

# THE (RE)TURN TO ‘SOFT LAW’ IN RECONCILING THE ANTINOMIES IN WTO LAW

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*This article seeks to broaden our understanding of how World Trade Organization member governments have turned once again to ‘soft law’ in the WTO, as they did under the General Agreement on Tariffs and Trade, in order to regulate difficult and complex situations, to make WTO obligations more manageable and to offer solutions to seemingly intractable problems, some of which have significant distributive consequences. It starts by identifying soft international law in the GATT/WTO context, accounting for variable normativity and examining the facilitative and coordinating role of soft law. The responsiveness of soft law to various antinomies, or paradoxes, in GATT/WTO law is then explored on the basis of five propositions. First, soft law can elaborate upon ‘hard’ rules in order to give meaning to the rule’s soft content. Second, soft law can act as a precursor to the development of other legal norms. Third, the sourcing of soft law norms exogenously may have an impact on the further development of treaty rules. Fourth, soft law can be used to constrain otherwise hard legal norms. Fifth, soft responsibility may arise from the operation of soft law norms, in much the same way as ordinary responsibility, although very little attention has been paid to the matter.*

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## I INTRODUCTION

We have become accustomed to thinking of the law of the World Trade Organization in terms of a code of legally binding rules that governs world trade. Embodied in this notion is an underlying belief that the sort of law we are talking about can only emanate from ‘hard’ legal rules, set out in specific treaty commitments, which are binding upon members by virtue of their adherence to

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the *Marrakesh Agreement*<sup>1</sup> and its annexes. However, a focus solely on ‘hard law’ rules results in an incomplete understanding of the nature and extent of current international economic regulation, as embodied in WTO law.<sup>2</sup> In particular, ‘soft’ or non-binding law,<sup>3</sup> with its rich and complex normative structure, is of significance in the context of both General Agreement on Tariffs and Trade (‘GATT’) and WTO law. Its reception into the former GATT multilateral trade regime,<sup>4</sup> and now into the WTO’s governance structure, has been instrumental to the functioning of the world trading system for more than half a century.<sup>5</sup>

A failure to understand and apply soft law norms denies the role that such norms can play in reconciling some of the antinomies or paradoxes in WTO law.<sup>6</sup> In fact, soft law has been relied upon in the past to resolve one of the more insuperable problems in the multilateral trading system. This was the dilemma of how to deal with different levels of economic development among the GATT contracting parties, and consequently how to make progress on trade liberalisation, which existed from the very beginning of the *GATT 1947*. What has become increasingly obvious in the WTO, and more particularly during the decade since the launch of the Doha Development Round multilateral trade negotiations (‘MTN’),<sup>7</sup> is that the problem has not gone away. If anything it has been exacerbated by the failure to conclude the Doha Round MTN.

Currently, there is a profound lack of agreement among developed and developing/least-developed country (‘LDC’) members, as well as among individual members, about the content and pace of the agricultural reform programme (formula reductions, special safeguards for agriculture and

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<sup>1</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (‘*Marrakesh Agreement*’).

<sup>2</sup> Simon Evenett, ‘“Soft Law” and International Economic Regulation: The Case of Mergers and Acquisitions’ (2005) 13 (Winter) *University of Nottingham Leverhulme Centre for Research on Globalisation and Economic Policy Newsletter* 10. For the problems of an incomplete understanding of the domain of international economic regulation, see Eibe Riedel, ‘Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?’ (1991) 2(2) *European Journal of International Law* 58, 72–3.

<sup>3</sup> According to A J P Tammes, ‘Soft Law’ in T M C Asser Instituut (ed), *Essays on International and Comparative Law in Honour of Judge Erades* (Martinus Nijhoff, 1983) 187, 187 the term ‘soft law’ was coined by Lord McNair. In fact, McNair used the term without explicitly referring to it in the sense of a non-treaty agreement: Arnold D McNair, ‘The Functions and Differing Legal Character of Treaties’ (1930) 11 *British Year Book of International Law* 100.

<sup>4</sup> See *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (‘*GATT 1947*’).

<sup>5</sup> Mary E Footer, *An Institutional and Normative Analysis of the World Trade Organization* (Martinus Nijhoff, 2006) 4, 87–8, 337–8.

<sup>6</sup> For a different account of how new sources like soft law and new actors could act as a counterbalance to the over-inclusive character of ‘hard’ WTO law, see Joost Pauwelyn, ‘Non-Traditional Patterns of Global Regulation: Is the WTO “Missing the Boat”?’ in Christian Joerges and Ernst-Ulrich Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart, 2006) 199, 201–19.

<sup>7</sup> *Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001, adopted 14 November 2001) (‘*Doha Ministerial Declaration*’) [45], formally affirms the decision to launch a new round of MTN, which was originally due to be concluded by 1 January 2005. Since then there has been an emphasis on the development aspect of this particular MTN and accordingly it has been dubbed the ‘Doha Development Round’: see, eg, WTO, *Doha Development Agenda: Negotiations, Implementation and Development* (20 November 2010) <[http://www.wto.org/english/tratop\\_e/dda\\_e/dda\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dda_e.htm)>.

product-specific caps) and further tariff reductions on manufactures in the context of non-agricultural market access ('NAMA'). Proposals for new rules on trade facilitation, designed to accelerate the movement and clearance of goods in international trade and transit, or disciplines on fisheries subsidies, both of which are aimed at removing trade distortions,<sup>8</sup> have fared no better. Similarly, attempts to develop rule-making agendas in areas of delegated rule-making within some of the WTO's institutional bodies have proceeded at a snail's pace. Yet there is a difference.

Whereas previously under the GATT regime developing and LDC countries were primarily seen as 'rule takers' and were content to rely on their developmental status in calling for a softer, more flexible approach towards rule-making and implementation, there has been a wind of change. Since the WTO Ministerial Meeting in Cancún<sup>9</sup> many WTO developing country members have learnt 'to participate more effectively [in negotiations] through coalitions' and 'the quality of developing country proposals has improved significantly in terms of range, depth and feasibility' turning them into 'rule makers' rather than mere 'rule takers' in search of hard, binding disciplines.<sup>10</sup> It has led some developed country members to reassess their positions and weigh up the merits of using soft law to bring closure on the Doha Development Round MTN in order to pursue broader trade liberalisation goals.

This leads to a further observation about soft law in the WTO. It is being used by the membership to try and ameliorate another set of disparities among members, which arises from differing views about cooperation at the macroeconomic policy level. Soft law has also been used where only a percentage of WTO members are willing and able to move forward on a particular issue, in pursuit of forms of plurilateralism within and outside the multilateral trading system.<sup>11</sup>

It is the aim of this article to broaden our understanding of how both developed and developing WTO member governments have turned once again to soft law in the WTO, as they did in the earlier GATT period, in order to regulate difficult and complex situations, to make hard WTO law obligations more manageable and to offer solutions to seemingly intractable problems, some of which have significant distributive consequences for certain members.

The next part seeks to identify soft international law in the context of the WTO. Part III locates soft law norms more precisely in WTO law and practice and accounts for their normative differentiation. This involves an exercise in mapping the interaction between soft and hard law and examining where and how soft law norms may play a facilitative or a coordinating role in the governance of the WTO in trade negotiations and in WTO dispute settlement. This analysis leads to the discovery that there are varying degrees of normativity

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<sup>8</sup> *Doha Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1, [13]–[14], [16], [27]–[28].

<sup>9</sup> WTO Ministerial Conference, Fifth Session, Cancún, Mexico (10–14 September 2003).

<sup>10</sup> Diana Tussie, 'Process Drivers in Trade Negotiations: The Role of Research in the Path to Grounding and Contextualizing' (2009) 15 *Global Governance* 335, 335–6, who attributes this change to 'substantive research and mastery of technical detail' in trade negotiations: 335.

<sup>11</sup> The term 'plurilateralism' is usually reserved for those multilateral trade agreements that have a narrower group of signatories, which means that some but not all WTO members are parties to them.

at work in the organisation, which is explored further in Part IV, on the basis of five propositions.

The first proposition is that soft law can elaborate upon a hard WTO treaty rule in order to articulate and give meaning to the rule's otherwise soft content. The second proposition is that both the transformation and the incorporation of soft law norms in the field of GATT/WTO law have acted, and continue to act, as a precursor to the evolution of secondary legal norms. Related to this second proposition is a third one, which is that the sourcing of soft law norms from external institutional fora, that is, exogenously, may be having an impact on the further development of treaty rules in certain substantive areas of WTO law.

The fourth proposition is that soft law can be used to constrain and 'soften' hard WTO law, particularly where there may be a conflict of interest between members over the distributive consequences of cooperation. The fifth and final proposition is that forms of 'soft' responsibility may arise from the operation of soft law norms in the WTO. However, the limits of soft law are defined by the application of the body of secondary rules on international responsibility since such rules can only apply where there are legally binding international obligations of the hard law variety.

The final part of this article provides some concluding remarks on the extent to which there has been a turn — or more properly a return — to the use of soft law in WTO law. This is achieved by examining the results of our analysis of the five propositions in the preceding part.

## II IDENTIFYING SOFT INTERNATIONAL LAW IN THE WTO CONTEXT

As Jan Klabbers explains, international lawyers have been talking about soft international law since the 1970s, initially by 'using the epistemological possibility of speaking in different terms of law's binding nature and creating a category next to the familiar "hard" law'.<sup>12</sup> Essentially, what he is referring to is the tendency in the past for positivist international lawyers to diagnose the presence of soft law by reference to all forms of international agreement that contain rights and obligations and are legally binding on states and international organisations, either on the basis of treaty or customary international law.

The following decade produced what Klabbers terms 'the justificatory phase'<sup>13</sup> in which international law scholars sought to address hard law, and its 'soft' shadow, 'predominantly in binary terms (legal/illegal, binding/non-binding)',<sup>14</sup> and as 'extralegal' or 'non-legal' norms<sup>15</sup> in which gradations from soft to hard law could be identified.<sup>16</sup> In other words there was a tendency to view soft international law in its relationship to treaty and customary international law as binary concepts, polar opposites, or even a bifurcation of one another.

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<sup>12</sup> Jan Klabbers, 'Reflections on Soft International Law in a Privatized World' (2005) 16 *Finnish Yearbook of International Law* 313, 315.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Michael Bothe, 'Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?' (1980) 11 *Netherlands Yearbook of International Law* 65, 68.

<sup>16</sup> Tadeusz Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"' (1984) 30 *McGill Law Journal* 37, 44.

From scepticism, or even derision, about soft international law in the early 1980s<sup>17</sup> there emerged over the course of the decade a functionalist approach to characterising and classifying soft law, dependent upon the bindingness of the international law instrument. Thus, by the end of the decade Christine Chinkin could readily identify soft law in a variety of instruments ranging

from treaties ... which include only soft obligations ('legal soft law'), to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organisations ('non-legal soft law')<sup>18</sup>

The distinction between legal soft law (hard rule–soft content) and non-legal soft law (soft rule–soft-to-hard content) goes to the heart of the legal instrument by identifying soft international law in terms of its substantive and/or its procedural 'softness'.<sup>19</sup> Soft law in the GATT/WTO context includes both forms. It serves a number of different purposes depending upon the subject matter, the interstitial policy domain, the relevant institutional setting and any procedural requirements. The application of soft law may arise in the course of MTNs, dispute settlement or within the framework of a regular council or committee meeting concerning the implementation of WTO rules.

Since the 1990s there has been a period of consolidation about the existence of soft international law. This is in no small part due to the expansion in the internal legislative activities of international organisations<sup>20</sup> combined with the secondary law-making activity in multilateral treaty fora. The latter is best characterised by activity in the fields of human rights, the environment and in areas beyond the jurisdiction of the state, such as outer space or the international seabed.<sup>21</sup>

Some authors have gone as far as to distinguish between primary and secondary soft law in general international law.<sup>22</sup> Primary soft law refers to 'those normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization'.<sup>23</sup> In the case of the WTO, the declaration adopted at the end of one of the ministerial conferences of the organisation constitutes a piece of primary soft law for WTO member governments.<sup>24</sup>

Secondary soft law consists of 'recommendations and general comments of international supervisory organs, the jurisprudence of courts and

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<sup>17</sup> Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413–14.

<sup>18</sup> Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 851.

<sup>19</sup> See Gruchalla-Wesierski, above n 16, 40.

<sup>20</sup> José E Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005) 217–57, 599–600.

<sup>21</sup> Francesco Francioni, 'International "Soft Law": A Contemporary Assessment' in Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge University Press, 1996) 167, 175.

<sup>22</sup> See, eg, Dinah Shelton, 'Soft Law' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge, 2009) 68, 70.

<sup>23</sup> *Ibid.*

<sup>24</sup> For the legal status of the *Doha Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1, see Steve Charnovitz, 'The Legal Status of the Doha Declarations' (2002) 5 *Journal of International Economic Law* 207, 208–9, discussed further in Alvarez, above n 20, 232–3.

commissions ... and the resolutions of political organs of international organizations applying primary norms'.<sup>25</sup> In the WTO context the recommendation of a WTO panel to the Dispute Settlement Body to request the respondent member to bring a non-conforming measure into conformity with its WTO obligations is a source of secondary soft law. Similarly, many of the decisions of various WTO councils, committees, working parties and working groups are of a secondary soft law character.

While some scholars of international law have been critical of soft law,<sup>26</sup> have been embarrassed by it,<sup>27</sup> or have otherwise suffered from the discomfort with which it manifests itself in the international community,<sup>28</sup> especially in relation to the traditional sources of public international law,<sup>29</sup> the functionalist approach has won the day. This is in no small part due to the efforts of scholars of international law<sup>30</sup> and international relations (the latter mostly rationalists), who have provided a typology and general analysis of soft law instruments,<sup>31</sup> or who have examined the impact and proliferation of soft norms along a spectrum of bindingness.<sup>32</sup>

Against this historical, doctrinal debate about soft law in international law and international relations, the term 'soft international law' is used in this article specifically to define *all* forms of non-binding law in the WTO legal order. Such norms are characterised by a range of extra-legal or non-legal norms,<sup>33</sup> which exist in the 'twilight' between law and politics.<sup>34</sup> It is understood that while not

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<sup>25</sup> Shelton, above n 22, 70.

