
A Framework for Understanding "Soft Law"

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The author begins by defining soft law as including both legal and non-legal instruments. These instruments are characterized by the relatively large amount of discretion which is left to the party bound by the obligation. Although soft law norms are discretionary in nature, they are not without important legal and political effects. By its very presence, soft law promotes a trend to the "hardening" of international relations. By its use and by subsequent practice, it may become subject to more effective interpretation. The author also discusses some of the possible sanctions for non-compliance with soft law obligations, placing special emphasis on the case of non-legal soft law. The approach throughout the article is theoretical, however, the author includes examples of how soft law norms have been or may be applied.

L'auteur amorce sa réflexion par une définition du « soft law » qui comprend à la fois les documents juridiques et non juridiques. Le « soft law » se distingue par la grande discrétion qu'il laisse au débiteur de l'obligation. Bien qu'il s'agisse de normes discrétionnaires, elles ne sont pas dénudées d'effets politiques et légaux. Le « soft law », par sa seule présence, apporte une certaine rigueur aux relations internationales. Son usage pourra en rendre l'interprétation plus efficace. L'auteur examine aussi des exemples de sanction dans les cas de violation d'une obligation de « soft law », en mettant surtout l'accent sur les obligations qui découlent du « soft law » non juridique. L'approche de l'auteur est certes académique, mais elle trouve toute son application dans la réalité, comme l'illustrent les exemples qu'il nous offre.

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Introduction

A curious phenomenon characterizes international economic relations: although states are willing to address problem areas collectively, they limit the constraints to which they subject themselves. Two main techniques are used by states and international organizations in the pursuit of these apparently conflicting goals. First, states will retain discretion over the definition of the obligations they undertake. Second, they will avoid legal obligations.¹ Sometimes they will use a combination of both methods. Provisions which use these techniques to achieve the goals of collective action and limited constraint can be described as "soft law".²

¹M. Virally, "La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus" (1983) 60-I Ann. Inst. dr. int. 166 at 328 and 330.

²For an example of states retaining the discretion over content, see *infra*, note 100 and accompanying text. Examples of the retention by states of the exigibility of obligations are given *infra*, notes 64-9 and the accompanying text. An example of states avoiding legal obligations is the O.E.C.D., *Code of Liberalization of Current Invisible Operations* (1973) as amended January 1975. On the effect of the latter, see R.K. Shelp, *Beyond Industrialization: Ascendancy of the Global Service Economy* (1981) at 127-36.

This paper develops the thesis that soft law is often unenforceable because the parties retain discretion over the content of the obligation or over its exigibility.³ This discretion will be called the subjective element of soft law. There are limits to the subjectivity. Beyond these limits, soft law contains an objective element which is enforceable. The sanctions available to enforce the objective element will depend in part on whether the soft law is legal or non-legal. Legal soft law is found in international agreements, or decisions of international organizations, which legally bind states which are parties to them. Legal sanctions are clearly available for legal soft law. Non-legal soft law, also found in international agreements, is not legally binding upon the parties. Non-legal soft law generally makes available only non-legal (political) sanctions.

Economic issues were once thought to be wholly within the sovereign power of states.⁴ Therefore, states might attempt to deal with economic issues unilaterally. It is significant, then, that states indeed create international instruments, whether in legal or non-legal form. It is also significant that, rather than agree to legal obligations which they might flout, states take the trouble either to create non-legal instruments or to retain discretion over the interpretation of legal ones. States undertake legal obligations only when they expect to be able to comply with them.⁵ Ironically, the adoption of soft law reflects a great deal of respect for international law on the part of states.

However, it is difficult for states to agree on widely acceptable legal rules. The upheaval after the Second World War changed the international economy, leaving many de-colonized states with weak economies and developed countries without assured access to raw materials.⁶ Rules in international economic relations must account for this economic diversity. Rules must also transcend the differences between national legal systems, which vary widely in type and sophistication.⁷

³Virally, *supra*, note 1 at 335.

⁴G. Schwarzenberger, "The Principles and Standards of International Economic Law" (1966) 117 *Recueil des Cours* 1 at 27.

⁵M. Bothe, "Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?" (1980) 11 *Neth. Y.B. Int'l L.* 65 at 91.

⁶I. Seidl-Hohenveldern, "International Economic 'Soft Law'" (1979) 163 *Recueil des Cours* 165 at 173-5.

⁷J. Davidow & L. Chiles, "The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices" (1978) 72 *Am. J. Int'l L.* 247 at 254; D.A. Walsh & K.W. Ryan, "Harmonisation and Standardisation of Legal Aspects of International Trade" (1977) 51 *Aust. L.J.* 608 at 609; J. Gold, "Strengthening the Soft International Law of Exchange Arrangements" (1983) 77 *Am. J. Int'l L.* 443 at 444.

The failure to obtain unanimous support for the *General Agreement on Tariffs and Trade*⁸ (the G.A.T.T.) illustrates the fact that even the widest of legal principles has difficulty receiving universal acceptance.⁹ Certain principles risk dividing states according to the level of economic development. States have divided along these lines over the principles and rules of the "New International Economic Order".¹⁰ One example is the principle of non-reciprocal preferential treatment of developing states,¹¹ which is found in the *Charter of Economic Rights and Duties of States*.¹² Developed states support the aim of this principle and will agree to it in non-legal agreements, but will legally bind themselves to it only in specific agreements. Developing states want the principle to be legally binding on all developed states.¹³ Indeed, developed countries generally disagree with much of the content of the *Charter*,¹⁴ while developing countries assert that the *Charter* is already international law.¹⁵

This is not to say that developing states always seek legally binding rules. Often they too have difficulty reconciling specific rules with the general principles they support. For instance, developing countries adamantly maintain economic sovereignty,¹⁶ but any legal obligation in international economic relations necessarily limits economic sovereignty.

States also avoid legal obligations because of technical problems involved in forming and terminating them. Treaty law is subject to the complex formalities of national law. Many countries require that treaty ratification be submitted for parliamentary approval before the executive may proceed.¹⁷ Federal states often require the approval of their constituent parts. Rules of customary international law (custom) generally can be formed

⁸55 U.N.T.S. 194 (applied provisionally as from 1 January 1948 pursuant to the *Protocol of Provisional Application of the General Agreement on Tariffs and Trade*, 55 U.N.T.S. 308 (signed 30 October 1947)) [hereinafter the G.A.T.T.].

⁹E.A. Laing, "International Economic Law and Public Order in the Age of Equality" (1980) 12 L. & Pol. Int'l Bus. 727 at 742.

¹⁰United Nations G.A. Res. 3201, S-6 U.N. GAOR Supp. (No.1), U.N. Doc. A/9559 (1974).

¹¹N. Horn, "Normative Problems of a New International Economic Order" (1982) 16 J. World Trade L. 338 at 340.

¹²United Nations G.A. Res. 3281, 29 U.N. GAOR Supp. (No. 31) 50, U.N. Doc. A/9631 (1974)[hereinafter *Charter*].

¹³Davidow & Chiles, *supra*, note 7 at 249.

¹⁴Seidl-Hohenveldern, *supra*, note 6 at 182.

¹⁵O.M. Garibaldi, "The Legal Status of General Assembly Resolutions: Some Conceptual Observations" (1979) 73 Proc. Am. Soc. Int'l L. 324 at 326-7.

¹⁶*Ibid.* at 340.

¹⁷Bothe, *supra*, note 5 at 90.

without national formalities, but suffer from their own problems: state practice must be general and consistent.¹⁸ However, practice in economic relations is diverse. In capitalist economies, enterprises and individuals (persons) are main actors. It is difficult to ascertain any rule of international law from the actions of persons, because, in classical theory, persons are not able to create custom.¹⁹ A state's treatment of persons can constitute practice which forms custom, but state practice varies according to the type of economic system and the level of economic development. It is too diverse to form custom.²⁰

In international economic relations, neither general nor special custom is formed from treaty sources. Treaties are not ratified widely enough to form a general custom. As well, treaties do not form special custom. Only ratifying parties are bound, because, as held in *The Asylum Case*,²¹ a state will not be bound by a special custom to which it has objected. The Court concluded that a state makes such an "objection" where, having signed a treaty, it does not ratify. Treaty negotiations tend to water down the norms which are finally agreed upon. The type of forum may keep away states which have no intention of creating legal obligations for themselves, although they might be amenable to non-legal obligations. At present, the treaty conference is not an appropriate forum in which to formulate widely acceptable norms of international economic law. Nor, until it is seen differently, is it an appropriate forum in which to formulate widely acceptable soft law. Thus, rather than attempt to formulate multilateral treaties which receive limited participation,²² it would seem preferable to establish agreement with respect to at least some norms which are widely acceptable.²³

¹⁸I. Brownlie, *Principles of Public International Law*, 3d ed. (1979) at 6; A.A. D'Amato, *The Concept of Custom in International Law* (1971) at 56.

¹⁹D.P. O'Connell, *International Law*, vol. 1 (1965) at 16; C. Osakwe, "Contemporary Soviet Doctrine on the Sources of General International Law" (1979) 73 Proc. Am. Soc. Int'l L. 310 at 311-4; B. Oppetit, "La notion de source du droit et le droit du commerce international" (1982) 27 Archives de philosophie du droit 43 at 53.

²⁰Davidow & Chiles, *supra*, note 7 at 254.

²¹(*Columbia v. Peru*), [1950] I.C.J. 266.

²²N. Horn, "International Rules for Multinational Enterprises: The I.C.C., O.E.C.D., and I.L.O. Initiatives" (1981) 30 Am. U.L. Rev. 923 at 936.

²³It may be argued that voting for the formulation of a treaty may be the adoption of a non-legal form of soft law, and that ratification only changes the obligation to a legal one. The parties to the non-legal soft law would be those voting in favour of the formulation of the norm and those signing the treaty. However, one must be careful to ascertain whether failure to ratify the treaty in any one case may be implicit or express rejection of the soft law norm, making it no longer binding in any sense. Because failure to ratify will often constitute rejection, this avenue of formation of soft law may not be of great practical importance.

Non-legal obligations avoid the technical legal problems described above. They do not require approval of parliaments but can be created or terminated by executive branches of governments alone. They do not need to be approved by constituent parts of federal states. Thus, they are much easier to bring into force.²⁴ In addition, non-legal agreements are more easily extinguished, given that they avoid the difficulties presented by termination procedures for legal obligations.²⁵ *Rebus sic stantibus*²⁶ allows for the rapid termination of treaty obligations, but the law with respect to it is rigid. Customary obligations cannot be changed by the will of just one state, thus, where a state's interests change, it cannot opt out of custom. The problem can be avoided by subscribing to non-legal obligations.²⁷

The major benefit of having legal rules is the possibility of recourse to legal sanctions. However, situations in which the legal rules are to apply must be clearly demarcated before they are legally enforceable.²⁸ Where states do not agree to such objective rules, or where they create subjective "escape clauses" to control the exigibility of the rules, it is clear that states are attempting to avoid legal sanctions. Where they do agree to legal rules that are not legally enforceable, it may be supposed that states nevertheless have a serious intent, given that they are willing to undergo the formalities of formation and termination.

This introduction concentrates on the reasons for soft law having found a place in international economic relations. The specific reasons for the existence of soft law beyond economic relations are somewhat different. Nevertheless, soft law always attempts to reconcile the aims of international collective action and limited constraint by creating largely subjective obligations. The framework for examining economic soft law, therefore, is equally applicable to soft law that deals with subjects other than economic relations. However, the examples drawn upon for this article are largely from economic soft law, which is an area where numerous forces impel states to seek collective action, even though they do not wish to subject themselves to enforceable legal obligations.

²⁴Bothe, *supra*, note 5 at 92.

²⁵M. Virally, "La deuxième décennie des Nations-Unies pour la développement" (1970) 16 *Ann. fr. dr. int.* 9 at 29.

²⁶*Rebus sic stantibus* or "fundamental change of circumstances" only applies to circumstances which are "an essential basis of consent of the parties" and where the change "radically" transforms the extent of obligations. See article 62 (1) of the *Vienna Convention on the Law of Treaties*, 23 May 1969, U.N. Doc. A/Conf. 39/27. The combination of the two hurdles makes use of the *rebus sic stantibus* doctrine very limited.

²⁷Virally, *supra*, note 1 at 338.

²⁸Bothe, *supra*, note 5 at 91.

I. Towards a Definition of Soft Law

There is no uniform opinion among publicists regarding the exact definition of "soft law". Some include both legal and non-legal norms in the definition.²⁹ Others restrict the term to legal norms, usually created by treaty, which are vague with respect to their content or weak with respect to the requirements of the obligation.³⁰

This article will deal with the wider definition of soft law. Although the word "law" in "soft law" suggests an obligation that is legal in form, the wider definition is not confined to such a literal meaning. Rather, the term soft law is used as a convenient shorthand to include vague legal norms. Examples of such norms include: the duty to cooperate found in the Framework Agreement between Canada and the E.E.C.;³¹ the duty to consult found in the G.A.T.T.;³² the precise non-legal norms such as those found in the O.E.C.D. Guidelines for Multinational Enterprises;³³ and less precise non-legal norms such as those found in the *Charter of Economic Rights and Duties of States*³⁴ as well as other instruments of the New International Economic Order.³⁵ While the characteristics of soft law may not distinguish a soft law norm from every other norm in international relations, they do describe what various instances of soft law have in common, and should at least move us closer to a working definition.

This discussion will focus, then, on the non-legal forms of soft law, although the definition includes both legal and non-legal norms. The effect of legal norms has already been well documented elsewhere. However, where there are elements of legal soft law that differ from those of other legal norms, they will be discussed.

The basic definition proposed in this paper is as follows. Economic soft law norms are legal or non-legal obligations which create the expectation that they will be used to avoid or resolve disputes. They are not subject to effective third party interpretation, and their subject matter and formation are international in nature. The five main elements of this definition will be examined in detail: A) the international nature of the subject matter and

²⁹Seidl-Hohenveldern, *supra*, note 6; R.R. Baxter, "International Law in 'Her Infinite Variety'" (1980) 29 Int'l & Comp. L.Q. 549 at 554.

