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The Financial Action Task Force: International Regulatory Convergence Through Soft Law

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I. INTRODUCTION

Since 1989, the Financial Action Task Force (FATF) has served as the preeminent international standard-setting body responsible for protecting the global financial system by coordinating a worldwide fight against money laundering, terrorist financing, and other financial crimes. Remarkably, the FATF has achieved considerable success in harmonizing national legal and regulatory systems without explicit, formal authority under international law.

This article describes the FATF, its methods, and reasons for its effectiveness, and argues that the FATF's success provides strong evidence that soft law promotes global consistency in financial regulation. Highly formalized approaches to lawmaking, such as treaties, are dispensable in this area, whereas soft law approaches should be looked to as the default mode for international financial regulation—and may prove useful in other legal fields as well.

II. HARD AND SOFT LAW IN INTERNATIONAL FINANCIAL REGULATION

A legal instrument is "hard" when it is highly authoritative. That is to say, it is adopted according to accepted procedures, provides concrete prescriptions, and is accompanied by a strong expectation of enforcement.[1] An instrument is "soft" when it lacks these characteristics. In international law, treaties are paradigmatic of hard law.[2] They are solemnly adopted, specific (or relatively so) in their provisions, and, in theory, readily enforceable through various means. Yet, treaties are seldom used in international financial regulation.[3]

As a matter of form, there is nothing inherent in the treaty instrument that would make it unsuitable for addressing international financial issues. Article 2(1)(a) of the Vienna Convention broadly defines the term "treaty" to include agreements "concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."[4] This definition does not exclude finance as an appropriate subject for treaty-making. Indeed, there are a number of bilateral and multilateral treaties relating to financial issues, and some are quite detailed. In the United States, both Article I congressional-executive agreements and the more traditional Article II treaties have been increasingly used over the past century to address a comprehensive range of topics.[5]

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1. *See* W. Michael Reisman, *A Hard Look at Soft Law*, 82 Am. Soc'y Int'l L. Proc. 373 (1988).
2. Chris Brummer, *Why Soft Law Dominates International Finance—And Not Trade*, 13 J. Int'l Econ. L. 623, 624–27 (2010).
3. A brief review of the United Nations' Treaty Collection on Multilateral Treaties deposited with the secretary-general finds only a handful of treaties that might be considered financial in nature. *See Multilateral Treaties Deposited with the Secretary-General*, United Nations Treaty Collection, https://treaties.un.org/pages/participationstatus.aspx (last updated Nov. 6, 6:27 PM).
4. Vienna Convention on the Law of Treaties (with Annex) art. 2(1)(a), May 23, 1969, 1155 U.N.T.S. 331.
5. *See, e.g.*, Oona A. Hathaway, *Treaties' End: The Past, Present and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236 (2008); John Yoo, *Rational Treaties: Article II, Congressional-Executive Agreements, and International Bargaining*, 97 Cornell L. Rev. 1 (2011).

Since World War II, Article I agreements have given the president and Congress greater flexibility to strike international bargains of all types without obtaining a two-thirds Senate majority. Nonetheless, scholars have observed that treaty-making as a discipline may generally be on the decline, while non-treaty-based (softer) approaches to global coordination are increasingly common,[6] especially in the field of international financial regulation.

Why is this the case? In the context of financial regulation, soft law generally refers to non-legislative methods of problem solving, which are typically carried out by transnational networks of domestic financial regulators and (in some cases) public or private organizations. Examples of soft law instruments include recommendations, memoranda of understanding, and proclamations or commitments from coordinating bodies such as the Group of Twenty Finance Ministers and Central Bank Governors (G20).

