Open Methods of Coördination. An analysis of its meaning for the development of a social Europe

Haar, B.P. ter

3 Hard law, soft law, no law? Framework to analyse the legal nature of transnational agreements

Abstract

In 1977 Dupuy labelled vague forms of transnational agreements as soft law, which started a debate whether these forms belong to the realm of law and how they can be recognised. This paper provides an overview of the literature on the reasons for the development of soft law and its function in the legal order. This is followed by a more general analysis why legal naturalists have no problems accepting soft law in the realm of law, while legal positivists strongly oppose against it. Finally, this article contributes to the debate by introducing a further developed framework to analyse the legal nature of law, which allows to distinguish between hard law, soft law and no law. This sort of analyses enhances the understanding of the legal nature of law in a sliding scale of legalization, and as such their legal strengths and weaknesses.

Keywords: transnational agreement, hard law, soft law, legalization, legal positivism, legal naturalism

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3.1 Introduction[1]

In 1930 Lord McNair noted that it would be wrong to treat all treaties in the same way, because they have different functions and serve different goals, which are of influence of the (legal) nature of the treaties.[2] With the influence on the legal nature of the treaties, Lord McNair not only meant that the origin of the obligations and rights constituted by the treaty could differ,[3] he also raised the question on whether the treaty intended to create legally binding rights and obligations between the parties.[4] In 1977 Dupuy introduced the term 'soft law' as a name for the increasing number of international agreements which legal value and juridical effects remained uncertain.[5] This marked the start of an ongoing debate about all sorts of transnational agreements that somehow holds the pretence of being law but of which its actual legal status remains unclear.[6]

One part of the doctrinal debate focuses on clarifications for the development of these forms of law and their function in the legal order,[7] while others strongly oppose against the inclusion of soft law in that legal order.[8] A smaller part of the doctrinal debate focuses on creating frameworks to analyse the legal status of these agreements. The development of such frameworks is interesting, since it helps to improve the understanding of the normative parts of these agreements and it offers a means to distinguish between agreements that are intended to be legally binding (and thus law) and those pretending to be but actually are no law at all.[9] The existing frameworks have

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1 I thank the participants of the Young Researchers Seminar of 27-30 May 2010 in Trento for their positive feedback on the analytical framework. I am also thankful for the interesting discussions on the analytical framework with Attila Kun and Antonio García-Muñoz Alhambra when we applied it to analyse the legal nature of codes of conduct that are part of the corporate social responsibility policies of multinationals and that of international framework agreements.

2 McNair 1930, 100–118. Other writers that followed McNair in describing the developing state practice to treaties with different functions and goals are: Fawcett 1953, 381-400; Lauterpacht 1953, 90–162, especially the comment on article 1, section 4 (96-98); and Myers 1957, 574-605.

3 For example: McNair (1930, 101) asks whether it is likely 'that all these multifarious types of treaties can be effectively governed by the same system of rules, whether recruited from the private law of contracts or from elsewhere?'

4 Lauterpacht 1953, 98; Fawcett 1953, 385, raised a similar question: "there is no presumption that States […] intend to create legal relations at all, […] this intention must be clearly manifested before a legal character is contributed."

5 Dupuy 1977, 248.

6 Among many others: Schachter 1977, 296-304; Virally 1983, 166-257 and 328-357; Baxter 1980, 549-566; Weil 1983, 413-442; Gruchella-Wesierski 1984/85, 37-88; Klabbers 1998, 381-391; D'Aspremont 2008, 1075-1093; and within the context of the EU: Wellens and Borchardt 1989, 267-321; and Senden 2004.

7 *E.g.* Shelton 2000; Lipson 1991, 495-538; Abbott and Snidal 2000, 441-444; Senden 2004, 117-120; and Schäfer 2006, 194-208.

8 *E.g.* Thürer 1985, 429-453; Klabbers 1996, 167-182; and D'Aspremont 2008.

9 Gamble 1985/1986, 37-47; Abbott *et al*. 2000, 401-419; and Raustiala 2005, 581-614.

not been without comments,[10] therefore this contribution aims to further develop such a framework by taking into account those comments.

Since the concept of soft law is ambiguous and its acceptance as part of the legal ambit is disputed, this Chapter starts in section 3.2 with a literature review in order to get a better understanding about what is understood by soft law. This review focuses on its genesis and its function in the legal order. Based on a description of several conceptions of law in general section 3.3 seeks to clarify why some legal scholars have no problem to accept soft law as part of the legal ambit, whereas others have fundamental problems doing so. Section 3.4 then introduces a further developed analytical framework that aims to meet the critics on the former frameworks and aims to be a model that proofs to be useful to enhance the understanding of the legal nature of all forms of law: hard law as well as soft law. Although it is impossible to provide a conclusive framework since, as argued by Schachter, in some occasions it is just impossible to know the intention of the parties involved with the adoption of the instrument,[11] it is possible to draw a more comprehensive framework that improves our understanding of the legal nature of law in the binary setting as well as in a sliding scale of legalization. This chapter concludes in section 3.5 with some reflections on how an analysis by the legal framework can improve our understanding of the legal nature of transnational agreements in a sliding scale of legalization.

Before starting the literature review, I have to note that for practical reasons, among which the readability of this chapter, the words 'transnational agreements' are used to indicate all sorts of international and regional forms of hard law and soft law, thus treaties, recommendations, resolutions, codes of conduct, but also the instruments that are used by regional organisations, for example integration instruments of the European Union, which includes regulations, directives, decisions *sui generis*, and the open method of coordination.

