

Soft Power and the future of international rule-making

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Introduction. – Why should liberals be concerned?

I would like to start this paper by asking why it is that liberals should be concerned about the exercise of soft power in international relations. In general we are likely to favour the use of soft power. We prefer the idea of persuasion to the use of force. However the reason we should be concerned is that the exercise of soft power includes the use of international law-making and rule-making mechanisms that have a material impact on individuals, but the mechanisms themselves are often opaque and obscure.

This obscurity of the process and the venue often makes it impossible in practice for the individual:

- to know the source of the law,
- or to influence the law-making process,
- or to obtain redress if adversely affected,
- or to sanction those who make bad rules.

In other words it is a process that disenfranchises and allows for the arbitrary exercise of power.

The theme of this paper therefore is a simple one. It is that the problems raised by the growing exercise of soft power in the context of international rule-making need to be recognised. International rule-making needs to be contained within a rules-based system consistent with democratic forms of government at the national level. The rule-makers themselves need to observe appropriate rules in what they do. We need rules to apply to the rule-makers.

What this paper does therefore is first to outline briefly the world of soft power – deal with the definitions, its key characteristics and the varieties of soft power. Secondly it turns to the reasons for the growth in the use of soft power and thirdly outlines the problem of holding those who make the rules to account and the different approaches that can be taken to strengthening accountability. Before concluding it looks at the future of international rule-making, both the benefits of the new style described earlier and the risks.

1. Delineating the World of Soft Power.

Defining Soft Power;

The broad definition of soft power comes from international relations theory and refers to accomplishing international aims through persuasion and co-optation rather than through the use of armed force or other forms of coercion such as use of economic sanctions.

Sometimes the definition is used more narrowly and limited to the cultural or ideological means of obtaining an objective. Conversely, sometimes a broader definition is used to include payments (such as foreign assistance) or trade concessions as part of the range of non-coercive techniques.

This paper will focus particularly on soft power in the sense of making international rules of behaviour as a way of avoiding the use of coercive means such as economic sanctions and the use of force.

In this rule-making context the phrase 'soft governance' is sometimes encountered. This refers to the use of soft instruments for coordination such as the 'Open method of Coordination' used in the EU's Lisbon process.

In one sense, both terms – 'soft power' or 'soft governance' – are slightly misleading in the context of rule-making. This is because in this context both soft and hard law-making techniques are employed. The Lisbon process is itself a good example of the use of hard as well as soft techniques because it relies not only on soft techniques such as benchmarking and recommendations but partly also on hard law – notably EU competition law. This paper defines soft power to include both hard and soft law.

Soft power in context of International Rule Making and Coordination.

In talking about international rule making and coordination the paper distinguishes between two broad means of exercising soft power. The first involves soft mechanisms. This means the use of informal institutional mechanisms and/or non binding legal forms that have nevertheless hard effects at the level of the country and individual citizen. The second involves hard mechanisms that use formal treaty based international organisations (such as the Bretton Woods organisations) and employs legally binding commitments and means of implementing or enforcing their actions. (The WTO would be an example).

There are three defining characteristics of the mechanisms of soft means of international action. First, there is a reliance on networks rather than treaty based international institutions. Secondly, the networks deploy recommendations or guidelines or principles rather than laws or treaties (for example one network organisation, the Financial Stability Forum (FSF), distinguishes between 'Principles', 'Practices' and the 'Methodologies/guidelines' it promulgates). Thirdly, the techniques blend together a combination of public and private processes and rule-makers. (For example the International Accounting Standards Board is structured as a private trust and its recommendations are then taken up by the official accounting bodies such as the Financial Reporting Council in the UK or the SEC in the US). In practice however there is a mixing and matching of both soft and hard techniques.

The Varieties of 'soft power'.

What makes the world of soft power difficult to pin down when it comes to international rule-making is precisely this mixing of hard and soft techniques of rule-making. The following examples illustrate the mix of institutions and techniques that are involved in contemporary international rule-making:

Hard institutions/hard technique.

1

A Treaty based organisation (WTO) enters into and enforces binding international trade agreements with a formal mechanism for resolving disputes.

Hard institutions/soft technique.

2

Treaty obligations entered into with a treaty based organisation that spawn soft methods of implementation. (WHO Framework Convention on Tobacco possibly relying on guidelines or recommendations for implementation).

Soft institutions/Hard technique.

3

Networks that sponsor hard domestic law.

