” than the hard law of treaties and even custom.⁵¹ While some have argued that hard and soft law are not as distinct and generate compliance through the same mechanisms,⁵² like in the context of a duty to rescue, the scholarly consensus is that the impact of soft law on behavior is smaller in magnitude than the impact of hard law.⁵³

Under American tort law, there is, with few exceptions, no affirmative duty to render a reasonable attempt to aid a stranger in peril.⁵⁴ However, even though there is no explicit duty, it is generally socially acceptable and preferable behavior to aid those in need.⁵⁵ There are incentives to being a “Good Samaritan” that allow enough “rescue” behavior to occur without needing to create a hard law establishing such duty.⁵⁶ On the other hand, this view of not needing a “duty to rescue” law must be weighed against the other possible outcome—the bystander effect.

The bystander effect is best illustrated by looking at the infamous Catherine “Kitty” Genovese case from March 1964. Thirty-eight persons (neighbors in their New York City

⁵⁰ Andrew T. Guzman & Timothy L. Meyer, *International Common Law: The Soft Law of International Tribunals*, 9 CHI. J. INT'L L. 515 (2009).

⁵¹ *Id.* See also Pieter Van Dijk, *Normative Force and Effectiveness of International Norms*, 30 F.R.G. YEAR BOOK INT'L L. 9, 20 (1987).

⁵² Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* (New York: Oxford University Press 2008).

⁵³ Guzman & Meyer, *supra* note 3, at 180.

⁵⁴ Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1452 (2008).

⁵⁵ *Id.* at 1464; David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 654 (2006).

⁵⁶ See generally, Marc A. Franklin & Matthew Ploeger, Symposium, *Of Rescue and Report: Should Tort Law Impose a Duty to Help Endangered Persons or Abused Children?*, 40 SANTA CLARA L. REV. 991, 992 (2000).

apartments) supposedly witnessed a man's stabbing attack and rape of the 28-year-old Genovese, which lasted over 30 minutes and left the woman dead. For decades, this murder became a well-known example of people's reluctance to "get involved," even to the point of not calling the police when that poses almost no risk for the caller.⁵⁷ While there are conflicting reports on the number of witnesses,⁵⁸ the message is clear: there is a sense of diffused responsibility when there are multiple witnesses that cause people to hesitate to act.⁵⁹ The question would then be whether a hard law would affect this phenomenon and actually make a difference in behavior.

In many instances, hard law is arguably more prevalent than soft law because domestic advocates for an international agreement will generally demand that the agreement be binding.⁶⁰ Hard law increases compliance and generates a negative sum sanction in the event of a violation, resulting in a possible tradeoff. In some instances, the compliance benefits will outweigh the impact of costly sanctions and the parties will opt for a formal treaty. In other instances, the cost of the sanctions will be too large and they will prefer a soft law agreement.⁶¹

With respect to soft law, scholars question why states would enter into a consensual exchange of promises – after much negotiation – that will be non-binding. States may utilize soft law, rather than hard law, because commitment can be reached more quickly

⁵⁷ Scordato, *supra* note 54, at 1450.

⁵⁸ Jim Rasenberger, "Kitty Genovese: The Myth, the Truth ... And Me," History News Network, May 1, 2016, at <http://historynewsnetwork.org/article/162664>.

⁵⁹ Latane, B. & Darley, J., "Bystander 'Apathy'," 57 AMERICAN SCIENTIST 244-268 (1969); Harold Takooshian, "The 1964 Kitty Genovese Tragedy: What Have We Learned?" Psychology Today, Mar. 24, 2014, at <https://www.psychologytoday.com/blog/not-just-bystander/201403/the-1964-kitty-genovese-tragedy-what-have-we-learned>.

⁶⁰ Guzman & Meyer, *supra* note 3, at 186 (citing Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L. L. 581, 598 (2005)).

⁶¹ *Id.* at 196-97.

and with more simplicity. Alternatively, hard law consensus mandates a more complex and time-consuming ratification process.⁶² In some instances, a certain number of ratifications may be required before the hard law is binding.⁶³ Additionally, compliance with soft law, as non-binding, may be achieved merely by a threat to enact hard law upon non-compliance.⁶⁴

4. Functionalism and Legal “Credibility”

Although international soft law is routinely used as a final arrangement among states, soft law is viewed as an integral part of the international legal system.⁶⁵ As functionalists argue, the drafters of laws (e.g., statutes) choose hard or soft law based on desired results.⁶⁶ Thus, states choose soft law because of its greater flexibility, conduciveness to incrementalism, non-state party participation, and lack of need for ratification.⁶⁷ Due to the higher impact of hard law, soft law is preferable when uncertainty is high, states' interests diverge greatly, informational costs are low, and consequently, reputational sanctions are low.⁶⁸ Furthermore, soft law often has a pre-law function and may be used as a “weigh station” to hard law; such as challenges to state sovereignty.⁶⁹ In situations where binding rules are either unavailable or inopportune, soft laws "are expected to provide normative guidance, to build mutual confidence, and to concert

⁶² Martin Köppel, *The Effectiveness of Soft Law: First Insights from Comparing Legally Binding Agreements with Flexible Action Programs*, 21 GEO. INT'L ENVTL. L. REV. 821, 824-25 (2009).