3.2 Soft law: exploration of its genesis and function

This section aims to get a better understanding of the ambiguous notion *soft law*. Therefore it provides a review of the literature that tries to provide a clarification for the development of forms of soft law in international and European law (section 3.2.1), and the literature that aims to clarify the function of soft law in these legal orders (section 3.2.2). The section concludes with a description of what in generally seems to be understood by soft law as can be deduced from the findings of literature reviews (section 3.3.3).

10 The concept of legalization for instance has been commented for ignoring constitutive aspects of law. *Cf* Trubek, Cottrell, and Nance 2006, 69-70; Finnemore and Toope 2001, 746-750; and Karlsson-Vinkhuyzen and Vihma 2009, 400-420.

11 Schachter 1977.

3.2.1 *Genesis of soft law in international and European law*

One of the main reasons for the development of soft law, is found in the changing international and regional relations between states since the second half of the 20th century. While at the beginning the relations could be qualified as coexistensive, which refers to relations that are generally regulated by traditional authority that is characterized by the domination of hierarchy and monopoly for rule setters (mostly state and public actors) and systems of law[12] – it became more cooperative.[13] This change is often indicated to be a result of, among other things, the decolonization,[14] the development of the principle of equality of all peoples,[15] and the technological development[16].[17] This changed world made it necessary for states to cooperate on economical, social and environmental subjects that traditionally belonged to their exclusive jurisdiction.[18] Therefore soft law is often involved with governing universal human concerns, which extends from matters of international security to questions of *e.g.* labour, social security and economic development. Instead of being regulated with traditional authority, these subjects are regulated by governance: processes and systems by which an organisation or society operates and that is characterized by the multiplicity of authorities (public as well as private) and systems of (soft) law.[19] Consequently, cooperative relations are not governed by a single system of law, *i.e.* the treaty, but, as Baxter expresses it, by an infinite variety of instruments.[20]

There are different reasons given why the treaty, in the traditional sense as a legally binding formal agreement, is ill suited to govern most of the

12 Mörth 2004, 1. See also Friedmann 1964, 68-71.

13 This difference of international relations between coexistence and co-operation is strongly advocated by Friedmann 1965, Chapters 1 and 6 and pp. 365-368; and from a more philosophical perspective by A. Álvarez as presented by Koskenniemi 2005, 211. This distinction is directly repeated by many others, among which Van Hoof 1983; and indirectly in standard works about international law written by several other scholars which can be deduced by the order in which subjects are treated: first coexistence, than cooperation. *E.g.* Shaw 2003; and Evans 2006.

14 *E.g.* Seidl-Hohenveldern 1979, 174-176.

15 *E.g.* Dupuy 1977, 247.

16 *E.g.* Jenks 1974.

17 See about the development of international law, and in particular the expanding legal scope of international relations: Shaw 2003, 42-47; and more briefly: Weil 1990, 418-420.

18 For example: Dupuy 1977, 247; Jenks 1974, 501; Seidl-Hohenveldern 1979, 173-177 and Fitzmaurice 1973, 318-319. Shelton 2000, 5-7 and 12-13. Prove for the extension of cooperation on these subjects might also be found in the numerous international agreements that were created on these subjects in the period after the Second World War. For example international agreements for the cooperation regarding social security: 1944 Philadelphia Declaration; 1952 ILO Convention 102; 1964 European Code of Social Security; 1972 European Convention on Social Security and; 1988 additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

19 Mörth 2004, 1. See for a different, yet in essence similar definition: Nowrot 2004, 5-6.

20 *Cf.* Baxter 1980.

cooperative relations. Two of those reasons are: 1) the divergent interests of states regarding their economical and social systems and their degree of development;[21] and 2) the complexity of the issues the international society has to deal with.[22] An appealing example to support these explanations can be found in Lecture II: Response to the Needs of a Rapidly Changing World: 1948-1968 of Director-General of the ILO, David A. Morse, in which he notes that the ILO could no longer suffices with traditional standard-setting treaties for the counteraction of "the adverse effects of international economic competition on the conditions of working people and to prevent certain countries from gaining unfair advantages in international trade by substandard labor laws and practices".[23] This was due to the decolonisation, as a result of which the number of members of the ILO expanded from 55 in 1948 to 118 in 1968. According to Morse, this expansion led to a shift of the power from the industrialised countries of Europe and America (the developed north) to the developing countries of Africa and Asia (the underdeveloped south), since they compromise more than half the members. Because the underdeveloped countries cope with different problems than the developed countries, the change in the composition of the ILO membership made it necessary to profoundly transform the substance of the standard-setting activities into more flexible (treaty-weakening) provisions, such as: optional or alternative parts; more flexible standards for certain countries; and provisions for certain exceptions. This flexibility is deemed necessary to cope with the diversity of race and ideology and the wide range of social, economic, cultural, and political development the ILO member states present.

This example shows that due to the changed balance of power between north (developed states) and south (underdeveloped states), the international society not only had to deal with a sift of power, yet, more significantly, it had and still has to deal with growing differences in interests.[24] Consequently, traditional standard setting treaties as means to regulate these issues became hard if not impossible to agree on.[25] Moreover, the issues dealt with traditionally belonged to the exclusive jurisdiction of the states, which makes them politically sensitive. Thus, although states are convinced that they have to cooperate on these issues, their attitude is reserved towards the international and regional (like within the EU) regulation of these subjects, often not lastly out of fear that their own legal arrangement of a certain subject has to change as the result of the international regulation of that sub-

21 See for example in: Dupuy 1977, 253; Seidl-Hohenveldern 1979, 173-177; Gruchella-Wesierski 1984/85, 40-42.

22 Abbott and Snidal 2000, 441-444.

23 Morse 1969, 37-73.

24 *Cf.* Gruchalla-Wesierski 1984/85, 41.