³⁰Virally, *supra*, note 1.

³¹(1976) O.J. Eur. Comm. (No. L/260), Article II(1). See note 48, *infra*, for the text of the article.

³²*Supra*, note 8, Article 15.

³³See O.E.C.D., *Declaration On International Investment and Multinational Enterprises*, 21 June 1976, reprinted in (1976) 15 I.L.M. 967 [hereinafter *Declaration*].

³⁴*Supra*, note 12.

³⁵*Supra*, note 10.

means of formation; B) the inclusion of both legal and non-legal instruments; C) the creation of expectations; D) the purpose of avoiding or resolving disputes; and E) the difficulty of effective third party interpretation.

A. *International Nature*

Economic soft law norms are formed by either international organizations or the agreement of state representatives and deal with problems of international commerce or investment. Thus, in both the formation and the subject matter of economic soft law norms, relations between states are implicated. Not only legal but political relations are included. Thus, the important issue is not whether soft law is "law", but whether it plays a definable role in international economic relations.³⁶ Economic soft law addresses matters that cannot be confined to the territory of any one state. It attempts to outline when states should act independently and when they should cooperate to deal with these matters. However, the relations between states are the main subject of international law, and thus the question of whether soft law has any legal effect must be considered from the perspective of international law.

There has been some controversy over the question of whether international law may apply to non-legal agreements. Basing their enquiries on the *travaux préparatoires* of the *Vienna Convention on the Law of Treaties*,³⁷ authors have considered whether the types of agreements which were not included within the definition of "treaty" are governed by international law. It would seem that a search through the *travaux préparatoires* of a treaty dealing with the law of treaties may not be the ideal way to determine what regime governs instruments that are not within the scope of the treaty being negotiated. Be that as it may, opinion is divided over whether international law may apply to non-legal agreements.³⁸ This paper does not consider the regime covering the agreements themselves; rather, it considers the repercussions of having such agreements. It is submitted that the regime of international law governs at least some of the effects of non-legal agreements.

³⁶R.D. Kautlarich, "The Review of the 1976 OECD Declaration on International Investment and Multinational Enterprises" (1981) 30 Am. U.L. Rev. 1009 at 1027.

³⁷*Vienna Convention on the Law of Treaties*, *supra*, note 26.

³⁸A. Schachter, "The Twilight Existence of Nonbinding International Agreements" (1977) 71 Am. J. Int'l L. 296 at 301, is of the opinion that international law does not apply to such agreements. P.M. Eisemann, "Le gentlemen's agreement comme source de droit international" (1979) 106 J. du dr. int. 326 at 343 says that the *travaux préparatoires* of the *Vienna Convention on the Law of Treaties* do not preclude the operation of international law with respect to these agreements.

The various forms of soft law are found in resolutions of international organizations,³⁹ decisions of international organizations,⁴⁰ treaties⁴¹ and other international agreements. There are only two types of legal soft law: treaties and legally binding decisions of international organizations. Non-legal soft law takes many forms, however. One type of non-legal soft law, the code of conduct, merits separate mention. Usually it is formulated by an international organization such as the U.N. or the O.E.C.D. It is a form of soft law which, although non-legal, regulates the conduct of persons within the jurisdiction of states.⁴² Depending on its precision, it may lend itself to incorporation by legislation into national laws, and it may also provide the basis for other unilateral state action.

B. Inclusion of Legal and Non-legal Instruments

Legal scholars do not agree that both legal and non-legal instruments should be included in a definition of soft law (though there is some support for the idea).⁴³ We will use the wider definition because both types of norms are used by states in the collective effort to address economic problems. Discussion of non-legal soft law will, however, predominate because of its less familiar nature. Although the objective aspect of all legal norms is treated equally by law, legal soft law is couched in terms which leave the content of the obligations or the exigibility of the obligation within the discretion of the state which is bound. Thus, the objective aspect of legal soft law is too limited to be enforceable, except in the most extraordinary circumstances.

C. Creation of Expectations

Expectations engendered are a key element of all law.⁴⁴ Soft law creates the expectation that it will be respected⁴⁵ or that it is binding.⁴⁶ It is either the precision of the obligation or its legal form which induces this expectation. Elaborate implementation procedures provided by a non-legal norm

³⁹A.A. Fatouros, "On the Implementation of International Codes of Conduct: An Analysis of Future Experience" (1981) 30 Am. U.L. Rev. 941 at 943.

⁴⁰Gold, *supra*, note 7 at 444.

⁴¹Virally, *supra*, note 1 at 181-2.

⁴²R.J. Waldmann, *Regulating International Business Through Codes of Conduct* (1980) at 27.

⁴³Baxter, *supra*, note 29 at 554.

⁴⁴M.S. McDougall, "Contemporary Views on the Sources of International Law: The Effect of U.N. Resolutions on Emerging Legal Norms" (1979) 73 Proc. Am. Soc. Int'l L. 300 at 328, where McDougall makes this point and emphasizes that it is especially so with respect to shared expectations.

⁴⁵Gold, *supra*, note 7 at 443.

⁴⁶Bothe, *supra*, note 5 at 68; Virally, *supra*, note 1 at 338.

suggest that it is to be binding. However, the expectations created by legal and non-legal rules differ.⁴⁷ Just as expectations differ for legal and non-legal norms, they also differ within those categories, depending on the precision of the norms. The more precise the norm, the greater the expectations it engenders.⁴⁸ In this way, its legal value depends on the nature of the norm, and not on its form.⁴⁹

If it appears that the distinction between legal value and legal form is unclear, perhaps the following will assist. It will be explained below that a state may take on a political (non-legal) commitment which prevents that state from relying on certain legal rights.⁵⁰ This demonstrates a legal value of a non-legal norm. But to enforce compliance with a political commitment, recourse to a political process is required.⁵¹ At this point, the legal value of a non-legal norm ends.

The manner by which the expectations are created is an important characteristic of soft law. State participation in the creation of the soft law, either directly or through an international organization which it has helped to create and which it supports financially, demonstrates some seriousness of intent. The norm is the result of negotiation, wherein various interests are reconciled and traded off,⁵² and therefore, the final result is a formulation of common intent.⁵³

Just as law succeeds because it establishes regular procedures that do not change with each new application,⁵⁴ it is clear that the intent of soft law is to create rules that are not to change with every application. It is true that soft law rules admit of subjective interpretation; however, it must be assumed that the state interpreting its own obligation will do so consistently.

⁴⁷Bothe, *ibid.* at 78 and 82; Kauzlarich, *supra*, note 36 at 1010.

⁴⁸For an example of precision see, *infra*, note 118 and accompanying text. For an example of imprecision see Article II(1) of the Framework Agreement, *supra*, note 31, which provides in part:

- II(1) The Contracting Parties undertake to promote the development and diversification of their reciprocal commercial exchanges to the highest possible level.
To this end, they shall, in accordance with their respective policies and objectives,
(a) cooperate at the international level and bilaterally in the solution of commercial problems of common interest.

⁴⁹Virally, *supra*, note 1 at 354.

⁵⁰*Ibid.* at 348.

⁵¹*Ibid.*

⁵²Bothe, *supra*, note 5 at 69; Eisemann, *supra*, note 38 at 345.

⁵³Gold, *supra*, note 7 at 443.

⁵⁴D'Amato, *supra*, note 18 at 270.

Thus, soft law rules tend to make each state's practice consistent, but not necessarily consistent with the practice of other states.

The final formulation of soft law is always recorded. While at present it is always written, in the near future other forms of recording may be used.⁵⁵ Soft law differs from customary international law and from treaties, both of which need no recorded form.⁵⁶ Indeed, a record is not required for soft law. Some precision or definition of the common intent is the sole requirement. By the process of recording intentions, precision is added or vagueness is deliberately included. This is not to say that unrecorded non-legal agreements are not binding — they are politically binding. However, if unrecorded, their legal effects are limited by the degree of attention given to the formulation of the norms. It may be said that terms were used accidentally and that one party's expression of them did not represent the intention of another. However, where the terms are recorded, then all parties to the norm's formulation can be said to have their intent expressed therein.

D. Purpose of Avoiding or Resolving Disputes

Economic soft law is composed of two types of provisions. Some establish links for cooperation and consultation on matters of international economic relations.⁵⁷ Others establish principles for specific relations between states, persons and international organizations.⁵⁸

Clearly the purpose of such provisions is to overcome deadlocks.⁵⁹ Soft law avoids or resolves disputes: first, by addressing the basic question of when subjects are international in nature; and second, by providing a guide for conduct, a mechanism for considering disputes, and a basis upon which discussions can be carried out.

⁵⁵While at present recording is only undertaken in the written form, in the future texts may be computer-stored in digital form, or may be an oral text stored on tape or videotape. The point here is only to note that writing is not essential, but an objective text is.

⁵⁶The *Vienna Convention on the Law of Treaties*, *supra*, note 26, definition of "treaty" in article 2(1)(a) includes only written agreements. However, article 3 states that the *Convention* does not affect the legal force of agreements not in written form. Publicists state that oral agreements may be binding in international law. See A.D. McNair, *The Law of Treaties: British Practice and Opinions* (1938) at 47 where the author writes: "There is nothing to prevent an international engagement being made by word of mouth, provided that the representatives of the parties are duly qualified."

⁵⁷The Framework Agreement, *supra*, note 31, is an example of this.

⁵⁸Codes of conduct (see *supra*, note 42 and accompanying text) are good examples of this. See Waldmann, *supra*, note 42 at 21 and, more generally, on the specific relationships that codes of conduct create, *ibid.* at 19-27.

⁵⁹Gold, *supra*, note 7 at 443.

E. Difficulty of Effective Third Party Interpretation

The questions of who has the authority to interpret soft law, and on what basis they may do so will be discussed below in Part III. Authority to interpret, it will be contended, depends in part on what entities are bound and to whom they are bound. It is increasingly difficult to determine these questions.⁶⁰ This is all the more so where codes of conduct regulate the conduct of persons.⁶¹ However, it is not for this reason that soft law is not subject to effective third party interpretation; rather, it is because the extent of the obligation is kept within the determination of the party which is bound. Anyone other than the party which is bound is here called a "third party".

Much economic soft law is subjective in nature because it deals either with dispute resolution or with the matters of national law. Dispute resolution in international law is always consensual unless a state agrees otherwise. States often agree to certain procedures *a priori* but will seek to retain control in practice over what they have agreed to in principle.⁶² The same is true with respect to the subject matter of much economic soft law. States are willing to agree in principle on ways to control matters of their national law but wish to preserve a balance between international cooperation and economic sovereignty.⁶³

There are two aspects to the discretionary, or subjective, nature of the soft law obligations. The first aspect is the degree to which the content of the obligation is vague. Vagueness leaves to the state contracting the obligation the ability to define the content. The second aspect is the exigibility of the obligation. Exigibility means that compliance may be required with the objective part of the obligation, but the state bound may have an escape clause upon which it can rely to maintain that the obligation is nevertheless not exigible.

Escape clauses or opting-out provisions allow the bound party to determine when the obligation is exigible.⁶⁴ Norms with escape clauses are not identical to non-legal norms. Non-legal norms are not exigible by law,

⁶⁰P. Weil, "Towards Relative Normativity in International Law?" (1983) 77 Am. J. Int'l L. 413 at 430-1.

⁶¹Fatouros, *supra*, note 39 at 943.

⁶²For example, the U.S. agreed in 1949 to the compulsory jurisdiction of the International Court of Justice (I.C.J.), but with a reservation which states in part: "Disputes with regard to matters which are essentially within the jurisdiction of the United States as determined by the United States of America" are not subject to the compulsory jurisdiction of the I.C.J. See (1949) 1 U.N.T.S. at 9; T.I.A.S. 1598.

⁶³Bothe, *supra*, note 5 at 91.

⁶⁴Baxter, *supra*, note 29 at 551.

but they are indeed exigible by political means.⁶⁵ Where there is an escape clause, however, there is no justification for enforcement of the norm, and thus, even political enforcement is prevented.

There are two types of escape clauses. The first type employs specific wording which allows the party, in a number of circumstances, to interpret and apply the norm as it sees fit. For example, the 1976 O.E.C.D. *Declaration On International Investment and Multinational Enterprises*⁶⁶ provides

that Member countries should, consistent with their needs to maintain public order, to protect their essential security interests and to fulfill commitments relating to international peace and security . . . [provide national treatment].⁶⁷

The phrase "their needs" emphasizes that the standard differs for each state. The phrases "needs to maintain public order" and "to protect essential security interests" are conditions wholly within the purview of the state's subjective interpretation. They provide an escape where the obligation is otherwise exigible.

The second type of escape clause can result from the weakness of the command.⁶⁸ The same provision from the 1976 O.E.C.D. *Declaration* begins with the language "that Member countries should, consistent with their needs . . .". The word "should" allows the state owing the obligation to continue to agree in principle to the obligation while also claiming that, in a particular instance, the obligation is not exigible.⁶⁹

While it may be said that the party bound to the soft law must interpret the subjective element of the obligation in a consistent manner, the same cannot be said with respect to the exigibility of the obligations. Thus, an obligation with vague content, such as the obligation to "cooperate" in the Framework Agreement between Canada and the E.E.C., must be interpreted consistently.⁷⁰ "Cooperation" may require only an exchange of information or may require a change of laws or practices, but, whatever means are chosen, the same will have to be used in later similar cases. In contrast, the escape clauses are designed to be subjectively interpreted as to their content. They are invoked as a type of justification for the fact of non-compliance with the primary obligation. An example of such a primary obligation is the national treatment standard required by the 1976 O.E.C.D. *Declaration*

⁶⁵Virally, *supra*, note 1 at 348.

⁶⁶*Supra*, note 33.

⁶⁷*Ibid.*, II(1).

⁶⁸Gold, *supra*, note 7 at 443.

⁶⁹This paper will consider below whether persistent non-compliance with a basic obligation may constitute implicit rejection of the accord constituting an international organization, or the violation of the member's obligations under that accord.

