Introduction: Key Theoretical Parameters of the Soft Law Debate: A Basic Overview

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Soft law has become a critical focal point for theorizing international financial law, and for good reason: not only do regulators routinely depend on soft law to grease the wheels of cross border financial cooperation, but it is also a convenient means by which financial authorities elide domestic stumbling blocks and hurdles to economic coordination. As such, it is among the most visible instruments of “minilateral” economic diplomacy reshaping interstate cooperation writ large.1

The debates unfolding in the following pages reflect serious questions relating to the appropriateness of soft law along two very different lines of inquiry. On the one hand is what can be understood as the “effectiveness” inquiry of soft law. Along this line of questioning, scholars have explored soft law’s usefulness and efficacy in light of the fact that it embraces no pretension of legal obligation. The second line of inquiry interrogates the “legitimacy” of soft law, and with it the appropriateness of administrative rulemaking machinations that routinely circumvent traditional legislative operations.

Both inquiries are deceptively complex, and will be elaborated in the book. For now it is worthwhile to note that the question of effectiveness explores whether informal communication and agreements – like those between financial regulatory authorities – enjoy coerciveness or “compliance pull.” It arises against the backdrop of tradition, where treaties have long occupied a special place in global economic affairs. In this tradition, treaties are unique means of making international commitments credible. Their creation requires significant levels of governmental involvement, including leadership by heads of state and usually ratification by legislatures, and in doing so generates official obligations on the behalf of governments and nation-states.

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1 Other key instruments include strategic alliances, which increasingly populate all forms of economic diplomacy, and financial engineering, which has become especially prevalent in international monetary affairs. See generally, Chris Brummer, Minilateralism: How Trade Alliances, Soft Law and Financial Engineering are Redefining Economic Statecraft (2014).
Scholars consequently agree that states can face considerable reputational costs where they do not honor their “hard law” obligations. Where countries fail to honor their commitments, they send a signal to the international community that they cannot always be trusted; they thus risk assuming bad reputations that could hamper their future prospects for cooperation from and with others.\textsuperscript{2} International treaties additionally enable the formation of institutions that can enhance compliance. Treaties can, for example, create mechanisms for surveillance that police compliance with their terms—and thus make it easier to identify and punish cheaters.\textsuperscript{3} Dispute settlement can also be embraced so that ambiguities are clarified and arguments between treaty parties resolved.

Soft law, by contrast, allows little, if any, space for the creation of a formal legal obligation under the norms and rules of contemporary international law. Instead, instruments of international financial diplomacy are inherently informal and expressively carry no official obligations on behalf of any government or state. Rules are not memorialized as treaties, but instead promulgated as codes of conduct, memoranda of understanding, and best practices. As a result, debates about international financial law routinely involve the effectiveness of informality and whether informal instruments can and should play a role in a world where backtracking from international regulatory commitments can undermine the health and safety of the global financial system.\textsuperscript{4}

As mentioned above, the second line of queries involves the legitimacy of soft law as a means of international economic coordination. In short, treaties, the traditional means of economic (and non-economic) diplomacy, memorialize legal obligations between countries and often require approval by national legislatures. As a result, treaties are not only able to express commitments in

\textsuperscript{2} This idea has been articulated by a variety of theorists, but for a comprehensive assessment see Andrew Guzman, How International Law Works (Oxford: Oxford University Press, 2007), 71–111. See also Chris Brummer, Soft Law and the Global Financial System 140–43 (2012).