⁶³ *Id.* (discussing the Kyoto Protocol).

⁶⁴ UDO DIEDRICHS ET AL., *THE DYNAMICS OF CHANGE IN EU GOVERNANCE* 38 (2011).

⁶⁵ Guzman & Meyer, *supra* note 3, at 176.

⁶⁶ Kenneth W. Abbott & Duncan Snidal, *Hard Law and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000).

⁶⁷ *Id.*; Gopalan, *supra* note 9, at 332.

⁶⁸ Gopalan, *supra* note 9, at 332; Raustiala, *supra* note 5, at 591-92.

⁶⁹ Gopalan, *supra* note 9, at 332; Abbott & Snidal, *supra* note 66, at 423.

political attitudes" and therefore may "give an impulse to further negotiation" that could lead to hard law.⁷⁰

Functionalists believe that states choose hard law when there are low domestic political costs, they desire to bind successive governments, and they need to modify the practices of their residents.⁷¹ Even when applying hard law, courts frequently refer to soft law instruments as evidence of custom and apply them when deciding cases.⁷² For example, even where contract provisions do not incorporate UNIDROIT principles, courts have applied the same under the presumption that such principles represent the "codification of trade usages".⁷³

Additionally, functionalists argue that soft law is advantageous because of lower contracting costs.⁷⁴ The belief is that hard law is more costly because states are more careful in negotiating and drafting hard law, due to higher costs associated with violations.⁷⁵ However, others believe that hard law is only more costly in terms of ratification, as all of the other costs are also incurred in the case of soft law.⁷⁶ As mentioned previously, soft law is not confined by the ratification process that surrounds hard law.⁷⁷

⁷⁰ Diedrichs et al., *supra* note 64, at 35. An important pre-law function of soft law is in the field of private law. UDO DIEDRICHS ET AL., THE DYNAMICS OF CHANGE IN EU GOVERNANCE 35 (2011) ("Academic model codes, such as the most recent Common Frame of Reference seek to promote legal harmonization").

⁷¹ Gopalan, *supra* note 9, at 332; Abbott & Snidal, *supra* note 66, at 426.

⁷² Gopalan, *supra* note 9, at 337.

⁷³ *Id.* at 362.

⁷⁴ *Id.* at 337.

⁷⁵ Abbott & Snidal, *supra* note at 434 ("Legal specialists must be consulted; bureaucratic reviews are often lengthy. Different legal traditions across states complicate the exercise. Approval and ratification processes, typically involving legislative authorization, are more complex than for purely political agreements.")

⁷⁶ Experts will still have to be consulted. Differences between legal families and systems must still be resolved. Negotiation is still contentious as proponents of various interests argue just as vigorously. Gopalan, *supra* note 9, at 33.

⁷⁷ Köppel, *supra* note 62.

Positing a different view, liberal theorists argue that states consider legal “credibility”⁷⁸ when choosing between soft law and hard law.⁷⁹ This is because, when such credibility (or constancy) depends on legislative approval, states prefer hard law unless the state possesses other mechanisms to ensure and enhance credibility.⁸⁰ And finally, realists argue that the powerful states' preferences dominate the choice between soft law and hard law as the principal players seek power in a zero-sum world.⁸¹ This is commonly due to the fact that, where powerful states agree on a particular policy, it is easier for the laws to be promoted globally.⁸² In fact, powerful states use hard law and soft law in conjunction and as compliments to get these preferences across.⁸³

B. Defining Hard and Soft Law along a Spectrum: Characteristics of that Law

Legal positivists tend to frame the distinction between hard and soft law using a simple, binary binding or non-binding divide.⁸⁴ Some legal positivists take the distinction even further, finding the very concept of soft law to be illogical, because law by definition cannot be “more or less binding.”⁸⁵ In practice, however, actors do not have to select one or the other.⁸⁶ Therefore, hard and soft law can be distinguished in terms of variation along

⁷⁸ I.e., the reliability of or authority underlying a principle or other supposed law.