⁷⁰See *supra*, note 48 for the text of the provision of the Framework Agreement.

referred to above. Escape clauses make non-compliance with the primary obligation justifiable. The state invoking it will give an escape clause a wide interpretation, and where it does not invoke the clause, no "interpretation" of it may be inferred from the fact that it was not relied upon. Where the O.E.C.D. *Declaration* provides that "member countries should" provide national treatment, a state may fail to provide it without breaching the provision. It may even fail to provide national treatment in some cases although it has provided it in the past in similar cases. The breach of the primary obligation will not be subject to effective third party interpretation.

Sometimes reliance upon the escape clause is controlled by linking its use to a secondary obligation. The Decision of the O.E.C.D. Council on National Treatment⁷¹ requires notification of measures which are exceptions to the provision of national treatment. Thus, use of any escape clause will likely necessitate such notification. Failure to notify is a breach of an obligation which has a large objective element. Thus, it can be effectively interpreted, and compliance can be determined. This is a rare case, in which the subjectivity of an escape clause is made more objective, although only due to a separate or secondary obligation as a pre-condition for the reliance on the escape clause.

A large degree of subjectivity or discretion prevents an evaluation of compliance in all save the clearest cases.⁷² The legal form does not make evaluation any easier. The substance of the norms is uncertain even when the legal form is clear.⁷³ Soft law reflects agreement on very broad principles.⁷⁴ It is sometimes said that where the content is very broad, the norm may be too indefinite to be enforced.⁷⁵ It is certainly true that where there is much subjective interpretation, there are very few clear cases which are susceptible of objective interpretation by which a determination of non-compliance may be made and upon which sanctions may be based. Even codes of conduct are not detailed enough to be self-executing treaties.⁷⁶ The content is always open to at least some subjective interpretation by the parties to the code.

⁷¹O.E.C.D., *Decision of the Council on National Treatment*, 21 June 1976, O.E.C.D. Doc. C(76) 118, reprinted in (1976) 15 I.L.M. 978 [hereinafter *Decision*].

⁷²Virally, *supra*, note 1 at 334-5.

⁷³Weil, *supra*, note 60 at 417-8.

⁷⁴Seidl-Hohenveldern, *supra*, note 6 at 192.

⁷⁵O'Connell, *supra*, note 19 at 199-200; Baxter, *supra*, note 29 at 550.

⁷⁶Davidow & Chiles, *supra*, note 7 at 260-1.

II. Effects of Soft Law

One goal of this paper is to describe and structure phenomena which are of interest to the jurist. While in other parts of this work it is possible to restrict the discussion to the legal value of various aspects of soft law norms, here the discussion must cut a wider swath and describe some political effects of soft law. This is necessary in order to understand the influence of soft law on both the formation of law and on the conduct of subjects. It is hoped that an examination of these influences will assist in drawing the parameters of the legal value of soft law without obscuring the formal distinction between what is and is not law.

It is vital to distinguish the effects of soft law from its interpretation, the control function it plays, and the sanctions that might result from non-compliance with it. The effects of soft law are always objective. Interpretation and control are often subjective. Sanctions are not effects of soft law, but rather the repercussions of failure to comply.

The article examines four effects of soft law: A) the "direct" legal effect; B) the "qualifying" effect; C) the "interpretive" effect; and D) the "political" effect.

A. *Direct Legal Effect*

There are three effects to be discussed under this heading: 1) the binding nature of soft law on an international body which adopts it; 2) the value of soft law as *opinio juris*; and 3) soft law's potentially delegitimizing effect on a previous norm, either of law or of non-legal soft law. These are described as direct legal effects because no intervening act is necessary to produce them, and because the effect is to change the previously recognized body of norms.

1. Binding on International Organizations Adopting Soft Law

Where an international organization is the author of soft law, there seems to be little question that the organization is bound in its internal proceedings to act in accordance with it. The soft law may not legally bind the *members* of the organization, as is the case with U.N. General Assembly Resolutions, but the procedure by which the norm was adopted makes it legally binding on the organization in its internal law.⁷⁷ Whether the normal voting procedure is used, or whether the agreement is the result of an *ad*

⁷⁷Seidl-Hohenveldern, *supra*, note 6 at 195; *Certain Modalities for Implementation of a Code of Conduct in Relation to its Possible Legal Nature*, U.N. Doc. E/C. 10/AC. 2/9 at 7 (22 December 1978) [hereinafter *Modalities*]; P. VerLoren van Themaat, *The Changing Structure of International Economic Law* (1981) at 127.

hoc procedure to which no one in the organization objects, it is binding in the internal law of the organization. For instance, the U.N. General Assembly has taken to adopting resolutions (many of which are in fact soft law) by consensus. This cannot change the effect of the soft law on the institution. However, on the question of whether the members of the organization are legally bound, a key factor will be whether the procedure prescribed by the constituting treaty was followed. This is far from a startling observation. The point is simply that soft law may be legally binding on the organization but not on the organization's members. What is binding in one legal system need not be binding in another. It may not be legally binding on the members where the organization has no legal power to bind its members, as is the case in international law with the U.N. General Assembly. It may also be the case that while the organization does indeed have the legal power to bind its members, it has not fulfilled the formal requirements to do so. An example of such formal requirements is found in Article 5 of the O.E.C.D. treaty.⁷⁸ Decisions of the O.E.C.D. are binding unless otherwise provided,⁷⁹ although only after the assenting vote of the country to be bound.⁸⁰

2. Value of Soft Law as *Opinio Juris*

The two elements of customary international law (custom) are the material, state practice, and the psychological, *opinio juris*.⁸¹ Some writers have characterized norms which do not legally bind as those able to provide the material element of custom.⁸² In other words, they would say that the formulation of a norm is evidence of state practice which could lead to the formation of custom once the practice is sufficiently general and uniform, and is coupled with the psychological element, *opinio juris*. However, by its very nature, soft law is abstract. The norms are composed not of actions but of words that are recorded. While writing words is an act, it is only one which may form the material element for a custom obliging states to write words. It cannot form the material element for a custom obliging states to act in the ways that the writing describes. As a result of its abstract nature, soft law cannot be held to provide the state practice that the wording of the norm describes. Thus it cannot satisfy the material requirement of custom.

⁷⁸12 U.S.T. 1728, T.I.A.S. 4891 (14 December 1960).

⁷⁹*Ibid.*

⁸⁰*Ibid.*, art. 6; see also R. Schwartz, "Are the OECD and UNCTAD Codes Legally Binding?" (1977) 11 Int'l L. 529.

⁸¹See, e.g., D'Amato, *supra*, note 18 at 47-56.

⁸²See, e.g., Laing, *supra*, note 9 at 777.

The better view is that soft law norms which are not legal in form can at best provide the psychological element of custom.⁸³ Even this claim is not beyond dispute. One could argue that since the form of the soft law is not legally binding, the parties' intention is not to be bound by a conforming practice. The counter-argument is that soft law is, by definition, composed of norms which, expressly or impliedly, are to be followed, and that this raises expectations. Soft law can be said to provide the psychological element necessary to make custom binding on states only where it is linked to state practice by parties to the same soft law.

However, for the norm to provide the psychological element, it must have been the product of official state action. Thus, a code of conduct created by a non-governmental organization, such as the International Chamber of Commerce (I.C.C.) for example, could not be said to embody any state's *opinio juris*. The most that could be said for such a code is that it "qualifies" the acts of a state, in the sense of clarifying their content.⁸⁴ But an I.C.C. code will not have a direct legal effect, because parties to it cannot be ascertained. For example, estoppel gives legal effect to a representation made by someone,⁸⁵ and here the code cannot be said to be made by anyone. The doctrine of estoppel therefore cannot apply, and the code can have no direct legal effect of this type.

It is also evident that, in order to provide the psychological element of custom, the content of the soft law norm must be appropriate. Wording that is not imperative tends to suggest that the intention of the states which are party to the rule is to respect it as a provision of international politics rather than of law. Thus, the value of non-legal soft law as expressing *opinio juris* will not often arise for consideration. However, it might be considered with respect to "Declarations" or "Charters" of the U.N. General Assembly. These are passed as resolutions, either by vote or consensus. Their mandatory provisions raise at least the question of whether they may be indicative of the *opinio juris* of the states which adopt them.⁸⁶

Of course, the soft law norms that might express *opinio juris* can only do so for those who are party to the soft law. It would be radical to suggest that the soft law norm might do so for those who are not party. Such an approach would presuppose that the state not party to the soft law not only had notice of it, but also must object if not intending to follow it. Otherwise,

⁸³*Ibid.* at 752-3; E. Suy, "Innovations in International Law-Making Processes" in R. Macdonald, D. Johnston & G. Morris, eds, *The International Law and Policy of Human Welfare* (1978) 187 at 190; S.M. Schwebel, "The Effect of Resolutions of the U.N. General Assembly on Customary International Law" (1979) 73 Proc. Am. Soc. Int'l L. 301 at 305.

⁸⁴See notes 100 and 101, *infra*, and accompanying text.

⁸⁵See notes 110 to 115, *infra*, and accompanying text.

⁸⁶See, e.g., *Charter, supra*, note 12.

one would be imputing purely fictitious psychological intent with respect to certain acts which might make up the material element of custom. Thus, one must conclude that a soft law norm cannot "provide" the psychological element necessary for formation of a rule of custom for the acts of a state not party to it. However, it may qualify the acts of those states in indirect ways.⁸⁷

3. Soft Law Delegitimizing a Previous Norm

"Delegitimization" is a broad term that means the change of either the legal status or the binding nature of an existing norm. The change may be achieved by either a formal or an informal process. In this article, formal process refers to the adoption of soft law. An informal process consists of the change of factual and political circumstances that often precedes the formal process. The distinction between the two will be discussed further below.

The formal process of delegitimization arises on the adoption of a soft law norm which is contrary to a pre-existing norm. The extent to which the binding nature of a previous legal norm is affected will depend on which theory of the termination of the pre-existing norm is adopted. If one believes that custom ceases to exist when states no longer consider themselves legally bound by the practice, then one equates the continued force of custom with a continuous *opinio juris*. Soft law that is subsequent and contrary to the custom may indicate that there is no longer *opinio juris* for the rule of custom, and thus that it has been "abrogated".⁸⁸ The soft law would not need legal form but would at least need to represent the views of a sufficient number of states to justify the conclusion that there is a lack of generality and uniformity of *opinio juris* for the rule of custom. However, if one believes that only a new rule can replace an old one, then to replace custom one would insist that the subsequent and contrary soft law must be legally binding upon sufficient states to form a new custom. It is submitted that the latter is the better view, and that it is also generally true that the legal status of a legal norm can only be affected by another legal norm.⁸⁹

One exception to the general rule is that even non-legal soft law may be said to constitute unilateral termination of a treaty. The right to unilateral termination may be expressed or implied by the treaty.⁹⁰ Where such a right

⁸⁷One such way is to suggest that the compliance with soft law by a non-party may have the effect of internationalizing the subject area for that state, as is discussed *infra*, notes 96-9 and the accompanying text.

⁸⁸Schwartz, *supra*, note 80 at 533.

⁸⁹Fatouros, *supra*, note 39.

⁹⁰See Article 56(1) of the *Vienna Convention on the Law of Treaties*, *supra*, note 26.

exists, subsequent soft law may be said to be an exercise of the right, unless notice requirements or formalities are not satisfied. In theory, at least, the adoption of soft law may represent the state's will to terminate a treaty obligation, and thus it may be a case in which the legal obligations of a state are changed, even though the state becomes party to a subsequent non-legal norm.

There is no problem with the notion that legal or non-legal soft law may delegitimize previous norms of non-legal soft law. Logic, and the necessity that norms change, demand it. But a non-legal norm cannot of itself cast aside a pre-existing legal norm. It may, however, create doubt that one had ever existed.

The adoption of soft law, or the formal process by which delegitimization occurs, may even affect a rule of *jus cogens*. It is true that states cannot, by definition, derogate from a rule of *jus cogens*.⁹¹ However, if states were in fact to adopt an agreement or resolution which was contrary to a purported rule of *jus cogens*, one might question whether the previous rule was really one of *jus cogens*. For example, if several states were to agree to an instrument providing for the adoption of any means, including torture, to interrogate suspected terrorists, then a question as to whether a prohibition against torture was *jus cogens* would arise. The agreement would not only beg the question but would also provide evidence of state practice to the contrary. In this way it may be said that a subsequent norm of soft law may "delegitimize" the status of the previous norm.

The informal process of "deligitimization" may have an indirect effect on legal rules and for this reason may be confused with the formal process. For example, many contend that the *Charter of Economic Rights and Duties of States*⁹², a non-legal norm, has invalidated the previous rule of custom governing the nationalization of foreign enterprises.⁹³ This proposition may

⁹¹*Vienna Convention on the Law of Treaties, ibid.* arts 53 and 64. It is said that *jus cogens* includes a prohibition against the use of force by states, a prohibition against genocide (Brownlie, *supra*, note 18 at 515; R. Ago, "Fifth Report on State Responsibility" [1976] 2 Y.B. Int'l L. Comm'n (Part I) 3 at 32, U.N. Doc. A/CN.4/291), and a prohibition against slavery (Ago, *ibid.*; "Reports of the International Law Commission" [1966] 2 Y.B. Int'l L. Comm'n 169 at 248, U.N. Doc. A/6309/Rev.1).

⁹²*Charter, supra*, note 12.

⁹³M. Wigdor, "Canada and the New International Economic Order: Some Legal Implications" (1982) 20 Can. Y.B. Int'l L. 161 at 162 and 165; VerLoren van Themaat, *supra*, note 77 at 277. But see B.H. Weston, "The Charter of Economic Rights and Duties of States and the Deprivation of Foreign Owned Wealth" (1981) 75 Am. J. Int'l L. 437 at 454-5.