<sup>26</sup> See, eg, Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 *Nordic Journal of International Law* 167; Jan Klabbers, 'The Undesirability of Soft Law' (1998) 67 *Nordic Journal of International Law* 381.

<sup>27</sup> Graft-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart, 2010) 258–60, who talk about the 'embarrassment' of soft law, with reference to Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford University Press, 2005) 81–2.

<sup>28</sup> Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 *European Journal of International Law* 1075.

<sup>29</sup> Francioni, above n 21, 168, 178; Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly* 901. For a broader discussion of soft law and its relationship to the traditional sources of international law such as treaty, custom and general principles of law, see Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press, 2007) 211–29.

<sup>30</sup> See, eg, Hartmut Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10 *European Journal of International Law* 499.

<sup>31</sup> Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421. Abbott and Snidal typify soft law instruments in terms of their precision, bindingness and delegation (to third parties for the purposes of interpretation and/or enforcement). See also the leading study by scholars of international law and international relations on the subject in Dinah Shelton (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000).

<sup>32</sup> See, eg, Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887.

<sup>33</sup> See Karl Zemanek, 'Is the Term "Soft Law" Convenient?' in Gerhard Hafner et al (eds), *Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of His 80<sup>th</sup> Birthday* (Kluwer Law International, 1998) 843, 857–8.

<sup>34</sup> Oscar Schachter, 'The Twilight Existence of Nonbinding Agreements' (1977) 71 *American Journal of International Law* 296.

formally binding such soft law may nevertheless have a normative character and may give rise to legal consequences.<sup>35</sup>

The types of non-binding or soft law instruments adopted by international organisations take the form of guidelines, codes of conduct, understandings and other (interpretative) acts. Depending on the internal legal order of the international organisation in question, these ‘institutional acts’ have the potential to become binding upon the members of the organisation.<sup>36</sup> If we were to place the range and type of legal instruments that international organisations like the WTO can espouse on a continuum then we would find at one end norm-creating instruments, which have ‘legally-binding content and exert an obligatory pull’,<sup>37</sup> and a range of non-binding or soft law instruments at the other end that do not<sup>38</sup> — or at least not to the same degree.<sup>39</sup>

In the WTO context the type of soft international law instruments that we are mostly talking about are the resolutions adopted by the organisation’s institutional bodies. These include not only ministerial declarations and decisions but also the decisions of the various councils and committees, which may embody understandings, guidelines, notes produced by the WTO Secretariat at the request of the members, Chairman’s statements and so on. While they are not intended to be legally binding they may nevertheless have practical effect<sup>40</sup> and may prove legally relevant.<sup>41</sup>

This is exactly what many governmental officials, who make up the permanent delegations to the WTO and other Geneva-based international bodies,

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<sup>35</sup> Daniel Thürer, ‘Soft Law’ in R Bernhardt (ed), *Encyclopedia of Public International Law* (Elsevier Science, 2000) vol 4, 452, 454.

<sup>36</sup> For a discussion of institutional acts, with or without normative effect, their bindingness and lawfulness, see Philippe Sands and Pierre Klein, *Bowett’s Law of International Institutions* (Thomson Reuters, 6<sup>th</sup> ed, 2009) 284–302; Nigel D White, *The Law of International Organisations* (Manchester University Press, 2<sup>nd</sup> ed, 2005) ch 6; Christian Dominicé, ‘Valeur et autorité des actes des organisations internationales’ in René-Jean Dupuy (ed), *Manuel sur les organisations internationales* (2<sup>nd</sup> ed, 1998) 441.

<sup>37</sup> Christopher C Joyner, ‘The Legal Status and Effect of Antarctic Recommended Measures’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 163, 179.

<sup>38</sup> *Ibid.*

<sup>39</sup> Henry G Schermers and Niels M Blokker, *International Institutional Law: Unity within Diversity*, (Martinus Nijhoff, 4<sup>th</sup> revised ed, 2003) 823 [1320]. See also Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press, 2008) 144.

<sup>40</sup> Schermers and Blokker, above n 39, 823 [1320]; Guzman, above n 39, 144.

<sup>41</sup> For a discussion of the variety and categorisation of soft law forms, the actors that employ them and degrees of compliance with soft law in general international law, see Christine Chinkin, ‘Normative Development in the International Legal System’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 21.

understand by soft law.<sup>42</sup> Steeped in trade policy and in constant contact with their governments in capitals around the world, they consider the doctrinal debate to be moot and see no difference between soft and hard law. Of course this is one of the dangers that Klabbers indicates, namely that ‘soft law is often indistinguishable from hard law’<sup>43</sup> in terms of its drafting and application. A consequence of this misperception is the notion that soft law can be thought to have the same authority and legal effect as hard law. This is most certainly not the case.

Why then is soft law so frequently used in the WTO legal order? The main reason is that soft law fulfils all of the functions usually ascribed to it in other areas of general international law, namely flexibility, adaptability, speed and simplicity.<sup>44</sup> Other reasons for soft law in the WTO are that it has proven to be particularly useful where the issue is politically sensitive, where there is broad lack of agreement or a lack of coordination among WTO members, where an issue is highly contestable or where cooperation gives rise to distributive conflicts. The next part locates soft law norms in the WTO prior to examining some of the antinomies or paradoxes in WTO law that may give rise to a soft law approach.

### III LOCATING SOFT LAW NORMS IN THE WTO

The sort of legal soft law, that is, hard rule–soft content, which was referred to in the previous part, can be found in some of the WTO multilateral trade agreements (‘MTAs’), which contain soft obligations, thereby demonstrating that ‘the use of a treaty form does not of itself ensure a hard obligation’.<sup>45</sup> A good example of legal soft law in the WTO is the matrix of norms on special and differential treatment (‘S&DT’).<sup>46</sup> Many of them are not couched in the language of obligation, as is clear from their abstract, non-committal and often aspirational character, and their lack of bindingness on members,<sup>47</sup> despite being taken up in a treaty provision. The overall thrust of many of such provisions is further softened by the use of the word ‘should’ instead of ‘shall’, helping to detract from their seemingly mandatory character.

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<sup>42</sup> These remarks are taken from the personal experience of the author in leading discussions with developing country delegates in informal sessions of the WTO Committee on Trade and Development (2002), in WTO-based public sessions with the International Development Law Organization on ‘Training for Trade’ (2003) and in informative sessions on soft law held in the context of negotiating a WTO Agreement on Trade Facilitation (2010) at the United Nations Conference on Trade and Development (‘UNCTAD’). UNCTAD was established pursuant to the *United Nations Conference on Trade and Development*, GA Res 1785, UN GAOR, 17<sup>th</sup> sess, Agenda Item 36, 1190<sup>th</sup> plen mtg, UN Doc A/RES/1785 (8 December 1962). It became an official organ of the UN General Assembly by means of the *Establishment of the United Nations Conference on Trade and Development as an Organ of the General Assembly*, GA Res 1995, UN GAOR 19<sup>th</sup> sess, 1314<sup>th</sup> plen mtg, Agenda Item 32, UN Doc A/RES/1995 (30 December 1964).

<sup>43</sup> Klabbers, ‘Reflections on Soft International Law’, above n 12, 316–17.

<sup>44</sup> Shelton, above n 22, 75–6.

<sup>45</sup> Chinkin, ‘The Challenge of Soft Law’, above n 18, 851.

<sup>46</sup> For the most recent and updated version of the matrix of the special and differential norms in WTO agreements and decisions, see *Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc TN/CTD/W/33 (8 June 2010) (Note by the Secretariat).

<sup>47</sup> Thürer, above n 35, 456.

Overall, these S&DT provisions exemplify the type of legal soft law that consists mostly of hortatory or ‘best efforts’ type language and is often inchoate, that is, it is not specifically addressed to anyone or anything. Nevertheless, such language may have an important role to play in limiting the obligations of developed WTO members vis-à-vis developing country and LDC members whilst at the same time seeking to safeguard and rebalance the obvious asymmetry in economic development between the two.<sup>48</sup>

Not surprisingly the *Doha Ministerial Declaration* — itself a piece of primary soft law of the non-legal type — calls upon members to review the S&DT provisions ‘with a view to strengthening them and making them more *precise, effective and operational*’.<sup>49</sup> To that end the *Doha Ministerial Declaration* endorses ‘the work programme on special and differential treatment set out in the *Decision on Implementation-Related Issues and Concerns*’,<sup>50</sup> known as the *Doha Work Programme*.<sup>51</sup> The fact that guidance had to be issued to the membership, concerning the extent to which these SD&T provisions could be used,<sup>52</sup> is indicative of their ambiguous and decidedly soft status in WTO law.

In the WTO context, various forms of non-legal soft law, that is, soft rule–soft-to-hard content, include decisions in the form of recommendations taken by members in one of the councils or committees, guidelines,<sup>53</sup> reports, statements, programmes of action and so on. They may also include informal arrangements in the management of the WTO treaty regime, for example ‘off the record’ meetings, informal sessions and ‘non-papers’ for discussion among the members. Such informal arrangements may be used for a variety of reasons, such as strengthening members’ commitments to agreement, reaffirming a common understanding about basic WTO treaty obligations through a process of elaboration and interpretation, establishing the basis for subsequent treaty texts and other forms of rule-making, or simply as a means of achieving consensus ahead of rule-making.<sup>54</sup>

Many of these soft law instruments and informal arrangements form part of the practice of the WTO membership, which sometimes relies on a mixture of specific WTO rules and long-standing practice, dating back to the former GATT period. It may also find expression in secondary, or subsidiary, rules for the implementation of WTO obligations as occurs with respect to some decisions of

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<sup>48</sup> Kenneth W Abbott and Duncan Snidal, ‘Pathways to International Cooperation’ in Eyal Benvenisti and Moshe Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge University Press, 2004) 50, 54.

<sup>49</sup> *Doha Ministerial Declaration*, WTO Doc WT/MIN(01)/DEC/1, [44] (emphasis added).

<sup>50</sup> *Ibid.*

<sup>51</sup> *Implementation-Related Issues and Concerns*, WTO Doc WT/MIN(01)/17 (20 November 2001) (Decision of 14 November 2001) (‘*Doha Work Programme*’). See also *ibid* [12], which states that ‘negotiations on outstanding implementation issues shall be an integral part of the Work Programme’, which was finally adopted in February 2002.

<sup>52</sup> See *Information on the Utilisation of Special and Differential Treatment Provisions*, WTO Doc WT/COMTD/W/77/ Rev.1/Add.4 (7 February 2002) (Note by the Secretariat).

<sup>53</sup> John H Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge University Press, 2006) 49.

<sup>54</sup> See, eg, Mary E Footer, ‘The WTO as a “Living Instrument”’: The Contribution of Consensus Decision-Making and Informality to Institutional Norms and Practices’ in Thomas Cottier and Manfred Elsig (eds), *Governing the World Trade Organization: Past, Present and Beyond Doha* (Cambridge University Press, forthcoming, 2011).

the councils or committees. These secondary rules may in turn spawn other soft law norms.<sup>55</sup>

Non-legal soft law whether generated by the WTO's institutional bodies or simply by the members, as a form of collective action, may nevertheless prove to be an effective means of cooperation on matters of common concern in the multilateral trading system. One example is the WTO ministerial declaration, adopted at the end of the Uruguay Round MTN, on coherence in global economic policy-making.<sup>56</sup> The idea behind this avowedly political Declaration was to allow for a better articulation of trade, financial and debt policies in order to achieve the WTO's key objectives of improving living standards, achieving sustainable development and contributing to the expansion of international trade.<sup>57</sup>

Under the mandate set out in the *Coherence Declaration*, the Aid for Trade initiative was launched at the Hong Kong Ministerial Conference in 2005,<sup>58</sup> aimed at helping developing country and LDC members to build their supply-side capacity and the necessary trade-related infrastructure in order to benefit more fully from the WTO Agreements and trade liberalisation.<sup>59</sup> A Task Force on Aid for Trade, established by the Director-General, has been charged with providing recommendations on how to operationalise the initiative and with making proposals on ways of 'mainstreaming' trade in development strategies,<sup>60</sup> within the broader framework of the Doha Development Round.

Up to now the importance of development policy in the Round has largely been ignored or marginalised. There is no doubt that a successful conclusion to the Doha Development Round, if there is one, is no guarantor that developing country and LDC members will reap real benefits without further macro- and micro-economic adjustment, combined with significant donor funding, in order to assist the process.<sup>61</sup> According to delegates from some developing and LDC member governments<sup>62</sup> the Aid for Trade initiative simply reaffirms the intention of the membership to do something in order to further the interests of those members, the legal basis for which is established in the Preamble to the

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<sup>55</sup> See, eg, Footer, *Analysis of the World Trade Organization*, above n 5, 289–91.

<sup>56</sup> Marrakesh Agreement annex ('Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking') ('Coherence Declaration').

<sup>57</sup> Footer, *Analysis of the World Trade Organization*, above n 5, 23.

<sup>58</sup> Doha Work Programme, WTO Doc WT/MIN(05)/DEC (22 December 2005, adopted 18 December 2005) (Ministerial Declaration) [57] ('Hong Kong Ministerial Declaration').

<sup>59</sup> Marc Auboin, 'Fulfilling the Marrakesh Mandate on Coherence: Ten Years of Cooperation between the WTO, IMF and World Bank' (Discussion Paper No 13, WTO, 2007) 31–2.

<sup>60</sup> See generally Faizel Ismail, 'Aid for Trade: An Essential Component of the Multilateral Trading System and the WTO Doha Development Agenda' in Dominique Njinkeu and Hugo Cameron (eds), *Aid for Trade and Development* (Cambridge University Press, 2008) 46, who calls for mainstreaming development in the WTO.