⁷⁹ Gopalan, *supra* note 9, at 346.

⁸⁰ Raustiala, *supra* note 5, at 600.

⁸¹ Robert G. Gilpin, *The Richness of the Tradition of Political Realism*, 38 INT'L ORG. 289, 290 (1984).

⁸² Shaffer & Pollack, *supra* note 1, at 765.

⁸³ *Id.*

⁸⁴ Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. Rev. 1147, 1159 (2011). See COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 2-5 (Dinah Shelton ed., 2000).

⁸⁵ Shaffer & Pollack, *supra* note 84; See Klabbers, *supra* note 4, at 168, 181; see also Raustiala, *supra* note 5, at 581-82 (distinguishing between form and substance in international agreements, as opposed to “hard law” and “soft law”).

⁸⁶ Shaffer & Pollack, *supra* note 84.

a spectrum.⁸⁷ Franchise law is a particular area that views laws on a spectrum. For example, with disclosure requirements, the laws require broad disclosures, but lack enough specificity to prevent franchisees from being misguided by these disclosures. Yet, in other areas, strict filing requirements, when unfulfilled, can impose heavy burdens upon the franchisor.⁸⁸ Even within a specific area of franchise law, there is a broad spectrum of coverage. Take, for example, the concept of good cause for termination: some states create broad definitions of what constitutes good cause, whereas others list exhaustive items that will be considered good cause.⁸⁹

Some scholars examine three characteristics to determine whether laws have a “harder” or “softer” legal character: (1) precision in the rules, (2) the parties’ duties or obligations, and (3) delegation to a third-party decision maker.⁹⁰ In this respect, hard law “refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”⁹¹ Thereafter, soft law is defined as a residual category: “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.”⁹² Hence, if an

⁸⁷ *Id.* at 1160.

⁸⁸ M. Stuart Sutherland, *The Risks and Exposures Associated with Franchise Noncompliance*, 42 BUS. LAW. 369, 397 (1987).

⁸⁹ Joseph J. Fittante, Jr. & Meredith Bauer, *Defaults and Terminations: An Unfortunate Reality of A Challenging Economy*, 28 FRANCHISE L.J. 214 (2009).

⁹⁰ Shaffer & Pollack, *supra* note 1, at 714; Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401, 401 (2000). *See also* Abbott & Snidal, *supra* note 66, at 424 (utilizing a “rational design” approach on international institutions); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT’L ORG. 761, 761-62 (2001); Guzman, *supra* note 7, at 580; Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L L.Q. 901, 901-13 (1999).

⁹¹ International trade law comes closest to this ideal type, although, for some subjects, it also is, or can become, soft. Shaffer & Pollack, *supra* note 1, at 714-15 (quoting Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421 (2000)).

⁹² *Id.* at 715.

agreement is not formally binding, then, along at least one dimension, it is soft. Interestingly, a formal binding agreement that is vague is even softer because of the discretion it leaves with the contracting parties. Leaving such discretion to the parties in implementing the terms of the contract can quite possibly lead to conflict, and if no monitoring or enforcement mechanism is in place in the contract, the agreement is yet, even softer.

Professors Shaffer and Pollack conclude, “if an agreement does not delegate any authority to a third party to monitor its implementation or to interpret and enforce it, then the agreement again can be soft.”⁹³ In the franchise context, even where authority is delegated to an agency or third party to monitor implementation, such as with hard law, the implementation can be done in an unfair manner or in a way that they do not have their intended effect. For example, even though the Franchise Rule requires certain disclosures, the FTC typically does not regulate franchising beyond the signing of the contract, once the stage of required disclosures has ended, even though it has authority to do so under Section 5(a).⁹⁴

Ideally, hard law is defined as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”⁹⁵ The hardness of hard laws varies across legal subject matters; the broad range of public law (constitutional, criminal,

⁹³ *Id.*; Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1236 (2004); Guzman & Meyer, *supra* note 50, at 516.

516 (concluding that, since they are not bound by *stare decisis*, international tribunals issue decisions that are soft law).

⁹⁴ Steinberg & Lescatre, *supra* note 17.

⁹⁵ Shaffer & Pollack, *supra* note 84, at 1160 (quoting Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2001)).

tax, and so forth), regulatory, and consumer protection laws are considered very hard laws because of their innate inflexibility and binding natures.⁹⁶ They are as influential as they are, in large part, because of these characteristics. In contrast, contract and sales laws are inherently “softer” hard laws because of the parties’ freedom *to* contract and freedom *from* contract.⁹⁷

On the other end of the spectrum, soft law is viewed as completely voluntary in nature.⁹⁸ However, there are some soft laws that are so universally accepted that they become quasi-hard law, such as the International Chamber of Commerce's Incoterms and Uniform Customs and Practices for Documentary Credit Transactions manuals.⁹⁹ Similarly, the International Franchise Association establishes a framework for the implementation of best practices for its franchise members internationally.

