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# Hard Law v. Soft Law: Unnecessary Dichotomy?

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There is much interest currently in what is named, to certain dissent,<sup>1</sup> “soft law.”<sup>2</sup> Sir Joseph Gold, in using the term, stated: “Almost as many definitions of soft law can be found as there are writers about it,”<sup>3</sup> but continued on to be very clear about just what, in his conception, a “soft” norm is: “. . . soft law expresses a preference and not an obligation that states should act, or should refrain from acting, in a specified manner.”<sup>4</sup> In international law, “hard” or “firm” law is an obligation of a state or states for the breach of which it or they are responsible, whatever form of sanction or penalty that responsibility may entail. “Soft” law does not imply obligation and, therefore, possible breach and responsibility for breach; “soft” law is instead a norm<sup>5</sup> expressed by the international community to which it

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1. See particularly Richard Bilder, *Beyond Compliance: Helping Nations Cooperate*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 65 (Dinah Shelton ed., 2000), at 71 [hereinafter Shelton] “. . . I join others in questioning the coherence and usefulness of the term ‘soft international law,’ particularly as applied to non-binding norms and instruments”, and again at 72, “Consequently, it seems inappropriate and unhelpful to use the term soft law to describe norms and normative instruments which are clearly not in legal form, not intended to be legally binding, and thus not, in any of the usual senses in which we use the word, law at all.” (emphasis in original)

2. See particularly Shelton, *supra* note 1, a collection of essays examining compliance with “soft” norms, which, to its credit, uses the latter term in its title, although a number of the authors continue to employ the term “soft law”; see Mario Giovanoli, *A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting*, in INTERNATIONAL MONETARY LAW: ISSUES FOR THE NEW MILLENNIUM 3, § C, entitled “International financial standards as “soft law” (Mario Giovanoli ed., 2000). Indeed, Sir Joseph Gold himself whose 1983 article, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT’L L. 443 (1983) [hereinafter Gold, *Strengthening*] used the term, culminating in a chapter in his last book, JOSEPH GOLD, INTERPRETATION: THE IMF AND INTERNATIONAL LAW (1996), ch. 4, at 299, “Soft Law” [hereinafter GOLD, INTERPRETATION].

3. GOLD, INTERPRETATION, *supra* note 2, at 301.

4. *Id.*

5. The use of the term “norm” itself raises jurisprudential problems. At what point does a preference for certain state behavior, say refusal to act as a tax or money-laundering haven, by a particular group of states ripen into an international “norm”? As Professor Charney, in his contribution, *Compliance With International Soft Law*, to Shelton, *supra* note 1, at 116, has remarked, international law “. . . doctrine determines when a

is hoped, at least by the group of states articulating the "norm," that states will adhere, but to which there is no obligation of adherence. One might say that so-called "soft" law is an expressed preference, at least by the group of states or international organization articulating the preference, for certain behavior and there are what Sir Joseph Gold designated "remedies" (as opposed to sanctions)<sup>6</sup> for failure to so behave, but the "remedies" are aimed at remediation of the consequences for the international system of the deviant behavior and not at punishment of the transgressor.

It is the thesis of this piece that Sir Joseph's interest in and profound writing about what he was willing to call "soft law"<sup>7</sup> was really acute observation over many years of the way in which the International Monetary Fund, the international organization of which he was the General Counsel, chose to further its goal of a stable functioning international monetary system, of observation of the international legal process of the Fund. In Sir Joseph's descriptions of this international legal process, it is possible to discern most of the themes of contemporary writing about international legal process,<sup>8</sup> writing that is concerned with how to ensure that states observe legitimate<sup>9</sup> international norms.