<sup>61</sup> *Recommendations of the Task Force on Aid for Trade*, WTO Doc WT/AFT/1 (27 July 2006) ('Task Force Report'). For an endorsement of this report by the WTO General Council, see *Minutes of Meeting*, WTO Doc WT/GC/M/104 (5 December 2006) (Decision of 10 October 2006) [36]–[37].

<sup>62</sup> Comments made to the author at Panel Discussion on 'Implementing the Future WTO Commitments on Trade Facilitation', UNCTAD, Geneva, 5 July 2010 ('UNCTAD Panel Discussion').

*Marrakesh Agreement*<sup>63</sup> and which is provided for in the *Coherence Declaration*.<sup>64</sup>

However, in order to make the Aid for Trade policy work for development, the Task Force in its first Report<sup>65</sup> invited WTO Director-General Pascal Lamy to establish an inter-agency monitoring and evaluation process.<sup>66</sup> Subsequently, he established an inter-agency Advisory Group in 2007, with participation from the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the International Monetary Fund, the Inter-American Development Bank, the Islamic Development Bank, the International Trade Centre, the Organisation for Economic Co-Operation and Development ('OECD'), the UN Conference on Trade and Development ('UNCTAD'), the UN Economic Commission for Africa, the UN Industrial Development Organization and the World Bank. The actual process of monitoring the Aid for Trade policy has thus far been carried out on the basis of Global Reviews in 2007 and 2009 with input from the aforementioned partner institutions.<sup>67</sup> This form of consultative monitoring and reporting is typical of the type of non-legal soft law that is found in the WTO.

#### A *Accounting for Variable Normativity in WTO law*

As with the norms of general public international law,<sup>68</sup> it is possible to conceive of soft WTO law in a primary and secondary sense, as Dinah Shelton has done with respect to general international law.<sup>69</sup> Primary public international rules of the hard law variety take the form of WTO treaty obligations. They seek to regulate the behaviour of WTO members by requiring them to do something (*prescriptive norms*) or not to do something (*prohibitive norms*). They are combined with other provisions that grant members a right to be allowed to undertake certain action (*permissive norms*) or to refrain from fulfilling one of their WTO obligations *provided* specific conditions are met (*exceptive norms*).

The International Law Commission's ('ILC') *Report on Fragmentation of International Law*<sup>70</sup> has suggested that from a treaty perspective there are subtle differences in the process of international 'legislation' between different types of hard law norms, and indeed in the nature of the underlying treaty regime. This is because 'many provisions in technical treaty-regimes have an exhortatory,

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<sup>63</sup> *Marrakesh Agreement* Preamble (second recital).

<sup>64</sup> *Coherence Declaration* [2], [5].

<sup>65</sup> *Task Force Report*, WTO Doc WT/AFT/1, 9 s H.

<sup>66</sup> Audoin, above n 59, 32.

<sup>67</sup> For details on the Aid for Trade initiative and the two Global Reviews see OECD and WTO, *Aid for Trade at a Glance 2009: Maintaining Momentum* (OECD and WTO, 2009).

<sup>68</sup> For a summary of the functions of norms of international law, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003) 158–9.

<sup>69</sup> Shelton, above n 22, 70. For a recent discussion and clarification of the proper distinction between norms of primary and secondary private international law, see Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009) 19–20.

<sup>70</sup> ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58<sup>th</sup> sess, UN Doc A/CN.4/L.682 (13 April 2006) ('*Report on Fragmentation of International Law*') 248–56 [491]–[493].

procedural or “programmatically” character’.<sup>71</sup> In other words, those norms, which are aspirational in character, are really *programmatically norms*.<sup>72</sup> Where this type of treaty obligation arises it is sometimes incapable of being implemented or else it is open to varying interpretations by national authorities when implemented in domestic legal orders.<sup>73</sup>

The presence of programmatic norms in WTO law draws directly on prior GATT law.<sup>74</sup> An example is the detailed set of principles and objectives in *GATT 1994* art XXXVI in favour of ‘less-developed contracting parties’, which is one of the provisions in Part IV that was added to the GATT in 1965.<sup>75</sup> In particular para 8 of art XXXVI removes the requirement of strict reciprocity from developing countries and LDCs in the reduction and removal of tariffs, thereby paving the way for developed countries to offer them preferential tariff treatment. Formally speaking this treaty provision contains a binding obligation but due to its soft content, which is essentially programmatic, it is no more than a piece of legal soft law.

The creation of a system of ‘generalized, non-reciprocal and non-discriminatory preferences beneficial to developing countries’, known as the Generalized System of Preferences (‘GSP’),<sup>76</sup> under the auspices of UNCTAD,<sup>77</sup> only exacerbated the situation. While the GSP was clearly meant to redress inequities between countries with different levels of economic development, GATT developed contracting parties could not grant preferential tariff treatment without violating their MFN obligations under *GATT 1947* art I:1. The 1971 waiver decisions adopted by the GATT contracting parties<sup>78</sup> legalised these ‘abstractly defined measures’<sup>79</sup> and gave effect to the GSP. Eventually the grant of preferential tariff treatment was put on a permanent basis

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<sup>71</sup> Ibid 253 [493(2)(d)]; see Bothe, above n 15 for a discussion of programmatic norms in international economic relations some 25 years earlier.

<sup>72</sup> See Riedel, above n 2, 67 where he speaks of ‘norms of aspiration’ serving as ‘landmarks’ for achieving programmatic aims, which informs his understanding of the phenomenon of ‘standards’.

<sup>73</sup> Footer, *Analysis of the World Trade Organization*, above n 5, 188–9.

<sup>74</sup> On programmatic norms in the GATT regime see, eg, Wolfgang Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht* (Springer-Verlag, 1990) 125, 470.

<sup>75</sup> *Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, GATT Doc L/2355 (11 February 1965) GATT BISD 13S/1-11; *Declaration on the De Facto Implementation of the Provisions of the Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development*, GATT Doc L/2356 (11 February 1965), opened for signature by those countries wishing to implement Part IV, (8 February 1965) GATT BISD 13S/10.

<sup>76</sup> See *Generalized System of Preferences*, GATT Doc L/3545 (28 June 1971) (Decision of 25 June 1971) GATT BISD 18S/24.

<sup>77</sup> The very notion of a generalized, non-reciprocal, non-discriminatory system of preferences (GSP) in favour of the developing countries rests on a non-legally binding or soft law commitment, in the form of Resolution 21(ii), adopted at the UNCTAD II Conference (New Delhi, 1968).

<sup>78</sup> *Generalized System of Preferences*, GATT Doc L/3545.

<sup>79</sup> Isabel Feichtner, ‘The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests’ (2009) 20 *European Journal of International Law* 615, 621.

with the *Enabling Clause* decision of 1979,<sup>80</sup> and was integrated into WTO law, as part of the *GATT acquis*.<sup>81</sup>

Secondary public international law rules of the hard law variety in the WTO context are rules that ‘have their legal basis in and derive their authority from primary treaty rules’.<sup>82</sup> They operate in such a way as to revise the content or application of primary treaty rules because they modify or interpret the normative basis of those rules.<sup>83</sup> The usual means of doing this is through a formal process of treaty amendment, as the ongoing amendment to the *TRIPS Agreement*<sup>84</sup> signifies.<sup>85</sup>

However, it is also possible that a modification to a treaty rule may arise from subsequent practice under the relevant treaty, which is relevant to its interpretation.<sup>86</sup> Examples of this in the WTO domain include supplementary tariff schedules and schedules of services’ commitments, which take the form of additional Protocols. Once annexed to the Schedules of Tariff Bindings (for goods) or to the Schedules for Services Commitments and Lists of Article II Most Favoured Nation (‘MFN’) Exemptions (for services) of those WTO members, which have participated in the negotiations and/or subsequently accepted the ‘amending’ Protocols, they become an integral part of the *GATT 1994* or the *GATS*<sup>87</sup> thereby supplementing those Agreements.<sup>88</sup>

Similarly, in the WTO context soft law may take the form of primary or secondary soft law. Primary soft law invariably has a normative content but where it differs from primary hard law is that it has *not* been adopted in binding treaty form. It may declare new norms, which are sometimes intended to be a precursor to the adoption of a later hard treaty text. Similarly, it may reaffirm or elaborate norms previously set forth in binding or non-binding instruments. It

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<sup>80</sup> *Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, GATT Doc L/4903 (28 November 1979) (Decision), GATT BISD 26S/203 (‘*Enabling Clause*’).

<sup>81</sup> This was done on the basis of the headnote to the *GATT 1994* [1(b)(iv)].

<sup>82</sup> Footer, *Analysis of the World Trade Organization*, above n 5, 203.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Marrakesh Agreement* annex 1C (‘*Agreement on Trade-Related Aspects of International Property Rights*’) (‘*TRIPS Agreement*’).

<sup>85</sup> *Amendment of the TRIPS Agreement*, WTO Doc WT/L/641 (8 December 2005) (Decision of 6 December 2005) annex (‘*Annex to the Protocol Amending the TRIPS Agreement: Article 31bis*’) (not yet in force) (‘*Protocol of Amendment*’). In accordance with the *Marrakesh Agreement* art X(3), the amendment ‘shall take effect for the Members that have accepted ... [it] upon acceptance by two thirds of the Members and thereafter for each other Member upon acceptance by it’. Almost five years since its adoption, just over one third of the WTO membership has accepted the *Protocol of Amendment*: see Matthew Kennedy, ‘When Will the Protocol Amending the TRIPS Agreement Enter into Force?’ (2010) 13 *Journal of International Economic Law* 459, 461.

<sup>86</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(b) states that ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ may be relevant; see also Chinkin, ‘The Challenge of Soft Law’, above n 18, 856.

<sup>87</sup> *Marrakesh Agreement* annex 1B (‘*General Agreement on Trade in Services*’) (‘*GATS*’).

<sup>88</sup> See Appellate Body Report, *European Communities — Customs Classification of Certain Computer Equipment*, WTO Docs WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, AB-1998-2 (5 June 1998) [84] (‘*EC — Computer Equipment*’); Decision by the Arbitrator, *United States — Measures affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/ARB (21 December 2005) [60] (‘*US — Gambling*’).

may also act to constrain or ‘soften’ hard law WTO obligations, particularly where the consequences of such hard law may give rise to distributive conflict.<sup>89</sup>

While not such a common occurrence in the hard law regime of the WTO, an example of primary soft law is the *Information Technology Agreement*,<sup>90</sup> which was formed pursuant to a Ministerial Declaration, adopted at the First WTO Ministerial Conference in 1996. Under the *ITA* participating WTO members, who represent approximately 90 per cent of world trade in information technology products, agreed, on the basis of a so-called ‘Modalities and Product Coverage’ approach, to eliminate *all* duties on listed IT products as between themselves. The idea behind the *ITA* was to allow a group of WTO members to pursue a plurilateral approach to ‘bind and eliminate customs duties’ on certain IT products by 1 January 2000 and to amend their tariff commitments under *GATT 1994* art II as a consequence.

The soft law character of the *ITA* meant that there was no problem in putting back the date by which the participants had to notify their acceptance of it before it went into effect.<sup>91</sup> What it also demonstrates is that an agreement with ambitious norms may be easier to obtain using a soft law process than a set of binding treaty rules and may in certain circumstances even be necessary. The *ITA* uses an innovative ‘dual’ approach to listing, which combines both IT products classified or classifiable in Harmonized System (‘HS’) codes<sup>92</sup> and a format for products specified separately, which allows for a narrative description in order to determine product coverage.<sup>93</sup> No domestic ratification is required for adoption of the *ITA* and the tricky matter of compliance, which comes with a hard law agreement, is not a central issue.

Even so, members participating in the *ITA* are not barred from bringing a complaint against the raising of previously agreed zero tariff rates in accordance with the *ITA* despite its soft law character. This is clear from the three complaints filed before a WTO panel by the United States, Japan and Chinese Taipei<sup>94</sup> with respect to the reclassification by the European Communities (‘EC’) (now European Union (‘EU’))<sup>95</sup> and its member states of duties on flat-panel display devices, set-top boxes which have a communication function and multifunctional digital machines, in violation of its commitment to provide duty-free treatment for these products under the *ITA*. The Panel found that the EC and its member

<sup>89</sup> Gregory C Shaffer and Mark A Pollack, ‘Hard vs Soft Law: Alternatives, Complements, and Antagonists in International Governance’ (2010) *Minnesota Law Review* 706, 730.

<sup>90</sup> *Ministerial Declaration on Trade in Information Technology Products*, WTO Doc WT/MIN(96)/16 (13 December 1996) (‘*Information Technology Agreement*’) (‘*ITA*’).

<sup>91</sup> The date for notification was moved back from 1 April 1997 to 1 July 1997: *ibid* annex (‘*Modalities and Products Coverage*’).

<sup>92</sup> In accordance with *ibid* attachment A.

<sup>93</sup> On the basis of *ibid* attachment B.

<sup>94</sup> Panel Report, *European Communities and Its Member States — Tariff Treatment of Certain Information Technology Products*, WTO Docs WT/DS375/R, WT/DS376/R, WT/DS377/R (16 August 2010) (‘*EC — Certain Information Technology Products*’).

<sup>95</sup> See *Treaty on European Union*, opened for signature 7 February 1992, [2009] OJ C 115/13 (entered into force 1 November 1993) art 2, as amended by *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009). The ‘European Union’ has replaced the ‘European Community’: see *Notification of Succession*, WTO Doc WT/Let/679 (19 July 2010) (Note Verbale).

states had imposed duties on these products — allegedly on the basis that technological innovation had transformed them into entirely new products — contrary to the duty-free tariff concessions that they had scheduled on the basis of their participation in the *ITA*.