C. Hard and Soft Law as Alternatives, Complements, and Antagonists

Hard law and soft law can be viewed as alternatives for international governance, complements leading to greater cooperation, and as antagonists.¹⁰⁰

As mentioned, legal positivists tend to view hard and soft law as strictly binary, and positivists favor hard law, defined as “legal obligations of a formally binding nature, while soft law refers to those that are not formally binding but may nonetheless lead to binding hard law.”¹⁰¹ For example, in the franchising context, the inclusion of certain contractual

⁹⁶ Larry A. Dimatteo, *CISG as Basis of a Comprehensive International Sales Law*, 58 VILL. L. REV. 691, 717 (2013).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Shaffer & Pollack, *supra* note 1, at 707.

¹⁰¹ *Id.* (noting also, “Rationalists, in contrast, contend that hard and soft law have distinct attributes that states choose for different contexts”).

provisions with certain elements may lead to the court’s requirement of “good cause” for termination, despite the fact that hard law may not so require. Those elements being “(1) in setting or carrying out the clause’s terms, the franchisor held a superior bargaining position to that of the franchisee; (2) the clause is incomplete or otherwise naturally requires some flexibility in interpretation or enforcement ... and (3) the franchisee reasonably expected that ... the franchisor would not abuse its discretion by invoking the clause.”¹⁰² States similarly impose different standards of responsibility or different franchising rules depending upon the type of contract clause present in the franchise relationship. Establishing which standard applies to a given situation is a very difficult task that often results in arbitrary reasoning and unpredictable decisions. Thus, while the standards and the legal effects that follow are clear, determining when to apply each standard remains uncertain.

In essence, the legal system has put the well-defined “cart” before the lesser-defined “horse.” A recommended approach is a reassessment of the applicability of the prevailing legal standards. Courts should consider the nature of particular franchise situations—for example, the parties’ actions and their relative bargaining strength—and then adjust the application of the legal standards accordingly.¹⁰³ Absent consistent application of the proper standards of care, the superior bargaining position of the franchisor may foster opportunism.¹⁰⁴

¹⁰² Robert W. Emerson, *Franchise Contract Clauses and the Franchisor’s Duty of Care Toward Its Franchisees*, 72 N.C. L. REV. 905 (1994).

¹⁰³ Robert W. Emerson, *Franchise Contract Interpretation: A Two-Standard Approach*, 2013 MICH. ST. L. REV. 641, 667 (2013).

¹⁰⁴ *Id.*

Rationalists find that, due to their varying and, often, complementary characteristics, hard and soft law “can build upon each other.”¹⁰⁵ This occurs in two ways “(1) [N]onbinding soft law can lead the way to binding hard law, and (2) binding hard law can subsequently be elaborated through soft-law instruments.” For example, “soft-law instruments are consciously used to generate support for the promulgation of treaties or to help generate customary international law norms [i.e., binding hard law],” and “treaties and state practice give rise to soft law that supplements and advances treaty and customary norms.”¹⁰⁶

Constructivists emphasize the creation of social norms and the interaction between the parties. They “maintain that state interests are formed through socialization processes [and] interaction which hard and soft law can facilitate.”¹⁰⁷ “Constructivists often favor soft law instruments for their capacity to generate shared norms and a sense of common purpose and identity, without the constraints raised by concerns over potential litigation.”¹⁰⁸ In the end, the soft law may, through this socialization process, and the “normative convergence,” herald a stronger, more palpable and coherent, and thus effective, hard law.¹⁰⁹

1. Facing Alternatives: Advantages and Disadvantages of Hard and Soft Law

– The Franchising Example

¹⁰⁵ Shaffer & Pollack, *supra* note 1, at 707-708.

¹⁰⁶ *Id.* at 721-722.

¹⁰⁷ *Id.* at 708.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 723.

Hard and soft law instruments “are sometimes used alone and sometimes combined dynamically over time, resulting in a complex hybrid of hard- and soft-law instruments.”¹¹⁰ The advantages to hard law, as stated by rationalist scholars, are (1) more credible commitment to international agreements,¹¹¹ (2) direct legal effects in national jurisdictions,¹¹² (3) creation of mechanisms for the interpretation and elaboration of legal commitments over time,¹¹³ and (4) greater ability to monitor and enforce commitments.¹¹⁴ Therefore, states typically use hard law when benefits from cooperation are “great” and the chances of costly opportunism are “high.” To control for risks of opportunism, states can engage in third party monitoring and enforcement actions, thereby reducing transaction costs “by providing an ongoing forum for interpreting, applying, enforcing, and elaborating agreed rules.”¹¹⁵

For example, franchisees often lack bargaining power and business experience when at the contract formation stage, and are thus stuck with the terms in the adhesion franchise contract.¹¹⁶ Further, as many franchisees fail to hire legal counsel when contracting, they may not understand the implications of certain terms in the franchise

¹¹⁰ *Id.* at 717.