In this writing, the distinction is not between "hard" law and "soft" law, but among methodologies of obtaining functional cooperation among states in reaching international goals of world order. Sir Joseph wrote<sup>10</sup> at length about how the Fund achieved, or tried to achieve, compliance with the international monetary system's norms, whether soft or firm; the contemporary literature stresses again and again that the sanctioning process of "hard" law tends to be counterproductive.<sup>11</sup> The efforts of the contemporary literature are directed towards trying to determine what methodologies other than "hard" law with sanctions for breach will work to achieve greater adherence by states to legitimate internationally agreed norms, whether "hard" or "soft."

This piece will begin by a contemporary example of "firm" law, which would seem to illustrate the thesis of the contemporary writers. It will then review some of Sir Joseph's international legal process writings, briefly review the contemporary writing, and finish by critiquing, from the point of view of this literature, a recent call<sup>12</sup> for transmutation of the "soft" norms of international financial law into "hard" law.

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norm is within international law, but no definition exists for "soft" norms." The issue raises the acute problem of legitimacy of standard setting by self-appointed groups of states, an issue that cannot be treated satisfactorily in a piece of this length.

6. In one of his seminal pieces on international legal process, Joseph Gold, *The "Sanctions" of the International Monetary Fund*, 66 AM. J. INT'L L. 737 (1972), at 738-39 [hereinafter Gold, "Sanctions"].

7. As per Chapter Four in GOLD, *INTERPRETATION*, *supra* note 2.

8. See Chayes & Chayes, *On Compliance*, 47 INT'L ORG. 175 (1993); CHAYES & CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (Harvard Univ. Press, 1995) [hereinafter *THE NEW SOVEREIGNTY*]; ENGAGING COUNTRIES, *STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* (Weiss and Jacobson eds., 1998) [hereinafter Weiss & Jacobson]; and Shelton, *supra* note 1.

9. See *supra* note 5.

10. As will be detailed in the text at note 24 *infra*.

11. See, e.g., *THE NEW SOVEREIGNTY*, *supra* note 8, at 2:

Our first proposition is that, as a practical matter, coercive economic – let alone military – measures to sanction violations cannot be utilized for the routine enforcement of treaties in today's international system, or in any that is likely to emerge in the foreseeable future. The effort to devise and incorporate such sanctions in treaties is largely a waste of time.

12. See Giovanoli, *supra* note 2, at 53.

At Punte Este in Uruguay, in 1985, the nations participating in the international system for trade in goods, the GATT,<sup>13</sup> determined to "harden" up the norms of international trade law. Ten years of international negotiations culminated in signature at Marrakesh in 1995 of the WTO Agreement<sup>14</sup> with very "hard" law rules indeed for dispute settlement and imposition of sanctions on those nations found under the dispute settlement system to have violated the rules of the Treaty. (While the GATT<sup>15</sup> had contained firm rules for international trade, there was in effect no way of "enforcing" those rules. Panel decisions (the dispute settlement mechanism under the Agreement) under GATT procedures were jurisprudence without teeth as the "losing" party could block any enforcement of the decision.)

The international community has now had over six years of the new "hard" law dispute resolution system of the WTO and concern is mounting over whether hardening up law to be able to sanction violations of the norms results in fact in remediation of the consequences for the international trading system of deviant behavior<sup>16</sup> or results only in what might be described as American style litigious game playing. *The Financial Times*, at the end of last year, had a piece entitled, "Gloom Descends Over Former Supporters of the WTO's Procedure for Disputes,"<sup>17</sup> which reported that large U.S. and EU companies, organized into a trade group entitled the Transatlantic Business Dialogue (TABD), were increasingly concerned over the consequences of sanctions to enforce international trade rules. *The Financial Times* reports that the TABD's November 2000 annual meeting expressed considerable doubts about the new methodology of enforcement of the WTO's hard law, which "... the companies argue ... has favoured litigation over negotiation ... The TABD urged the US and the EU to 'consider much more carefully' whether to launch dispute cases."<sup>18</sup> "... [T]he rigid timetables [introduced by the WTO Agreement for dispute resolution], while intended to speed up resolution of disputes, have often forced governments into unnecessarily belligerent actions."<sup>19</sup> Finally, the piece quotes the chairman of the WTO working group of the federation of European employers' associations as pointing out the use of sanctions to penalize violators only builds new barriers to trade "instead of making trade and investment easier."<sup>20</sup>