The accomplishment of the soft law *ITA*, as a way of dealing with the concerns of a group of WTO members wishing to move forward on a particular issue, has attracted broader interest in the membership. The *ITA* could serve as a model for similar sorts of instruments designed to bring closure on some of the Doha Development Round MTN and to reap an ‘early harvest’ in terms of results.<sup>96</sup> Not only could such a model assist in resolving the paradox of how to deal with the situation where a group of WTO members wishes to move ahead on a specific sectoral issue but it could also provide a means of resolving the conundrum of the Doha Development Round MTN.

This is because the Round is supposedly all about the reduction of agricultural subsidies (by developed country members) and enhanced market access (for developing countries and LDC members) but the membership remains bitterly divided on how to bring about closure. Could primary soft law assist in achieving this?

There have been two attempts by developing and LDC members to get some traction in the stalled Round by using soft law. The first initiative was an unsuccessful attempt by a group of LDC trade ministers to try and reap an early harvest agreement at the Geneva Ministerial Conference<sup>97</sup> by introducing a Ministerial Declaration, which they had previously adopted in October 2009, for consideration by the membership. The so-called *Dar Es Salaam Declaration*<sup>98</sup> sought movement on three key areas of concern to LDC members: duty-free and quota-free (‘DFQF’) market access for LDC members; preferential treatment for requests made by LDCs in services’ negotiations; and an ‘ambitious, expeditious and specific’ solution to the problem of cotton subsidies.

Each of these three areas of coverage pits the interests of the LDC members against those of the developed (and to some extent developing country) members and demonstrates the paradox in which a particular group of members find themselves in the midst of the Doha Development Round. For example, the call for DFQF treatment rests on a provision in the *Hong Kong Ministerial Declaration*,<sup>99</sup> with reference to the earlier *Doha Work Programme*,<sup>100</sup> in which developed country members had previously reaffirmed their commitment on implementation of DFQF.<sup>101</sup> Likewise, the call for an immediate waiver of the MFN provision in the *GATS* was aimed at going beyond the ‘LDC modalities’

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<sup>96</sup> Hunter Nottage and Thomas Sebastian, ‘Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law’ (2006) 9 *Journal of International Economic Law* 989, 1000.

<sup>97</sup> WTO Ministerial Conference, Seventh Session, Geneva (30 November – 2 December 2009).

<sup>98</sup> *Dar Es Salaam Declaration*, WTO Doc WT/MIN(09)/2 (21 October 2009). The *Dar Es Salaam Declaration* was circulated at the request of the Delegation of Tanzania.

<sup>99</sup> *Hong Kong Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC, [47], which refers to the attached annex F regarding ‘special and differential treatment’.

<sup>100</sup> *Doha Work Programme*, WTO Doc WT/MIN(01)/17.

<sup>101</sup> David Laborde, ‘Looking for a Meaningful Duty Free Quota Free Market Access Initiative in the Doha Development Agenda’ (Competitiveness and Sustainable Development Series Issue Paper No 4, International Centre for Sustainable Development, 2008).

agreed in 2003<sup>102</sup> by allowing developed and developing WTO members to offer better market access for services and service providers from LDC members.<sup>103</sup> On assistance to specific LDC cotton farmers concerning the 'Sectoral Initiative on Cotton'<sup>104</sup> the *Dar Es Salaam Declaration* sought to accelerate the removal of domestic subsidies by certain developed country members (notably the US) and to impose a safety net to help meet declining international prices on raw cotton in the face of the global financial and economic crisis.<sup>105</sup>

A second initiative, on which greater progress has been made, concerns negotiations on a soft law instrument on trade facilitation, aimed at simplifying and harmonising cross-border trade and transit requirements with respect to trade in goods, which many developing country and LDC members feel impair normal trade. The original modalities text for those negotiations was adopted by the General Council back in 2004<sup>106</sup> and subsequently endorsed in the *Hong Kong Ministerial Declaration*.<sup>107</sup> Notwithstanding scepticism on the part of some developing and LDC country members about the prospect of negotiating on a new issue area the negotiations have led to the elaboration of a Draft Consolidated Negotiating Text on trade facilitation, now on its second revision.<sup>108</sup> The draft text could form the basis for a primary soft law agreement on trade facilitation, even acting as a precursor to a legally binding treaty instrument.

The mandate given to WTO delegations is to clarify and improve upon *GATT 1994* arts V (transit), VIII (fees and charges connected with import/export) and X (transparency: publication and administration of trade regulation).<sup>109</sup> It is thereby designed to tackle some of the more onerous technical barriers to trade caused by weak administrative procedures and operations that mostly involve customs, border clearance and transit of merchandise through landlocked countries as well as the provision of timely and efficient information concerning trade regulations.

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<sup>102</sup> *GATS* art II:1.

<sup>103</sup> In terms of services negotiations WTO members already agreed on so-called 'modalities' for special and differential treatment of LDC members with respect to services trade back in September 2003: see *Report of the Meeting Held on 4 and 10 July and 3 September 2003*, WTO Doc TN/S/M/8 (29 September 2003) (Note by the Secretariat) [43]. These 'modalities' were endorsed in the *Hong Kong Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC, [27], annex C [3].

<sup>104</sup> The principal cotton exporting LDC members are the West African countries of Benin, Burkina Faso, Chad and Mali: *Poverty Reduction: Sectoral Initiative in Favour of Cotton*, WTO Doc WT/MIN(03)/W/2 (15 August 2003) (Joint Proposal by Benin, Burkina Faso, Chad and Mali). They are also known as the 'Cotton-Four': WTO, *Members Mull New Details in 'Cotton Four' Proposal* (2 March 2006) <[http://www.wto.org/english/news\\_e/news06\\_e/cotton\\_2march06\\_e.htm](http://www.wto.org/english/news_e/news06_e/cotton_2march06_e.htm)>.

<sup>105</sup> Five years earlier the General Council had agreed that the issue of heavily subsidised cotton exports (especially from the US) would be addressed 'ambitiously, expeditiously and specifically' within the negotiations on agricultural subsidies: see *Doha Work Programme*, WTO Doc WT/L/579 (2 August 2004, adopted 1 August 2004) (Decision) ('*Doha Work Programme Decision*').

<sup>106</sup> *Ibid* [1(g)].

<sup>107</sup> *Hong Kong Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC, [33].

<sup>108</sup> *Draft Consolidated Negotiating Text*, WTO Doc TN/TF/W/165.Rev.2 (4 May 2010) (Revision).

<sup>109</sup> *GATT 1994* arts V, VIII, X.

Despite the importance of such an agreement for developing and LDC members there is still some doubt among many of the delegates involved in its negotiation as to whether it will achieve its goals, which stems from two factors. One is the enormous number of S&DT flexibilities that have been introduced, which provide for layer upon layer of exceptive behaviour. Another is the paradigm shift that this text introduces whereby the conditions and timeframes for implementation of the S&DT flexibilities will be differentiated. Each member must decide for itself under what conditions and within which timeframe it will apply the basic provisions.

A further factor in its negotiation is that many developing and LDC members simply see the draft text at best as a precursor to a hard law agreement (see next part) or at worst an attempt by developed country members to take the real decisions concerning rules on trade facilitation in other fora and then to insist upon the subsequent adoption of those rules in the WTO.<sup>110</sup>

In summary then primary soft law has been resorted to in order to reaffirm or elaborate previously binding or non-binding norms in areas where distributive conflicts exist in the membership with differing degrees of success. By seeking to impose the terms of the *Dar Es Salaam Declaration* on the Geneva Ministerial Meeting the LDC members sought to vary the terms of cooperation in their favour without offering anything in exchange thereby affecting other members calculation of the costs and benefits arising out of an early harvest of part of the Doha Round MTN.<sup>111</sup>

By contrast the negotiation of a soft law instrument on trade facilitation enjoys wider support, given that the timely and efficient administration of customs, border clearance and transit of merchandise are matters that affects the entire membership. Thus whilst there may be a lingering doubt by some developing and LDC members as to its potential conclusion, this soft law instrument stands a better chance of being adopted by the membership.

Secondary soft law consists of things like recommendations and general comments of supervisory/monitoring bodies or adjudicative bodies as well as statements issued by an institutional body or by the members acting collectively. Sometimes the two coincide, especially where it concerns a 'member-driven' organisation like the WTO. An example of soft law process in the WTO, which is administered by an institutional body, is the range of supervisory activities carried out by the TRIPS Council. Under *TRIPS* art 63:2 the TRIPS Council is tasked with reviewing all members' domestic laws and regulations in the field of intellectual property protection to check their conformity with WTO obligations.<sup>112</sup>

An example of a piece of secondary WTO soft law adopted by the members acting collectively is the *Transparency Mechanism for Regional Trade Agreements*.<sup>113</sup> Its aim is to provide a mechanism for the improved flow of information from WTO members about any regional trade agreements ('RTA')

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<sup>110</sup> Comments from various developing country and LDC delegates in the UNCTAD Panel Discussion, above n 62.

<sup>111</sup> See generally Shaffer and Pollack, above n 89, 732.

<sup>112</sup> Footer, *Analysis of the World Trade Organization*, above n 5, 60.

<sup>113</sup> WTO Doc WT/L/671 (18 December 2006) (Decision of 14 December 2006) ('*Transparency Mechanism*').

that they have entered into (or are about to enter into) force on the basis of *GATT 1994* art XXIV,<sup>114</sup> *GATS* art V<sup>115</sup> or the *Enabling Clause*.<sup>116</sup> The *Transparency Mechanism* contains enhanced notification procedures that members, which are parties to a RTA, should submit for inclusion in the Integrated Data Base ('IDB').<sup>117</sup> For trade in goods this covers detailed data on tariff concessions, MFN duty rates, product-specific preferential rules of origin and import statistics.<sup>118</sup> For trade in services it requires submission of data to include trade or balance of payments statistics, product data/production statistics, relevant data on foreign direct investment and movement of natural persons.<sup>119</sup>

An important element of the *Transparency Mechanism* is that members, which are parties to a RTA, also have notification obligations subsequent to the introduction of any changes in the RTA that might affect the implementation or operation of the Agreement.<sup>120</sup> Equally, such notification obligations exist in the event that the RTA is implemented over a transition period in which case the member(s) involved must notify the extent of their liberalisation commitments during this period.<sup>121</sup>

Secondary soft law can also be found in WTO dispute settlement. For example *Understanding on Rules and Procedures Governing the Settlement of Disputes* art 19:1 makes it clear that a panel or the Appellate Body may make recommendations, and occasionally suggestions, as to how a member can bring an infringing measure into conformity with its WTO obligations.<sup>122</sup> Even so, there are limits to such secondary soft law because panels and the Appellate Body should not seek 'to add to or to diminish the rights and obligations'<sup>123</sup> of members as set out in the WTO Agreements.

### B *The Coordinating and Facilitative Role of Soft Law in WTO Law*

For some lawyers, the absence of a formal legal rule of the hard law type is considered problematic because implicit in such a rule is a sense of its bindingness and effectiveness.<sup>124</sup> The lack of bindingness that attaches to informal, soft law norms is often considered to be synonymous with their lack of effectiveness. But is this necessarily true?

As we know from the history of GATT/WTO relations, the existence of a body of explicit legal rules, bound up in a formal treaty instrument, is no

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<sup>114</sup> *GATT 1994* art XXIV; see Jo-Ann Crawford, 'A New Transparency Mechanism for Regional Trade Agreements' (2007) 11 *Singapore Yearbook of International Law* 133.

<sup>115</sup> *GATS* art V.

<sup>116</sup> *GATT* Doc L/4903.

<sup>117</sup> *Regional Trade Agreements Transparency Mechanism*, WTO Doc WT/L/671, annex [1].

<sup>118</sup> *Ibid* annex [2].

<sup>119</sup> *Ibid* annex [3].

<sup>120</sup> *Ibid* annex [14].

<sup>121</sup> *Ibid* annex [15].

<sup>122</sup> *Marrakesh Agreement* annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*') ('*DSU*') art 19:1.

<sup>123</sup> *Ibid* art 3.2.

<sup>124</sup> See, eg, Klabbbers, 'The Undesirability of Soft Law', above n 26, 387; Kal Raustiala, 'Form and Substance in International Agreements' (2005) 99 *American Journal of International Law* 581, 586.

guarantor that those rules will be effective<sup>125</sup> in shaping the behaviour of member governments or their constituents. Stephen Toope has advanced the idea that ‘if notionally binding rules are often not effective in practice, it is equally true that informal, non-binding norms may come to shape practice quite effectively.’<sup>126</sup>

In other words, soft international law and regulation can be efficacious in the multilateral trading system where there may be little or no immediate compliance,<sup>127</sup> or else compliance occurs over time because it uses other methods to achieve it. Thus, while rules may play an important role in controlling WTO members’ behaviour they may also be influenced by soft law norms that fulfil a coordinating and/or a facilitative function.<sup>128</sup> It is to this aspect of soft law that we turn next.

The *Coherence Declaration*, and the Aid for Trade initiative to which it has given rise, have already been mentioned. It is a piece of non-legal soft law of the secondary type, which fulfils an important coordinating and facilitative function, the ultimate effectiveness of which can only be measured on the basis of the monitoring and evaluation process.<sup>129</sup> A similar piece of secondary soft law is the decision taken up in the *Hong Kong Ministerial Declaration* concerning LDC members’ rights and obligations under the WTO Agreements. Not only does it recognise that LDC members are only required to ‘undertake commitments and concessions to the extent consistent with their individual development, financial and trade needs, and their administrative and institutional capabilities’ but it also permits them to bring to the level of the General Council ‘for examination and for appropriate action’ any issue that would prevent them from complying with ‘a specific obligation or commitment’.<sup>130</sup>

A soft law instrument that fulfils a facilitative role through a process of monitoring and evaluation, with which all members must comply on the basis of a binding WTO treaty obligation, is the *Trade Policy Review Mechanism*.<sup>131</sup> The *TPRM* is the peer review system utilised by the membership in order to conduct scheduled reviews of one another’s trade policies and members’ performance in adhering to rules, disciplines and commitments under the MTAs. It involves ‘the

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<sup>125</sup> An enquiry into the effectiveness of international rules is not the same thing as an enquiry into the nature of compliance itself; the latter is the means by which the effectiveness of legal rules is measured. See Mary E Footer, ‘Some Theoretical and Legal Perspectives on WTO Compliance’ (2007) 38 *Netherlands Yearbook of International Law* 61, 67.