¹¹¹ State commitments are more credible because hard law increase the cost of reneging, whether on account of legal sanctions or on account of the costs to a state's reputation where it is found to have violated its legal commitments. *Id.* at 717-18.; Guzman, *supra* note 7, at 582; Abbott & Snidal, *supra* note 66, at 426-27; Lipson, *supra* note 7, at 508 (“The more formal and public the agreement, the higher the reputational costs of noncompliance.”); *cf.* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. LEGAL STUD. S95, S108-09 (2002) (examining the development of segmented reputations).

¹¹² Hard law can be “self-executing” or can require domestic legal enactment, thereby creating new tools that mobilize domestic actors. Abbott & Snidal, *supra* note 66, at 428 (noting that by increasing the costs of a violation the states’ commitments become more credible).

¹¹³ *Id.* at 433.

¹¹⁴ This includes the use of dispute-settlement bodies such as courts. *Id.* at 427.

¹¹⁵ *Id.* at 429; Shaffer & Pollack, *supra* note 1, at 718.

¹¹⁶ Emerson & Benoiel, *supra* note 17, at 206–09, 213–15.

contract.¹¹⁷ Hard laws addressing disclosure could help even the bargaining disparities between franchisors and franchisees, preventing franchisor opportunism.¹¹⁸

However, as a disadvantage, hard law also entails significant costs.¹¹⁹ These costs include (1) creation of formal commitments that restrict the behavior of states and thereby infringe on national sovereignty,¹²⁰ (2) fierce and lengthy bargaining,¹²¹ and (3) greater difficulty in adapting to changing circumstances.¹²² This concept carries over in the franchise context in the sense that the implementation of statutes or regulations that are binding upon the franchise relationship will decrease the flexibility that the parties have in their contracting abilities. Moreover, a state's decision on whether to use hard or soft law is influenced by its concerns about the impact that an international agreement will have on changing state conduct.¹²³

On the other hand, soft law is seen as advantageous over hard law because it (1) is easier and less costly to negotiate, (2) imposes lower "sovereignty costs" on states in sensitive areas, (3) provides greater flexibility in cases of uncertainty, (4) allows greater cooperation among states than they would if they had to worry about enforcement, (5) copes better with diversity, and (6) is directly available to non-state actors, including international secretariats, state administrative agencies, sub-state public officials, and

¹¹⁷ Emerson, *supra* note 19.

¹¹⁸ *Id.* at 766-70.

¹¹⁹ Shaffer & Pollack, *supra* note 1, at 718

¹²⁰ *Id.* at 718-19.

¹²¹ Abbott & Snidal, *supra* note 66, at 434.

¹²² *Id.* at 433.

¹²³ Gopalan, *supra* note 9, at 331. If states desire a low impact, then they are more likely to choose soft law; conversely, if states desire a high impact, then they will elect hard law. However, the correlation between impact and form of several international agreements is not positive. Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988).

business associations and nongovernmental organizations (NGOs).¹²⁴ These similar advantages can be seen in some aspects of franchise law, where, while a rule has been adopted, such as with the Franchise Rule, the agency in charge of enforcement, in this case, the FTC, has merely adopted the provisions, but does little to police the parties beyond the initial requirements.¹²⁵ Soft law is perceived to be advantageous for its flexibility.¹²⁶ For example, soft-law nudges tend to be more economically efficient because, while cleverly nudging firms in the direction of preferred behavior, they allow firms to consider all costs involved and remain compliant if choosing to ignore the nudge.¹²⁷ In the international franchising context, with a variety of firms in different industries and geographic locations, and of different sizes with distinct costs and markets, such flexibility may be preferable over “one-size-fits-all” hard law.¹²⁸

Some posit that states will select soft law in instances where contracting costs increase.¹²⁹ Additionally, advocates contend that soft law can be more effective than many

¹²⁴ Shaffer & Pollack, *supra* note 1, at 719; See John J. Kirton & Michael J. Trebilcock, *Introduction to Hard Choices, Soft Law: Voluntary Standards* in GLOBAL TRADE, ENVIRONMENT, AND SOCIAL GOVERNANCE 3, 9 (John J. Kirton & Michael J. Trebilcock eds., 2004); Abbott & Snidal, *supra* note 66, at 434-54; Lipson, *supra* note 7, at 500-01, 514-27. Francesco Sindico, *Soft Law and the Elusive Quest for Sustainable Global Governance*, 19 LEIDEN J. INT'L L. 829, 832 (2006) (Neth.).