Another straw in the wind suggesting that the hardening of international norms to make rules that are "enforceable" through forms of international litigation does not necessarily lead to a strengthening of international coordination is a recent (May 17, 2001) conference sponsored by the British Institute of International and Comparative Law and the World Trade Organization. The first panel was entitled, "The World Trade Organization and its Dispute Settlement System: Is There a Constitutional Crisis Emerging?" The author understands<sup>21</sup> that the concern of the panel was the effects on the law of international trade

13. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

14. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 I.L.M. 1125, 1143 (1994).

15. *Supra* note 13.

16. See Gold, "Sanctions," *supra* note 6.

17. Edward Alden, *International Economy: Bad losers cast gloom over WTO's disputes procedure: US and European business leaders throw doubt on the use of trade sanctions to settle differences*, FIN. TIMES, Dec. 6, 2000, at 8.

18. *Id.*

19. *Id.*

20. *Id.*

21. From a conversation in London after the Conference with Dr. Mads Andenas, the Director of the British Institute of International and Comparative Law.

of the WTO Agreement dispute settlement innovation of the possibility of appeal of a Panel decision to a permanent Appellate Body.<sup>22</sup> It seems that the Appellate Body in its reports has begun to behave like any other judicial body, that is to say, to interpret the rules laid down in the treaty and naturally, the party "losing" the dispute believes the interpretation to be a reading not agreed to in the drafting of the treaty and thus a *rewriting* of the law. The problem, of course, is not the interpretation itself by the Appellate Body, but the fact that under the new system of dispute resolution, the Appellate Body's reading of the "hard law" treaty results in legal responsibility for the party found to be in "violation" of the law and to the possible imposition of sanctions for the "violation."

This description of recent criticisms of the new "hard law" of dispute resolution in the WTO stands in sharp contrast to the international legal process of the International Monetary Fund<sup>23</sup> as Sir Joseph has described it in a seminal series of writings beginning in 1972.<sup>24</sup> In his 1974 article "Pressures," Sir Joseph referred back to his 1972 article on the Fund's "remedies,"<sup>25</sup> summarized it and remarked, as he was to emphasize again and again in later writing: "... the Fund has made sparing use of the remedies available to it. The Fund has concluded that a policy of consultation and persuasion is not less likely to promote adjustment [a term of art in international monetary law] and compliance with obligations than a readiness to apply remedies."<sup>26</sup> It will be recalled by those familiar with the history of international monetary law that the monetary system instituted by the original Fund Agreement<sup>27</sup> signed at Bretton Woods in 1944 had broken down by 1971 and that the international community had appointed a "Committee of Twenty" and its Deputies to try to design a reformed system that could be agreed to.<sup>28</sup> The Outline of Reform drafted by the Deputies contained a list of "pressures" that, in the reformed system, could be applied to countries deviating from the rules of the new system<sup>29</sup> and Sir Joseph's 1974 article<sup>30</sup> discusses these "pressures" in detail.<sup>31</sup> He reviews the "remedies" of the original Fund Agreement, lists the proposed "pressures" in the Outline of Reform that would be innovations, and points out with respect to the existing "remedies" just why the Fund had been reluctant to invoke them. He notes, with respect to the complete lack of invocation of the "scarce currency" clause, article VII, section 3, that:

22. Understanding on Rules and Procedures Governing the Settlement of Disputes, art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations 364, 33 I.L.M. 1236 (1994).

23. The Articles of Agreement of the International Monetary Fund, Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39, as amended [hereinafter Fund Agreement].

24. Gold, "Sanctions," *supra* note 6; Joseph Gold, "Pressures" and Reform of the International Monetary System, 7 N.Y.U. J. INT'L L. & POL. 423 (1974) [hereinafter Gold, "Pressures"]; Gold, *Strengthening*, *supra* note 2; GOLD, INTERPRETATION, *supra* note 2.