As a strategy, soft law responds to three challenges: (1) the demands for rapid responses to global financial crises; (2) the unwillingness of domestic legislatures, especially economically powerful ones, to cede control or sovereignty; and (3) the difficulty in reaching a consensus on technical issues, particularly when the outcomes may be subject to political tinkering as a condition of ratification.[7] Soft law addresses these three challenges by relocating the prescriptive process to a "decentralized regulatory space" where technocratic networks are empowered by their national governments to address complicated issues and "the national-international dichotomies associated with public international law do not apply."[8]

National financial regulators are increasingly coordinating their actions through intermediary organizations designed to facilitate a higher level of multilateral action.[9] Intermediary organizations provide forums for national decisionmakers and stakeholders in diverse states to deliberate over solutions to shared problems. Such bodies also permit political and bureaucratic elites to consolidate their influence in order to promote global regulatory programs. For example, in 2008, following the onset of the global financial crisis, leaders of the world's largest economies presented a united front under the auspices of the G20 by issuing declarations at a series of

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6. *See, e.g.*, Chris Brummer, Soft Law and the Global Financial System: Rule Making in the 21st Century (2012).

7. *See generally* Nicholas W. Turner, *Dodd-Frank and International Regulatory Convergence: The Case for Mutual Recognition*, 57 N.Y.L. Sch. L. Rev. 391 (2012–2013).

8. Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 Geo L.J. 257, 273 (2011).

9. Examples include the G20, the Basel Committee on Banking Supervision, the International Organization of Securities Commissions (IOSCO), the International Accounting Standards Board (IASB), the Committee on Payments and Settlements Systems (CPSS), and, to an extent, the International Monetary Fund (IMF) and the World Bank. *See Advancing the SEC's Mission through International Organizations*, U.S. Sec. & Exch. Comm'n, http://www.sec.gov/about/offices/oia/oia_intlorg.shtml#monitoring (last visited Apr. 10, 2015).

summits in Washington, D.C. The agenda set at these various summits continues to be enacted.[10]

Those who prefer the stability of a treaty-based regime may not want to see soft law applied to a subject as critical as the maintenance of the international financial system. After all, serious issues deserve the most authoritative of responses. However, the distinction between the two approaches matters little since both are capable of achieving their desired objectives. Generally speaking, soft law works because, like all law, it establishes expectations of appropriate conduct and controlling practice. At its core, law (hard or soft) is a process of communication. During the 82nd Annual Meeting of the American Society of International Law, Michael Reisman, Myres S. McDougal Professor of International Law at the Yale Law School, explained:

> Lawmaking at any level of social organization, and whether it is accomplished in a formal or informal, organized or unorganized setting, refers to the processes in which expectations of authority, and communications about intentions of control—the intention to make that authority effective—are generated and mobilized to sustain certain policy formulations, which are themselves designed to affect human behavior.[11]

Following Reisman's view, the proliferation of new types of law goes hand in hand with the increasing interdependence of the world's people, the dissemination of communications technologies, and the introduction of new participants in the authoritative decisionmaking process. He explains, "The traditional diplomatic conduits, by which territorial-based elites have communicated and clarified their common interests, continue to be important, but many other international conference and parliamentary arenas have come into operation. In some of these, nonofficial actors may participate in direct or indirect fashion."[12] These alternative arenas have proliferated in the financial regulation field and other areas of international law.

In his book, *When International Law Works*, Tai-Heng Cheng, then a professor at New York Law School, further developed the concept of law as a process of authoritative communication. Cheng writes, "In the international legal system, soft laws are not legal rules such as those identified in Article 38 of the ICJ Statute but are informal prescriptions that nonetheless authoritatively shape expectations of appropriate conduct by governing elites and can control outcomes in international problems."[13] Recent events offer clear evidence that informal prescriptions lead to

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10. *See generally* Turner, *supra* note 7, at 395–96.

11. Reisman, *supra* note 1, at 373.

12. W. Michael Reisman, *International Law-Making: A Process of Communication*, 75 Am. Soc'y Int'l L. Proc. 101, 106 (1981).