<sup>126</sup> Stephen Toope, ‘Formality and Informality’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 107, 119.

<sup>127</sup> Robert Howse and Ruti Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (2010) 1(2) *Global Policy* 127.

<sup>128</sup> Göran Ahrne and Nils Brunsson, ‘Soft Regulation from an Organizational Perspective’ in Ulrika Mörth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar, 2004) 171, 187–9.

<sup>129</sup> Sheila Page, ‘Aid for Trade: A New Issue in the WTO’ in Dominique Njinkeu and Hugo Cameron (eds), *Aid for Trade and Development* (Cambridge University Press, 2008) 131.

<sup>130</sup> *Hong Kong Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC, annex F [1]. (The title of one of the proposals in annex F refers to the *Decision on Measures in Favour of Least Developed Countries*, which is attached to the *Marrakesh Agreement*). This is a reference to the *Marrakesh Agreement* annex (‘*Decision on Measures in Favour of Least Developed Countries*’).

<sup>131</sup> *Marrakesh Agreement* annex 3 (‘*Trade Policy Review Mechanism*’) (‘*TPRM*’).

regular collective appreciation and evaluation of the full range of *individual* members' trade policies and practices and their impact on the functioning of the multilateral trading system'.<sup>132</sup> While a member under review has to explain its government's trade policies and respond to questions and criticisms, the actual recommendations, which the Trade Policy Review Body makes, are of the non-binding<sup>133</sup> soft law type.

A further example of secondary soft law, but this time of the purely facilitative type, is the process of accession to the WTO, based on *GATT 1947* procedures.<sup>134</sup> The issue here is not a return to soft law but recognition that the use of soft law has never been abandoned. This is clear from the issuance by the WTO Secretariat in 1995 of a *Technical Note on the Accession Process*,<sup>135</sup> which was subsequently revised in 2004.<sup>136</sup> It is intended to serve as a practical guide to assist the members in 'the organization and pursuit of accession negotiations' by individual Working Parties and is of a non-binding character.<sup>137</sup>

The *Technical Note on the Accession Process* must be read and acted upon in conjunction with two other non-binding instruments arising out of *GATT 1947* practice, namely the *Complementary Procedures on Accession Negotiations*<sup>138</sup> and the Chairman's statement on the *Management of Accession Negotiations*.<sup>139</sup> These informal, soft law rules, which constitute the practice around GATT/WTO accession, provide the membership with considerable flexibility and a good deal of discretion in the conduct of its negotiations with individual countries seeking accession to the WTO.

#### IV VARIABLE NORMATIVITY AND THE ANTINOMIES IN WTO LAW

The varying degrees of normativity at work in WTO law reveal a mixture of hard and soft law interacting with each other. Accounting for normative differentiation and its role in economic governance is one thing but what role, if any, can soft law norms play in reconciling some of the antinomies of WTO law? At times soft law and hard law may complement each other so as to produce the required effects in terms of rule-making and compliance for the resolution of a

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<sup>132</sup> Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press, 2<sup>nd</sup> ed, 2008) 93–4 (emphasis altered).

<sup>133</sup> See, eg, Nicholas Bayne, 'Hard and Soft Law in International Institutions: Complements, Not Alternatives' in John J Kirton and Michael J Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, 2004) 347, 349.

<sup>134</sup> See generally Footer, *Analysis of the World Trade Organization*, above n 5, 241–52.

<sup>135</sup> *Accession to the World Trade Organization*, WTO Doc WT/ACC/1 (24 March 1995) (Note by the Secretariat) ('*Technical Note on the Accession Process*'); Gabrielle Marceau, 'Les Procédures d'Accession à l'Organisation Mondiale de Commerce (OMC)' (1997) 35 *The Canadian Yearbook of International Law* 233, 239.

<sup>136</sup> *Technical Note on the Accession Process*, WTO Doc WT/ACC/10/Rev.2 (22 October 2004) (Note by the Secretariat) (Revision).

<sup>137</sup> *Ibid* [2]. See also Footer, *Analysis of the World Trade Organization*, above n 5, 245.

<sup>138</sup> *Accession to the General Agreement*, GATT Doc L/7317 (2 November 1993) (Complementary Procedures to be followed in the Organization and Pursuit of Negotiations) ('*Complementary Procedures on Accession Negotiations*'), which includes an annex containing an 'outline format for a memorandum on the foreign trade régime'.

<sup>139</sup> *Management of Accession Negotiations*, GATT Doc C/COM/4 (16 November 1994) (Statement of the Chairman of the Council).

paradoxical situation.<sup>140</sup> Alternatively hard and soft law may interact in a more antagonistic fashion,<sup>141</sup> particularly where a trade issue is highly contestable. In such situations soft law may be employed to restrain the effects of hard law.

The idea of variable normativity and its responsiveness to the antinomies in WTO law are examined in the following part on the basis of the five propositions, which were set out in the introductory part of this article.

#### A *The Role of Soft Law in Elaborating upon WTO Treaty Rules*

The first proposition is that soft law can elaborate upon a hard WTO treaty rule in order to articulate and give meaning to the rule's otherwise soft or unclear content. In the GATT/WTO context so-called 'elaborative soft law'<sup>142</sup> provides guidance in the interpretation or application of a particular treaty rule.<sup>143</sup>

Examples of elaborative soft law from the GATT period include the 1970 Report of the Working Party on 'Border Tax Adjustments'.<sup>144</sup> Various GATT panels and in particular the WTO panel and Appellate Body in *EC — Asbestos*<sup>145</sup> have relied upon the approach adopted by the Working Party in its Report in analysing 'like products', about which there has been much controversy in GATT/WTO jurisprudence,<sup>146</sup> on the basis of four criteria.<sup>147</sup>

Similarly, at the end of the Uruguay Round various interpretative texts were concluded in order to resolve issues that the GATT Contracting Parties had concerning inter alia the notification of 'other duties and charges' under the tariff bindings in *GATT 1994* art II:1(b),<sup>148</sup> the application of balance of payments measures under *GATT 1994* arts XII and XVIII:B<sup>149</sup> and the interpretation of certain aspects of regional arrangements formed pursuant to *GATT 1994* art

<sup>140</sup> Gunther F Handl, 'A Hard Look at Soft Law: Remarks by Professor Handl' (1988) 82 *Proceedings of the American Society of International Law* 371, 371.

<sup>141</sup> Shaffer and Pollack, above n 89, 743–8.

<sup>142</sup> Chinkin, above n 41, 30.

<sup>143</sup> A E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly* 901, 905.

<sup>144</sup> GATT Panel Report, *Report by the Working Party on Border Tax Adjustments*, GATT Doc L/3464 (adopted 2 December 1970), GATT BISD 18S/97. In seeking to establish GATT principles on tax adjustment, over which there was significant divergence among the GATT contracting parties, the Working Party used the OECD's definition of 'border tax adjustments': GATT BISD 18S/100-101, [14]–[17].

<sup>145</sup> Appellate Body Report, *European Communities — Measures affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R, AB-2000-11 (12 March 2001) [88] n 58 ('*EC — Asbestos*').

<sup>146</sup> *Ibid* [101].

<sup>147</sup> The criteria are '(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and (iv) the tariff classification of the products': *EC — Asbestos*, WTO Doc WT/DS135/AB/R, [85], [101].

<sup>148</sup> *Understanding on the Interpretation of Article II:1(b) of the General Agreement on Tariffs and Trade 1994*, interpreted in Panel Report, *Dominican Republic — Measures affecting the Importation and Internal Sale of Cigarettes*, WTO Doc WT/DS302/R (26 November 2004) [7.55]–[7.89] ('*Dominican Republic — Import and Sale of Cigarettes*').

<sup>149</sup> *GATT 1994* annex ('*Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994*'), interpreted in Appellate Body Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc WT/DS90/AB/R, AB-1999-3 (23 August 1999) [180] ('*India — Quantitative Restrictions*').

XXIV.<sup>150</sup> In WTO practice the further elaboration of certain provisions in the multilateral trade agreements by means of soft law includes the RTA *Transparency Mechanism*, which was referred to earlier, and the more recent decision on *Transparency Mechanism for Preferential Trade Arrangements*,<sup>151</sup> the coverage of which extends to preferential trade arrangements ('PTAs') on the basis of the *Enabling Clause*,<sup>152</sup> PTAs with LDCs and any other form of non-reciprocal PTA under the *Marrakesh Agreement*.

Turning to WTO dispute settlement we note that it has 'become common practice for panels and the Appellate Body to *interpret* WTO rules with reference to other rules of international law',<sup>153</sup> which may include soft law, and to do this in order to avoid conflict. For example in *US — Shrimp*<sup>154</sup> the Appellate Body took into consideration a set of multilateral environmental agreements ('MEAs') in order to ascertain the meaning of the term 'exhaustible natural resources' in *GATT 1994* art XX(g) in light of the preamble to the *Marrakesh Agreement*, which informs the *GATT 1994* and explicitly acknowledges 'the objective of *sustainable development*'.<sup>155</sup> In particular, it drew upon inter alia *Agenda 21*<sup>156</sup> and the Resolution on Assistance to Developing Countries,<sup>157</sup> adopted in conjunction with the *Convention on the Conservation of Migratory Species of Wild Animals*,<sup>158</sup> in determining the contemporary meaning of term 'exhaustible natural resources'.<sup>159</sup>

In the case of *EC — Tariff Preferences*<sup>160</sup> the Appellate Body interpreted WTO rules in order resolve a conflict between two norms, one of which prohibits (discrimination under *GATT 1994* art I:1<sup>161</sup> on MFN) what the other norm permits (permitting tariff preferences to developing countries on the basis of the *Enabling Clause*).<sup>162</sup> In so doing the Appellate Body made it clear that in order to resolve the normative conflict a panel should first 'examine the consistency of

<sup>150</sup> *GATT 1994* annex ('*Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994*'), interpreted in Appellate Body Report, *Turkey — Restrictions on Imports of Textile and Clothing Products*, WTO Doc WT/DS34/AB/R, AB-1999-5 (22 October 1999) [53]–[57], especially at [57] ('*Turkey — Textiles*').

<sup>151</sup> *Transparency Mechanism for Preferential Trade Arrangements* WTO Doc WT/COMTD/71 (11 October 2010).

<sup>152</sup> *Enabling Clause*, GATT Doc L/4903.

<sup>153</sup> Pauwelyn, 'Is the WTO "Missing the Boat"?', above n 6, 206.

<sup>154</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) [129]–[131] ('*US — Shrimp*').

<sup>155</sup> *Ibid* [129].

<sup>156</sup> *Report of United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol I) (1993) annex II ('*Agenda 21*').

<sup>157</sup> Final Act, Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals (1979) 19 ILM 11, 15.

<sup>158</sup> Opened for signature 23 June 1973, 993 UNTS 243 (entered into force 1 July 1975).

<sup>159</sup> *US — Shrimp*, WTO Doc WT/DS58/AB/R, [130]; discussed further in Margaret Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech Case*' (2007) 56 *International and Comparative Law Quarterly* 907, 919.

<sup>160</sup> Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries*, WTO Doc WT/DS246/AB/R, AB-2004-1 (7 April 2004) ('*EC — Tariff Preferences*').

<sup>161</sup> *GATT 1994* art I:1.

<sup>162</sup> Pauwelyn, 'Is the WTO "Missing the Boat"?', above n 6, 207.

a challenged measure with Article I:1' and second, if it finds an inconsistency then it should determine whether 'the measure is nevertheless justified by the Enabling Clause'.<sup>163</sup> Here the interpretative function in WTO dispute settlement clarifies the normative relationship between WTO rules in a dynamic way.

#### B *Soft Law as a Precursor to the Development of Other WTO Legal Norms*

The second proposition is that the transformation and incorporation of soft law norms in the field of GATT/WTO law have acted, and continue to act, as a precursor to the evolution of primary and secondary legal norms. In the field of international environmental law it has been argued that soft law may set the pace for subsequent hard law development because it 'may put pressure on "laggards" in negotiations over hard law rules or provide salient solutions for negotiators engaged in integrative bargaining'.<sup>164</sup> Similarly, it has been held that the 'transformation or incorporation of soft law norms into hard law institutions will strongly improve the implementation of those norms' and may even lead to further normative developments.<sup>165</sup>

In this part, we consider how and where soft law has been used in the GATT/WTO in a similar fashion. Our particular interest is in finding out whether soft law has led to the resolution of antinomies that occur either as the result of insufficient regulation or in its absence.

An example of primary soft law in the former GATT as a precursor to the adoption of a primary legal norm law, that is, a treaty rule, under the *Marrakesh Agreement* was the *Understanding on Notification, Consultation, Dispute Settlement and Surveillance*,<sup>166</sup> which included an annex on the 'Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (Article XXIII:2)'. This soft law instrument is particularly significant because it sets out the understanding of the Contracting Parties at the time as to when a complaint can be brought before a panel and the procedures for working parties and panels on a matter, which was insufficiently regulated at the time<sup>167</sup> It was followed by the adoption of several other decisions, the most important of which was the *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures* during the Uruguay Round MTN.<sup>168</sup> Although neither of these soft law instruments dealt with the problem that a GATT contracting party could block either the establishment of a panel or the adoption of a panel report, the 1979 *Understanding* and the 1989 *Improvements Decision* eventually came to form the basis for the DSU and its annexed agreements.

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<sup>163</sup> *EC — Tariff Preferences*, WTO Doc WT/DS246/AB/R, [101].