25. Gold, "Sanctions," *supra* note 6.

26. Gold, "Pressures," *supra* note 24, at 427.

27. Fund Agreement, *supra* note 23.

28. See ANDREAS F. LOWENFELD, THE INTERNATIONAL MONETARY SYSTEM 161 (2d ed., 1984).

29. *Id.* at 180.

30. Gold, "Pressures," *supra* note 24.

31. Ultimately, the Outline of Reform and its "pressures" were not adopted in the Second Amendment to the Fund Agreement agreed to at Jamaica in 1976. See LOWENFELD, *supra* note 28, at 174, 204; see also Gold, *Strengthening*, *supra* note 2 (for a brilliant musing on the "soft" law of what was adopted in the Second Amendment and how that "soft" law functions).

In its attitude to the clause, the Fund was influenced by both a general reluctance to employ remedies and a particular distaste for discrimination. [The scarce currency clause was invocable against a single country.] It seemed dangerous to promote a practice that was inconsistent with the purposes of the Fund and that might lead to political retaliation among countries.<sup>32</sup>

In discussing which organ of the revised Fund would have the authority to take decisions to apply the "pressures" being provided for, Gold remarks:

One of the surprising aspects of the deliberations of the Committee and its Deputies is how little attention was given to the occasional question about the Fund's practice of avoiding the use of remedies. Perhaps the questions were rhetorical because everyone was aware of the answers. The Executive Directors [the management committee, in effect, of the Fund] have become reluctant to apply remedies because of the strong reactions they provoke against the organization and other members and because a remedy applied against one country may be a precedent for similar action against one's own country.<sup>33</sup>

Sir Joseph went on to add:

If the Committee and the Deputies were willing to endorse the principle of pressures, it was not because pressures would permit or require retaliation for the failure to perform obligations, but because pressures might contribute to the most fundamental necessity of an effective international monetary order, a process of adjustment that would really work.<sup>34</sup>

As one hopes the remainder of this piece will demonstrate Sir Joseph in 1974 sounded extraordinarily contemporary in his emphasis on the inadequacies of "retaliation for the failure to perform obligations."<sup>35</sup>

The Second Amendment<sup>36</sup> to the Fund Agreement was agreed to at Jamaica in 1976. After he had left the post of General Counsel and Director of the Legal Department of the Fund and became Senior Consultant to the Fund, Sir Joseph published an extremely interesting article in 1983 in the *American Journal of International Law*<sup>37</sup> on the compromises that had eventuated from Jamaica and how the Fund was administering the new "soft law" of exchange arrangements and exchange rates after the Second Amendment came into force. Sir Joseph remarked that he thinks the article may be of general interest because its topic "... deals with the present balance that has been reached in an important sector of international relations between national sovereignty and international legal regulations."<sup>38</sup> He gives his opinion that the Second Amendment rewrote article IV of the Fund Agreement on exchange arrangements as "soft law" because "... A return to legality made a negotiated solution unavoidable, but soft law offered a compromise with skepticism."<sup>39</sup> Sir Joseph in writing is fully aware that he is dealing with international legal process: he contrasts the

32. Gold, "Pressures," *supra* note 24, at 452.

33. *Id.* at 457.

34. *Id.* at 458.

35. *Id.*

36. Proposed Second Amendment to the Articles of Agreement of the International Monetary Fund, Apr. 30, 1976, 29 U.S.T. 2203, 15 I.L.M. 546.

37. The author, who several times arranged for Sir Joseph to speak at public gatherings, noticed a change in tone and emphasis in his talks after he was no longer General Counsel. He seemed freer to advance his interest in the health of the international community as a whole once he was no longer in an official position to a particular international organization with its own particular mandates and political needs.

