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

by

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How to Render Soft Law Effective

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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 Goldmann & Discacciati
  - 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

- Qualitative analysis

- 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 Goldmann & 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

- Change 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
III. Study #2: Court’s Attitudes towards Sovereign Debt

Defense Success by Decades (all countries / ex HI countries)

- Public Defense Rate of Success
- Private Defense Rate of Success
- Public Defense Rate of Success (ex HI)
- Private Defense Rate of Success (ex HI)

Data points:
- 1980s: 68.42%
- 1990s: 69.70%
- 2000s: 37.50%
- 2010s: 56.41%
Stylized findings

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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
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Thank you!

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