One must be careful not to confuse who is bound by soft law with who is bound by another norm that the soft law may attack. This may lead to conclusions that are not warranted. A state's position with respect to soft law is not the same as its position with respect to another norm that the soft law delegitimizes. For example, C.J. Olmstead, E.J. Krauland & D.F. Orntlicher in "Expropriation in the Energy Industry: Canada's Crown Share Provision as a

well be another way of stating that there is no longer *opinio juris* for the previous rule of custom, or that there is *opinio juris* for a new custom. Alternatively, it could be a statement that where the former norm is based on conditions that have changed and the new norm reflects the new conditions, the old norm has been "delegitimized" by an informal process. The latter kind of delegitimization does not depend on the formation of a new custom, nor on discontinuity of *opinio juris* of the states. It depends solely on a change in circumstances and thus can be seen as similar to *rebus sic stantibus* in treaty law. But where *rebus sic stantibus* terminates a treaty obligation, the informal process only gives a factual and political reason why the rule should no longer be followed. This is a step prior to the actual termination of a legal rule, and thus the legal form of the soft law norm that was in fact adopted, the *Charter*, has no relevance and need not be considered.⁹⁴ The rule governing nationalization may be said to have been delegitimized by changes in international conditions — namely the attainment by many former colonies of statehood, and the resulting upheaval in international economic relations. But this has nothing to do with the adoption of the *Charter* itself; it merely relies on the same reasons that inspired the adoption of the *Charter*.

Thus, "delegitimization" can be said to include the following concepts. First, the legal status of the pre-existing norm can only be changed by a subsequent legal norm. Second, the binding nature of a non-legal norm may be affected by subsequent legal or non-legal soft law. Third, the previous existence of a norm, whatever its form, may be cast into doubt. These effects are the result of a formal process: the adoption of soft law.

Violation of International Law" (1984) 29 McGill L.J. 439 at 459-61, equate Canada's position with respect to soft law as determining its position with respect to a rule of custom. The authors argue that Canada's objection to the *Charter* leaves it bound by the old custom. But this assumes that there is some significance to Canada's objection to the *Charter*, whereas in fact the objection has no connection with any rule found outside of the *Charter*. If the old rule continues to exist, there is no question that Canada is bound by it. However, if the rule has in fact been abrogated, then Canada cannot be bound by it *vis-à-vis* the United States. The objection to the *Charter* rule cannot bind Canada to a rule that no longer exists. Thus, the fundamental question is the existence of the rule of custom, not Canada's position with respect to the *Charter*.

It is true that Canada could be bound by a regional or special custom, or some other rule of law, of the same effect as the old custom, which applies to those states. Canada's objection to the *Charter* does not assist in ascertaining whether there is such a rule.

Any change in the old rule brought about by the *Charter* is a delegitimizing effect of soft law. This effect must be evaluated before one may ascertain whether Canada is bound by the old rule, and there is no short-cut. The effect of the *Charter* on the old rule will be the same for all states. It does not matter whether states are parties to the soft law or not. It is only relevant whether they are governed by the old rule. On the other hand, it is important to determine who is party to the soft law for the purpose of assessing the weight the soft law norm will have to delegitimize the previous norm.

⁹⁴Fatouros, *supra*, note 39 at 953.

B. *Qualifying Effect*

The "qualifying" effect of soft law is the meaning soft law gives to subsequent acts. One such effect would be that an act qualified as a breach of soft law will give rise to the sanctions discussed below. But soft law qualifies acts that comply with it as well. These acts are given meaning which they might not have were it not for the soft law. More often, soft law makes clear the meaning of an act which might otherwise be ambiguous. It is in these latter senses that the qualifying effect of soft law will be examined.

Soft law gives a certain character to actions which they otherwise would not have had. The attribution of this character can only be effective between the parties to the soft law. The question of who the "parties" are may be difficult to determine in practice. One may argue, for example, that when a state appears to act in a manner described in a norm of soft law, the state has accepted it by implication. However, it would be unjust to give the acts of that state a quality which may have legal effect because that state cannot be said to have raised legitimate expectations that it would comply with the norm. Repeated acts in accord would raise expectations of consistency in the future, but unless they were somehow linked to the soft law norm they could not be said to be implied acceptance of the soft law.⁹⁵

The qualifying effect of soft law may be more or less direct. A direct qualifying effect would be the internationalization of the subject matter with which the soft law deals. It may even be said that this is a direct effect and not a qualifying effect, because the legal position of the state which formerly had exclusive sovereignty has been changed. It would be preferable, however, to consider the internationalization of an issue as having a qualifying effect, because it only changes the nature of a subsequent act, such as diplomatic protest or attempted extraterritorial enforcement of laws. It is the quality of those acts which has been changed, and it can be said that the state is still internally competent in the same fashion; only its international relations have changed. This article will treat as a qualifying effect: 1) the internationalization of a subject matter, and 2) the fact that subsequent acts may have consequences in international law.

1. Internationalization of a Subject Matter

One effect of soft law is that by the very facts that it has been a subject of international negotiation by the state and that some formulation respecting it has been agreed to, the subject matter is no longer within the exclusive

⁹⁵The link might be provided by the conformity itself with a very precise norm where conformity admitted of no other explanation than reference to the norm. Proof of this fact, needless to say, would be most difficult. However, explicit reference to the soft law would make the case certain.

domain of that state.⁹⁶ The result is that a state may no longer complain of intervention in its internal affairs if another state accuses it of non-compliance or demands compliance with a soft law that may have application only within the territory of the other state.⁹⁷ It may be that the loss of the right to complain of intervention is only the loss of a political right. However, it is also very likely that the legal argument of *fin de non recevoir* is precluded on the mere basis of exclusive sovereignty.⁹⁸ In other words, the state can no longer refute accusations that it has not acted in a certain way by merely stating that to act or not to act in that way was wholly within its exclusive domain. The mere fact that there has been an international agreement on the subject which is binding in a legal or political sense alters the right to invoke exclusive sovereignty.

Another potential consequence of the internationalization of an area of national competence is that the extraterritorial effect of one state's law on another may be said to be unobjectionable. If this is the case, it is indeed the most far-reaching effect of the internationalization of a subject matter of domestic law. In areas such as restrictive business practices, it may be that third world states would be quite content with extraterritoriality exercised by developed countries which conformed to the Restrictive Business Practices Code (R.B.P. Code).⁹⁹ It may be expected, however, that there will be much resistance to the extraterritorial effects of laws, even those conforming to the R.B.P. Code, in states which have developed laws and practices with respect to restrictive business practices. It would seem to be contrary to the subjective nature of soft law to say that those same soft laws legitimize effects within the state's territory which the state has not subjectively desired. However, once a state has agreed to a formulation of what another state may do within its own borders, it would seem that a corollary obligation of the state arises to allow another state to give effect to the agreement, as long as the other's measures are not contrary to international law or the former state's internal law. It is a logical implication of soft law that a state be allowed to create laws which apply to its own subjects operating in the territory of another state, provided that the laws accord with the soft law and are not contrary to international law or to the internal law of the state in which they are to apply.

⁹⁶Baxter, *supra*, note 29.

⁹⁷Schachter, *supra*, note 38 at 304.

⁹⁸Virally, *supra*, note 1 at 347 and 356.

⁹⁹Davidow & Chiles, *supra*, note 7 at 259-60. The R.B.P. Code has been adopted as a U.N. General Assembly Resolution by consensus, 5 December 1980: See United Nations Conference on Restrictive Business Practices, *The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/Conf./10 (1980); see W. Fikentscher, "United Nations Codes of Conduct: New Paths in International Law" (1982) 30 Am. J. Comp. L. 577. For text of the R.B.P. Code, see (1980) 19 I.L.M. 813.

Only states have the capability to internationalize a subject matter. Persons cannot do so. For this reason it may be said that international formulations of standards by non-governmental organizations such as the I.C.C. are not soft law. They do not show the desire of *states* for collective action.

2. Subsequent Acts May Form International Law

a. *State Practice*

It is clear that soft law may give acts subsequent to its adoption a quality which results in the acts having effects on international law. For example, acts may be given a quality which shows them to be part of the process of law formation, state practice which is creating custom. But this is not to say that the soft law itself is the state practice. This may be illustrated by Article 2(2)(c) of the *Charter of Economic Rights and Duties of States*, which provides that each state has the right:

To nationalize, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the State considers pertinent. In any case where the question of compensation gives rise to a controversy, it shall be settled under the domestic law of the nationalizing State and by its tribunals, unless it is freely and mutually agreed upon by all States concerned that other peaceful means be sought on the basis of the sovereign equality of States and in accordance with the principle of free choice of means.¹⁰⁰

Here the state which nationalizes foreign property, in order to determine "appropriate compensation", need only take into account its own laws and regulations as well as any circumstances it considers fitting. These criteria leave the appropriate compensation within a state's subjective determination. When a state acts in this subjective way in determining compensation, it is state practice which may be considered as an element in the formation of a custom to the effect that compensation is within the sole jurisdiction of the state that nationalizes. But the adoption of the *Charter* by any state cannot be said to be state practice leading to formation of that custom. An act other than mere adoption of the *Charter* is needed. The act is qualified as an element leading to formation of a custom because there is an expectation that soft law will be followed. This expectation qualifies conforming acts as having a deliberate purpose and rules out the view that they may be accidental.

¹⁰⁰*Charter, supra*, note 12.

The qualification of subsequent acts as acts that may form international law is not the same as asserting that the adoption of a soft law norm is a state's *opinio juris*. As *opinio juris*, soft law would qualify the practice as being *binding* as law,¹⁰¹ but the interpretation of the practice would still have to be considered. However, when soft law qualifies the conforming acts as state practice, it is a norm that describes the practice. In other words, the first case is one in which an element of custom is provided. The second case is one in which no element is provided; rather, the soft law norm is a description of the rule of custom which subsequent practice may create.

b. Practice That Interprets a Treaty

Where soft law is found in a treaty, it also qualifies conforming practice as practice which must be taken into account when interpreting the extent of the treaty obligation. For the purposes of Article 31(3) of the *Vienna Convention on the Law of Treaties*,¹⁰² unilateral acts, such as the treatment of aliens by a state, could constitute "agreement" (pursuant to Article 31(3)(b)) to the extent of obligations under a treaty of "friendship, cooperation and navigation", where the alien's state accepts it. Bilateral acts, such as discussions at a ministerial level, may constitute "agreement", pursuant to Article 31(3)(a) or (b), to the interpretation of an obligation to "cooperate" in a treaty like the Framework Agreement between Canada and the E.E.C.¹⁰³ Thus, very vague terms such as "cooperate" found in legally binding agreements take on greater precision with each specific instance of subsequent conforming practice.

Soft law may lead to firmer law in both treaty law and custom because of the qualification by it of state practice. Many writers share the notion that it may lead to harder law.¹⁰⁴ Some, however, recognize that soft law may harden, but state that it is unlikely that custom will form. A primary reason given is that in order to bind states, the custom must be widely practiced, and because non-parties to soft law are not likely to participate, the formation of a general custom will be inhibited.¹⁰⁵ Soft law will not bind non-parties to it by virtue of special custom, because states need to consent specifically to a special custom, according to the International Court of

¹⁰¹See notes 81-6, *supra*, and accompanying text.

¹⁰²*Supra*, note 26.

¹⁰³*Supra*, note 31.

¹⁰⁴Gold, *supra*, note 7 at 444; Seidl-Hohenveldern, *supra*, note 6 at 192 and 199; Bothe, *supra*, note 5 at 79; Davidow & Chiles, *supra*, note 7 at 255; VerLoren van Themaat, *supra*, note 77 at 43-4; C.C. Joyner, "U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation" (1981) 11 Calif. W. Int'l L.J. 445 at 459; Horn, *supra*, note 22 at 937; Suy, *supra*, note 83 at 191.

¹⁰⁵Seidl-Hohenveldern, *supra*, note 5, 204-5; Schwartz, *supra*, note 80 at 536.

Justice in *The Asylum Case*.¹⁰⁶ In other words, special custom offers no particular benefit and suffers from most of the drawbacks of a treaty on the subject matter. The implications are that non-parties to soft law would only be legally bound where there was a general custom, but that such a custom is unlikely to be created.

3. Subsequent Acts May Have Legal Effects

a. *Good Faith*

Soft law may also give subsequent acts a quality which invokes existing legal rules or principles. One such effect is that soft law qualifies an act that is in accord with it as done in good faith. This effect is limited to the parties to the soft law but is true whether the soft law is legally binding or not. One writer would go further and state that good faith requires acting in accordance with the soft law.¹⁰⁷ Another writer is uneasy about the term "good faith" because he does not like to suggest that the legal principle of good faith applies so as to require any action on the basis of non-legal soft law.¹⁰⁸ It would seem that the latter view is most sensible. The difference may be explained by the way each uses the term "good faith". Professor Michel Virally, who espouses the former view, takes pains to note that, in stating that good faith requires compliance, he means that it is required either as a political or a legal obligation. This paper restricts the notion of "good faith" to its legal meaning. Thus, the lowest threshold position that would seem to be consistent with either view is that, while no act is required to be taken in accord with the soft law, any act which is in fact taken in accord must be described as being in good faith.

Another way to say that acts done in accord with soft law must be in good faith is to say that soft law makes them legitimate. It is widely recognized that soft law "justifies" or "legitimizes" conforming conduct.¹⁰⁹

b. *Estoppel*

Soft law also qualifies an act which conforms to it as reasonable. It should naturally follow that non-legal soft law may form the basis of estoppel in international law. Estoppel in international law was defined in *The Barcelona Traction Case*¹¹⁰ as having two main elements: conduct inducing

¹⁰⁶ *Supra*, note 21 at 276-8.

¹⁰⁷ Virally, *supra*, note 1 at 338.

¹⁰⁸ Eisemann, *supra*, note 38 at 339.

¹⁰⁹ Gold, *supra*, note 7 at 443; Seidl-Hohenveldern, *supra*, note 6 at 195-6; Davidow & Chiles, *supra*, note 7 at 270; VerLoren van Themaat, *supra*, note 77 at 44; Horn, *supra*, note 22 at 937; Fatouros, *supra*, note 39 at 954; Fatouros, Book Review (1980) 12 N.Y.U.J. Int'l L. & Pol. 653 at 664-6.

