

11th UNCTAD Debt Management Conference

13–15 November 2017

Palais des Nations , Geneva

Responsible Financing: The role of «soft law» in promoting sustainable lending and borrowing practice

by

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The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.

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How to Render Soft Law Effective

11th UNCTAD Debt Management Conference
14 November 2017

How to Render Soft Law Effective

- I. Soft Law – the Problem with Courts
- II. Study #1: Courts and Soft Law
- III. Study #2: Courts and Public Interest
- IV. Two Strategies for Rendering Soft Law Effective

I. Soft Law – the Problem with Courts

Two potential addressees of soft law:

Governments

- E.g. UNCTAD Principles of Responsible Sovereign Lending and Borrowing
- Part of the public debate
- Pressure by civil society

Courts


- One reference so far (German Federal Court of Justice)
- Rejected applying the Principles because they are non-binding

I. Soft Law – the Problem with Courts



I. Soft Law – the Problem with Courts

Two questions for
rendering soft law
effective



When and how do
courts use soft law?

When and how do
courts change their
case law?

II. Study #1: Courts and Soft Law

Database collected by Goldman & Discacciati

Qualitative analysis

- 80 Cases
- Textual and contextual
- Large array of variables
- Identify in text and context the reasons for the particular use of soft law made by the Court in the case

Countries

- CAN, USA, UK, NZ, ISR
- A, B, D, I, IRL, NL, RUS
- Bangladesh, India, Philippines, Singapore
- Mauritius, South Africa, Uganda
- Brazil, Bolivia, Chile, Columbia, Peru

II. Study #1: Courts and Soft Law

Main finding: There are strategic and non-strategic uses of soft law

Strategic uses

- Group 1: Courts in developed, democratic states
 - Shield the domestic democratic process against internat. soft law
→ discard soft law as non-binding
 - Protect parliament against the executive
→ endorse soft law and engage with its content
- Group 2: Activist courts in predominantly emerging & developing states
 - Use of soft law for progressive ends
 - Bolsters the authority of courts
→ endorse soft law and engage with its content

II. Study #1: Courts and Soft Law

Main finding: There are strategic and non-strategic uses of soft law

Non-strategic uses

- Group 3: Courts as epistemic communities
 - Soft law provides technical guidance
 - Mostly in economic relationships (IP, tax law)
→ The relevant soft law is accepted and routinely used
- Group 4: Soft law as a learning device
 - There is no routine use
 - Court seems disengaged with the outcome
→ Use of soft law like an expert statement

III. Study #2: Court's Attitudes towards Sovereign Debt

Database collected by Goldman & Pustovit

Qualitative & quantitative analysis

- 108 cases decided by US Courts
- 1980-2016
- Excluded the bulk of the cases against Argentina
- Large array of variables
- Identify how states invoke the public interest in a restructuring (& success rate)

Public interest defenses

- Sovereign Immunity
- Act of State
- Force majeure
- Global public stability
- Unspecified public interest
- NOT: Contractual defenses