<sup>164</sup> Jan Birger Skjærseth, Olav Schram Stokke and Jørgen Wettstad, 'Soft Law, Hard Law, and Effective Implementation of International Environmental Norms' (2006) 6 *Global Environmental Politics* 104, 105.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance*, GATT Doc L/4907 (28 November 1979) GATT BISD 26S/210.

<sup>167</sup> It also incorporates by reference the earlier *Decision on Procedures under Article XXIII*, relating to developing countries and dispute settlement under the GATT: *Decision on Procedures under Article XIII*, (5 April 1966) GATT BISD 14S/18.

<sup>168</sup> *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures*, GATT Doc L/6489 (12 April 1989) (Decision) GATT BISD 36S/61.

Another type of soft law instrument with strong procedural underpinnings, is the move by some WTO members to create a mediation tool to deal with the frustration and lack of progress that many members, and representatives of their business communities, feel in dealing with the problem of non-tariff barriers ('NTBs'). This is in response to a situation of considerable concern to the membership but for which there is currently no regulation at all. Spear-headed by the EU,<sup>169</sup> the ongoing NAMA negotiations have been considering the introduction of a mechanism for a mediation process, which is designed to reach mutually agreed solutions between WTO members over NTBs that have an adverse effect on trade. The idea behind the proposed mediation mechanism is to create a

horizontal mechanism, in the form of a procedure for problem solving in the area of NTBs, with short time-lines, as well as with the involvement of a facilitator that can assist countries in reaching mutually agreed solutions.<sup>170</sup>

It is intended that resort to the mechanism will not be determinative of the consistency of an NTB with a multilateral trade agreement and the legitimacy of the policy underlying the measure cannot be challenged. Furthermore, its use is without prejudice to a member's right to invoke the DSU.

The resort to soft law as a precursor to secondary legal norms can also result from the lack of consensus necessary to introduce a hard law rule or to amend an existing one. In that case, a non-legal soft law rule may act as a second-best option for resolving the dilemma of non-regulation where a legally binding hard law rule is unattainable<sup>171</sup> or where one of the addressees of the rule is a non-governmental entity. WTO practice to date attests to several efforts that go beyond simply elaborating upon the soft content of a treaty provision in one of the multilateral trade agreements. Instead, the objective is to ensure that members do not behave in a manner inconsistent with their WTO obligations. This can come about through various forms of secondary soft law ranging from the decision of a particular WTO committee, which may implicitly or explicitly contain guidelines, or be based on something like a code of conduct, which is taken up in a treaty text.

An example of the former, drawn from the practice of the SPS Committee under the *Agreement on Sanitary and Phytosanitary Measures*<sup>172</sup> is the Committee's decision on the matter of equivalence. Back in 2000 it was reported by some exporting (mostly developing country) members that importing member governments were refusing to recognise their SPS measures as providing an

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<sup>169</sup> *Market Access for Non-Agricultural Products: Negotiating Proposal on WTO Means to Reduce the Risk of Future NTBs and to Facilitate their Resolution*, WTO Doc TN/MA/W/11/Add.8 (1 May 2006) (Communication from the EC) (Addendum) ('*NTB Mediation Mechanism Proposal*'). A detailed proposal of how the 'Mechanism' would work is contained in the annex to the aforementioned *Proposal* and a more recent version is available: DG Trade, *Annex 14-A Mediation Mechanism for Non-Tariff Measures* (2010) <[http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc\\_145188.pdf](http://trade.ec.europa.eu/doclib/docs/2009/october/tradoc_145188.pdf)>.

<sup>170</sup> *NTB Mediation Mechanism Proposal*, WTO Doc TN/MA/W/11/Add.8, [13].

<sup>171</sup> W Michael Reisman, 'A Hard Look at Soft Law: Remarks by W Michael Reisman' (1988) 82 *Proceedings of the American Society of International Law* 373, 376.

<sup>172</sup> *Marrakesh Agreement annex 1A ('Agreement on Sanitary and Phytosanitary Measures')* ('*SPS Agreement*').

equivalent level of protection of human, animal and plant life and health (including food safety and environmental requirements) to their own.

The SPS Committee decided to address the matter in its *Equivalence Decision*<sup>173</sup> which seeks to remedy this antinomy. Three elements of that *Decision* are noteworthy. First, the importing member must explain the objective and rationale for its SPS measure and clearly identify the risks that the measure is intended to address.<sup>174</sup> Second, the importing member must indicate the ‘appropriate level of protection’ or ALOP that its SPS measure seeks to achieve,<sup>175</sup> taking into account the soft law *Guidelines to Further the Implementation of Article 5.5*<sup>176</sup> (on SPS risk). Third, the exporting member must provide appropriate science-based and technical information to support its objectives and to demonstrate that its measure achieves the appropriate level of protection identified by the importing member.<sup>177</sup>

In the recent case of *US — Poultry (China)*,<sup>178</sup> in a complaint brought by China against the US Federal Safety and Inspection Service’s (‘FSIS’) ‘equivalence determination process’, the panel drew attention to the fact that the *Equivalence Decision* ‘sets out guidelines for any Member who requests the recognition of equivalence of their SPS measures and for the importing Member who is the addressee of such request’.<sup>179</sup> In its view the *Equivalence Decision* is ‘not binding and does not determine the scope of Article 4’ but nevertheless it ‘expands on the Members’ own understanding of how this particular provision relates to the rest of the *SPS Agreement* and how it is to be implemented’.<sup>180</sup> The panel identified the three key elements of the *Equivalence Decision*, noted above, before proceeding to place the *Decision* in its proper relationship to *SPS* art 4 and the rest of the *SPS Agreement*, which eventually led to a finding that the US’s equivalence determination process violated its obligations under the *SPS Agreement*.<sup>181</sup>

An example of the latter is the *Code of Good Practice for the Preparation, Adoption and Application of Standards*, which is taken up in Annex 3 to the *Agreement on Technical Barriers to Trade*<sup>182</sup> (*Code of Good Practice*).<sup>183</sup> Two

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<sup>173</sup> *Decision on the Implementation of Article 4 of the Agreement on the Application of Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19 (26 October 2001). It was subsequently revised in accordance with para 13 of the original *Equivalence Decision* by means of two further decisions: *Decision on the Implementation of Article 4 of the Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19/Rev.1 (2 April 2004) (Revision including clarifications adopted by the Committee) and *Decision on the Implementation of Article 4 of the Sanitary and Phytosanitary Measures*, WTO Doc G/SPS/19/Rev.2 (23 July 2004) (Revision) (collectively, ‘*Equivalence Decision*’). See Footer, *Analysis of the World Trade Organization*, above n 5, 289–91.

<sup>174</sup> *Equivalence Decision* [1].

<sup>175</sup> *Ibid* [2].

<sup>176</sup> *Guidelines to Further the Practical Implementation of Article 5.5*, WTO Doc G/SPS/15 (18 July 2000).

<sup>177</sup> *Equivalence Decision* [4].

<sup>178</sup> Panel Report, *United States — Certain Measures affecting Imports of Poultry from China*, WTO Doc WT/DS392/R (29 September 2010) (‘*US — Poultry (China)*’).

<sup>179</sup> *Ibid* [7.135].

<sup>180</sup> *Ibid* [7.136].

<sup>181</sup> *US — Poultry (China)*, WTO Doc WT/DS392/R, [7.136].

<sup>182</sup> *Marrakesh Agreement* annex 1A (‘*Agreement on Technical Barriers to Trade*’) (‘*TBT Agreement*’).

important aspects of the *Code of Good Practice* are designed to resolve potential conflicts about standardisation arising from the role of standardising bodies, many of which are non-governmental, in international standard-setting.

The first is a provision that encourages a diverse range of standardising bodies in the territories of WTO members to accept the *Code of Good Practice*<sup>184</sup> irrespective of whether they are supported by central, regional or local government or wholly private. Many governmental and private standardising bodies in individual WTO members' territories have subsequently accepted the Code of Good Practice.<sup>185</sup>

The second is a provision encouraging wherever possible the development of international standards by such standardising bodies.<sup>186</sup> Early on its existence the TBT Committee adopted a soft law decision, which contains a set of principles that seeks to promote the development in a uniform manner of international standards by standardising bodies, as set out in arts 2, 5 and Annex 3 of the *TBT Agreement*.<sup>187</sup>

### C *The Sourcing of Soft Law Norms Exogenously*

An important issue in the context of WTO normativity is the fact that WTO law is 'institutionally embedded (or "nested") in a broader network of norms and institutions' than its predecessor, the GATT.<sup>188</sup> This has come about because some MTAs, like the *SPS Agreement* and the *TBT Agreement*, reference non-binding or soft law norms that have been developed by an institutional body exogenous to the multilateral trade regime.

This brings us to the third proposition, which is that the 'sourcing' of soft law norms from external institutional fora, that is, exogenously, may be having an impact on the further development of treaty rules in certain substantive areas of WTO law. This process is known more generally in private and public international law as 'rule referencing' or 'rule sourcing'.<sup>189</sup>

In particular, its impact on the multilateral trading system is forging a regulatory regime, aimed at greater harmonisation of members' regulatory systems in areas of concern to consumers, in a way that did not occur previously under the GATT.<sup>190</sup> It has even led one commentator to describe the process as

<sup>183</sup> *TBT Agreement* annex 3 ('*Code of Good Practice for the Preparation, Adoption and Application of Standards*') ('*Code of Good Practice*').

<sup>184</sup> *Ibid* [B].

<sup>185</sup> See for details the *WTO TBT Standards Code Directory: Standardizing Bodies having Accepted the WTO TBT Code of Good Practice for the Preparation, Adoption and Application of Standards: Update 2010-09-13* (Geneva: ISO/IEC).

<sup>186</sup> *Code of Good Practice* [G].

<sup>187</sup> *Decision on Principles for the Development of International Standards, Guides and Recommendations with Relation to Articles 2, 5 and Annex 3 of the TBT Agreement*, contained in *Decisions and Recommendations adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995*, WTO Doc G/TBT/1/Rev.9 (8 September 2008) (Note by the Secretariat) pt I, s III, 10–12; annex B, 37–9.

<sup>188</sup> Footer, *Analysis of the World Trade Organization*, above n 5, 89 (citations omitted).

<sup>189</sup> *Ibid* 320.

<sup>190</sup> Viejo Heiskanen, 'The Regulatory Philosophy of International Trade Law', (2004) 38 *Journal of World Trade* 1, 13–14.

one of ‘progressive regulatory democracy’.<sup>191</sup> However, the sourcing of soft law norms from external institutional fora raises the paradox of whether the process of incorporation by reference of a rule or a standard in WTO law has the effect of turning a non-binding norm into a binding one.

Before attempting to answer this question, we pause to consider some examples of rule referencing in WTO law and practice. These include efforts under art 3.1 of the *SPS Agreement*<sup>192</sup> to harmonise sanitary and phytosanitary measures as widely as possible, using as a basis international standards, guidelines or recommendations developed by such intergovernmental bodies as the FAO/WHO *Codex Alimentarius Commission*<sup>193</sup> for food safety, the International Office of Epizootics<sup>194</sup> for animal health and zoonoses and the Secretariat of the *International Plant Protection Convention*,<sup>195</sup> as well as cooperating regional organisations, for plant health.<sup>196</sup> For matters not covered by any of these named bodies, other international standards developed by ‘relevant international organizations open for membership to all Members, as identified by the [SPS] Committee’, and which promulgate ‘appropriate standards, guidelines and recommendations’, may be used.<sup>197</sup>

Article 2.6 *TBT Agreement*<sup>198</sup> gives expression to a similar harmonisation of technical regulations prepared by appropriate standardizing bodies. The two relevant standardising bodies, referred to in annex 1 to the *TBT Agreement*,<sup>199</sup> are the International Organization for Standardization<sup>200</sup> and the International Electrical Congress.<sup>201</sup> These two semi-private bodies promote the development of voluntary, non-binding or soft law norms but while they may be non-governmental they have a special place under the *TBT Agreement*, as a result

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<sup>191</sup> Robert Howse, ‘A New Device for creating International Legal Normativity: The WTO Technical Barriers to Trade Agreement and “International Standards”’ in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart, 2006) 383, 384, 394–5.

<sup>192</sup> *SPS Agreement* art 3.1.

<sup>193</sup> Created by the FAO and WHO in 1963, the Codex Alimentarius Commission develops food standards, guidelines, recommendations and related texts, such as codes of practice, under the Joint FAO/WHO Food Standards Programme. See generally Mariëlle D Masson-Mathee, *The Codex Alimentarius Commission and Its Standards* (T M C Asser Press, 2007).

<sup>194</sup> *International Agreement for the Creation at Paris of an International Office for Dealing with Contagious Diseases of Animals*, opened for signature 25 January 1924, 57 LNTS 135 (entered into force 17 January 1925).

<sup>195</sup> *International Plant Protection Convention*, opened for signature 6 December 1951, 150 UNTS 67 (entered into force 3 April 1952).

<sup>196</sup> *SPS Agreement* art 3.2; annex A arts 3(a)–(c).

<sup>197</sup> *Ibid* annex A art 3(d).

<sup>198</sup> *TBT Agreement* art 2.6.

<sup>199</sup> *Ibid* annex 1.

<sup>200</sup> The International Organization for Standardization (‘ISO’) was founded in 1946 and comprises a federation of some 120 national standard-setting bodies. Its purpose is to promote voluntary international standards that will facilitate global trade. See Naomi Roht-Arriaza, ‘“Soft Law” in a “Hybrid” Organization: The International Organization for Standardization’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 263, 265.

<sup>201</sup> Established in 1906, the International Electrotechnical Commission (‘IEC’) is a federated standard-setting body, comprised of 59 full and 22 associate national committee members: IEC, *Members of the IEC* (16 November 2010) <<http://www.iec.ch/dyn/www/f?p=102:5:0>>.

of rule referencing under annex 1 as distinct from other private standard-setting bodies that do not.<sup>202</sup> The conundrum here is that under the *TBT Agreement* ‘governmental regulations that adhere to [the standards developed by these international standardising bodies] are presumptively legitimate and do not constitute barriers to trade’.<sup>203</sup> For the purposes of our proposition such international standards, which are ‘sourced’ externally on the basis of either the *SPS Agreement* or the *TBT Agreement*, are a source of secondary soft law since both derive their authority and usefulness from primary soft law.