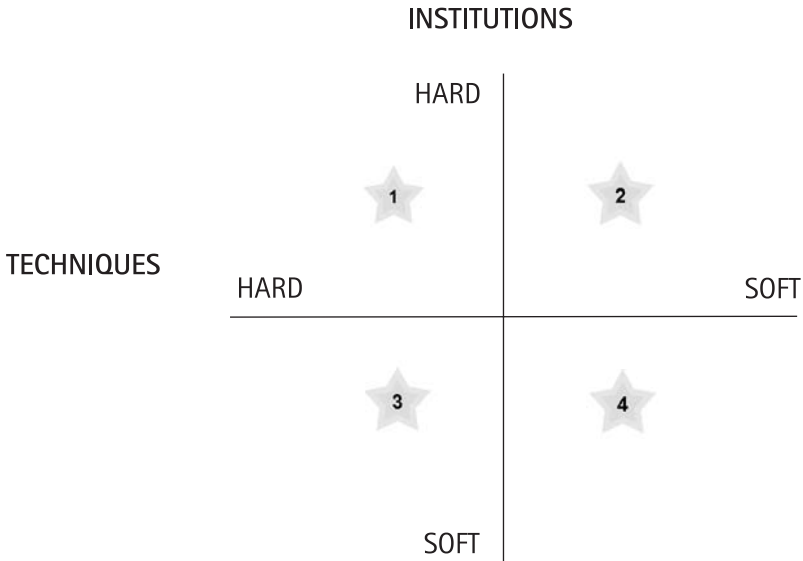
Soft institutions/soft technique.

4

Networks that promote soft methods of implementation. (IOSCO & codes of conduct for rating agencies).

The theoretical possibilities can be shown in the form of a simple quadrant. The illustrations given above fall one into each quarter.

Varieties of Rule Making



The Choice.

These examples provoke the question as to what determines the choice of venue and instrument in the making of international rules. Why should governments prefer one part of the quadrant to another? Two types of consideration are important from the perspective of the rule-makers:

First, there are the factors that go into the framing of international rules that may affect the choice of institution. The academic literature on the choice of venue is limited. It tends to look at the choice through the lens of Principal/ Agent theory. This postulates that governments may find some venues easier to control than others and will prefer them. Conversely, some agents (for example the European Commission) may prefer a venue where they can escape tight control of their principals (EU Member States).

I am doubtful about the application of P/A theory in this setting. In my view the degree of like-mindedness of members is likely to be critical in the choice. What this means is that a preferred venue will be one where participants see and approach the problem in the same way and share common disciplines and expe-

rience. Collegiality will prevail over contestation and thus the chosen setting is conducive to reaching a common position.

The second consideration that affects the other side of the equation – the choice of instrument – involves what is referred to as the 'logic of implementation'. What this means is that different types of implementation situation will call forth different types of instrument. If there are serious doubts about whether a rule will be implemented in practice a hard mechanism may be required, in other cases softer instruments for management or persuasion may be sufficient. Again the academic literature is relatively limited but it is probably safe to say the choice of institutional venue and instrument will reflect a combination of framing and implementation considerations.

2. The Growth of soft techniques of rule-making.

Institutional economics provides a framework for exploring the reasons for the growth of soft techniques of rule-making. The reasons can be brought together under the heading of the desire of governments to reduce the transaction costs of international rule making. In some cases these transaction cost savings are savings in a literal sense and in other cases they stand for reducing other kinds of complexity in rule-making.

It is useful to distinguish between three main kinds of transaction costs: administrative, informational and what are called below 'coordination' costs.

Saving on Administrative Costs:

As far as administrative costs are concerned soft techniques can reduce costs in a literal sense. Using networks of national officials (such as FATF) reduces institutional costs. The set-up costs of treaty-based organisations are avoided as are also the running costs of permanent bureaucracies. Soft forms of rule-making may also reduce negotiation costs because it may be easier to reach a consensus on soft measures. Soft techniques may also reduce implementation costs because the details of transposition can be left to each jurisdiction.

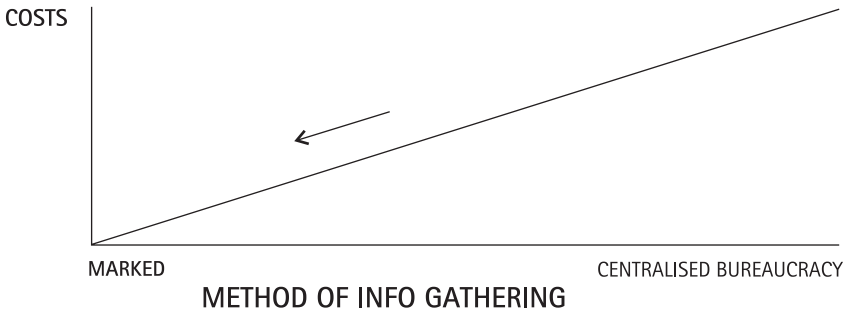
Reducing these kinds of administrative costs are significant but probably not decisive in themselves.