¹¹⁰ *The Barcelona Traction Case* [1970] I.C.J. 3.

another state to adopt a certain position, and prejudice to the other state arising because it has reasonably changed its position.¹¹¹ It could be said that upon agreeing to soft law, a party expects compliance from the other parties to the soft law. Thus, it follows that one party induces another party to act in conformity with the soft law. Changing one's position on the basis of the soft law must also be said to be reasonable. It would, therefore, be a simple matter to apply the principle of estoppel based on an act qualified by soft law. For example, Canada is obliged under its Trade Agreement with the People's Republic of China (China) to grant China most favoured nation treatment.¹¹² Suppose that the two countries were party to a non-legal agreement which provided that a 15 per cent customs duty could be imposed on imports of a certain textile. Suppose, as well, that Canada provided for a 15 per cent duty on the textile imports from China but required, in the case of the same textile, only a 10 per cent duty on imports from South Korea. China would then be estopped from claiming that most favoured nation treatment applied, and thus estopped from claiming the duty on its textiles imported into Canada should be 10 per cent. It is of the very essence of estoppel that actions by a party not intending to create legal relations do in fact have legal effects for that party.¹¹³ Thus, by taking on political commitments, a state may not be able to rely on its legal rights when a party which complies with soft law invokes estoppel.

However, where one state demands that another fulfil political commitments, it can only rely on political processes.¹¹⁴ The political enforcement of soft law has received some attention,¹¹⁵ and its implications should not be underestimated.

c. *Abuse of Rights*

The qualifying effect of soft law also extends to acts which are contrary to norms of soft law. Here the acts are given a quality which may have definite legal effects. A state contradicting non-legal soft law to which it is party might be unable to rely on legal rights, although it acts in pursuit of them, as a result of the doctrine of abuse of rights. Of course, not all conduct that is contrary to soft law and in pursuit of legal rights can be said to be

¹¹¹See K. Marek, "Le problème des sources du droit international dans l'arrêt sur le Plateau Continental de la Mer du Nord" 6 *Rev. belge de dr. int.* 44 at 65.

¹¹²Trade Agreement between the Government of Canada and the Government of the People's Republic of China, Peking, 13 October 1973, 1973/31 C.T.S., Article II.

¹¹³Virally, *supra*, note 1 at 343-4.

¹¹⁴*Ibid.* at 348.

¹¹⁵*Ibid.*; Eisemann, *supra*, note 38 at 347; Schachter, *supra*, note 38 at 301.

an abuse of rights.¹¹⁶ It should be conduct that at least shows bad faith or, more likely, malice or arbitrariness.

d. Violation of a Treaty Constituting an International Organization

Where the act is contrary to a resolution or a decision of an international organization, it may be said that there is a violation of the treaty which constitutes the international organization.¹¹⁷ A similar argument, based on U.N. General Assembly Resolutions, was used against South Africa with respect to *apartheid*. It is most likely that, for this argument to have any reasonable chance of success, there would have to be several violations. More probably, the violations should be persistent. However, it would seem that, before such a point is reached, it would become clear that the state has manifested the will to abandon the soft law norm.¹¹⁸ Where the soft law is non-legal, the result is that implicit rejection of the soft law norm will precede any violation of the constituting treaty of the international organization.¹¹⁹ The example of South Africa is somewhat different because it cannot be said that South Africa was ever a party to the soft law norm against *apartheid*. Although South Africa was a member of the U.N., it persistently objected to the resolutions which created the norm.

e. Recognition in Conflict of Law Rules

A specific type of act which is qualified by soft law is national legislation. Qualification has specific legal effects that extend beyond legitimization, although certainly it is important that other parties to soft law can have no objection to enacting national law in accordance with its provisions, provided the law is no more specific than the soft law.¹²⁰ Once enacted within the national law of one state, it may then be incumbent on other states

¹¹⁶F.A. Mann, "Money in Public International Law" (1959) 96 *Recueil des Cours* 1 at 92 gives a specific use of the abuse of rights doctrine, or "absence of reasonable relation to a legitimate end", to challenge a state's monetary powers in international law. See also *ibid.* at 93-4 n. 5. But see Brownlie, *supra*, note 18 at 445 where he states that "it may be said that the doctrine is a useful agent in the progressive development of the law but that, as a general principle, it does not exist in positive law". However, Brownlie admits, *ibid.* at 445, that it may explain the genesis of rules of positive law such as the prohibition of a state's use of its own territory to cause injury with fumes to the territory of another, and, *ibid.* at 444, that it is not unreasonable to regard the principle of abuse of rights as a general principle of law. See Brownlie, *ibid.* at 444 n. 2 for collected authorities on the abuse of rights in international law.

¹¹⁷Bothe, *supra*, note 5 at 88.

¹¹⁸Schachter, *supra*, note 38 at 304.

¹¹⁹Termination of legal soft law is more complicated. It may not be possible to imply termination of obligations because certain formalities are not fulfilled merely by acting in accord with subsequent soft law. See *supra*, note 90 and accompanying text.

¹²⁰Seidl-Hohenveldern, *supra*, note 6 at 203; Davidow and Chiles, *supra*, note 7 at 256; Horn, *supra*, note 22 at 937; Fatouros, *supra*, note 39 at 958-60.

party to soft laws to recognize the law in their conflict of law rules, or in an act of state doctrine. It is likely that no changes need be made to those rules to permit recognition of the foreign incorporation of soft law into domestic law. Rather, it seems that this may happen automatically. The result will be that national legislation of non-legal soft law will give it a subsidiary effect in *other* states.¹²¹

C. Interpretative Effect

Economic soft laws, especially precise non-legal norms, can be put to another use: interpreting international treaties;¹²² and, in national courts, interpreting contracts or national business law.¹²³ National courts and administrative bodies may even give direct effect to the soft law norms as reflecting the policies of their government.¹²⁴ Some authors feel, however, that soft laws cannot directly affect the nationals of any state.¹²⁵ Of course, the effect depends on national law and on the mandate of the user.

International or national decision makers may also use soft law to interpret present rules of international law, even if the soft law is non-legal. As norms which have already been articulated, soft law can be attractive to a decision maker. It might be said that the soft law articulates a prior law, even though the articulation is non-legal in form. On the other hand, the soft law articulation may reflect a nascent law which has since crystallized as described by the soft law. This was the decision of the arbitrator in the international arbitration *Texaco v. Libya*. He found General Assembly Resolution 1803 (XVII) to have since crystallized and, as a result, to reflect custom.¹²⁶

D. Political Effect

1. Use as Law

Persons are perhaps most affected by the political effects of soft law. Persons are subjects of national law, but are generally not considered to possess legal personality under international law. Thus, even where some

¹²¹Seidl-Hohenveldern, *ibid.* at 194-200; Davidow and Chiles, *ibid.* at 262.

¹²²Seidl-Hohenveldern, *ibid.* at 201.

¹²³Horn, *supra*, note 22 at 937.

¹²⁴Fatouros, *supra*, note 39 at 958-60.

¹²⁵For example, Seidl-Hohenveldern, *supra*, note 6 at 198.

¹²⁶In *Compensation for Nationalized Property* (U.S.A. v. Libya), reprinted in (1977) 17 I.L.M. 1, the arbitrator held that a General Assembly resolution had in fact crystallized into nascent law.

soft law addresses them directly,¹²⁷ they cannot acquire any legal benefits from it under international law. However, they may acquire benefits from it in national law. On the other hand, persons will suffer the effects when states adopt soft law. For example, they may be subject to the extraterritorial reach of states in which they do business or are located.¹²⁸

Political effects of soft law are vital to many persons. Persons may follow soft law in an effort to establish good public or client relations, or in an attempt to assure future government intervention on their behalf. Soft law might be complied with in order to assure access to investment insurance or export/import financing that states which are party to the soft law may control.¹²⁹ Depending on the particular circumstances, these gains may be as important to the person as legal effects are to the jurist. A natural consequence of soft law is that persons put new limits on their own conduct. The fact that soft law is the reason they do so is a political effect that ought to interest the jurist.

The political effect of soft law results from both the legal and non-legal forms. One such political effect is that non-legal soft law norms will be used as law. One might argue that this is a legal effect of soft law. However, unlike the effects described in the sections above, the use of soft law norms in national law is purely subjective. In other words, the legal effects of soft law are those that flow from the adopted soft law norm without any further action by the state affected. It is as a direct result of the soft law, or as a result of the intervening act of another, that the legal effect on the affected state occurs. The political effects of soft law are those that flow from a decision subsequent to the formulation of soft law and may be a decision of parties or non-parties. Thus, a political effect of soft law is that it may be incorporated into a treaty or a contract, or enacted as a national law and thus made legally binding.

The uses of soft law norms as law result in their being subject to objective interpretation by a third party. In this way, then, the essential nature of soft law — its subjectivity — is altered. Nevertheless, one can argue that where it is altered by the subjective choice of a party to the soft law, the party has merely exercised its subjective rights.

¹²⁷Commission on Transnational Corporations, *Report of the Intergovernmental Working Group on a Code of Conduct on its Fourteenth Session*, 26 June 1981, U.N. Doc. E/C. 10/79 [hereinafter *Report*].

¹²⁸See *supra*, note 99 and accompanying text.

¹²⁹See *infra*, notes 174-7 and accompanying text.

a. *National Law*

An example of the use of non-legal soft law in national law is the voluntary inclusion by the parties to a contract of the norms as terms of their agreement. A state and a multinational enterprise could contract to include a version of the provision on transfer pricing of the Code of Conduct on Transnational Corporations within an investment agreement.¹³⁰ Were it not for the choice of each party there would be no legal effect. Thus, the fact that some soft law norms are suitable as contractual provisions results in the political effect that they may be so used.

Another occurrence of the use of soft law norms in national law, particularly the precise non-legal norms, is the enactment of them as part of the domestic law of a state. Earlier discussion concerned the position of other states with respect to the state legislating a soft law norm; now, the focus is on the effect that an accord on a soft law norm has in encouraging a state to legislate the same norm into its internal law. This use of soft law norms results again from the choice of a state itself and affects its nationals and perhaps itself. Such a use may also have legal consequences in other states, for example, those caused by the normal operation of conflicts of law rules.

b. *International Law*

An example of the use of non-legal soft law as international law is the incorporation by the parties into a legally binding treaty of some provisions that were originally formulated in a non-legal soft law. Legal soft law may also be incorporated into more widely subscribed treaties. For example, consultation provisions from bilateral treaties are the origin of a similar provision in the G.A.T.T.¹³¹ Because of the legal nature of the subsequent agreement, one may be tempted to overlook the origin of the norms contained therein.

Non-legal soft law norms might also be used as a basis of an arbitral decision, as part of "commercial custom" or where the arbitrator is empowered to sit as an *amiable compositeur*. Even the International Court of Justice could consider soft law applicable, if empowered by the parties in their *compromis* to decide a case *ex aequo et bono* under article 38(2) of the Statute of the International Court of Justice.

¹³⁰As found in art. 30 of the *Report, supra*, note 127 at 5.

¹³¹R.E. Hudec, "Retaliation Against 'Unreasonable' Foreign Trade Practices: The New Section 301 and G.A.T.T. Nullification and Impairment" (1975) 59 *Minn. L. Rev.* 461 at 464-6.

2. Coercion of Conformity

It must be emphasized that the political effect of soft law norms is not limited to the parties to the soft law. The soft law norms may be used by persons in dealings with each other, or may be used by states or nationals of states that did not participate in the soft law's creation and did not subsequently adopt it. There can be no doubt that, as a result of a political choice, there is a legal effect given the norm when used by parties to a contract, by a decision maker or by a law maker. However, those who are not subject to the law that incorporates the soft law norms may only be affected in some other way by soft law, such as by its qualifying effect, or by its delegitimizing effect on other norms that bind the non-party.

a. *Political Benefits*

Non-parties to the soft law may also be encouraged to act in accord with it. They may do so to reap political rewards, or to avoid the political consequences of not acting in accord. It is often these same motivations that induce a state to legislate, or parties to contract in conformity with soft law. Thus, this can be called a political effect of soft law. There is no legal coercion to follow non-legal soft law, only political coercion. However, there may be some legal benefits and legal liabilities which result from acting in accordance with any soft law.

b. *Collective Legitimization*

Non-parties may conform to the soft law norm because, where there is no other norm, any standard has a certain attractiveness. This may especially be the case with a norm that has been "collectively legitimized" by at least some members of international society. The cogency of the "collective legitimation" depends on the number, importance and diversity of the states that have become parties to the soft law norm. Thus, a norm adopted by consensus of the U.N. General Assembly can be said to express the "collective will" of international society, because of the close-to-universal membership of the Assembly.¹³² For this reason, some even consider certain of these types of resolutions as a formal source of international law.¹³³ The

¹³²K. Skubiszewski, "Are Resolutions of the U.N. General Assembly a Source of Law?" (1981) 36 *Panstwo i Prawo* 19 at 25 [in Polish with summary in English, French and Russian].

¹³³*Ibid.* at 28. Skubiszewski says that they are not binding because they would then have to constitute a new source of international law, and a new source of law can only be created through an old source of international law. However, he cites Cheng and Engel as being proponents of the view that U.N. General Assembly resolutions may create international law. English language readers will be most familiar with B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law" (1965) 5 *Indian J. Int'l L.* 23.

better view would seem to be that since the General Assembly does not have legislative competence, what it cannot do by majority vote it cannot do by unanimity or consensus.¹³⁴ Instead, General Assembly resolutions have the political effect of bringing pressure to bear upon all states, even objecting ones, and of formulating shared expectations.¹³⁵ In essence, this is "collective legitimization". It gives a political value, in both international relations and domestic politics, to actions which form law or have legal consequences.¹³⁶

3. Consistency and Clarity

Expectations raised by soft law can be political in nature even with respect to legal forms of soft law. The expectations are that the subjective interpretation of soft law norms will be consistent and made with the mutual benefit of the parties in mind. The political effect of creating expectations gives legal effects to non-legal soft law. The precise extent of the expectations, and thus the legal effects, will vary with the content, form and circumstances surrounding the formulation of the soft law.