25 Shelton 2000, 297 notices in this context that due to the increasing heterogeneity of the international community, some consensus on basic values is necessary. In my opinion this not only refers to the emergence of peremptory norms or *jus cogens*, but also to the evolvement of broad formulate principles in international agreements.

ject.[26] Within the context of the European Union, Trubek and Mosher have expressed this clearly when they note that,

> '[A]lthough all Member States share some common problems, the extent of the problems varies from state to state. Because the legal rules and institutional structures in industrial relations and social policy of the fifteen Member States are extremely varied yet deeply embedded any effort to demand uniformity would be unrealistic.'[27]

Another content based rationales for states to use soft law is the complexity of the issues they have to deal with in their international relations. According to Abbott and Snidal, the underlying problems of these complex issues may not always be well understood, which makes it hard to anticipate all possible consequences of a legal international agreement.[28] Two reasons could be mentioned for the complexity of the issue in question: the subject matter itself is complex because it is surrounded with uncertainties or a lack of (technical) knowledge;[29] or, the subject is complex because it affects several other issues and as such involves tensions between different policy objectives.[30] Soft law offers some alternatives for dealing with these complexities. For instance, through the reduction of the precision of the legally binding commitments leaving the states involved a more wide margin of appreciation and as such resulting in a less sweeping effect on the domestic legal arrangement of the governed subject;[31] or, oppositely, through arrangements that are very precise but legally non-binding leaving the states involved the competence to experiment and learn which rules they may benefit from and which could better be neglected because they are to costly in their case, without the fear for legal repercussions;[32] or, thirdly, through

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26 *Cf.* Seidl-Hohenveldern 1979, 176; Abbott and Snidal 2000, 436-437. See about this also Fastenrath 1993, 311, who emphasises the cultural differences which result in different conceptions and interpretations when international law is transposed into the national legal order.

27 Trubek and Mosher 2003, 52. See about this also: Scharpf 2002, 645-70.

28 Abbott and Snidal 2000, 441.

29 For instance environmental issues, such as global warming. See also the example referred to by Abbott and Snidal 2000, 442.

30 *Cf.* Taylor-Gooby 2004, 1, where he notes that "[S]ocial policy is complex, involving government policies in health care, education, social security, housing and poverty directly; it is indirectly associated with economic, fiscal, labour-market and family policies. Governments wish to promote growth as well as citizen welfare. […] The most obvious and intractable [tension] lies between economic and welfare policy objectives." See also Shelton 2006, 294 who gives an example of how human rights guarantees affect WTO obligations on trade.

31 A subject for which this alternative may work is global warming and its unfamiliar environmental conditions: Abbott and Snidal 2000, 442. See also Bothe 1980, 86; and D'Aspremont 2008, 1084.

32 An example of this is Agenda 21 adopted at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3 to 14 June 1992: Abbot and Snidal 2000, 441-444.

moderate delegation to international organisations and institutions, in particular judicial dispute settlement.[33]

D'Aspremont has discerningly summarised the tenor of this part of the doctrinal debate with the words that,

> 'the binary nature of law is ill suited to accommodate the growing complexity of contemporary international relations, and that complementary normative instruments are needed to regulate the multi-dimensioned problems of the modern world.'[34]

Besides the content based reasons for the use of soft law in state practice, also procedural based reasons for the use of primarily informal international agreements are introduced. Most of these procedural reasons are presented in terms of benefits and costs.[35] Summarised, the main procedural reasons for using soft law agreements to the detriment of traditional treaties are "simplicity, speed, flexibility and confidentiality."[36]

Simplicity, speed, and flexibility all are related to the period of the creation of soft law and as such lower the contracting costs.[37] More specific, soft law is more simple and speedy to conclude, because there are no formal rules to take into account. For instance, for a treaty to enter into force, it needs to be signed, ratified by national parliaments and published. Soft law comes into effect on signature or by an in the agreement settled date, without further (national) procedures.[38] Hence, these national procedures were for instance the reason for the ILO to modify their legal regulatory means as from 1994 onwards: after a decline of ratifications of their traditional conventions the ILO has opted to use more legally non-binding agreements, such as recommendations and codes of conduct.[39] Generally, the administrative burden for soft law is lower. For example, it is scarcely required to publish it nor needs it to be registered with the United Nations (UN).[40] Because it is not required to register or publish soft law, it is exceedingly suited for agreements that have to be kept confidential. Confidentiality might for instance be needed for reasons of national security or to protect sensitive commercial information.[41]

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33 Abbott and Snidal 2000, 443.
34 D'Aspremont 2008, 1076. See also: Abbott and Snidal 2000, 441-444.
35 *E.g.* Gruchalla-Wesierski 1984/85, 41-43; Aust 1986, 787-812; Lipson 1991, 532-537; and Abbott and Snidal 2000.
36 Aust 1986, 789.
37 Abbott and Snidal 2000, 434-436.
38 *Cf.* Gruchalla-Wesierski 1984/85, 41; Aust 1986, 789; Lipson 1991, 514-518; and Klabbers 1998, 384.
39 *Cf.* Abbott and Snidal 2000, 434; Maupain 2000, 372-373.
40 Aust 1986, 789-790; and Fawcett 1953, 389-390, about the registration obligation under Article 102 UN Charter in general and some reflections on the term "international agreement".
41 Aust 1986, 792-793; and Lipson 1991, 523-527.