Saving on the Costs of Gathering Information:

Another and more important class of costs that can be reduced through soft techniques of international law making concern various types of informational cost.

First, networks and the co-option of private sources of information (such as those private sources mobilised by IASB and IOSCO) provide information gathering efficiencies. This is illustrated in the chart below that shows the market as the most efficient institution for gathering information and centralised bureaucracy as the least efficient. The use of networks and private bodies drives costs to the more efficient end of the curve.

Chart B: Information Gathering Costs



Secondly, networks are also likely to be more efficient than permanent bureaucracies in linking up with epistemic communities conversant with the latest scientific and technical knowledge. (IPCC is an example where the network mobilises the knowledge while the host institutions, WMO and UNEP, provide the venue).

Thirdly, an important driver in the use of soft techniques in a national context is the desire of those being regulated to have legal certainty. With techniques such as guidelines, or comfort letters, or guidance notes, the regulatory body provides a 'safe harbour'. Similar techniques, such as letters or memorandums of understanding, can reduce the costs of legal uncertainty in international transactions.

Savings on the Costs of Coordination:

Finally, soft international rule-making can reduce coordination costs. The first of these is the costs associated with dealing with an agenda shift in areas of international action where the line between what is international and what is domestic is increasingly blurred. This kind of agenda shift can be seen in the area of international trade where there has been a shift from dealing with tariff barriers to non tariff barriers including regulatory barriers. The key difference is that talks about non tariff barriers enter into regulatory issues that have traditionally been seen as the domain of domestic policy. Policy making in the international arena thus increasingly requires coordination with those who were previously just domestic actors. The further that international rule making gets into this new agenda and touches on core domestic policies the more likely it is that soft techniques will be preferred. A similar evolution can be seen at work within the EU.

The need to co-opt the private sector in rule-making can also be viewed as a coordination issue between the public and private sectors. It would be difficult to imagine effective international accounting standards being developed without IASB or securities standards without IOSCO. The private sector is also often needed in the implementation of rules. Various forms of co-regulation or 'monitored self-regulation' also provide ways of reducing implementation costs.

Another important way of reducing coordination costs has already been referred to. It is signalled in the development of international rule making through the use of groups of the like-minded rather than through the use of traditional international organisations with their universal membership that is divided in its interests and approaches to policy. A clear symptom of this can be seen in the trade field where there seems to be a shift away from mechanisms such as the Doha Round towards bilateral free trade agreements (FTAs).

The main point about these ways of reducing transactions costs is that, in their entirety, they can be seen as providing a huge incentive to move in the direction of new forms of international rule making. Moreover these incentives are not going to go away. If anything they are going to become even more compelling in the future.

This leads to the question of what, if anything, is wrong with these developments.

3. The Problem of Accountability.

The institutions that wield power in international rule-making can be criticised both on the grounds of lacking legitimacy and on the grounds of operating in an unaccountable way. Legitimacy and accountability are closely related concepts but are not the same. Legitimacy is about the justification of powers and accountability is about the exercise of powers. For the purposes of this paper the emphasis is on accountability – the way in which power is exercised – in the making of both soft and hard international rules and the mix.

There are two general reasons why people are concerned about the lack of accountability in international rule making. One reason is that the processes seem to lack transparency and that lack erodes all dimensions of accountability. The other is that soft international laws are often seen as the precursor to hard mandatory and binding laws – what is sometimes referred to as 'the shadow of hierarchy'. But, whereas within a state, formal law-making is subject to various checks and balances, this netherworld of international soft law seems to operate without such checks and balances. In addition to these general reservations there are more specific concerns.

Classic democratic theory distinguishes between three dimensions of accountability. Those wielding power need to be answerable and give reasons for what they do; they need to keep within defined terms of reference and there needs to be the possibility of sanctioning them if they overstep their bounds or operate without answering to anyone or anything. These distinctions help us see why there is concern about the accountability of international rule-makers.

Answerability. (The need to give public reasons).