Soft law by its nature is the articulation of a norm. Thus, depending on its precision, it also has a significant political effect in guiding state practice, clarifying nascent law and accelerating potential state practice creating law.¹³⁷ This result is due to the qualifying (legal) effect of soft law. The political decision of how to act with respect to nascent law is better understood once practice is qualified. It is better understood by both international society and by the maker of the decision.

4. Guide for Negotiation and Settlement

Soft law may also guide the negotiation and settlement of disputes. This political effect is likely an off-shoot of the "collective legitimization" effect, although further removed. However, it works in practice,¹³⁸ and an objective standard can potentially lend credence to a state's position:

The norm will establish new standards of relevance for the negotiations between the parties. Certain arguments will be ruled out The norm will establish

¹³⁴Seidl-Hohenveldern, *supra*, note 6 at 185; Skubiszewski, *supra*, note 132 at 22; Garibaldi, *supra*, note 15 at 325-7; G. Arangio-Ruiz, *The U.N. Declaration on Friendly Relations and the System of Sources of International Law* (1979) at 298-9.

¹³⁵Bothe, *supra* note 5 at 68-77.

¹³⁶T.L. Brewer, "Collective Legitimization in International Organizations: Concept and Practice" (1972) 2 Den. J. Int'l L. & Pol. 73 at 88. Brewer writes specifically about collective legitimization of national laws by international organizations but recognizes the implications for international law as well. VerLoren van Themaat, *supra*, note 77 at 44, describes the same phenomenon in the international sphere.

¹³⁷Joyner, *supra*, note 104 at 459.

¹³⁸R. Blanpain, *The Badger Case and the O.E.C.D. Guidelines for Multinational Enterprises* (1977) at 127.

the legal framework within which the dispute about its application may be resolved. It will establish presumptions, indicate the prevailing trend of opinion, provide a guiding principle which may have a certain inherent appeal for the parties, and channel negotiation and settlement into legal and ordered paths.¹³⁹

Essentially, two notions are contained in the preceding description of the usefulness of soft law in the settlement of disputes. First, it will carry a certain weight, and second, it will often organize its own use. "Collective legitimization" is another way to describe the weight of the soft law norm. But the organization that a soft law norm may provide, particularly in a lacuna, can be described as a legal effect. A lawyer as a social engineer must produce machinery to resolve differences or disputes between states.¹⁴⁰ Where dispute resolution is organized, settlement is more likely to be peaceful. The structure of soft law assists in this aim.

The objective aspect of soft law may also facilitate the peaceful resolution of disputes. Soft law prevents an escalation of differences to a greater extent than would otherwise occur in reciprocal diplomacy.¹⁴¹ The greater the precision in the soft law norm, the greater this effect is likely to be.

III. Interpretation of Soft Law and Resulting Control

This section concerns the implications of the retention by states of discretion over either the content or the exigibility of their obligations. The discretionary element of the obligation is its subjective element. The element which is beyond a states's discretion is the objective element. It is only the objective element which may be interpreted by someone other than the person obliged by soft law.¹⁴² The more an obligation is discretionary, the less it is objective. Thus, the more an obligation is subjective, the fewer are the cases in which another has the authority to interpret compliance with soft law, and therefore the parties to the soft law are controlled less. Both the authority to interpret and the degree of control are the result of the formulation of the soft law norms.

It can be said that the acceptance of an obligation does not imply the acceptance of the control of its application.¹⁴³ However, by agreeing to an obligation a party cannot object to another complaining about non-compliance. It may, however, object to the way in which the complaint was

¹³⁹Baxter, *supra*, note 29 at 565.

¹⁴⁰*Ibid.* at 566.

¹⁴¹Fatouros, *supra*, note 39 at 960-1.

¹⁴²See, *supra*, notes 63-76, and accompanying text.

¹⁴³J. Charpentier, "Le fondement du pouvoir de contrôle des organisations internationales" in *Mélanges Burdeau* (1977) 999 at 1001.

formulated, or how the surveillance of compliance was carried out. There is usually no agreement to any form of control in soft law save an implicit agreement to control based on the interpretation of the recorded form of the soft law obligation. The implicit agreement is derived from the mere formulation of the words of the soft law, which set some standards that are objective. It can be seen that the two notions of control and interpretation coincide to a large degree. In soft law, he who has the authority to interpret will usually be the only one who will be able to control, and only by interpretation of the soft law.

The question of interpretation begins with the constraint of the norm. It is true that the legal or non-legal form tends to determine the interpretation problems of that type of soft law. As we have seen, legal norms which attempt to bridge differences in economic development, economic systems and national laws tend to have a very vague content. On the other hand, non-legal soft law norms are at times very specific and would tend to be objective in nature were it not for the fact that their form precludes definite objective determination. But the constraint depends on the content, not the legal or non-legal form.

The constraint of the norm depends on the precision of the provision, the kind of action prescribed, and any implied or explicit escape clauses.¹⁴⁴ The less precise the norm, the greater is the discretion of the addressee of the obligation to interpret subjectively the content of the obligation. The kind of action prescribed, together with the degree to which the burden of proof is placed upon the addressee, also limit the subjective interpretation of the content of the obligation. The burden of proof can range from discharging a standard of diligence to providing an absolute guarantee that a state of circumstances will be achieved.¹⁴⁵ Soft law obligations can seldom be said to impose a burden of proof greater than that of diligence.

On the other hand, the escape clause raises the question of the interpretation of the exigibility of the obligation and not its content. Although the norm may be objective, the requirement to comply is subjective where the escape clause applies. Where the addressee of a norm may interpret the escape clause, it is a defence to non-compliance with the norm. Since this is usually the case, interpretation by another is a phenomenon that only

¹⁴⁴Virally, *supra*, note 25 at 31.

¹⁴⁵In the Civil Law the concept is known as the "intensity" of the obligation. There are three basic standards recognized: 1) diligence; 2) result; and 3) guarantee. The diligence standard requires proof, by he who asserts, that the defendant did not act prudently. The result standard only requires proof of the occurrence of an event by he who asserts but allows the defendant to escape liability by proof of impossibility or a fortuitous event. The guarantee standard requires the same proof by he who asserts as does the result standard, but does not allow the defendant any exculpation.

affects the content of an obligation, and not its exigibility. Thus, the focus below is on the interpretation of content.

In a similar way, one might think that the non-legal nature of some soft law norms is an escape clause. But that is quite different. While it is true that the norm may not be exigible, it is only the case that the norm is not exigible by legal sanctions. With respect to non-legal soft law, it was part of the expectations of the parties to the soft law that the norm would be observed but that compliance could not be legally enforced. Thus political sanctions are still appropriate. In the case of a real escape clause, the norm is not exigible by any means.¹⁴⁶

Persons (enterprises and individuals) may seem to merit a special place in the examination of interpretation, because while persons are the addressees of some soft law norms,¹⁴⁷ they are quite clearly the subjects of national laws. Naturally, persons will have an interest in the interpretation of obligations that apply directly to them; they will also have an interest in the norms addressed to their state with respect to treatment of persons, and norms addressed to other states with respect to treatment of foreign persons. However, their position with respect to interpretation and control seems to be similar enough that one does not constantly have to distinguish between persons and states.

Generally, questions of interpretation and control revolve around who has the authority to interpret the soft law: whether one interprets one's own obligation, or whether another with similar obligations interprets it, or, finally, whether an independent third party interprets it. There are only these three cases as long as there is one type of addressee of the norm. However, because there are two types of addressees of soft law, states and persons, a further case is added to the analysis: the question of interpretation of the norm by someone with different obligations. This type of interpretation arises also if distinctions are made in the soft law between states. Developed and developing states often have different obligations for example.

Interpretation sometimes has the effect of making the objective element of a soft law obligation greater. The objective element will generally be open to interpretation by any party, and by a tribunal having jurisdiction if the obligation is a legal one. The analysis below deals largely with how part of the subjective element of the obligation is made objective, and for whom. Reciprocal considerations, and the expectation that soft law will be observed, are usually the bases upon which soft law is made more objective.

¹⁴⁶See, *supra*, notes 64-9 and accompanying text.

¹⁴⁷An example is the Code of Conduct for Transnational Corporations in *Report, supra*, note 127.

A. *Interpretation of Obligations by the Party Bound*

Soft law obligations are subjective to a large degree. It is this subjective element that one interprets when one interprets one's own obligation. There is much less room given to persons to interpret their own obligations than is sometimes the case for states. This may be due in part to the limited input persons are allowed in the formation of soft law norms, and also to the fact that they cannot be said to be parties to it in quite the same sense as are states. Whatever the reasons, the result is that the norms relating to the duties of persons are quite precise, and thus non-compliance with them is objectively ascertainable.

A prime example of this may be seen in the 1976 O.E.C.D. *Declaration and Decision*.¹⁴⁸ States are bound under the *Decision*¹⁴⁹ to duties which are legal in nature. They are to provide information to the O.E.C.D., and to notify it of practices contrary to a national treatment standard. O.E.C.D. members¹⁵⁰ are also to consult with each other in a special forum provided by the Organization. The *Declaration* and its Appendix set out the substantive reciprocal *quid pro quo*. Therein it was stated that states "should" accord national treatment to foreign controlled enterprises in their territory subject to an escape clause. On the other hand, multinational enterprises "should" take into account various general policies of states in which they operate, as well as comply with norms whose objective content is great:

[I]n the context of *bona fide* negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organize, enterprises should not threaten to utilise a capacity to transfer the whole or part of an operating unit from the country concerned in order to influence unfairly those negotiations or to hinder the exercise of a right to organise. . . .¹⁵¹

There seems to be much less latitude given to persons addressed in soft law norms than often is given to states. This removes much of the interpretative function from these persons. They are also subject to a stricter kind of control because there is a more objective and ascertainable standard upon which compliance with the content of the obligation may be determined.

States often take on extremely vague legal soft law obligations. For example, in the Framework Agreement between Canada and the European

¹⁴⁸See *Declaration, supra*, note 33 and *Decision, supra*, note 71.

¹⁴⁹Pursuant to articles 5 and 6 of the *Convention on the Organisation for Economic Co-operation and Development*, 12 U.S.T. 1728, T.I.A.S. 4891 (14 December 1960).

¹⁵⁰Until March 1981, Turkey had not adopted these rules. See *Declaration*, note 33 at 977.

¹⁵¹See paragraph 8 in the section entitled "Employment and Industrial Relations" in the Appendix to the *Declaration, ibid*. This provision has been subsequently amended. See O.E.C.D., *International Investment and Multinational Enterprises* (1979).

Economic Community (E.E.C.)¹⁵² the parties agreed to "take fully into account their respective interests and needs regarding access to and further processing of resources".¹⁵³

While it is clear what items are to be taken into account, the weight to be ascribed to them is left completely to the discretion of the state taking them into account. It is a very subjective provision. There is no result that need be achieved or guaranteed, nor is there any control or objective way to ascertain whether the party has indeed taken the factors into account. The best that can be expected is that a party consult and review these matters with the other party pursuant to Article II(3) of the Framework Agreement.¹⁵⁴ This latter provision at least ensures that the one party may make another aware of its interest and needs. The provision still leaves completely to the other party the assignment of weight to those factors.

Where a party subjectively interprets its obligation, the control exercised by a provision depends upon the good will of the party. Thus, as a general proposition, there is greater control of persons by soft law norms than there is of states, because subjective interpretation by persons is more often limited.

B. Interpretation by Another Party Subject to the Same Obligations

This is the only case in which one must consider the interpretation of both parts of a soft law obligation. It may be argued that a party subject to the same obligation should credibly be able to interpret the content of another party's subjective obligation. Where it has the same obligation, a party interpreting another's subjective obligation will basically be saying: "I would act in this way in these circumstances, so I expect you to do so now." The result is that the party interpreting the other's obligation makes its *own* more objective. Furthermore, compliance with the interpretation has clear consequences. Compliance constitutes state practice sufficient for the formation of custom, and perhaps even state practice showing *opinio juris*. If the obligation arose from a treaty law norm, then it could be said that compliance with another state's interpretation of the norm is evidence of the understanding of the parties as to the meaning of the treaty's terms.

It must be pointed out, however, that interpretation of the subjective part of another party's obligation, and the finding of non-compliance as a result, cannot be a basis for any sanctions, because they would be impossible to justify objectively. Thus, the theory of the interpretation of the subjective

¹⁵²*Supra*, note 31.

¹⁵³*Ibid.*, Article II(1)(c).

¹⁵⁴*Ibid.*

part of another's obligation is a concept of limited usefulness. It is otherwise with respect to the objective part of the obligation. Here, there is more effective control and a potential basis for retaliatory action on non-compliance with the norm.

However, because one has the same obligation, the interpretation of a norm to determine compliance by another party has the reciprocal effect of subjecting one's own compliance to scrutiny on the same standard. This may dissuade a party subject to the same obligations from resorting to interpretation. There is no reason to think that the effect would be different between persons than between states.

A major problem with the idea that one may interpret another's subjective obligation is that such an interpretation changes the subjective nature of an obligation to an objective one. This might seem to undermine the usefulness of soft law considering that soft law serves to bridge differences that law cannot bridge, without a large amount of subjective interpretation left to the obliged. However, it is only the subjective nature of one's own obligation that changes by this interpretation, so the objection is weak. States have the power to retain their subjectivity. However, they will be discouraged from interpreting an obligation that binds them as well, because by declaring the extent of the obligation for another party, they make the obligation more subjective for themselves, and thus lose some of their subjective power. Nevertheless, they gain little because their interpretation of the subjective element of another's obligation cannot bind without the other's consent.

The logic which allows a party with the same obligation to interpret the subjective element of the content of another's obligation applies *a fortiori* to allow it to interpret the objective element of the content. The former's interpretation of the objective element will certainly have the effect of holding its own obligation up to the same standard of scrutiny. However, finding non-compliance will justify sanctions, whether or not the other party agrees with the interpretation, as is generally the case with the objective part of soft law obligations.