¹²⁵ When the Federal Trade Commission in 2007 amended the FTC Rule on franchises and business opportunities that it promulgated in 1978, it “once again affirmed that federal filing or registration is not required.” David W. Oppenheim & Rebekah Prince, *Franchise Disclosure Issues*, in FUNDAMENTALS OF FRANCHISING 91, 95 (Rupert M. Barkoff, Joseph J. Fittante, Ronald K. Gardner, Jr. & Andrew C. Selden eds., 4th ed. 2015). Some states engage in more substantive oversight, through franchise relationship laws, state filing requirements, or both.

¹²⁶ Gabriel, *supra* note 44, at 668; Guzman & Meyer, *supra* note 3, at 180.

¹²⁷ See Gabriel, *supra* note 44, at 668; Guzman & Meyer, *supra* note 3, at 180.

¹²⁸ Gabriel, *supra* note 44 at 668; Guzman & Meyer, *supra* note 3, at 180.

¹²⁹ Kenneth W. Abbott & Duncan Snidal, *Pathways to International Cooperation*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES 50, 54 (Eyal Benvenisti & Moshe Hirsch eds., 2004). This is because in those cases, “states can limit their legal obligation through hortatory language, exceptions, reservations and the like,” such as safeguarding and rebalancing clauses under the WTO.

formally binding treaties.¹³⁰ Non-binding instruments have distinct advantages, ranging from more rapid “entry into force” to greater flexibility to greater willingness by governments to consider ambitious or experimental approaches, as described above.¹³¹

Other scholars view the advantages of soft law in terms of the reduction of contracting and sovereignty costs, generation of information leading to common understandings, or through the facilitation of persuasion, argumentation, and socialization, and the development of common norms.¹³² This principle is mirrored in the franchising context with respect to franchise goodwill. A rule about ownership of franchise goodwill may create incentives for the parties either to pattern their relationship in line with this new, simple legal principle, or to take this clearly delineated line of “title” to the goodwill and make practical adjustments reflecting the parties' needs.¹³³ The parties presently have a number of expectations about goodwill, which—given the breadth, vagueness, or elasticity of the relevant law—may well lead to false assumptions and inefficient behavior.

States may choose soft law over hard law to solve a straightforward coordination problem. In such instances, once states select a set of rules, there is a high degree of compliance due to self-enforcement.¹³⁴ Another reason to utilize soft law is due to the loss

¹³⁰ Kal Raustiala & David G. Victor, *Conclusions*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 659, 684-86 (David G. Victor et al. eds., 1998); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538, 538 (Walter Carlsnaes et al. eds., 2002); Kal Raustiala, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 *CASE W. RES. J. INT'L L.* 387, 398 (2000). *See also* George W. Downs et al., *Managing the Evolution of Multilateralism*, 52 *INT'L ORG.* 397 (1998).

¹³¹ Raustiala, *supra* note 130.

¹³² Shaffer & Pollack, *supra* note 1, at 720-21 (examining the perspective of realists and constructivists). *See also* David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination*, 11 *EUR. L.J.* 343, 353 (2005).

¹³³ Emerson, *Franchise Goodwill: Take a Sad Song*, *supra* note 40.

¹³⁴ *Id.*

avoidance theory, as the choice of soft law over hard law can maximize value for states.¹³⁵ This is because the key distinction between hard law and soft law is that a state faces larger costs for violating hard law, including lost reputation, retaliation, or reciprocal noncompliance, thereby giving hard law greater “compliance pull” than soft law.¹³⁶ This distinction could prove beneficial for statutes governing the franchise relationship, where the drafting of these statutes to govern as hard law would have a greater effect on the franchise relationship than non-binding soft law.

Due to this loss in the event of a violation, parties sometimes opt for soft law.¹³⁷ Furthermore, another reason for states to select soft law is that amendment of the rules may be achieved more efficiently than through the formal renegotiation process needed for hard law.¹³⁸

2. Interaction of Hard Law and Soft Law as Complements to Franchise Law

Among both political science and legal scholars, an increasingly popular view is that both hard and soft law can work together and build on each other “as complementary tools for international problem solving.”¹³⁹ Two main pathways to this result are: “(1) nonbinding soft law can lead the way to binding hard law, and (2) binding hard law can subsequently be elaborated through soft-law instruments.”¹⁴⁰ In their complementary

¹³⁵ Guzman & Meyer, *supra* note 3, at 177.