As far as the answerability of international rule-makers is concerned the key critique is that the reasoning and evidence base employed to justify measures is not subject to adequate ex ante scrutiny. There is a lack of impact assessment that is a key tool for collecting market evidence. In addition, epistemic standards such as the need for independent peer review or the replicability of scientific reasoning is often absent. The IPCC can be seen as setting new standards in this area but even it has been criticised for lacking rigour. If the reasoning behind proposed measures is not exposed to independent scrutiny then there is a risk that bias will creep in and epistemic communities or interest groups or NGOs or in-house bias or a coalition of interests will distort the rule-making process.

Terms of reference. (Keeping the rule-makers within clear bounds).

As far as keeping rule-makers to defined terms of reference is concerned public choice theory tells us that permanent bureaucracies will develop their own objectives. This is even more likely to occur at the international level where parliamentary scrutiny is absent, government shareholders have conflicting objectives and the organisations have their own biases including being advocates of the cause they espouse. Networks have more cohesive controlling groups or governments but they possess their own biases, write their own terms of reference, operate largely out of sight and certainly outside parliamentary scrutiny.

Sanction.

Finally the application of sanctions in respect of international rule-making is a difficult and clumsy process. In theory such means exist as withholding budget support. But in practice sanctions are difficult to apply when there are mixed constituencies and mixed motives. Attempts to discipline UN organisations by withholding funds might for example be represented as showing an anti-UN attitude and not worth the diplomatic cost.

In short, the charge is that international rule makers follow unclear standards and disciplines, operate without clearly defined terms of reference and there is a lack of means to sanction any transgressions. There are doubtless exceptions to this charge sheet. Bodies that operate in the financial sphere such as IOSCO or FSF are well aware that a misstep can be hugely damaging and their reports are often thorough, respect market evidence and are put out for consultation and comment. IASB aims at transparency. Other organisations may not always be so disciplined.

4. Developing Safeguards. Democratisation Or Rules?

In looking at how to remedy this situation two different avenues are open. One is to look for some kind of democratisation of global rule making. The other is to look to a stronger rules-based framework.

Democratisation?

Democratisation at the global level is vulnerable to the criticism that it is 'unrealistic' and some consider that it is also undesirable at this point. Alternatively there are those who suggest that we should look below the level of states, at transnational mechanisms, and rely on the kinds of self-discipline that are brought

to the table by the networks that now make the rules. This is vulnerable to the criticism that we are condoning elitism rather than democracy. It also makes the very questionable assumption that the disciplines that operate within national systems also operate in the same way at the international level.

A less direct approach to democratisation places the emphasis on the need to democratise states. This would have a number of advantages such as increasing the degree of like-mindedness among the rule-makers and make it more likely that they would respect the kind of rule-making procedures that are observed within democracies. It would also increase the likelihood that the rules they make are indeed consonant with the interests of democracies themselves and with democratic expression within them.

Historically, liberals have always qualified their support for democracy via the ballot box by stressing the need for 'democracy within the rules' rather than viewing democracy as what the electorate wants. Given the difficulties of introducing the ballot box at the global level it is to the rules that we should also look. Moreover, with the exception of a body such as the Security Council of the United Nations itself that has a clearly political mandate, the aim should be to have in place rules applying to the international rule-makers that provide a discipline equal to the kinds of procedures that apply to unelected bodies within a democratic country.

Components of rules based approach

Within democratic countries it is increasingly accepted that unelected bodies must follow high standards of ex ante impact review to ensure that proposed measures are supported by evidence. In the United States these procedures have recently been extended explicitly to soft measures in the form of departmental guidance notes. Equally in the United States there is a requirement that any measure that is based on a scientific assessment must have that science base independently peer reviewed. The replicability of assumptions is an important defence against poor model building whether in the physical or social sciences. There is also increasing acceptance in democracies worldwide of the need for independent performance audit and ex post evaluation mechanisms of rules and regulations. Unelected bodies within democratic countries are also subject to judicial review which means that their decisions can be overturned if they show omission of material facts or procedural omissions (for example, inadequate consultations with those potentially affected by the decision), There has also been a huge increase in the number of extra-judicial appeal and disputes resolution mechanisms in addition to the possibilities of judicial review through courts. All of these mechanisms need to be brought into play at the international level.

5. The Future of International Rule-Making.

In today's world international rules are made in a mix of instruments from treaties to recommendations and involve a range of venues from the formal international organisations such as the WTO with their universal membership to informal networks of national officials sharing a common discipline and outlook. Within this array of international venues there has been a shift away from the post second world war structures such as the United Nations and the Bretton Woods organisations to less formalised bodies using less formalised techniques of rule-making. This overall trend is likely to continue. The earlier discussion of savings in 'transaction costs' gave a compelling overall rationale for why the new methods were likely to be preferred. This motivation will continue.