C. Interpretation by Another Party Not Subject to the Same Obligations

There are two types of addressees of soft law obligations, namely, states and persons. There are also obligations between states, and between persons, as well as obligations between states and persons. We have treated the obligations persons owe to persons and states owe to states. Even these obligations should be reconsidered here, in so far as states interpret person-to-person obligations and persons interpret state-to-state obligations.

The difference between the two cases is that person-to-person obligations are clearly a subject of national law, while state-to-state obligations are clearly a subject of international law. While the state has the power to affect person-to-person relations by means of law or politics, persons are rarely allowed to affect state-to-state relations by means of law. There are exceptions. For example, in the United States, section 301 of the *Trade Act* allows persons recourse to a procedure by which they may convince the President of the country to take remedial actions against another state.¹⁵⁵ Viewed from this perspective, the interpretation of non-compliance with state-to-state obligations by persons, as well as person-to-person obligations by states, is a phenomenon of interest to the jurist.

The problem in these two cases is that the interpreter is not the direct beneficiary of the obligation; the obligation is not owed to it. The effect is that the interpreter's recourse to sanctions cannot be justified except on some other basis, that is, one not within the ambit of the soft law provision being interpreted. In the result, a state may justify sanctions affecting person-to-person obligations on the basis of its sovereign powers, while a person will likely not be able to justify recourse affecting state-to-state relations, even if the person actually has the power to do so. Where the justifications do not flow out of interpretations of the same soft law, there is what can only be described as a political linkage of causes and effects. This emphasizes the need for the jurist to distinguish the authority to interpret from the actual imposition of sanctions. While sanctions may be imposed by one who feels that the soft law was not complied with, the question of who may interpret the norm also determines who may justify his sanctions on the basis of it.

Nevertheless, a sanction may be linked in fact to the soft law, although not justified by it. This possibility gives a party with different obligations the ability to influence, to some degree at least, the compliance of the obliged party with the soft law norm. But this is not control that results from the soft law. It depends on other powers, which may be legal or non-legal.

Cases where the interpreter of an obligation is owed the obligation, but does not owe a corresponding one, include those where a state interprets a person's obligation and a person interprets a state's obligation. In these cases, the control which the interpreter exercises depends on the reciprocal obligations which it owes in return for being a beneficiary of the soft law provision. These reciprocal obligations may not be within the same instrument creating the provision which is being interpreted. It may thus be difficult to determine the effectiveness of the control by such interpretation. It may

¹⁵⁵*Trade Act of 1974*, 19 U.S.C. 2411 (d)1 (Supp. IV 1980).

be relatively easy, however, to assess the influence which sanctions may have on the conduct of the obligated party.

Those who interpret obligations of another which they do not share have no basis upon which they may purport to interpret the subjective part of the other's obligation. It is only the objective aspect that they may interpret. This restricts the effectiveness of control over compliance with the soft law norm. Here we see that the constraint of the soft law norm largely determines how effectively control may be exercised by others.

However, this type of interpretation is particularly ineffective in controlling compliance. The interpretation of the other's obligation would tend to be more strict than would be the case if the interpreter had the same obligation. The interpreter here tries to maximize his benefits, but his interpretation has absolutely no consequence for his own actions. It can be concluded that this kind of interpretation is not very credible. This tends to weaken the effectiveness of control that the interpretation of compliance might otherwise have.

D. Interpretation by an International Organization

International bodies are treated separately from persons and states, because, while an international organization could be considered a "beneficiary" of certain soft law obligations, it arrives at decisions by committee, and thus is generally not representative of only one interest. At the same time, international organizations may hold a large amount of power and can therefore very effectively sanction those obliged by soft law.

The International Monetary Fund (I.M.F.) "Standby Arrangement" is an example. Under this arrangement, the I.M.F. provides states with liquidity assistance, conditional on compliance with certain economic policies.¹⁵⁶ Interpretation by the I.M.F. can lead to drastic sanctions. Further assistance may be denied, and thus a very effective enforcement is possible. However, the enforcement of only the objectively ascertainable part of the obligations is exercised.

When international organizations are the origin of soft law norms, they are in a position quite different from that of parties to it. The parties may find their soft law obligations made more objective without having caused the change themselves. The obligations can be made more precise by subsequent accord, or perhaps be "clarified" by an agreed procedure, as is the case under the O.E.C.D. Council's Decision on Inter-Governmental Consultation Procedures on the Guidelines for Multinational Enterprises.¹⁵⁷

¹⁵⁶Bothe, *supra*, note 5 at 82-3; see also Gold, *supra*, note 7 at 444.

¹⁵⁷*Supra*, note 33.

This type of interpretation affects parties to soft law. It could not be undertaken outside an international organization, unless the soft law norm is used as law and is consequently susceptible of interpretation by an outside decision maker. Thus, review processes in international organizations of soft law norms that they have created are an important interpretative function.

Subjective parts of the obligation may become objective in character as a result of interpretation by the international organization which originated the soft law norm. Parties to the soft law norm can be said to have consented to this by their consent to the review process. There is no separate consent each time an obligation is made more objective. For this reason, the interpretation by international organizations must be kept distinct from interpretation by other actors in international relations. Of course, the interpretative and norm-creating functions are very closely intertwined in international organizations.

However, as international organizations are often composed of government representatives or government appointees, they generally refrain from interpreting obligations of persons, the subjects of national law. But interpretations of the soft law norms may have the effect of interpreting the obligations of persons where they are the addressees of those norms. Thus, in *The Badger Case*,¹⁵⁸ the O.E.C.D. Committee on International Investment and Multinational Enterprises (C.I.M.E.) "clarified" the O.E.C.D. Guidelines on Multinational Enterprises, with the result that the dispute was settled. The interpretation of the C.I.M.E. did not assess compliance, but merely addressed questions of principle.¹⁵⁹ But "the way in which the discussion [in the C.I.M.E.] evolves may indicate whether a certain behaviour coincides with the Guidelines or not".¹⁶⁰ The C.I.M.E. took pains to point out that it was not deciding on the merits of the case.¹⁶¹ However, its interpretation of the O.E.C.D. Guidelines clearly had an effect on the settlement of the dispute, and thus demonstrated effective control of the party to the soft law obligation.

The constitution of the international organization will be directly relevant to the efficiency of the control which it can exercise. An intergovernmental organization is composed of state representatives and is more likely to have the resources of the state behind it. In this kind of organization, control is likely to be more efficient. A non-governmental organization is composed of persons in their personal capacity. While its interpretation may be more objective or devoid of political motivations, and thus perhaps

¹⁵⁸Blanpain, *supra*, note 138.

¹⁵⁹*Ibid.* at 129.

¹⁶⁰*Ibid.*

¹⁶¹*Ibid.*

more credible, such interpretation lacks the weight of states' action behind it and is therefore less likely to effect control of compliance with norms.

IV. Sanctions for the Coercion of Compliance

It is trite to point out that the form of a soft law norm will determine whether certain sanctions are available. Legal obligations, if breached, will bring down the whole range of sanctions recognized in the law which governs the obligation. However, we have seen that the legal forms of soft law are not open to effective objective interpretation. Thus, non-compliance often cannot be determined, and the legal form does not confer any advantage, from a practical point of view, with respect to the availability of sanctions. As a matter of fact, the contrary is true. The legal form often inhibits states from agreeing to very specific economic obligations. Therefore, the non-legal forms of soft law may be very precise and greatly constraining, as well as much less subjective. This is true, at least with respect to the content of the obligation they may contain,¹⁶² but perhaps not with respect to their exigibility.

Four types of sanctions will be examined: those that emanate from persons with respect to states, states with respect to persons, states with respect to states, and international organizations with respect to states. There may well be interesting sanctions that persons impose on persons, but these will be omitted as they are interrelated with national laws and are, as such, beyond the scope of this paper. There may also be complex and interesting chains of sanctions. For example, a state may sanction another state which may then sanction a person. In the case of such chain reactions, the four types of sanctions which this study examines ought to apply as long as each connected sanction may be justified in the same way as would be the case were it the only one.

Some authors suggest that the best one can hope for with respect to non-legal soft law is that the state resign from the agreement if it can no longer follow it.¹⁶³ Once this has occurred, the situations with respect to that state would return to the *status quo*.¹⁶⁴ But this would tend to minimize the effect of the expectations of other parties to the soft law. Those expectations are related most directly to the concept of reciprocity:

A legal norm against a state's immediate interests may be obeyed either because of the expectation of similar reciprocal compliance in the future or because of

¹⁶²See Baxter, *supra*, note 29 at 564-5.

¹⁶³Eisemann, *supra*, note 38 at 328.

¹⁶⁴*Ibid.* at 336.

the expectation of present lateral compliance on a different international legal issue.¹⁶⁵

There is no reason that expectations or actions would differ with respect to non-legal forms of soft law, except perhaps in degree. All that is necessary for sanctions to be triggered on the basis of reciprocity is a determination of non-compliance.¹⁶⁶ This determination, as we have seen, is a result of the interpretative function. Only interpretation of the objective part of the obligation justifies sanctions. The basis of the sanctions is reciprocity.¹⁶⁷ Thus, the limitations put on interpretation likewise limit the reciprocal justification of sanctions.

A. *Sanctions Persons Use Against States*

The concept of reciprocity should naturally result in an equivalent to *exceptio non adimpleti contractus*. By virtue of the defence of *non adimpleti contractus*, a party to a contract is not bound to perform its obligations if the other party has breached.¹⁶⁸ Similarly, a party to soft law is no longer bound by its soft law obligations with respect to a party who has breached the soft law instrument. This equivalent to *non adimpleti contractus* is based on the notion that the soft law obligations are reciprocal. There is no good reason to believe that persons could not also benefit from this application of reciprocity, where it is assumed that states could.¹⁶⁹

It may be argued that persons are not party to the soft law, although their conduct is regulated by it.¹⁷⁰ It may also be argued that, not being party to the agreement, they cannot resign from it. This argument would lead to the conclusion that one addressee is to be treated differently, although the instrument makes no distinction between addressees. Further, it would allow a non-complying state to benefit nevertheless from the compliance by persons with the soft law. To prevent this result one must conclude by analogy to *non adimpleti contractus*, that persons can resign from performing obligations under soft law with respect to the non-complying state.

A person may resort to actions that had been restricted by analogy to *non adimpleti contractus*. Thus, under the 1976 O.E.C.D. Guidelines, a multinational enterprise which "should" supply information to its subsidiaries to satisfy local authorities¹⁷¹ may refuse to do so once it is denied

¹⁶⁵D'Amato, *supra*, note 18 at 27-8.

¹⁶⁶Virally, *supra*, note 1 at 335.

¹⁶⁷*Ibid.*

¹⁶⁸*Black's Law Dictionary*, 5th ed. (1979) at 503.

¹⁶⁹See *Modalities*, *supra*, note 77.

¹⁷⁰Fatouros, *supra*, note 39 at 943.

¹⁷¹See the section entitled "General Policy" in *Declaration*, *supra*, note 33 at 972.

the national treatment that the state "should" provide for it.¹⁷² Because each obligation is subject to an escape clause in the form of a weak command, (*i.e.* "should") this is not a simple example. However, where the state does not provide national treatment and fails to notify the O.E.C.D. of the exception,¹⁷³ it is clear that the multinational's obligation to provide information, however weak, no longer obliges. It is true that the multinational might refuse to do so in any case, based on the escape clause. However, it would still be seen to be deviating from its primary obligation and might then encourage reciprocal deviation by the state from its primary obligation. This is not the case where deviation from the primary obligation is justified by another's breach, as opposed to the escape clause.

Some persons may have sufficient economic, or other, power to coerce a state to comply in the future or to punish a breach. To determine the breach, the person must have the authority to interpret compliance. The use of the person's power may then be justified by the state's breach. Of course, any such measures would have to comply with national law.

National laws will cause persons the greatest problems in seeking to impose sanctions. If the soft law is used as law by the state, then even the equivalent of *non adimpleti contractus* cannot be said to apply, since national legislation is unilateral. Nevertheless, because soft law is formulated by negotiation, there is the assumption of reciprocal benefits on which an analogy to *non adimpleti contractus* is based.

B. Sanctions States Use Against Persons

States also must act within the confines of their own national public law. However, states have discretionary powers in international economic relations that may well apply even if the soft law is legislated internally.

State sanction of persons that are its nationals is often encouraged by soft law. For example, the Restrictive Business Practices Code (R.B.P. Code) states:

Appropriate action should be taken in a mutually reinforcing manner at national regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations.¹⁷⁴

The state may then refrain from performing its obligations with respect to the person violating the soft law norm. The problem with this equivalent

¹⁷²*Supra*, note 67 and accompanying text.

¹⁷³See, *supra*, note 70 and accompanying text.

¹⁷⁴Section (c)(i)(1), U.N. Doc. TD/RBP/Conf./10 (1980), reprinted in (1980) 19 I.L.M. 813 at 816. See also Fikentscher, *supra*, note 99 at 583.

of *non adimpleti contractus* is that care must be taken to see that the performance of obligations in a multilateral instrument, the suspension of which is being considered, is for the sole benefit of the non-complying party. Otherwise, complying parties may be prejudiced by the suspension of performance of obligations in response to non-compliance by another, and this may cause soft law codes to be less effective than they need to be.