Furthermore, because of the lack of procedural requirements, soft law is considered to be more flexible since it can be amended as simple and speedy as the original agreement is adopted.[42] As a result, soft law is highly susceptive of new knowledge or changing circumstances. Soft law is also more flexible with respect to the actors involved with the creation of the agreement. Hard law, or formal agreements, can only be adopted by states or international organisations when it has the competence to do so. Soft law, or informal agreements allows the participation of all stakeholders or interested parties in the process of transnational (soft) law-making.[43] Hence, many negotiations on cooperative subjects take place within international (non-governmental) organisations (NGOs) or within transnational enterprises (TNE) instead of between states only. This raises another problem in transnational law, namely that within the existing legal settings, only states are competent to adopt hard law and sometimes international/regional organisations when states have conferred them the power to do so.[44] Consequently, the transnational agreements concluded within international/regional organisations without such competence, NGO's and TNE are automatically labelled soft law.[45]

3.2.2 Function of soft law in the legal order

In general three functions of soft law are recognised in the literature:
1. soft law as a substitute for hard law (para-law function);
2. soft law to avoid or overcome a deadlock (pre-law function); and
3. soft law as part of the legislation process, either to pave the path for the adoption of hard law (pre-law function) or to complement or strengthen existing hard law (post-law function).[46]

Some scholars consider soft law as a substitute for hard law, since it offers to a certain level the same qualities as hard law (credibility and precision), avoids some of the costs of hard law (sovereignty and ratification) and has a few advantages of its own (in particular flexibility and participation).[47] With

42 Aust 1986, 791-792; Lipson 1991, 518-523; Abbott and Snidal 2000, 441-442; Boyle and Chinkin 2007, 214 and 218-219.

43 Trubek, Cottrell and Nance 2006, 12; and Reinicke and Witte 2000, 94-95.

44 This is for instance the case with the United Nations, especially with the adoption of resolutions by the Security Council and within the European Union and the adoption of integration instruments by the institutions of the EU. See about the latter for instance: Craig and De Búrca 2008, 88-95; and Ter Haar 2009, 4-5.

45 Much debated agreements and used examples in the soft law debate are the resolutions of the UN General Assembly and the OECD decisions and guidelines. *E.g.* Gruchella-Wesierski 1984/85 and on the former only Bothe 1980, 75-79.

46 The terms para-law, pre-law and post-law are from Senden who has made a slightly different, yet in essence similar, distinction of functions of soft law in European Community law: Senden 2004, 118-120 and 123-231.

47 See more elaborate: Lipson 1991 and Abbott and Snidal 2000. See also Trubek, Cottrell and Nance 2006, 11-12 and 27-29.

the qualities of hard law is mainly understood the credibility of a states future behaviour in compliance with the obligations undertaken by the transnational agreement and the precision by which those obligations are created. Regarding the latter can be noticed, that some informal transnational agreements can create rights and obligations that are just as precise as, or even more precise than formal agreements can do.[48] With credibility is meant that a state is a solid and reliable partner to cooperate with.[49] How credible a state is, depends on its behaviour; *e.g.* whether a state regularly complies with the obligations it undertakes. Since in practice states intend to comply with soft law in the same way as they do with hard law, even while they are not legally binding, soft law offers the same qualities as hard law.[50] Sometimes, though, the actors involved with the adoption of the transnational agreement have no formal competence to adopt a legally binding agreement, as a result of which they can only resort to soft law, even though they would desire or intent differently.[51]

There are not many scholars that consider soft law simply as substitute for hard law,[52] there are though, many scholars that consider soft law as a means to avoid or overcome deadlock.[53] As already appeared from the content based explanations for the use of soft law in practice, many of the cooperative issues of international relations are (politically) sensitive and (technically) complex. Consequently, it is very hard, if not impossible, to agree on rigid, common standards, whereas soft law offers suitable alternatives to deal with these problems and thus prevent or help to overcome a deadlock.[54] Abbott and Snidal have described this capability of soft law as follows:

> 'soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power'.[55]

Schäfer adds to this, that soft law can overcome or avoid deadlock, because it 'creates opportunities for deliberation, systematic comparisons, and learning'.[56] More generally, some scholars (indirectly) consider soft law in

48 A classical example is the Helsinki Final Act. See also: Baxter 1980, 550; Weil 1983, 414; and Chinkin 1989, 851.
49 Lipson 1991, 501 and 511-512.
50 Lipson indirectly nuances this a little by arguing that hard law enhances the credibility because it is legally binding, therefore soft law offers to a certain level, the same qualities. (1991, 508-511). See about similarities between hard and soft law also: Bothe 1980, 85-86.
51 *Cf.* García-Muñoz Alhambra, Ter Haar and Kun 2011, 361.
52 *E.g.* Lipson 1991, 538.
53 The most fervent advocate of this function of soft law is Schäfer 2006, 194-208. It is also recognized by many other scholars, among which: Grucella-Wesierski 1985/84; Chinkin 1989; Abbott and Snidal 2000; Senden 2004; Mörth 2004 and Shelton 2006, 322.
54 Jenks, 1974; and Shelton 2000, 5-7 and 12-13.
55 Abbott and Snidal 2000, 423.
56 Schäfer 2006, 198.