¹³⁶ *Id.* Reputational losses are costly because they make it more difficult for a state to enter into future value-increasing agreements and may change the way it is treated today. Guzman, *supra* note 52. Downs & Jones, *supra* note 111, at S95. Retaliation involves a punishment imposed by one state on the other, and it is costly to both.

¹³⁷ Guzman & Meyer, *supra* note 3, at 177.

¹³⁸ *Id.* This is particularly advantageous in the case of changed circumstances. However, this is not to say that soft law is *formally* easier to amend than hard law. Timothy Meyer, *Soft Law as Delegation*, 32 *Fordham Int'l L.J.* 888, 909 (2009). *But cf.* Lipson, *supra* note 7, at 500.

¹³⁹ Shaffer & Pollack, *supra* note 1, at 721.

¹⁴⁰ *Id.* at 721-22; *see also* JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 95 (2d ed. 2006) (“soft-law instruments are consciously used to generate support for the promulgation of treaties or to help generate customary international law norms [i.e., binding hard law],” and “treaties and state

roles, hard and soft law instruments lead, through dynamic processes, to social and then legal norms, thereafter to greater state-to-state or party-to-party cooperation and even, ultimately, active coordination.¹⁴¹ This can also be seen in the franchise context. If franchise laws were drafted with more formalism and with greater constructs, this would lead to greater cooperation on the part of the franchise parties and coordination of greater laws over time. Soft laws in the form of ethics codes¹⁴² and model laws¹⁴³ compliment hard law in this way. For example, model franchise laws – a non-binding form of soft law - aid in the interpretation of hard law by acting as a sort of international common law.¹⁴⁴ Franchising ethics codes generally inform parties to a franchise contract how to interact in good faith. However, when ethics are inappropriate, such as in the disclosure setting, when franchisor lawyers should be held liable to franchisees, the hard law disclosure requirements can fill in the gap.¹⁴⁵

Legal positivists view soft law as a second-best alternative to hard law because it is not formally binding and cannot, as such, be enforced by courts.¹⁴⁶ By contrast,

practice give rise to soft law that supplements and advances treaty and customary norms.”). In their examination of hard and soft law acting as complements, scholars can again be divided into the same three groups: (1) positivist legal scholars who find that soft law is inferior to hard law but should not be discarded because it can potentially lead to hard law; (2) rationalist scholars who view soft law as a complement to hard law which serves state interests in many contexts, including because the hard-law option is not initially available because of its costs; and (3) constructivist scholars who view soft law as a complement to hard law that can facilitate dialogic and experimentalist transnational and domestic processes which transform norms, understandings, and perceptions of state interests.

¹⁴¹ Shaffer & Pollack, *supra* note 1, at 722; *See, e.g.*, Dinah Shelton, *Introduction: Law, Non-Law and the Problem of “Soft Law,”* in COMMITMENT AND COMPLIANCE, at 1, 10 (“In fact, it is rare to find soft law standing in isolation; instead it is used most frequently either as a precursor to hard law or as a supplement to a hard law instrument.”); Chinkin, *supra* note 9, at 866.

¹⁴² *See supra* notes 19–22 and accompanying text.

¹⁴³ *See supra* notes 41–49 and accompanying text.

¹⁴⁴ *See supra* notes 41–49 and accompanying text.

¹⁴⁵ *See* Emerson, *supra* note 19, at 759-70.

¹⁴⁶ Shaffer & Pollack, *supra* note 1, at 724; *See, e.g.*, Klabbbers, *supra* note 4, at 181; Klabbbers, *supra* note 4, at 382 (“[V]iolations of soft law are by definition soft violations, which may give rise to soft responsibility which will, in turn, be enforced by means of soft sanctions”); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 414 (1983) (“[T]he fact remains that the proliferation of ‘soft’

rationalists are indifferent as to whether hard or soft law is preferable.¹⁴⁷ Similar to rationalists, constructivists also view hard and soft law as complements.¹⁴⁸ Thus, constructivists contend that neither soft law or hard law should be privileged (free from an override) because states need flexibility to address situations involving uncertainty.¹⁴⁹ Finally, experimental scholars in the “new governance” tradition sometimes go further by arguing that soft-law approaches should generally be privileged to promote responsive governance.¹⁵⁰

3. Hard Law and Soft Law as Antagonists

The relative attributes – both positive and negative - of hard law and soft law instruments have primarily been assessed as alternatives for international governance and as mutually reinforcing complements.¹⁵¹ In contrast, some scholars contend that hard law and soft law act as antagonists.¹⁵² First, applying conflicts-of-laws jurisprudence, hard and soft legal norms can be antagonistic in a conflict-of-laws sense, because a proliferation of legal norms can lead to inconsistencies and conflicts among norms in the international legal

norms... does not help strengthen the international normative system.”). See also Kirton & Trebilcock, *supra* note 124, at 24-25, 31 (concluding that “[a]t best, [soft law] is a complement”).