III. Study #2: Court's Attitudes towards Sovereign Debt

Stylized findings

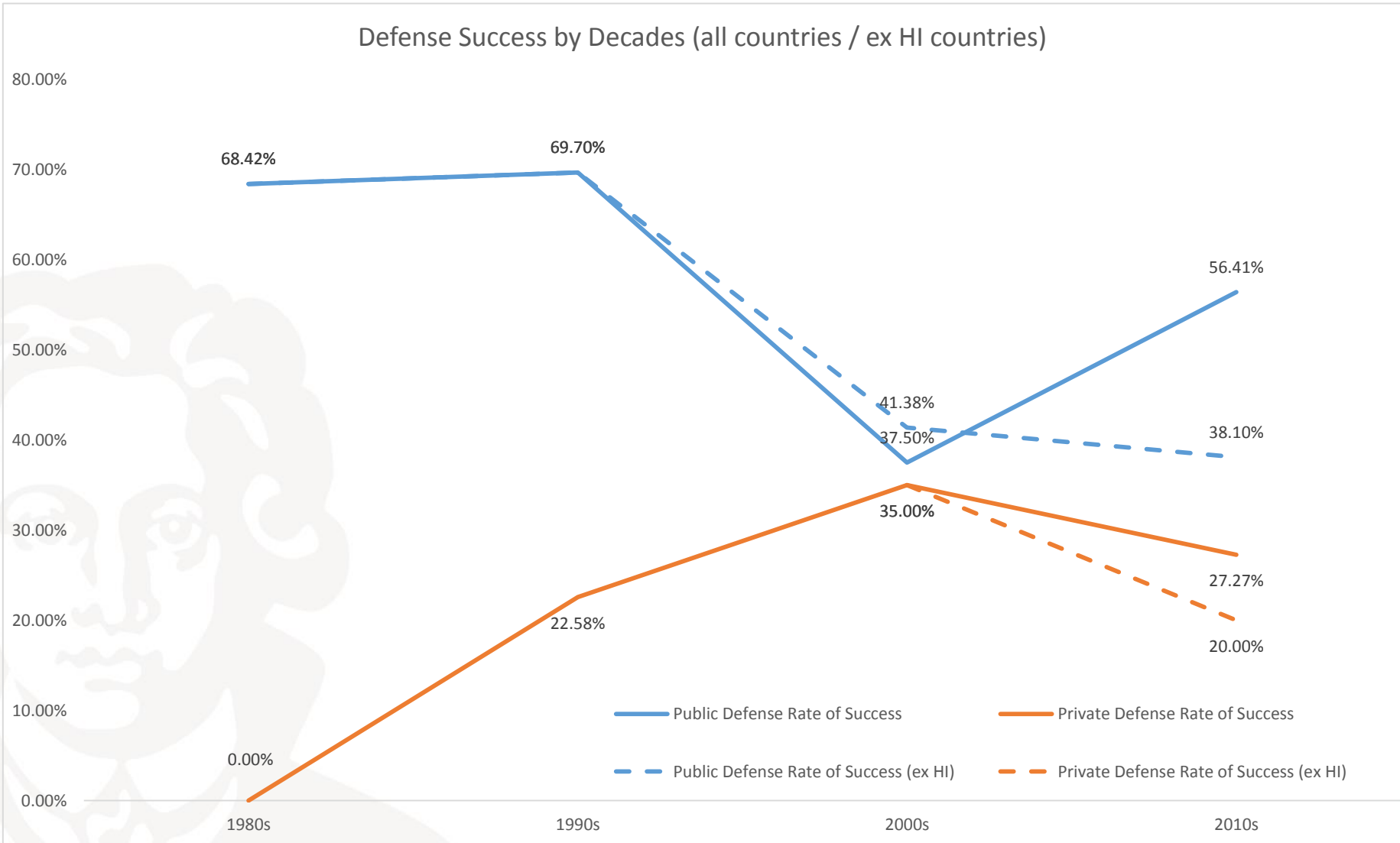
Variation in the use and success rate of public interest defenses

- 1980s: Still the era of sovereign immunity – **HIGH SUCCESS RATE**
- 1990s: New, creative public interest defenses appear – **HIGH SUCCESS RATE**
- 2000s: Decline of public interest defenses, rise of private defenses – **LOW SUCCESS RATE**
- 2010s: Trend reverses – more public interest defenses – **RISING SUCCESS RATE**

Interpretation

- Chage maps dominant policy trends in sovereign debt restructuring
- Courts seem to defer to government policies
→ separation of powers in foreign & economic policy
- Governments change their policies as a result of changing international discourse

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IV. Two Strategies for Rendering Soft Law Effective

Expertise

- Make soft law a useful technical standards
- Technical rules tackle technical problems (only)
- E.g. Debt sustainability analysis
- E.g. Human rights impact assessment
- E.g. Restructuring of complex products

Policy

- Frame discourse through soft law
- Soft law as a signpost of government agreement
- Influence on courts is indirect
- Signpost needs to be visible! → combined efforts

How to Render Soft Law Effective



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Thank you!

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