this function as substitute for hard law,[57] while others consider this capacity of soft law as a step in the process of legislation.[58] More specifically, they describe this as follows: States agree that a specific issue is a subject of common concern and therefore cooperation is needed. Often the first intention or attempt is to regulate this issue through a fully-equipped, legally binding formal agreement (hard law), however, it is not exceptional that during the negotiation process it appears that the interests of the states are to far apart or even opposites,[59] or that the states involved are not prepared to conclude a legally binding agreement, because they cannot reasonably foresee that they will be in a position to comply with it.[60] As a result, the conclusion of hard law is deadlocked and to overcome this, the agreement needs to be softened, for instance by creating imprecise rights and obligations in the formal agreement or by turning it into a legally non-binding informal agreement. The softened agreement than allows the states either to slowly overcome their differences or to adapt their commitments to their particular situation. In both situations the mutual expected behaviour is enhanced and over time the agreed soft law may have paved the path for the adoption of the initially intended hard law.[61]

There are also scholars that consider soft law always, no matter what reason for its adoption, as part of the legislation process.[62] Some, because they do not accept soft law as part of the legal sphere at all,[63] and others because they consider soft law as an expression of *lex feranda*.[64] Another role of soft law as part of the legislation process is the complementation or strengthening of hard law, for example to specify some norms or emphasise a specific topic through a soft law agreement,[65] or as an expression of the *opinio juris* in customary law.[66]

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57 *E.g.* in the literature about the Helsinki Final Act, such as Russel 1976, 246-249; and Van Dijk 1980, 106-110. See more general: Bothe 1980, 90-92; Lipson 1991; Abbott and Snidal 2000, 434-450; and Schäfer 2006.

58 Among many others: Grucella-Wesierski 1984/85, 48; Wellens and Borchardt 1989, 282; Shelton 2006, 321; and Senden 2004, 120.

59 For example as illustrated by Chinkin 1989, 852, where she describes the development of the New International Economic Order. See also Boyle and Chinkin 2007, 216-220, where they describe the role of soft law as part of the multilateral treaty-making process.

60 Bothe 1980, 91. See also: Shelton 2000, 12; and Abbott and Snidal 2000, 445.

61 For example two ILO Recommendations (67, the Income Security Recommendation and 69, the Medical Care Recommendation) adopted in 1944 paved the path for the adoption in 1952 of ILO Convention 102, the Social Security (Minimum Standards) Convention, which has been supplemented by a number of later conventions setting higher standards. See more elaborate about this in: Pennings 2006, 6-8; Abbott and Snidal 2000, 446-447.

62 E.g. Dupuy 1977, 252; Higgins 1994, 28; Kooijmans 2002, 15-16; and Shelton 2000, 10.

63 Weil 1983; Thürer 1985; Klabbers 1996 and 1998; and D'Aspremont 2008.

64 *E.g.* Cini 2001, 196; Kooijmans 2002, 15-16.

65 *E.g.* Thürer 1985, 446; Kälin 2001, 6-7; and Senden 2004, 120.

66 Shelton 2006, 321.

3.3 Soft law: general views and acceptance in the legal realm

The above literature review shows that on the international and regional level there exists in practice a need for more flexible forms of regulating transnational cooperation, which has been labelled soft law. The functions of soft law in the legal order explains how these forms are situated within the legal order and what they are expected to offer that hard law cannot offer. When all is taken together, two forms of soft law can be distinguished: a legally binding agreement that creates vague and conditional rights and obligations and can therefore not be upheld by judicial review, also indicated as formal soft law; and a legally non-binding agreement that creates clear and unconditional rights and obligations that due to the lack of legal bindingness, can also not be upheld by judicial review, but nonetheless generates normative effect also indicated as informal soft law. Only formal soft law is accepted as part of the realm of law by all legal scholars, while informal soft law is not.

Remarkably enough, and also pointed out by D'Aspremont, only legal positivist take the effort to explain from a fundamental law perspective why it is that informal soft law cannot be part of the legal realm.[67] This section builds on this and attempts to add clarifications why legal naturalists accept both forms of soft law as being part of the legal realm. Although legal positivism and legal naturalism are only two among other approaches to law, they are leading in theories about the nature of law in opposing ways from an ontological point of view and therefore also in the recognition of soft law in the legal realm.[68] Furthermore, it should be noted that both theories include many varieties and nuances, however, they have been taken in consideration for the sake of the main argument.[69]

In legal positivism the understanding of the legal nature of law can be followed back to Bentham, Austin, Hart, Kelsen and McCormick.[70] In short legal positivism has been characterised by two theses: (1) 'the existence and content of law depends entirely on the social facts'; and (2) there is 'no necessary connection between law and morality – more precisely, the existence and content of a law do not depend on its merits or demerits.'[71] In opposition to legal positivism, legal naturalism can be characterised by the following two theses: (1) the existence and content of law does not necessarily depend on social facts; and (2) it is not possible to disconnect law from morality – more precisely, the existence and content of a law depends on its merits or demerits.[72] In this context Villa argues that the opposition between

67 D'Aspremont 2008.
68 Villa 2009, 50.
69 See for an impression of different approaches on law: Kelly 1992; Koskenniemi 2005; Bix 2010, 211-227; and Coleman & Leiter 2010, 228-248.
70 Kelly 1992, 402-409; Coleman & Leiter 2010; and Villa 2009.
71 Villa 2009, 49-50; Coleman & Leiter 2010, 228; and D'Aspremont 2008, 1077.
72 *Cf*. Villa 2009, 50.

the two is of a fundamentally meta-ethical nature, which in particularly involves the opposition between absolutism (legal naturalism) and relativism (legal positivism). More precisely, it is about the acceptance (or not) 'of the possibility of an absolute and objective foundation of values (in this case *legal* ones), or at least of some of them, in a transcultural and non-contingent key.'[73] Although, this relates to the acceptance of the existence (or not) of norms and values underlying law and rights, the ontological approach of the two legal theories makes the fundamental difference in the acceptance of the existence of the phenomenon *soft law*.

