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Soft law initiatives

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96. Soft law initiatives

Introduction to soft law

Concept of soft law

The term 'soft law' refers to two different types of instruments that contain norms (normative instruments). 'Soft law' refers, in part, to instruments that have a non-binding form, insofar as they do not impose binding legal obligations on the states and other actors that have concluded them. Non-binding instruments include resolutions, declarations, guidance, codes of conduct, recommendations, and standards. Such instruments typically prescribe conduct by using the word 'should' rather than 'shall'. Because these instruments are non-binding and therefore do not constitute law at all, the term 'soft law' is a misnomer that has nevertheless attracted widespread usage. The term 'non-binding instrument' is more accurate. Notable non-binding instruments in the anti-corruption field include the anti-bribery recommendations and guidance of the Organisation for Economic Co-operation and Development (OECD); the 40 Recommendations of the Financial Action Task Force (FATF), which deal with money laundering and the financing of terrorism and nuclear proliferation; and the standards on transparency that have been produced by the Extractive Industries Transparency Initiative (EITI) (see Chapters 54, 85).

Another use of the term 'soft law' refers to instruments that have a binding form (i.e., treaties), but a content that can be described as 'soft' due to the use of vague, non-mandatory, hortatory, or qualified norms. These instruments impose binding legal obligations on the states that are party to them, but the obligations themselves are 'soft'. The term 'soft law' is therefore not a misnomer when applied to such binding instruments. An example of this second type of soft law would be the United Nations Convention against Corruption (UNCAC), which binds states parties, but includes many 'soft' norms that are vague, qualified, or only semi-mandatory (see Chapter 101). This entry focuses on instruments with a 'soft' form (non-binding anti-corruption instruments) rather than a 'soft' content (anti-corruption treaties) because the functions and advantages and disadvantages of non-binding instruments merit special attention.

Functions of soft law

The purpose of non-binding anti-corruption instruments is to generate norms that influence the behavior of states as well as non-state actors, such as business entities and private banks. The functions of non-binding instruments are often understood in relation to binding treaties, which may precede or follow the development of non-binding norms. Non-binding instruments may lead to the negotiation of a treaty by allowing states and other actors to develop a consensus on particular issues. In addition, states parties to an existing treaty may use non-binding instruments in order to further develop the norms contained in the treaty. Such elaboration may be desirable in situations where scientific or technical knowledge has evolved, where new issues have arisen, or where the normative consensus among states has evolved since the conclusion of the treaty. The recommendations and guidance produced by the OECD on foreign bribery exemplify both of these functions, as they led to the conclusion of the treaty and have subsequently elaborated on the treaty. In addition to these two functions, non-binding instruments may also operate independently of treaties, neither leading to nor elaborating on a binding instrument. The norms contained in non-binding instruments may indefinitely take a 'soft' form, which the drafters may prefer over codification in a treaty due to the advantages of non-binding instruments.

Advantages and disadvantages of soft law

Non-binding instruments have a number of advantages in comparison with treaties. One advantage is that non-binding instruments can be relatively easily revised as the need arises. Whereas treaties are subject under treaty law to fairly cumbersome rules on modification and amendment, no formal rules govern the revision of non-binding instruments. States and other actors can revise non-binding instruments without having to follow any particular procedures. The FATF 40 Recommendations have, for example, been repeatedly revised as money laundering techniques have evolved, and as the range of predicate crimes has expanded.

Another related advantage of non-binding instruments is that they allow states to avoid cumbersome and/or politically sensitive ratification processes at the domestic level, which typically involve the legislative

branch of government. In many states, legislative approval of treaties is a part of the ratification process and is necessary in order to become a treaty party. Non-binding instruments, by contrast, require no more than an agreement among the drafters. While domestic legislatures may be involved in the domestic implementation of the norms contained in non-binding instruments, their approval of the instrument itself is unnecessary.

The most obvious disadvantage of non-binding instruments is that states and other actors are not legally bound to comply with them. In legal terms this means that conduct that conflicts with the norms contained in a non-binding instrument does not violate any legal obligations and does not generate any legal consequences. Under the law on state responsibility, possible legal consequences for violations of treaty norms could include counter-measures by other states, as well as litigation before international courts and tribunals on the basis of a dispute settlement clause contained in the treaty at issue. The limited enforcement mechanisms that exist under the law on state responsibility do not apply to non-binding instruments.

Despite the absence of legal enforcement mechanisms for non-binding instruments, states and other actors may still face significant pressure to comply with the norms contained in these instruments. Pressure is typically exerted by a monitoring body that reviews implementation of the norms by states and other actors that have committed to complying with the non-binding instrument (see Chapter 81). Monitoring bodies in the anti-corruption field consist of representatives from the states and other actors committed to the instrument, and carry out peer review, in which states and other actors review each other's compliance and issue recommendations as to how compliance could be improved. The OECD Working Group on Bribery, for example, reviews not only compliance with the OECD Anti-Bribery Convention, but also the associated non-binding recommendations and guidance.