The question is: to what extent, if at all, does this sourcing of soft law norms lead to their being upgraded to hard law by means of the referencing process under those Agreements such that they might become binding on WTO members? In *EC — Hormones*, the Appellate Body stated that *SPS* art 3.1 should not be read ‘as requiring Members to harmonize their SPS measures by conforming those measures with international standards, guidelines and recommendations’.<sup>204</sup> In its view, were this to happen it would ‘vest such international standards, guidelines and recommendations (which are by the terms of the *Codex recommendatory* in form and nature) with *obligatory* force and effect’.<sup>205</sup> In concrete terms the incorporation by reference of such non-binding, soft law norms into WTO law cannot ‘transform those standards, guidelines and recommendations into binding norms’.<sup>206</sup>

However, it has been claimed — at least with respect to the international food safety standards set by the *Codex Alimentarius* — that *Codex* measures, while not legally binding on WTO members in and of themselves,<sup>207</sup> have *de minimis* a benchmarking effect and are *de facto* binding on members in the context of the *SPS Agreement* and the *TBT Agreement*.<sup>208</sup> Again, as José Alvarez notes, ‘the *Codex* is formally only a “recommendation”’ and yet

there is abundant evidence that its terms are widely accepted by those engaged in the food trade as well as governments, and that the pressures of the market (as well as those imposed by the WTO ... ) render its standards binding in practice, irrespective of whether governments have formally consented to them.<sup>209</sup>

So for the purposes of our analysis it would appear that not only does soft law — through the exogenously referenced rule or standard — create a paradox but it also resolves it by changing the behaviour of the addressees of the rule or

<sup>202</sup> There has been a fierce debate as to whether the WTO institutional bodies, such as the *SPS Committee* or the *TBT Committee*, should pay any attention to non-tariff barriers in the form of private voluntary standards.

<sup>203</sup> Alvarez, above n 20, 505, citing David A Wirth, ‘Compliance with Non-Binding Norms of Trade and Finance’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, 2000) 330, 339–40.

<sup>204</sup> Appellate Body Report, *EC — Measures concerning Meat and Meat Products (Hormones)*, WTO Docs WT/DS26/AB/R, WT/DS48/AB/R, AB-1997-4 (16 January 1998) [165] (*‘EC — Hormones’*) (emphasis altered).

<sup>205</sup> *Ibid.*

<sup>206</sup> *Ibid* (emphasis altered).

<sup>207</sup> Pauwelyn, ‘Is the WTO “Missing the Boat”?’’, above n 6, 209.

<sup>208</sup> Masson-Mathee, above n 193, 175–7.

<sup>209</sup> Alvarez, above n 20, 222–3, citing Steve Charnovitz, ‘The Supervision of Health and Biosafety Regulation by World Trade Rules’ (2000) 13 *Tulane Environmental Law Journal* 271, 286–7, who discusses incorporation of the *Codex* standards into the *SPS Agreement*.

standard in order to comply with it, as if the rule or standard were presumptively binding upon them. It raises another issue and that is: where does this leave us with respect to the sourcing or referencing of soft law norms in the WTO other than in the context of harmonisation or standardisation measures?

The matter has been addressed with respect to the matter of export subsidies in the case of *Brazil — Aircraft*<sup>210</sup> and other Brazil/Canada aircraft cases<sup>211</sup> where reference was made to the non-binding *OECD Export Credits Arrangement*.<sup>212</sup> This is a ‘gentleman’s agreement’ — a typical piece of soft international law — and not an OECD act.<sup>213</sup> The extraordinary part about it is that the *OECD Export Credits Arrangement* carries no formal signature by the participants<sup>214</sup> nor does it contain any procedures for its application and interpretation, which is left instead to the participants.

In *Brazil — Aircraft* the Appellate Body came to the conclusion that indirect reference to this soft law arrangement, in the second paragraph of item (k) of the ‘Illustrative List of Export Subsidies’, which is annexed to the *SCM Agreement*,<sup>215</sup> was sufficient for it to be considered as a benchmark in determining what constitutes a ‘material advantage in the field of export credit terms’.<sup>216</sup> The Appellate Body went on to find that the ‘appropriate comparison’ was between the effective interest rate in a Brazilian Export Finance Program transaction (upon which Brazil was relying) with the relevant Commercial Interest Reference Rate<sup>217</sup> of the *OECD Export Credits Arrangement*, thereby explicitly referencing the rules governing interest rates in a soft law instrument.

Thus, it would appear that in WTO law, which involves matters other than harmonisation or standardisation, soft law which has been exogenously sourced, may have a role to play — albeit a limited one — in resolving a dispute between

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<sup>210</sup> Appellate Body Report, *Brazil — Export Financing Programme for Aircraft*, WTO Doc WT/DS46/AB/R, AB-1999-1 (2 August 1999) [180]–[187] (*‘Brazil — Aircraft’*).

<sup>211</sup> See, eg, the Brazil/Canada aircraft cases, especially: Panel Report, *Canada — Measures affecting the Export of Civilian Aircraft — Recourse by Brazil to Article 21.5 of the DSU*, WTO Doc WT/DS70/RW (9 May 2000) [5.74] n 67, [5.79]; Panel Report, *Brazil — Export Financing Programme for Aircraft — Second Recourse by Canada to Article 21.5 of the DSU*, WTO Doc WT/DS46/RW2 (26 July 2001) [5.71]–[5.91]; Panel Report, *Korea — Measures affecting Trade in Commercial Vessels*, WTO Doc WT/DS273/R (7 March 2005) [7.315]–[7.327].

<sup>212</sup> The *OECD Arrangement on Officially Supported Export Credits* (also referred to as the ‘*OECD Consensus*’) emerged in the margins of the annual IMF/World Bank meetings and was further developed under the OECD in the 1970s. The most recent version is: Trade and Agriculture Directorate, *Arrangement on Officially Supported Export Credits*, OECD, OECD Doc TAD/PG(2010)2 (28 January 2010) (*‘OECD Export Credits Arrangement’*). It sets out the most generous export credit terms and conditions that may be supported by its participants, with monthly updates of Commercial Interest Reference Rates (*OECD Export Credits Arrangement* [61]), which represent the relevant government bond rate plus 100 basis points (*OECD Export Credits Arrangement* [20(b)]).

<sup>213</sup> *Ibid* [2].

<sup>214</sup> The current participants in the *OECD Export Credits Arrangement* are Australia, Canada, the EC, Japan, Korea, New Zealand, Norway, Switzerland and the US, although other OECD members and non-members may be invited to participate by the current participants: *ibid* [3].

<sup>215</sup> *GATT 1994* annex (*‘Agreement on Subsidies and Countervailing Measures’*) (*‘SCM Agreement’*) annex I (k).

<sup>216</sup> *Brazil — Aircraft*, WTO Doc WT/DS46/AB/R, [180]–[182].

<sup>217</sup> *Brazil — Aircraft*, WTO Doc WT/DS46/AB/R, [182].

parties. In the example just cited its use was restricted to applying the relevant interest rates in the *Arrangement* as an industry benchmark. What is perhaps more interesting is that this piece of soft law, despite its flexibility and somewhat ambiguous status, can be applied in WTO dispute settlement and, on the strength of its incorporation by reference can even apply to non-participants of the *Arrangement*.

#### D *The Constraining Effect of Soft Law on Hard WTO Law*

The fourth proposition is that soft law can be used in GATT/WTO law order to constrain and 'soften' an otherwise hard legal norm. This may be particularly relevant in situations where there is a conflict of interests among members over the distributive consequences of cooperation, including aspects of compliance with WTO obligations.

Gregory Shaffer and Mark Pollack have argued that 'power differentials among actors shape the adoption and implementation of hard and soft legal instruments.'<sup>218</sup> While international regimes like the WTO trade regime can foster cooperation nevertheless conflicts may arise among the members over the costs and benefits arising from that cooperation.<sup>219</sup> Such conflicts manifest themselves most starkly when it comes to MTNs where the interests of one group members, for example the LDCs, who sought to reap an early harvest in the Doha Development Round under the terms of the *Dar Es Salaam Declaration*,<sup>220</sup> are pitted against the interests of another and potentially more powerful group, that is, the rest of the membership, in trying to vary the terms of cooperation in their favour.<sup>221</sup>

They have therefore advanced the claim that hard and soft law may operate not only as complements or alternatives but also in an antagonistic fashion and that the issue of distributive conflict and power relations have been underestimated in determining the outcome of negotiations and other forms of international cooperation. In order to soft the blow of a hard treaty obligation 'soft-law instruments may make enforcement more problematic, but reduce distributive conflicts in bargaining over the precise terms of cooperation'.<sup>222</sup>

We can observe this development at work in the context of ongoing negotiations in the GATS Working Party on Domestic Regulation,<sup>223</sup> which is trying to establish a set of disciplines GATS art VI:4,<sup>224</sup> which would prescribe norms that members should apply in their domestic regulation. Due to the wide divergence in views, and lack of consensus, among key WTO members<sup>225</sup> it has

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<sup>218</sup> Shaffer and Pollock, above n 89, 728.

<sup>219</sup> Ibid 730.

<sup>220</sup> *Dar Es Salaam Declaration*, WTO Doc WT/MIN(09)/2; see also ibid 732, where the point is made more generally in respect of reduced tariffs on industrial goods versus the reduction and removal of agricultural subsidies.

<sup>221</sup> As predicted by Shaffer and Pollock, above n 89, 732.

<sup>222</sup> Ibid 736.

<sup>223</sup> The GATS Working Party on Domestic Regulation was established by the *Decision on Domestic Regulation*, WTO Doc S/L/70 (28 April 1999, adopted 26 April 1999) (Decision).

<sup>224</sup> GATS art VI:4.

<sup>225</sup> Australia, Hong Kong, New Zealand, Switzerland and a few others are in favour of such disciplines whereas other members (mostly the US) are against or somewhat non-committal (the European Union).

so far proven impossible over the course of the past decade to realise this goal. Following considerable pressure on the Chair of the Working Party on Domestic Regulation (Peter Govindasamy of Singapore) to forge a consensus among the members, he issued a draft text in March 2009,<sup>226</sup> which contains what is perceived to be very soft, flexible language.

This has led to a call by, inter alia, Australia, New Zealand, Japan and China for the WTO Secretariat to draw up a note on the extent to which ‘flexible’ or soft language in Chairman’s 2009 text, such as ‘as far as possible’, ‘where practicable’, ‘shall endeavour’ and ‘in appropriate cases’ has been applied in WTO dispute settlement and with what results.<sup>227</sup> If the development of regulatory disciplines under *GATS* art VI:4 is to proceed any further then it could very well be based on a compromise position. Certain members will only accept such disciplines if the language is deliberately kept as soft and flexible as possible in order to ensure maximum manoeuvrability in the face of a far-reaching threat to the regulatory autonomy of their domestic service regulators. Should the current Chair of the Working Party (Misako Takahashi of Japan) succeed in bridging the gap between members, which have significant service economies but very different regulatory approaches, then potentially the *Disciplines on Domestic Regulation*, if adopted, could establish an antagonistic relationship between different members, leaving it up to the dispute settlement organs to resolve.

Shaffer and Pollock further argue that ‘the negotiation of international regulatory standards can be particularly prone to distributive conflicts’ and this may even extend to creating a countervailing soft law instrument in a parallel international regime.<sup>228</sup> The ongoing talks, spearheaded by Japan and the US (with Canada, the EU and Switzerland joining later), which have been ongoing since 2008 to establish an Anti-Counterfeiting Trade Agreement (‘ACTA’)<sup>229</sup> are evidence of a potentially antagonistic hard law-soft law development although an example of the reverse paradigm.

This is because the ACTA’s stated aim is to establish international standards for enforcing IP rights in order to fight more efficiently the growing problem of counterfeiting and piracy. The proposed legal framework currently anticipates that ACTA will be concluded as a binding multilateral treaty, which will clarify a number of issues on the enforcement of IP rights in Part III of the *TRIPS Agreement*,<sup>230</sup> and is seen as the only viable alternative to the soft character of the *TRIPS Agreement* enforcement provisions. We are therefore witnessing a draft multilateral treaty instrument being negotiated in a separate but overlapping regime of IP enforcement. Here rather than seeking to use soft law to undermine hard law there is the deliberate intention to adopt ‘hard-law provisions that will

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<sup>226</sup> *Draft Disciplines on Domestic Regulation pursuant to GATS Article VI:4*, (20 March 2009) (Informal Note by the Chairman) (Second Revision) <<http://www.tradeobservatory.org/library.cfm?RefID=106851>>.

<sup>227</sup> *Working Party on Domestic Regulation: Report of the Meeting of 27 April 2010*, WTO Doc S/WPDR/M/44 (4 June 2010) (Note by the Secretariat).

<sup>228</sup> Shaffer and Pollock, above n 89, 736–7.

<sup>229</sup> Anti-Counterfeiting Trade Agreement Consolidated Text, informal Predecisional/Deliberative Draft (2 October 2010) <[http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc\\_146699.pdf](http://trade.ec.europa.eu/doclib/docs/2010/october/tradoc_146699.pdf)>.

<sup>230</sup> *TRIPS Agreement* pt III (‘Enforcement of Intellectual Property Rights’).

trump objectionable trends in emerging soft law'<sup>231</sup> or more likely produce hard law that counters existing legal soft law, that is, what is perceived to be the soft character of a binding treaty rule.<sup>232</sup>

#### E *Soft Responsibility and the Limits of Soft Law in the WTO*

The fifth and final proposition, which is raised in this part, is that soft responsibility may arise from the operation of soft law norms. It does so in much the same way as ordinary responsibility despite the fact that very little or no attention has been paid to the matter. However, the idea of soft responsibility is another antinomy or paradox in a hard law regime like the WTO.