More particularly in respect of soft law, D'Aspremont explains that the distinction between legal act and legal fact is crucial, since, for a legal positivist, an international agreement to 'qualify as a legal act, the legal effect of the act in question must *directly* originate in the will of the legal subject to whom the behaviour is attributed and to any pre-existing rule in the system.' Those acts that 'yield legal effects but which are not a *direct* consequence of the will of legal persons cannot be considered as legal acts […] they are *legal facts ('faits juridiques')*, even though they take the form of an act'. From this, it follows that 'the claim of the softness of international law does not pertain to those behaviours which create legal effects irrespective of the will of the state. […] In other words softness is not programmed by the legal order but is simply determined by its subjects and, for that reason, only legal acts can prove soft'[74] (emphases in original).

D'Aspremont, thus argues, that from a legal positivist's point of view, it is important to make a distinction between the *instrumentum*, which is the container of the legal act and the *negotium*, which is the content of the legal act. This is important, since the softness of the *instrumentum* pertains to the choice made by the legal subjects of an instrument, which lies outside the realm of law, while, the softness of the *negotium* refers to a legal act that is casted in non-normative terms that do not, as such, fetter the freedom of their authors.[75] From a legal naturalist's point of view this distinction between *instrumentum* and *negotium* is also made, however, as argued by legal theorists like Radbruch, Villey, Fuller, Finnis and Dworkin,[76] to determine whether an act constitutes as legal or as law depends on the morality, the merits and demerits of that act.[77] As such, this approach leaves room for an object and purpose-test of the instrument, which means that even if the *instrumentum* and the formalities involved with it do not portray the constitution of a legally binding act, the act can still become part of the legal realm based on a moral evaluation of its merits, its *negotium*.[78] This is in particular the case when the intention of the parties involved with the act is vague and

73 Idem.
74 D'Aspremont 2008, 1078-1080.
75 *Idem*, 1081-1082.
76 *Cf*. Brix 2010, 218-225; and Kelly 1992, 418-430.
77 *Cf*. Barnett 1978, 97.
78 *Cf*. Brix 2010, 224.

the *negotium* creates norms that denote a clear and unconditional behavioural expectation of those affected by those norms.[79]

From this perspective it follows that the form in which a legal agreement is casted is not determinative for its legal nature.[80] This actually means that law is not binary, *i.e.* an agreement is either law or not, rather, it implies the recognition of law being a legal ambit based on a sliding scale of legislation. This is also the underlying idea of Abbott *et al* who have developed an analytical model to asses the dimension of legislation of international agreements based on a particular set of characteristics that international actors may (or may not) possess when they create a transnational agreement.[81] It is also with these characteristics that transnational actors 'create subtle blends of politics and law', hence soft law.[82]

3.4 Framework to analyse the legal nature of transnational agreements

This section intents to introduce a framework to analyse the legal nature of transnational agreements. Therefore, it builds on the models introduced by Abbott et al., Gamble[83] and Raustiala,[84] the works of Senden[85] and D'Aspremont[86], and the case-law of the ECJ. The main challenge for this further developed analytical framework is to create a framework that meets both basic views on law, thus that of the legal positivists and the legal naturalists. Although it is impossible to create a conclusive scheme, simply because even between the actors themselves there can remain discussion whether the instrument creates legally binding rights and obligations.[87]. It is nonetheless worthwhile to create a more comprehensive scheme to analyse the legal nature of a transnational agreement, since it improves our under-

79 See among many others: Fawcett 1953; Dupuy 1977; Schachter 1977; Baxter 1980; Gruchalla-Wesierski 1984/85; Chinkin 1989; and within the context of the EU Borchardt and Wellens 1989.

80 *Cf.* Baxter 1980, 564-565.

81 Abbott *et all*, 2000, 401.

82 *Idem* 419.

83 Gamble 1985/86.

84 Raustiala 2005.

85 Senden 2004.

86 D'Aspremont 2008.

87 See for instance Klabbers 1998, 381-382, where he gives the example of a case for the Telders moot court competition based on "soft law", *i.c.* guidelines and codes of conduct, which was by the competing lawyers either upgraded to law or downgraded to no law, *i.e.* merely political commitments. Disputes on the legal status of an instrument can also be found in the case-law of the ECJ, for instance: Case C-311/94, *IJssel-Vliet Combinatie B.V.* v. *Ministerie van Economische zaken* [1996] ECR I-5023, par. 44; Case C-57/95, *France* v. *Commission* [1997] ECR I-1627; ECJ Case C-313/90, *CIRFS* v. *Commission* [1993] ECR I-1125; and Case C-366/88, *France* v. *Commission* [1990] ECR I-3571.

standing of the legal aspects of that instrument, in particular its weaknesses and strengths.