38. Gold, *Strengthening*, *supra* note 2, at 444.

39. *Id.* at 460.

original Articles on exchange arrangements with the Second Amendment "soft law" version in terms of "comparing the deterrent effect of the two versions of the Articles."<sup>40</sup> He notes that under the new version, members are not required to obtain the advance approval of the Fund "for the member's choice of its exchange arrangements or for the member's determination of the external value of its currency."<sup>41</sup> He also observes "[a] requirement of prior approval by an international organization puts greater pressure on members to respect international standards than the possibility that the organization might investigate the consistency with international standards of policies or practices after they have been instituted."<sup>42</sup> This creates a softer approach to exchange arrangements, which at the time suited the members better. Since, as Gold explains, the members knew that the "... Fund has been reluctant in the extreme to adopt censorious decisions," they knew that they would be "... safe from censure in following [exchange] practices that were incompatible with the policies of the organization."<sup>43</sup>

He continues his analysis of the legal process of exchange arrangements subject to "soft law" by a dissertation on the Fund's process of "firm surveillance" over the exchange rate policies of members. This surveillance must be done through the Executive Board of the Fund and its willingness "to take decisions on the situation of each member."<sup>44</sup> But Sir Joseph describes the process of the Executive Board as extremely "soft"; even the last stage of "consultations" required under article IV, debate in the Executive Board, are completed with "'conclusions,' in contrast to the 'decisions' [the Executive Board] takes on other items placed on its agenda. The word 'conclusions' was chosen because it sounds less like an assertion of authority than 'decisions.'"<sup>45</sup> However, Sir Joseph goes on to quote Jacques de Larosiere, the Managing Director of the Fund at the time, to the effect that "consultations have succeeded in dissuading members from resort to abusive practices."<sup>46</sup> Nevertheless, Gold points out that the process of consultations under article IV is one of persuasion or dissuasion only. Since the law of exchange arrangements is now "soft," "[G]overnments are not subject to the reproach that they are neglecting *obligations* if they give decisive effect to national, rather than international, interests."<sup>47</sup> (emphasis added)

Sir Joseph ends his article on the soft law of exchange arrangements with what he terms "some modest proposals."<sup>48</sup> He stresses that the difficulty in hardening the law of exchange arrangements is that the economists involved do not agree on the economic forces at work and that they may feel that "[f]irmer rules of law would be undesirable because they would reduce the choice of policies available to governments."<sup>49</sup> Sir Joseph suggests instead strengthening procedures in the sense of "firmer administration of existing rules of law."<sup>50</sup> He specifically suggests changing the procedures of the Executive Board so that consultations under article IV would be

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40. *Id.* at 461.

41. *Id.*

42. *Id.*

43. Gold, *Strengthening*, *supra* note 2, at 462.

44. *Id.*

45. Gold, *Strengthening*, *supra* note 2, at 464.

46. *Id.* at 465.

47. *Id.* at 477.

48. *Id.* at 481.

49. *Id.* at 482.

50. Gold, *Strengthening*, *supra* note 2, at 483.

completed by the Executive Board with the adoption of avowed decisions. . . . The decisions should be formulated as the expression of the collective view of the Executive Board and not as its endorsement of the Chairman's summing up of the views expressed by various Executive Directors. With this change, it would be clearer that the Fund was expressing the judgment of peers.<sup>51</sup>

He also suggests a change in Fund procedure, which indeed has been adopted in recent years: the Fund to give its consent to publication of the staff report on a consultation with a member or the "conclusions" reached in the consultation if so requested by the member. At no point does he urge the transformation of soft law into firm law even though he recognizes that "[t]he international lawyer is predisposed by training to support [such a] transformation"<sup>52</sup> because Gold understands fully that the soft law of exchange arrangements was the most that could be achieved at the time of the Second Amendment.