The problems with the suspension of performance make recourse to more direct and discretionary powers preferable to the use of the equivalent of *non adimpleti contractus*. The state can effectively sanction persons without recourse to legislation, by refusing diplomatic intervention on behalf of persons not complying with soft law.¹⁷⁵ Further, export/import bank financing for international commercial transactions may be linked to compliance with soft law, or denied on breach of it.¹⁷⁶ It is also possible that foreign investment insurance may be linked to compliance with soft law.¹⁷⁷

C. Sanctions States Use Against States

The legal form of the soft law is an important factor in determining the sanctions available to non-breaching parties. Whereas soft law in legal form may be seen as being breached when there is non-compliance, it remains an obligation on the other parties until the appropriate legal formalities have been complied with. A treaty (legal) obligation is not terminated by any non-compliance but only on a "material breach".¹⁷⁸ Where the breach is not "material", other formalities must be complied with despite one party's non-compliance. For example, a treaty normally has a minimum notice provision, express or implied, for its termination.¹⁷⁹ As compensation for the rigidity of the legal form, sanctions provided by law may be sought. However, soft law in non-legal form may be immediately suspended with respect to a breaching party, by analogy to *non adimpleti contractus*.¹⁸⁰

Other sanctions concern the possibility of recourse to counter-measures based on the failure of reciprocity. Two types of counter-measures recognized in international law are reprisals and retortion. Reprisals are a breach of international law that is justified by a prior breach of an international legal obligation by another. Retortion deals with the recourse to other measures that are not illegal in themselves, based on the prior breach of an

¹⁷⁵D.J. Plaine, "The O.E.C.D. Guidelines for Multinational Enterprises" (1977) 11 Int'l L. 339 at 344; Seidl-Hohenveldern, *supra*, note 6 at 199.

¹⁷⁶See Plaine, *ibid.* at 345; Seidl-Hohenveldern, *ibid.*

¹⁷⁷Plaine, *ibid.* at 345.

¹⁷⁸Vienna Convention on the Law of Treaties, *supra*, note 26, art. 60.

¹⁷⁹*Ibid.* Art. 56 implies a minimum 12 month notice period where none is provided in the treaty itself.

¹⁸⁰Seidl-Hohenveldern, *supra*, note 6; Bothe, *supra*, note 5 at 87-8.

international legal obligation. These concepts apply in breach of non-legal obligations as well.¹⁸¹

However, there is some debate as to whether the concept of reprisal might apply on breach of non-legal obligations in international economic law. Some authors state clearly that it does not.¹⁸² Others contend that it does apply with respect to at least some non-legal obligations. The example given for justification of the concept of reprisal is violation of an accord, such as the Yalta agreement, which is considered political and non-legal.¹⁸³ It may be argued that certain non-legal agreements dealing with vital interests of states may justify breach of international law, while those which do not touch these interests do not. The question remains whether economic interests could ever be of such vital interest to a state that it would justify a reprisal.

The U.N. study *Certain Modalities for Implementation of a Code of Conduct*¹⁸⁴ suggests that retortion is available as a recourse, but only where it is proportional. To borrow the principle of proportionality, it can be argued that reprisals for breach of international economic law are indeed justified, but must be proportional to the non-compliance of the other. This view, applied in general, tends to look at the seriousness of the non-compliance and allow reciprocal measures of equal gravity, without constraints imposed by the mere form of accord or actions taken. The concept of proportionality is flexible, and perhaps best complements the norms that we have described as "soft law", straddling, as they do, legal form. The legal form of the norm breached may be considered to be one factor in determining the gravity of the non-compliance. However, with the soft law norm it ought not to be determinative of the type of counter-measures that may be taken.

Proportional retortion is not an object of great controversy. It amounts to reciprocity in the execution of international obligations.¹⁸⁵ Retortion allows a state to justify measures, where they are not breaches of legal obligations in retaliation for breaches of soft law. It may be symmetrical. For example, the lack of national treatment by one state¹⁸⁶ of the nationals of another state may invoke a similar response to the first state's nationals. However, symmetrical retortion presupposes at least that similar circumstances exist between the two states; otherwise it would not be proportional.

¹⁸¹Virally, *supra*, note 1, 337 at 338 and 356.

¹⁸²For example, Bothe, *supra*, note 5 at 87-8.

¹⁸³Virally, *supra*, note 1 at 356.

¹⁸⁴*Supra*, note 77.

¹⁸⁵M. Virally, "Le principe de réciprocité dans le droit international contemporain" (1967) 122 *Recueil des Cours* 3 at 51.

¹⁸⁶*Declaration, supra*, note 33.

In the example, similar circumstances may appear to exist where there were similar numbers of the nationals of each state in the other. However, even where similar circumstances appear to exist, there may be a vastly different effect on one state's nationals than on those of the other state. If the nationals in one state did their only foreign business in that state, while the nationals in the other state did only some of their business there, the effects would be different. Similarly, the number of nationals present has no necessary relation to the economic value of the activity they carry out. In short, because the facts to which similar measures apply often vary, they have effects that are frequently radically different.¹⁸⁷

The inability of symmetrical reciprocity to account for various circumstances is the reason that, quite often, asymmetrical retortion is used.¹⁸⁸ Nevertheless, it must be proportional, as was discussed above. If the retortion is not proportional, then recourse may be had by the non-complying state to the doctrine of abuse of rights, in so far as it exists in international law.¹⁸⁹

The generality of the acceptance of the principles of retortion, and even reprisal, in international economic relations is evidenced by their inclusion in Article XVIII of the G.A.T.T.¹⁹⁰ The right to counter-measures is regulated by the contracting parties to the agreement, and by the principle of proportionality.

The only real difficulty with the theory of counter-measures is that in practice it seems largely ineffective in producing the desired results.¹⁹¹ Two provisions that had little effect were found in United States national law. Foreign aid was tied to the expropriation conduct of other states, and duty-free treatment was denied to countries which withheld or raised prices of vital commodities.¹⁹² Similarly, when the E.E.C. instituted protectionist measures designed to keep out United States chickens, retaliation under the G.A.T.T. also proved not to have the desired effect of either opening up the market for the chickens, or recovering compensation for the interests affected by the measures.¹⁹³ However, there seems to be little doubt that, in principle, counter-measures are available to the state in response to non-compliance by another with soft law.¹⁹⁴

¹⁸⁷Virally, *supra*, note 185 at 90.

¹⁸⁸*Ibid.* at 52.

¹⁸⁹*Ibid.* See also Eisemann, *supra*, note 38 at 347; Schachter, *supra*, note 38 at 301.

¹⁹⁰G.A.T.T., *supra*, note 8 at 252.

¹⁹¹Davidow & Chiles, *supra*, note 7 at 263.

¹⁹²*Ibid.*

¹⁹³See A.F. Lowenfeld, "Doing Unto Others... — The Chicken War Ten Years After", (1973) 4 J. Maritime L. & Comm. 599.

¹⁹⁴Seidl-Hohenveldern, *supra*, note 6 at 204.

D. *Sanctions International Organizations Use Against States*

Sanctions which international organizations may impose generally differ greatly from those available to states, as these bodies do not wield the powers that states do. However, certain organizations have greater power than some states. The I.M.F., for example, can wield immense power. If it denies further assistance for failure to comply with conditions of its assistance, a state could face a liquidity crisis. Such value deprivation, however, is perhaps the most potent sanction that any international organization can use against a state.¹⁹⁵ The constitution of many international organizations does not allow control of sufficient resources or powers for these kinds of large scale sanctions.

Some international organizations have the power to allow dispensations from legally binding norms.¹⁹⁶ Withholding such a dispensation may prove to be a very effective sanction for non-compliance with soft law norms, even non-binding ones. For example, the Commission of the E.E.C. may allow exemptions from certain violations of Article 85 of the E.E.C. Treaty.¹⁹⁷ Should it withhold exemptions to companies not complying with the Code on Restrictive Business Practices, the sanction would likely be effective to coerce compliance. This is one case where an international organization can sanction persons directly, and it arises due to the nature of the E.E.C. Treaty, which establishes a common market which from the outside may resemble that of one state. The interests of persons are protected in that treaty by giving them recourse to the Court of Justice under Article 173 or 175 of the E.E.C. Treaty. However, persons addressed by most other international organizations have no remedy against similar decisions.¹⁹⁸

More routine sanctions imposed by international organizations depend on the degree to which they are allowed to control the action of states. Normal functions, such as the collection and dissemination of information,¹⁹⁹ may have significant effects. In particular, the reporting function of international organizations is, at times, a hotly debated issue. For example, much difference in opinion is in evidence at the U.N. over whether to give a reporting function to an international body supervising the Code of Conduct for Transnational Corporations.²⁰⁰ However, the U.N. study *Certain*

¹⁹⁵Bothe, *supra*, note 5 at 88.

¹⁹⁶VerLoren van Themaat, *supra*, note 77 at 125.

¹⁹⁷Done 5 March 1957 at Rome, (1957) 298 U.N.T.S. 3, reprinted in (1957) 51 Am. J. Int'l L. 865.

¹⁹⁸Colloque, "Economic Integration and New Sources of International Law" [1971] Coll. Acad. dr. int. priv. 401 at 404-5.

¹⁹⁹Seidl-Hohenveldern, *supra*, note 6 at 175.

²⁰⁰Fatouros, *supra*, note 39 at 963-4.

*Modalities for Implementation of a Code of Conduct*²⁰¹ suggested that a Code might be enforced by means of an international organization alerting public opinion to the non-compliance with the soft law.

A report may result in considerable political pressure coming to bear upon the party failing to comply with the soft law norm.²⁰² It has thus been used as a means of implementing soft law. One instance in which it is used is the Restrictive Business Practice Code (R.B.P. Code).²⁰³ Section G of the R.B.P. Code establishes an Intergovernmental Group of Experts.²⁰⁴ Among the group's functions is to collect and disseminate information and to "make appropriate reports and recommendations".²⁰⁵

Conclusion

Soft law is distinguished by the way in which it works, and the subject matter it concerns. It is not the legal form of a soft law norm that determines the amount of control and the availability of justifiable sanctions. Sanctions may be justified, and control exercised, depending on the constraint of the norm, which is to say its precision, the action it prescribes, its burden of proof and any implied or explicit escape clauses it contains. The legal form is of secondary importance. It is the constraint of the norm that defines the element that is open to objective interpretation. The more subjective is the norm, the less is the control to which an addressee is subject. The less control to which the addressee is subject, the fewer are the situations in which sanctions against it may be justified.

The essence of an enforceable norm is its objectivity. Only its objective portion is subject to interpretation. In addition, it is only on the objective portion of the norm that sanctions against a non-complying party may be justified. Sanctions justified on a basis other than the soft law norm which is breached do not form part of the sanctions for non-compliance with soft law.

Soft law has a much greater subjective component than does "harder" law. The subjective component is the key characteristic of soft law whether it is legal or non-legal in form. Interpretation of the subjective element can only be justified by another party which shares the same obligation. Even in that case, however, the result of the interpretation depends entirely on the party which is bound. It cannot be said, even in this case, that the interpretation of the subjective component of another's obligation justifies

²⁰¹*Supra*, note 77.

²⁰²Fikentscher, *supra*, note 99 at 587-8.

²⁰³*Supra*, note 99.

²⁰⁴*Ibid.* at 822.

²⁰⁵*Ibid.*, paras 3(f) and (g), 822. See also Fikentscher, *supra*, note 99 at 587.

sanctions of any sort. But it may be said that it does effect a certain control. An interesting side effect is that, by exercising such control, the interpreting party makes his own obligation more objective.

The subject matter of economic soft law is either international co-operation or rules in areas that were previously considered to be wholly within national jurisdiction. Codes of conduct deal specifically with either the conduct, or regulation by states of persons who are international in nature or whose acts are international in scope. In this way, persons are integrated into the pre-existing systems of national²⁰⁶ and international law, with account being taken of the problems each of these systems cause for the other. The soft law nature of these rules is a recognition of the fact that multinational enterprises, and in most cases all persons, are not subjects of international law.²⁰⁷ However, they are recognized to be objects of international law.

As the integration of persons, especially multinational enterprises, into the two systems continues, the rules of international commerce under which they operate are similarly being integrated. This tends to lessen the need for a third system of law. It is on the basis of the need to recognize the rules of international commerce, as found in arbitral decisions, contracts, instruments of international non-governmental organizations such as the I.C.C. and the habits, usages and practices that persons follow, that authors have developed what they call *lex mercatoria*.²⁰⁸ This system is characterized by the fact that it recognizes that rules of international commerce are formed by persons, and thus it compensates for the inability of persons to form international law in classical theory.

It may be argued that persons may form soft law. The test, which is usually not met, is that the mere formulation of the norm must create an expectation that it will be followed. Where states do not participate, the seriousness of the intent of an international body to create standards acceptable enough to guide international relations may be questioned. However, there are examples of rules not formed by state representatives that do create expectations. For instance, rules formed by the I.C.C. will likely be followed. But it is impossible to ascertain the parties to the norms. For that reason, there is no legal effect from the mere formation of the I.C.C.

²⁰⁶Horn, *supra*, note 22 at 928.

²⁰⁷T.W. Stanley, "International Code of Conduct for MNC's: A Skeptical View of the Process" (1981) 30 Am. U.L. Rev. 973 at 983; Seidl-Hohenveldern, *supra*, note 6 at 171.

²⁰⁸See H.J. Berman & C. Kaufman, "The Law of International Commercial Transactions (*lex mercatoria*)" (1978) 19 Harv. Int'l L.J. 221; Oppetit, *supra*, note 19.

rules, and they are thus not soft law. However, there may be a legal effect on subsequent practice, due to the convenience of having some standard.

The inclusion of persons in international economic relations makes it all the more difficult to sort out the matrix of who is bound by what and with respect to whom. Another complication is added to the matrix by consideration of the way in which the sanctions justified by soft law may obviate a party of the necessity to perform with respect to a non-complying party. It is not enough to determine who are the parties to the soft law. A determination must also be made as to whether they continue to be parties, and then whether they must perform with respect to a particular state or person. As a consequence of soft law, the practice of each state is made more regular, and such practice is guided by an ascertainable standard.

Soft law is a useful solution to practical problems of international relations. One such solution is still unexplored, but it is potentially very important for international economic relations: it is the extent to which soft law may legitimize extraterritorial application of national laws. In this paper, it was submitted that a state cannot object to another's extraterritorial application of its laws when the law corresponds to soft law norms to which both states are party. There remain the thorny questions of whether this is also the case where only part of the national law corresponds to the soft law, and whether each state must be a party to the soft law norm for this effect to occur. Nevertheless, it seems that soft law norms can provide rational standards upon which some extraterritoriality disputes may be peacefully resolved. In similar ways, soft law solutions may be able to cope with other delicate problems in international relations more efficiently than "hard" law or reciprocal diplomacy.