Based on the works of the above mentioned scholars, the scheme as shown in table 3.1 can be drawn. It is only in combination with each other that these three features can give an acceptable indication of the legal nature of the instrument. The next sections (3.4.1 – 3.4.3) describe what is understood by the features and elements of this scheme.

Table 3.1 Scheme to analyse the legal nature of international instruments

Features	**1. Lawfulness**	**2. Substance**	**3. Structure**
Elements	Form / *instrumentum* Competence Adopting procedure Surrounding circumstances	Sort of obligation Precision Used language	Dispute settlement Monitoring compliance Further rule-making

3.4.1 Lawfulness

The first feature, lawfulness, refers to formal aspects involved with the adoption of a transnational agreement. This feature includes four elements: the form of the instrument (*instrumentum*); the procedure by which the instrument is adopted; the competence to adopt the transnational agreement; and the circumstances that surrounded the creation of the agreement.

The element *instrumentum* refers to the sort of instrument that is adopted. Although, as is cogently argued by Myers[88] and Baxter[89] and confirmed by the case-law of the ECJ[90], the form of the agreement is not conclusive, it nonetheless gives a first impression of what the actors may have intended to create.

The second element is concerned with the competence of the actors involved to adopt a legally binding instrument. In essence, this comes down to the fact that if an instrument is adopted by actors that are not competent to do so, the instrument is adopted unlawfully and will therefore lack legal bindingness. While on the other hand, when it is adopted by actors who are formally competent to do so, this contributes to the lawfulness of the instrument. As such, this element appeals to the binary nature of law as argued by the legal positivists: law is either law or no law at all. However, sometimes actors lack formal competence, but are inherently competent to deal with the subject. This is for instance the case in labour law where both sides of the industry: employers (organisations) and employees' representatives are competent to deal with labour issues, despite the fact that there is no a formal competence on transnational level.[91]

88 Myers 1957, 574-605.
89 Baxter 1980, 549-566.
90 D'Aspremont 2008.
91 See about this also Garcia-Muñoz Alhambra, ter Haar and Kun 2011, p 361.

The third element is that of the procedures that are involved with the adoption of the instrument. In general transnational agreements that are intended to be legally binding have to be adopted by specific procedures ensuring the lawfulness. These procedures include for instance rules on signatures, how and when an agreement comes into force, where and when it has to be published, and how it is to be ratified. If an agreement is adopted according to such a procedure, it is more likely that the parties involved intended to create a legally binding agreement which remains in the dark when such procedures are not followed. Moreover, the lack of such procedures may indicate that the intention was to create a legally non-binding agreement.

The last element is that of the circumstances that surround the creation of the transnational agreement. This element appeals to the reasons why the involved actors in a particular case prefer the adoption of a legally non-binding instrument over a legally binding instrument. As became clear from the literature analyses on the reasons for the development of soft law,[92] one of those circumstances is the complexity of the subject. A subject can be complex because the subject matter itself is complex, or because it affects several other issues.[93] Another circumstance is that of confidentiality as is found with matters of security.[94] But also politics are a relevant circumstance in whether or not the actors involved intended to create a legally binding agreement. In particular when it seems politically impossible to reach an agreement, it is more likely that the actors will find recourse in the adoption of a legally non-binding instrument in order to overcome or prevent a deadlock rather than failing and adopting no agreement at all.

3.4.2 Substance (negotium)

The second feature, substance or *negotium*, is concerned with the normative quality of the content of the transnational agreement. With content is understood the rights and obligations created by the agreement in order to direct the behaviour of those that are covered by the scope of the instrument. As such, an agreement is more likely to generate normative effect when it creates clear and precisely defined rights and obligations that leave hardly a margin of appreciation, when the rules are coherent with each other, and when they are formulated in legal language referring to legal discourses.[95] To determine this, the feature includes three elements: obligation; precision; and used language.

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92 See above section 3.2.1.
93 Abbott and Snidal 2000.
94 Lipson 1991.
95 This feature heavily draws of the underlying idea of "the concept of legalization" as introduced by Abbott et al 2000.

As shown by Abbott et al several sorts of rights and obligations can be created, among which:

- unconditional rights and obligations;
- implicit conditions on rights and obligations captured in a political treaty;
- contingent rights and obligations and escape clauses that allow for national reservations regarding specific provisions;
- hortatory obligations; and
- recommending and guiding norms.[96]

What sort of right or obligation is created can be recognised by the other two elements: precision and the used language.

The element precision is firstly about the internal coherence of the instrument as a whole. This means that the norms of the agreement are non-contradictory related to each other. Secondly, precision refers to the margin of appreciation in the upholding of the rights or the execution of the obligation.[97] For example, statements of general aims and broad declarations of principles are considered to indefinite to create unconditional rights and obligations.[98] Overall, Abbott *et al* discern the following four indicators for precision (ordered from precise to vague):

- determinate rules that only allow for narrow issues of interpretation;
- rules that leave substantial yet limited issues of interpretation;
- rules that leave broad areas of discretion; and
- rules that contain "standards" which are only meaningful with references to specific situations.[99]

Furthermore, it is possible to determine the nature of the obligation by the language that is used to formulate the rights and obligations. Law has its own rhetoric;[100] therefore, the sort of language that is used is an indication or signal of the intention of the actors. For example, if the intention of the actors is to create a legally binding agreement, they are more likely to use legal terminology that includes words like 'shall', 'must', 'agree', 'obligations' and 'enter into force', instead of words like 'will', 'should', 'undertake', 'provisions', and 'come into operation' or 'come into effect' which are words that denote the intention to create something less than a legally binding agreement.[101]

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96 Abbott *et al* 2000, 410.