Nevertheless, Sir Joseph sees "soft law" as law and, as he was to express in 1996, "soft law" matters because

. . . members [of the Fund] can no longer claim that matters subject to soft law are solely within their national discretion. They have joined in the expectation that the soft law as interpreted by the organization will be respected, even though a member's action or inaction that neglects the shared expectation is not a breach of obligation.<sup>53</sup>

Sir Joseph certainly would have agreed with the large thesis of writings by Abram and Antonia Chayes (and indeed, those writings cite Fund surveillance procedures as an example of the managerial process of review and assessment they recommend).<sup>54</sup> That thesis, first laid out in Chayes and Chayes, *On Compliance*,<sup>55</sup> fully explicated in the *New Sovereignty*<sup>56</sup> and elaborated once again in *Managing Compliance*,<sup>57</sup> is that compliance with international norms, whether "hard" or "soft," is better achieved through regulatory regimes that utilize a "managerial model" relying on a cooperative, problem-solving approach than regimes presenting an "enforcement model" with a coercive approach.<sup>58</sup> Chayes and Chayes think that deliberate violations of what is accepted as "law" are the rare exception and that non-compliance with international norms springs from inadvertence, incapacity or a failure to understand treaty provisions.<sup>59</sup> These authors stress that the foundation for compliance is norms, in the larger meaning of that term, including non-binding norms:<sup>60</sup> "If a normative consensus on an issue area exists, then much initial compliance may be motivated by the consensus rather than by treaty compliance mechanisms."<sup>61</sup>

The authors describe their managerial model of compliance as follows: "As in other managerial settings, the approach is not primarily accusatory or adversarial . . . Although

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51. *Id.*

52. *Id.* at 481.

53. GOLD, INTERPRETATION, *supra* note 2, at 329.

54. See Chayes et al., *Managing Compliance: A Comparative Perspective*, in Weiss & Jacobson, *supra* note 8, at 50 [hereinafter *Managing Compliance*].

55. 47 INT'L ORG. 175 (1993).

56. THE NEW SOVEREIGNTY, *supra* note 8.

57. *Managing Compliance*, *supra* note 54.

58. See THE NEW SOVEREIGNTY, *supra* note 8, at 3.

59. *Managing Compliance*, *supra* note 54, at 41.

60. *Id.* at 42.

61. *Id.*



effective regime management requires distinguishing willful violation from unintentional non-compliance, the process starts with the assumption that all regime members are engaged in a common enterprise."<sup>62</sup>

The authors stress that effective regimes have a process of review and assessment (along the lines of Fund "consultations") and that when the compliance is viewed as below the level acceptable to the parties to the regime, managerial techniques such as capacity building should come into play.<sup>63</sup> They view dispute resolution as capacity enhancing in that it clarifies the norm for all parties and "specifies the performance required of the disputants in the particular circumstances,"<sup>64</sup> but state their preference for resolution of disputes involving legal issues in regimes managed by international organizations by "authoritative or semi-authoritative interpretation by a designated body of the organisation."<sup>65</sup> In a sentence that could well have been written by Sir Joseph, they remark about their preference for resolution of legal issues by interpretation: "A state will tend not to disregard the answer to a question it has submitted, especially if such a nonadversial context encourages working out differences or misunderstandings."<sup>66</sup>

This description of Sir Joseph's and the Chayes' approach to obtaining effectiveness<sup>67</sup> of international norms explains the title of this piece. It is not the "hardness" or "softness" of the particular norm embedded in the regulatory regime that matters, it is the process of obtaining effectiveness that matters, the methodology of better international dealings and cooperation. If Sir Joseph and the Chayes and their followers are correct, that states do want to act in accordance with the normative consensus, and if failure to do so is due to lack of capacity, lack of clarity as to what the norm requires or any other reason than deliberate violation, then the issue is not the "hardness" or "softness" with which the norm is expressed (for that characteristic may only reflect the degree of consensus that could be achieved in "writing up" the regime), but rather the questions we could not delve into here, the legitimacy of the norm, the particular set of states involved in creating the consensus, etc.