¹⁴⁷ Shaffer & Pollack, *supra* note 1, at 725; See Abbott & Snidal, *supra* note 129, at 51.

¹⁴⁸ Trubek et al., *supra* note 8, at 89; See also Trubek & Trubek, *supra* note 132, at 355-59 (explaining how soft law can be a powerful tool to complement hard law); Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT’L L.J. 65, 141 (2004); see also Janet Koven Levit, *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, 15 IND. J. GLOBAL LEGAL STUD. 49, 56, 71, 73 (2008).

¹⁴⁹ Trubek et al., *supra* note 8, at 66-67.

¹⁵⁰ Shaffer & Pollack, *supra* note 1, at 726; See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1019-20 (2004); William H. Simon, *Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 37, 37-38 (2006).

¹⁵¹ Shaffer & Pollack, *supra* note 84, at 1148; See, e.g., Nicholas Bane, *Hard and Soft Law in International Institutions: Complements, Not Alternatives*, in HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE 347, 350-51 (John J. Kirton & Michael J. Trebilcock eds., 2004); Chinkin, *supra* note 9, at 856-59.

¹⁵² Shaffer & Pollack, *supra* note 84, at 1148; See Shaffer & Pollack, *supra* note 1, at 708.

order.¹⁵³ This issue can be seen in the franchise context where franchise laws are far from uniform, as evidenced in the franchise discrimination and franchise termination context.¹⁵⁴ Second, actors can strategically create and use hard and soft law to attempt to undermine, change, and reorient existing international law.¹⁵⁵ This antagonism between hard and soft law can lead to the softening of hard law, as it becomes less precise in its meaning, thus reducing legal certainty and predictability.¹⁵⁶ This can be seen in the American legal system where case law and subsequent statutes clarify original statutes that expand upon the statutory meaning, or to a further extreme, case law drastically morphing common law principles to adapt to changing times.

Soft law “has both a legitimising and delegitimising direct effect . . . While there is no doctrine of desuetude in international law, the legitimacy of a previously existing norm of international law may be undermined by emerging principles of soft law.”¹⁵⁷ Similarly, the rise of soft law provides a challenge in terms of generating an “inconsistent normativity to the point where, in critical matters, international law has become like a camera whose every shot is a double exposure.”¹⁵⁸ There is a dearth of practical or legal knowledge for others to fill.- legal “literature). Suddenly literature to systematically assess the conditions under which actors are likely to deploy hard and soft law as antagonists instead of complements.¹⁵⁹ This issue arises in the franchise context, and many other areas of law,

¹⁵³ Shaffer & Pollack, *supra* note 1, at 746.

¹⁵⁴ Robert W. Emerson, *Franchise Terminations: Legal Rights and Practical Effects When Franchisees Claim the Franchisor Discriminates*, 35 AM. BUS. L.J. 559, 559 (1998).

¹⁵⁵ Shaffer & Pollack, *supra* note 84, at 1148. See Shaffer & Pollack, *supra* note 1, at 746.

¹⁵⁶ Shaffer & Pollack, *supra* note 84, at 1148.

¹⁵⁷ Chinkin, *supra* note 9, at 866.

¹⁵⁸ Reisman, *supra* note 33, at 144.

¹⁵⁹ Shaffer & Pollack, *supra* note 84, at 1166-67.

where individuals who do not practice from day to day develop the laws and principles. Distributive conflict is defined as conflict over the distribution of the costs and benefits of cooperation.¹⁶⁰ A low level of distributive conflict among states, and in particular among powerful states, leads to a greater use of hard and soft law as complements.¹⁶¹ On the other hand, under conditions of high distributive conflict and high regime complexity, it is likely that hard and soft law will interact as antagonists.¹⁶²

Only with planning and communication may state actors and the parties themselves (e.g., franchisors and franchisees) harness the power of the hard and soft law rather than simply face the problems associated with a slippery, perhaps transient, and definitely uncertain legal environment of laws that may be both too soft or insufficiently hard.

¹⁶⁰ Shaffer & Pollack, *supra* note 1, at 730.

¹⁶¹ Shaffer & Pollack, *supra* note 84, at 1167.