97 For completeness it should be noted that there will always be some margin of appreciation as it is observed that some vagueness is inherent to international law. Fastenrath 1957, 305-340.

98 Some scholars argue that when this is the case the actors involved intended at least to avoid legal bindingness of the instrument. Schachter 1980.

99 Abbott *et al,* 2000.

100 Abbott *et al,* 2000, 409-410.

101 Aust, 1986, 800; Gamble 1985/86, 39-40.

3.4.3 Structure

The third feature, structure, is about 'the extent to which states and other actors delegate authority to designated third parties […] to implement agreements.'[102] The first element of this feature is that of dispute settlement. This is presumed to be the strongest when it is conducted by a judicial court and the weakest when settled trough political negotiation. The strength of judicial courts is not so much about its (constitutional) enforcement power, rather in its function to require justification for allegedly breaches of the instrument which induces more compliant behaviour from the actors involved.[103] This rests upon the assumption that 'word and deed can only diverge so much before countervailing pressures arise: while word can shift to match deed, if legal proceedings constrain the kinds of arguments that can validly be made, deed may shift as well.'[104]

The second element is concerned with the monitoring of compliance, which is considered to offer a strong structure if it is upheld by judicial courts and as weak when it involves methods like implementation reports, the dissemination of information and fostering learning.[105]

The third element of structure is that of the delegation of further rule-making. This element is useful for the assessment of the legal nature of a transnational agreement, since it is presumed that only a legally binding agreement can delegate the competence to further adopt legally binding agreements. Furthermore, it is a useful indicator for the normative impact an agreement may have, since the adoption of further rules, either through the case-law of a court or by the adoption of a rule, further clarifies the expected future behaviour.[106]

3.5 Conclusions

The literature review in section two showed that once Dupuy dubbed transnational agreements with vague legal status as soft law this opened a doctrinal debate explaining the reasons for the use of such agreements in international relations as well as European integration and their possible functions in the legal order. In both situations the changing relations from co-existence to co-operation is followed by an extension of regulatory methods from traditional authority only to one including governance as well. The latter involves processes and systems by which an organisation or society operates and that is characterized by the multiplicity of authorities (public as well as private) and systems of (soft) law. Unlike traditional authority with

102 Abbott *et al*, 2000, 415; Raustiala 2005.
103 Raustiala 2005, 606.
104 Idem.
105 *Idem* 607.
106 Abbott *et al* 2000, 416-418.

its legally binding rules in treaties, governance is presumed to be better suited to deal with the complex and sensitive subjects the cooperative-relations moved into, among which labour, social security and economic development.

The result of these governance processes, soft law, is considered to have at least three functions in the legal order: firstly, it may substitute hard law; secondly, it may overcome or prevent a deadlock; and thirdly it can be part of the legislation process. Although sometimes actors have no choice in adopting soft law since they lack formal competence to adopt hard law, not many scholars consider soft law as a substitute for hard law. Instead, most of them consider it to be part of the legislative process, either based on its capacity to overcome or prevent deadlocks, as an expression of *lex feranda*, or as complementary to hard law when it specifies some norms or emphasises a specific topic.

From the literature review it also became clear that two forms of soft law can be distinguished: a legally binding agreement that creates vague and conditional rights and obligations which cannot be upheld by judicial review, also indicated as formal soft law; and a legally non-binding agreement that creates clear and unconditional rights and obligations that due to the lack of legal bindingness, can also not be upheld by judicial review, also indicated as informal soft law. Only the former form of soft law is accepted as part of the legal realm by all legal scholars, while the latter is only accepted by legal naturalists, while it is rejected by legal positivists, who basically consider law as a binary concept: law is either legally binding or it is no law at all. Legal naturalists on the other hand, recognise law as a legal ambit based on a sliding scale of legislation that enables transnational actors to create subtle blends of politics and law.

In both conceptions of law, it is interesting though to get a better understanding of the legal nature of these transnational agreements. Within the first understanding, law is binary, law can be soft because of a vague substance or weak structure to ensure compliance, while within the second view, law as sliding scale of forms of legalisation, law can be soft for all sorts of reasons. Understanding these reasons, improves not only our understanding of the legal nature of the transnational agreement, but also what the legal strengths and weaknesses of these instruments are and as such the normative impact the agreement may have.

In order to gain a better understanding of the legal strengths and weaknesses, several legal scholars have introduced analytical frameworks, that also have been commented on certain aspects. The aim of the fourth section of this article was therefore to introduce a further developed framework that meets one of the main comments on the former frameworks and that is able to offer analysis that is useful within both conceptions of law. Based on the works of in particular, Gamble, Abbott et al, Senden, Raustiala and D'Aspremont, this has resulted in a framework as shown in table 3.1, which is comprised by three features of law: 1) lawfulness; 2) substance; and 3) structure to ensure compliance. By the further definition of these features

into elements, insight can be gained about the legal strengths and weaknesses per feature and when taken together of the transnational agreement in general. An analysis of the legal strengths and weaknesses of these features has not only proven to be useful in the case of soft law[107], but also in the case of hard law[108]. Finally, a better understanding of the legal strengths and weaknesses can also serve as input to improve the legal nature of the respective transnational agreement in further negotiations about that agreement or the adoption of future.

107 *Cf*. García-Muñoz Alhambra, ter Haar and Kun 2011; and Ter Haar 2012a.
108 De Gruijter 2012.