Two decades ago when the concept of soft law began to emerge and consolidate in the international law discourse some commentators began to discuss the notion of soft responsibility in terms of its normative content.<sup>233</sup> At that time Gunter Handl reminded us that the ILC in some of its earlier work on state responsibility had considered the issue of 'international liability for injurious consequences arising out of acts not prohibited by international law'.<sup>234</sup> In other words, it was thought that there were acts that might engage the responsibility of the state even though its conduct was perfectly lawful, which in effect amounted to 'soft responsibility'.<sup>235</sup>

Although subsequently not taken up in the final text of the 2001 *Articles on State Responsibility*,<sup>236</sup> this notion of what has been termed 'soft responsibility' comes close to the concept of a non-violation complaint in GATT/WTO law.<sup>237</sup> Similarly, the issue of non-violation complaints remains a conundrum in the context of some WTO Agreements<sup>238</sup> although the concept has never been comprehensively explored in terms of state responsibility.

More recently the ILC has suggested that more work needs to be done on establishing typologies of treaty provisions that may be amenable to differentiation both as to their normative content and the scope of responsibility that attaches to them in terms of hard and soft law provisions. Important for our discussion here is its suggestion that

<sup>231</sup> Shaffer and Pollock, above n 89, 744.

<sup>232</sup> Ibid 792–5, especially at 795 where they give the example of the US concluding bilateral treaties with stronger IP rights protection as a counterweight to the protections offered by the *TRIPS Agreement*, that is, a forerunner to the ACTA process.

<sup>233</sup> See, eg, Gunter Handl, 'National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered' (1986) 26 *Natural Resources Journal* 405, 407–9.

<sup>234</sup> Ibid 409.

<sup>235</sup> 'Fourth Report on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law' [1983] II(1) *Yearbook of the International Law Commission* 201.

<sup>236</sup> 'Report of the International Law Commission on the Work of Its Fifty-Third Session (23 April – 1 June and 2 July – 10 August 2001)' [2001] II(2) *Yearbook of the International Law Commission* 1, 31–2. Here the concept of 'soft responsibility' is clarified but no explanation is offered for its exclusion.

<sup>237</sup> For a detailed study of the concept of non-violation nullification or impairment in WTO law, see especially Dae-Won Kim, *Non-Violation Complaints in WTO Law: Theory and Practice* (Peter Lang, 2006).

<sup>238</sup> See, eg, *Hong Kong Ministerial Declaration*, WTO Doc WT/MIN(05)/DEC, [45], which records the fact that the TRIPS Council's work programme continues to examine the scope and modalities of non-violation and situation complaints in the context of the *TRIPS Agreement*.

typologies might contrast, for example ‘programmatic’ provisions with provisions that set up subjective rights and ‘hard law’ provisions associated with formal responsibility with ‘soft law’ provisions under ‘soft responsibility’ regimes.<sup>239</sup>

The question is whether in the WTO context, and leaving aside possible non-violation complaints, certain legal law norms may give rise to soft responsibility. One possible area of study in this connection, from which we could gain some preliminary answers, might be GATT/WTO waiver practice. Joseph Gold, former General Counsel to the IMF, has described the normative character of the grant of a waiver by an international organisation as an exercise in its ‘dispensing’ powers and as providing an important supplement to the provisions of its constitution.<sup>240</sup> Henry Schermers and Niels Blokker have suggested that a waiver may affect not only the performance of a WTO obligation by an individual member but for all intents and purposes may change the field of responsibility of the organisation thereby affecting *all* members.<sup>241</sup> In other words, despite the specificity of the waiver, ‘the legal consequences arising from its grant affect the rights and obligations of *all* other Members *erga omnes partes*’.<sup>242</sup>

While this particular aspect of a waiver decision signifies a subtle change in the overall character of responsibility, what sort of responsibility does it entail? Presumably the measure of this responsibility will vary, depending upon its normative content and scope. What effects does such a waiver have on trade when a WTO treaty obligation is temporarily set aside and does it matter whether the responsibility that arises is of the hard law or soft law type? More detailed examination of the normative basis upon which waivers are granted is needed before such questions can be comprehensively answered. However, as a preliminary matter, there are some initial remarks that can be made in this respect.

The character of the underlying norm for which the waiver is granted may be important. For example, there may be a difference between waivers granted on an individual or a collective basis. The majority of waivers are individual ones, which are usually granted for the formation of a bilateral (preferential) trade agreement,<sup>243</sup> the extension of preferential treatment by a member to another member<sup>244</sup> or to a group of countries<sup>245</sup> in order to derogate from their WTO obligations.

Some collective waivers do, however, exist. They are mostly related to the extension of time limits to allow members to ‘implement recommended amendments to the Harmonised System or HS nomenclature in their Tariff

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<sup>239</sup> *Report on Fragmentation of International Law*, UN Doc A/CN.4/L.682, 253 [493(1)(b)].

<sup>240</sup> Joseph Gold, ‘The “Dispensing” and “Suspending” Powers of International Organizations’ (1972) 19 *Netherlands International Law Review* 169, 172–9, who compares the practice of the IMF to that of other international institutions, including the *GATT 1947*.

<sup>241</sup> Schermers and Blokker, above n 39, 911 [1444], 119–20 [157]–[158].

<sup>242</sup> Footer, *Analysis of the World Trade Organization*, above n 5, 254.

<sup>243</sup> See, eg, *European Communities — The ACP–EC Partnership Agreement*, WTO Doc WT/MIN(01)/15 (14 November 2001) (Decision). This decision was re-circulated as *European Communities — The ACP–EC Partnership Agreement*, WTO Doc WT/L/436 (7 December 2001) (Decision of 14 November 2001) and subsequently extended.

<sup>244</sup> See, eg, *United States — Former Trust Territory of the Pacific Islands*, WTO Doc WT/L/183 (18 October 1996) (Decision of 14 October 1996).

<sup>245</sup> See, eg, *Caribbean Basin Economic Recovery Act: Renewal of Waiver*, WTO Doc WT/L/104 (24 November 1995) (Decision of 15 November 1995).

Schedules'.<sup>246</sup> The effects on trade, which arise when hard law treaty obligations are temporarily set aside by means of a waiver, suggest that the grant of a waiver to one group of members can change the field of responsibility for another group of members, leading to built-in contradictions that may render hard law obligations ineffective,<sup>247</sup> as evidenced by the bananas dispute where a GATT/WTO waiver under the *Lomé Convention*<sup>248</sup> was challenged.<sup>249</sup>

A further anomaly with respect to the exceptive character of a waiver decision is that occasionally its application does not involve a straightforward violation of a WTO obligation, that is, a nullification and impairment of a benefit. Instead, it may 'rest on the unfamiliar principle of giving a remedy in the absence of a right'.<sup>250</sup> Arguably, the waiver granted to 'covered' members, participating in the Kimberley Process Certification in order to stop the trade in so-called 'conflict diamonds' and to protect the legitimate diamond industry, is of this type.

The Kimberley Process Certification Scheme ('KPCS')<sup>251</sup> constitutes a set of precise, non-binding or soft law rules, which participating states have agreed to implement domestically.<sup>252</sup> In order to participate in the KPCS, 'covered' members were granted a waiver from applying *GATT 1994* art I:1 (MFN) and can henceforth impose an export or import ban on conflict diamonds in violation of *GATT 1994* arts XI:1, XIII prohibition on quantitative restrictions.<sup>253</sup> Not only does the *Kimberley Waiver* set up a potential conflict between a prohibitive norm and a permissive norm in the waiver,<sup>254</sup> which is not dissimilar to the situation of MFN and the Enabling Clause under GATT/WTO law,<sup>255</sup> but a conflict could also arise if the WTO itself were to prohibit a ban on conflict diamonds while the *Kimberley Waiver* expressly allows it. This could occur in spite of the soft law character of the KPCS, which imposes no legal obligation in this respect.<sup>256</sup> The normative scope and content of the KPCS procedure could at best be said to engage soft responsibility.

Aside from issues of responsibility, the actual effect of the operation of the KPCS on the trade in both legal and illicit diamonds can only be measured on the external plane, outside of the WTO. A working group, consisting of governmental and non-governmental representatives, is responsible for monitoring implementation of the KPCS,<sup>257</sup> using methods of soft accountability

<sup>246</sup> Footer, *Analysis of the World Trade Organization*, above n 5, 256.

<sup>247</sup> Reisman, above n 171, 376.

<sup>248</sup> *ACP-EEC Convention of Lomé*, opened for signature 28 February 1975 [1976] OJ L 25/2 (entered into force 1 April 1976).

<sup>249</sup> Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, AB-1997-3 (9 September 1997) [184]–[187].

<sup>250</sup> Gold, above n 240, 175, who refers to Kenneth W Dam, *The GATT: Law and International Economic Organization* (University of Chicago Press, 1970) 358.

<sup>251</sup> Kimberley Process, *Kimberley Process Certification Scheme* (19 July 2010) Kimberley Process <<http://www.kimberleyprocess.com/>>.

<sup>252</sup> Pauwelyn, 'Is the WTO "Missing the Boat"?', above n 6, 201.

<sup>253</sup> *Waiver concerning Kimberley Process Certification Scheme for Rough Diamonds*, WTO Doc WT/L/518 (27 May 2003) (Decision of 15 May 2003) ('*Kimberley Waiver*').

<sup>254</sup> Feichtner, above n 79, 638.

<sup>255</sup> See *Enabling Clause*, GATT Doc L/4903 and discussion in the supporting text at above n 80.

<sup>256</sup> Pauwelyn, 'Is the WTO "Missing the Boat"?', above n 6, 207–8.

<sup>257</sup> *Ibid* 203.

that in many instances are one step removed from responsibility as properly understood in international law.

On another note, Alvarez in his discussion of the ‘hardening’ of soft law, notes the ambiguities surrounding the enforcement of decisions rendered under the WTO’s dispute settlement system, which ‘do not lead to clear notions of what is the “responsibility” of a state that refuses to comply with the rulings of these dispute settlers’. This is a different matter altogether from listing the possible remedies that may arise in a dispute involving a challenge to a waiver.<sup>258</sup>

Some of the remarks in this part lead to the conclusion that the limits of soft WTO law are defined by the boundaries of the secondary rules on international responsibility, which do not usefully accommodate soft responsibility. While it may be thought that such rules are irrelevant they may nevertheless have some legal significance.

## V CONCLUSIONS

From the foregoing examination of the presence and reach of soft international law in WTO law and practice it is clear that there is variable normativity at work in the WTO legal order. Soft law norms have played a decisive role in the practice of the contracting parties under the former GATT regime and the turn (or more properly the return) to using soft law by WTO members as a means of regulating difficult and complex situations, or in providing solutions to intractable problems, remains. If anything, there has been an increase in the resort to soft law instruments and mechanisms as a way of dealing with issues arising out of the Doha Development Round MTN and the failure of the membership to conclude negotiations in a timely fashion. In particular, soft law mechanisms and procedures, which have a coordinating, facilitative, and an informative function, appear to dominate WTO practice in the way they did previously under the GATT trade regime.

Drawing on our analysis of the five propositions in the previous part, there are several conclusions that can be reached. First, soft law can supplement hard law in the GATT/WTO legal order as we have seen with respect to the historical development of S&DT. Statements and practice that develop around hard law treaty provisions may elaborate or amplify the text of provisions in the MTAs in a manner that is no different from other framework treaties.<sup>259</sup>

Second, primary soft law can be a precursor to the development of other WTO legal norms law, particularly where there is lack of consensus over the objective to be reached or the means for reaching it, just as in the former GATT. The *ITA* and its ilk is an example of this development, in the same way that the *Understanding on Notification, Consultation, Dispute Settlement and Surveillance* and the *Decision on Improvements to the GATT Dispute Settlement Rules and Procedures* evolved in the GATT era.

Whereas secondary soft law in the GATT era is perhaps best exemplified by the accession process for contracting parties under *GATT 1947* procedures, which is still in use for the accession of new WTO members today, the increase

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<sup>258</sup> Alvarez, above n 20, 506.

<sup>259</sup> Chinkin, ‘The Challenge of Soft Law’, above n 18; Alan Boyle, ‘Soft Law in International Law-Making’ in Malcolm Evans (ed), *International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 141, 146–7.

in the range of institutional bodies under the multilateral trade agreements means that there is plenty of scope for the development of secondary soft law in the WTO. The *Equivalence Decision*, adopted by the SPS Committee, and the Code of Good Practice, taken up as an Annex to the *TBT Agreement*, has already provided, or may soon provide, further evidence of this.

Third, it is clear that the sourcing or referencing of soft law norms from external institutional fora is having an effect on developments in some areas of WTO law. This is particularly true in regulatory areas like sanitary and phytosanitary protection and technical barriers to trade, where the incorporation by reference of exogenous standards is already fairly developed, but it could be of potential application with respect to domestic regulation in trade in services. Of more recent provenance, and of growing importance, is the referencing of rules exogenously from other international law regimes and instruments, including those that are themselves simply of the non-binding or soft law type.

Fourth, it is clear from WTO practice that soft and hard law may not always act as complements or alternatives to one another but may be used in an antagonistic way. Recent developments calling for a review of the interpretation of flexibility language in the MTAs by the dispute settlement organs in view of *GATS* disciplines on domestic regulation, or the establishment of a separate hard law instrument on IP enforcement, which overlaps with part of the *TRIPS Agreement*, both attest in different ways to the potentially antagonistic relationship of soft and hard law in the WTO.

Fifth, the issue of 'soft' responsibility may have significant effects on the operation of soft law. However, this topic merits further study as to how some of the anomalies, which arise from a mixture of hard and soft law norms, which we have seen in the context of waivers, can be satisfactorily resolved in the WTO, and in what ways the secondary rules on international responsibility circumscribe the limits of the law in this context.