Within this overall trend to favour the new style of international rule-making some specific trends are likely to become more pronounced. First is the need for the private sector to be fully involved in rule-making and rule implementation. The information and knowledge needed in modern rule making does not exist within government bureaucracies nor does it exist within the traditional international bureaucracies. Secondly the search for more flexible ways of expressing international rules of behaviour is likely to grow. A pointer in this direction is signalled by the discussion in the context of financial rule-making of the advantages of trying to reach agreement on underlying principles of regulation rather than trying to make rules in detail. Thirdly, traditional international bureaucracies, including many UN agencies will continue to decline in importance. They have favoured advocacy more than evidence, politics more than problem solving and have rewarded in-grown bureaucratic skills more than the need to find new ways to mobilise knowledge from outside. They are paying the penalty and will continue to do so. So-called 'reform' efforts that focus on changes in government shareholdings or voting power are of a startling irrelevance.

There are certain dangers that accompany the new style of international rule-making. Reliance on the like-minded and on epistemic communities may make it easier to reach agreements by consensus. But it does not guarantee that the consensus will be 'right'. There is a need for consultation and review procedures that provide much greater space for challenge and 'robust response' in rule-making. This may be of particular relevance in science-based policy making such as that relevant to the IPCC or WHO. There are other dangers that may come with what looks like 'success'. There may be too high a virtue placed on 'convergence' rather than competition among rules. In the current financial crisis it could be that the Basel accord on capital adequacy has increased volatility in the financial

sector by encouraging all banks around the world to take assets off their balance sheets whereas a more diversified regulatory approach might have proved safer. But the greatest danger is that the rewards that can come from the making of good international rules will be undermined if the bodies that make them are not seen to be legitimate or accountable. The new venues and the new instruments require new methods of accountability.

6. Conclusions.

The world of international rule-making is an arcane world of its own inhabited by experts and elites of whom as democrats we should be suspicious. It is a world where we can expect to see the increasing use of soft power exercised through soft means. We therefore need a stronger framework for democratic accountability that applies both to hard law venues and techniques, to soft forms of international rule making and to the mix. The reality is that despite a long tradition within the political science community of talking about 'multi-level governance' and an even longer tradition among legal scholars in talking about international law making we still have a basic problem that we are not able to connect up different levels of rule-making in democratic ways. It would be nice to say with confidence that the EU is leading the way in showing how it can be done. Unfortunately the EU is neither a model of democratic legitimacy nor accountability – or at least, not yet.

This brief paper does not pretend to have all the answers. The prescriptions are more about the direction in which we should be going. We should not lose sight of the importance for established democracies of democratising those states that remain authoritarian. This would make it more likely that soft power will be exercised in international rule-making in ways that are consonant with rule-making within democracies. In addition, a rule-based framework for the rule-makers would involve a requirement for them to observe higher epistemic standards (both before and after rule making) and would also require new possibilities for judicial review, a new breed of independent extra-judicial watchdogs providing for review of impact assessments, performance review, as well as new appeal and disputes settlement procedures. In short, we need new rules to apply to the new rule-makers.

Selected references.

Chayes, Abram & Chayes, Antonia H. (1995). *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press.

Florini, Ann (2003) *The Coming Democracy: New Rules for Running a New World*. Island Press.

Haas Peter M (2004) When Does Power Listen to Truth? *Journal of European Public Policy*. Vol.2. No.4. pp569-592.

Hartlapp, Miriam. (2007) On Enforcement, Management and Persuasion: Different Logics of Implementation Policy in the EU and the ILO. *JCMS*. Vol.45, no.3. pp653-674.

Held, David & McGraw, Anthony (eds) 2003. *Governing Globalization*. Polity Press.

Héritier et al. (2007) *New Modes of Governance in the EU*. JPP forthcoming.

Nye Joseph S. (2002). *The Paradox of American Power*. OUP.

Reinicke, Wolfgang H. (1997) *Global Public Policy*. *Foreign Affairs*. Vol.76.

Slaughter, Anne-Marie. (2004). *A New World Order*. Princeton U. Press.

Thatcher, Mark (1998) The Development of Policy Network Analysis. *Journal of Theoretical Politics*. Vol.10. No.4. pp389-416.

Vibert, Frank (2007). *The Rise of the Unelected*. Cambridge University Press.