This piece will end with a critique of a recent superb piece of writing in international economic law, Giovanoli, *A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting*,<sup>68</sup> from the point of view just expressed. Professor Giovanoli reviews in detail the great variety of international financial standard setting that has been achieved in recent years by a great variety of international bodies, while noting that the vast majority of these "... rules applicable to international financial activities on the global markets are either national, or are recommendations, guidelines or other ar-

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62. *Id.* at 49.

63. *Id.* at 52.

64. *Managing Compliance*, *supra* note 54, at 54.

65. *Id.* at 55.

66. *Id.*

67. The word "effectiveness" is used here in the belief that Richard Bilder is on the right track when he, in the piece he wrote for Shelton, *supra* note 1, remarks that

... an emphasis on compliance [with soft norms] may point towards a backwards-looking and essentially legalistic approach focusing on state "misbehavior," rather than toward a productive enquiry into devising and deploying better normative techniques and arrangements that facilitate more effective international dealings and cooperation.

*Id.* at 72.

68. Giovanoli, *supra* note 2.

rangements of a non-binding nature, and the concept of 'soft law' has often been used in this respect."<sup>69</sup> He then compares what he views as the advantages and disadvantages (mostly disadvantages) of law whose implementation is not mandated (e.g., international soft law standards).<sup>70</sup> Professor Giovanoli does recognize clearly that "soft law" and "hard law" are complementary,<sup>71</sup> but articulates his preference for the standard setting bodies to turn to the law-creating bodies (such as UNCITRAL, UNIDROIT, the Hague Conference, the Council of Europe, and others) to draft the standards into "legally enforceable rules to be embodied in model laws, uniform laws or international treaties, which would be formally adopted and open to ratification by all countries."<sup>72</sup> He analogizes to the success of the European Union in harmonizing the rules applicable to the banking and financial sector, by, in Professor Giovanoli's words, utilizing "an efficient mechanism to turn standards into legally binding rules, with the necessary flexibility in the form of the so-called directives."<sup>73</sup> Professor Giovanoli thinks that such "a mechanism inspired by the legal framework of the European single market might be an appropriate means for strengthening international financial standards for the global market,"<sup>74</sup> his goal being to grant the standards "an appropriate legal status in international law" so as to avoid the possibility that the standards' "efficiency and reliability, especially in a crisis situation" might be hampered by "the current soft law character of these standards."<sup>75</sup>

This is the point at which the present author would part company with Professor Giovanoli's cogent analysis. First, it may be remarked that the European Union's successful use of the methodology of directives may very well result from the integrative effect of the jurisprudence of the European Court of Justice and particularly the doctrine of "direct effect," which permits in many cases the enforcement of the mandates of directives by private party suit.<sup>76</sup> Perhaps more importantly, this author fears that an effort to embody international financial law standards into a treaty structure might cause the effort to focus on sanctions for violation of treaty obligation, on the enforcement model of international law obligation rather than the Chayes' "managerial model." Only if the effort to strengthen international financial standards focuses on establishing the type of active management of compliance of the kind described in the new literature initiated by the Chayes',<sup>77</sup> the type of international legal process so well understood and analyzed by Sir Joseph, is it apt to add stability and crisis avoidance to the global financial markets.

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69. *Id.* at 10.

70. *Id.* at 45-50; the curious point concerning his argumentation is that he does not explore the problem that a treaty obligation to implement an international financial standard is no more or less "enforceable" in international legal process than any other international "obligation" and that the methodologies of what he calls "implementation" that he discusses, assessment, surveillance and transparency, are the managerial model of obtaining compliance as discussed by Chayes and Chayes, see text *supra* notes 54-65.

71. *Id.* at 52.

72. *Id.* at 54.

73. *Id.* at 55.

74. Giovanoli, *supra* note 2, at 56.

75. *Id.* at 59.

76. See for the doctrine of "direct effect," Bermann, Goebel, Davey & Fox, Cases and Materials on European Community Law, West, 1993, at 166 *et seq.*

77. See text *supra* notes 54-65.