Non-binding anti-corruption instruments

Normative development in the international anti-corruption field has mainly occurred through treaty-making under the auspices of both international and regional organizations.

Non-binding instruments have, however, played a role in the development of norms concerning foreign bribery, money laundering, and transparency. The following focuses on the most prominent non-binding anti-corruption instruments, which have been developed by the OECD and FATF.

OECD recommendations and guidance

The OECD Anti-Bribery Convention is one of a relatively small number of treaties that has been concluded under the auspices of the OECD, an organization where binding instruments are very much the exception, rather than the rule. The OECD Anti-Bribery Convention mainly requires states parties to criminalize the bribery of foreign public officials, and it is associated with a series of recommendations dealing with various aspects of the same issue. The recommendations of 1994 and 1997, which pre-date the Convention, were initially seen by the OECD Working Group on Bribery as the most efficient way of harmonizing domestic laws on foreign bribery among OECD members, given that the legal systems of the members diverged considerably on this issue (Pieth 2014, pp. 18–19). The United States, however, pushed for a binding instrument on foreign bribery, in order to ensure that the business enterprises of the other members of the OECD would also be bound by domestic laws prohibiting foreign bribery. US-based companies had been bound by such laws since the enactment of the Foreign Corrupt Practices Act in 1977 (see Chapters 52 and 53). The OECD recommendations of 1994 and 1997 thus provided an important normative basis for the successful conclusion of a binding treaty in 1997.

Since its entry into force in 1999, the OECD Anti-Bribery Convention has been supplemented by non-binding instruments adopted in 2009, 2010, and 2021. These instruments address issues that either did not garner a consensus or did not arise during the treaty negotiations. The 2009 Recommendation facilitated normative development with respect to certain issues that had been omitted from the 1997 Convention due to a lack of a consensus. In particular, the recommendation calls on states parties to prohibit or discourage the use of small facilitation payments and to re-examine the tax deductibility of bribes. The 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance addresses issues that did not arise during the treaty

negotiations, namely the prevention of bribery through the implementation of compliance programmes by companies (see Chapter 31). The 2021 Recommendation addresses, *inter alia*, another issue which did not arise during the treaty negotiations: the norms relevant for the non-trial resolution of foreign bribery cases, which became very common in the decade following the 2009 Recommendation (see Chapter 84). The string of non-binding instruments that has followed the treaty has allowed states parties to update the relevant body of norms on foreign bribery so that they reflect contemporary issues and the evolution of practice and opinion among OECD member states.

FATF 40 Recommendations

The Financial Action Task Force is an inter-governmental organization that was established in 1989 by the Group of Seven (G7) to combat money laundering. The term “money laundering” refers to the process of obscuring the illegal origins of proceeds derived from crime such as corruption. Because money laundering is closely related to corruption, the FATF Recommendations may be considered a soft law initiative in the anti-corruption field.

The Recommendations, which were first issued by FATF in 1990, can be seen as a significant elaboration on the anti-money rules set out two years earlier in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and the Statement of Principles of the Basel Committee on Banking Regulations and Supervisory Practices, a non-binding instrument. But the establishment of a separate organization and a distinct body of rules also represented a shift by the G7 away from both the United Nations and treaty-making for the purpose of further developing anti-money laundering norms. The FATF 40 Recommendations have not been formulated with a view toward the eventual development of a treaty that would codify the standards and impose binding obligations on states and other entities. Instead, the Recommendations are very likely to remain indefinitely ‘soft’. Since their development, however, some of the Recommendations have influenced the drafting of provisions contained in binding instruments, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption.

Despite their non-binding status, the FATF Recommendations represent the most authoritative and influential set of anti-money laundering standards. The Recommendations have a global reach because FATF, which now has 39 members, has promoted the development of FATF-style Regional Bodies that are responsible for monitoring implementation among their regional members. While the Recommendations technically have a ‘soft’ form, their contents are generally more precise and detailed than binding instruments concerning transnational criminal law. In addition, compliance with the Recommendation is monitored by FATF, which has developed relatively coercive methods for applying pressure on non-complying states, especially in comparison with the working methods of the UNCAC Review Mechanism.

Conclusion

Despite their non-binding form, the normative force of the recommendations and guidance produced by organizations such as the OECD and FATF should not be underestimated. These non-binding instruments have had a significant influence on the behavior of states and other actors, in part because they are subject to relatively robust monitoring mechanisms that operate on the basis of peer review and peer pressure. Soft law initiatives have played, and in all likelihood will continue to play, key roles in the development of international anti-corruption norms.

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