13. Tai-Heng Cheng, When International Law Works: Realistic Idealism After 9/11 and the Global Recession 199–200 (2012). Article 38 of the Statute of the International Court of Justice identifies sources of international law as including:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;

serious expectations. In the example of the G20, the proclamations of political elites—which continue to be elaborated and enacted by both international and national actors—have led to significant reforms and closer regulatory harmonization across major economies. The G20's success, although imperfect, merits attention because it demonstrates that it is possible to achieve compliance with international prescriptions in the absence of legislative authority. Under the right circumstances, the sustained efforts of a wide range of participants operating in arenas other than "traditional diplomatic conduits" can shape policy globally.

This inclusive theory of international law applies particularly to the realm of financial regulation, in which technocratic elites engage in rulemaking outside the normal political process, largely outside of the public view. Anne-Marie Slaughter, former dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, emphasized this point in her book, *A New World Order*,[14] in which she describes the role of transgovernmental networks. She writes:

> The structural core of a disaggregated world order is a set of horizontal networks among national government officials in their respective issue areas, ranging from central banking through antitrust regulation and environmental protection to law enforcement and human rights protection. These networks operate both between high-level officials directly responsive to the national political process—the ministerial level—as well as between lower level national regulators. They may be surprisingly spontaneous—informal, flexible, and of varying membership—or institutionalized within official international organizations.[15]

Chris Brummer, a professor at Georgetown University School of Law and leading expert on international financial regulation, further applied this notion by offering a detailed analysis of the global financial regulatory system in *Soft Law and the Global Financial System*.[16] He explains, "Decision making is not vested in the hands of uninformed political elites. Rather, it is guided by a stable of skilled technocrats who develop shared expectations and trust allowing them to dispense with time-consuming treaties and formal international organizations."[17] He also writes:

> Soft law . . . provides a decisively cheaper means of agreement-making. It carries what can be thought of as low bargaining costs due to its informal status. Perhaps most important, it does not necessarily require extensive participation by heads of state or lengthy ratification procedures. Instead,

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> c. the general principles of law recognized by civilized nations;
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> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice, art. 38(1)(a)–(d), June 26, 1945, 59 Stat. 1031, 33 U.N.T.S. 993.

14. Anne-Marie Slaughter, A New World Order (2004).

15. *Id.* at 19.

16. Brummer, *supra* note 6.

17. Chris Brummer, *Post-American Securities Regulation*, 98 Calif. L. Rev. 327, 342 (2010).

> agreements can be entered into between administrative agencies and technocrats—with relatively little interference by outsiders.[18]

Soft law provides a practical and efficient means of adopting rules. But are these rules effective? According to Berkeley Law Professor and Associate Dean Andrew Guzman, "compliance occurs due to state concern about both reputational and direct sanctions triggered by violations of the law."[19] He adds that emphasizing incentives for compliance reveals that soft law "should be recognized as part of a spectrum of commitment along which states choose to locate their promises."[20] For example, countries failing to adopt certain regulations may be perceived as risky or, worse, conducive of dangerous activities. Such a reputation could result in negative responses from other states or private actors.

III. THE FINANCIAL ACTION TASK FORCE

A. History and Structure

The Financial Action Task Force on Money Laundering (today shortened to the Financial Action Task Force) was formed under the initiative of the G7 and the European Commission following the 1989 G7 Summit in Paris.[21] Its original purpose was to coordinate global efforts against money laundering related to drug trafficking. In 1996, the FATF broadened the scope of its Recommendations to include predicate crimes other than drug trafficking.[22] In 2001, the FATF's mandate expanded to include coordinating efforts in the global fight against terrorist financing, which led to the creation of eight Special Recommendations (a ninth was added in 2004). Together, the original and Special Recommendations are known as the FATF 40+9 Recommendations. Other focuses include financial inclusion for the poor, governmental corruption, voluntary tax compliance programs, and enhanced coordination with the private sector.

In 2012, the FATF's members renewed and extended the organization's mandate until 2020. The key elements of the new mandate clarify expectations for global money laundering and terrorist financing regulation, promote implementation of the FATF Recommendations, identify new and emerging threats to the global financial system, and increase engagement with various stakeholders—including the private sector.[23]

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18. Brummer, *supra* note 2, at 631.

19. Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Calif. L. Rev. 1823, 1827 (2002).

20. *Id.* at 1828.

21. *History of the FATF*, Fin. Action Task Force, http://www.fatf-gafi.org/pages/aboutus/historyofthefatf/ (last visited Apr. 10, 2015).

22. Predicate crimes are other "serious offenses" as defined by FATF member states in their national legislation. Fin. Action Task Force on Money Laundering, Annual Report 1995–1996, at 24 (June 28, 1996), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/1995%201996%20ENG.pdf.

23. Fin. Action Task Force, Fin. Action Task Force Mandate (2012–2020), at 2–3 (Apr. 12, 2012), *available at* http://www.fatf-gafi.org/media/fatf/documents/FINAL%20FATF%20MANDATE%202012-2020.pdf [hereinafter Mandate].

The FATF's membership is comprised of direct members, who are immediately involved in the FATF's work, and indirect members, who take part via FATF-Style Regional Bodies (FSRBs). As of April 2014, the organization's direct membership includes thirty-four member states and two regional organizations (the European Commission (EC) and the Gulf Co-operation Council (GCC)).[24] In order to become a FATF member, an applicant must be considered "strategically important." This designation takes into account quantitative factors such as population and gross domestic product, qualitative factors such as the relative importance of the applicant's financial sector, and additional factors such as the applicant's adherence to financial industry standards and participation in other international organizations.[25] Prospective members must issue a high-level written commitment to the FATF and the Recommendations.[26] Following a consultation between FATF staff and the relevant national political and regulatory officials, the FATF Plenary may decide to give the applicant "observer status." Upon completion of a satisfactory Mutual Evaluation, which may require a corrective action plan for areas deemed noncompliant, an observer becomes eligible for membership in the FATF.[27] In total, the FATF covers more than 190 jurisdictions, and includes most major financial centers. Twenty-one observer organizations take part in the FATF's work, including the IMF, World Bank, United Nations, and the Egmont Group of Financial Intelligence Units.

The FATF Secretariat is housed in the Organisation for Economic Co-operation and Development's (OECD) headquarters in Paris and employs experts in law, regulation, and enforcement, as well as administrative staff.[28] The Secretariat's primary functions are to: support the activities of the FATF and its working groups; facilitate cooperation between members, associate members, and observers; ensure efficient communications; manage FATF records, correspondence, and web sites; and carry out other functions assigned by the FATF president or Plenary.[29]

B. FATF Strategies: Recommendations and Assessments

In 1990, a year after its inception, the FATF issued the original 40 Recommendations on anti-money laundering (AML), which provided an outline of what the FATF

24. *FATF Members and Observers*, Fin. Action Task Force, http://www.fatf-gafi.org/pages/aboutus/membersandobservers/ (last visited Apr. 10, 2015).

25. *FATF Membership Policy*, Fin. Action Task Force, http://www.fatf-gafi.org/pages/aboutus/membersandobservers/fatfmembershippolicy.html (last visited Apr. 10, 2015).

26. *Process and Criteria for Becoming a FATF Member*, Fin. Action Task Force, http://www.fatf-gafi.org/pages/aboutus/membersandobservers/membershipprocessandcriteria.html (last visited Apr. 10, 2015).

27. *Id.*

28. *FATF Secretariat*, Fin. Action Task Force, http://www.fatf-gafi.org/pages/aboutus/fatfsecretariat/ (last visited Apr. 10, 2015); Founded in 1961, the thirty-four member Organisation for Economic Co-operation and Development (OECD) provides a forum for global economic policy development. In addition to housing the FATF, the OECD issues guidance related to money laundering designed to complement the FATF's work, particularly in the area of taxation. *See Money Laundering*, OECD, http://www.oecd.org/cleangovbiz/toolkit/moneylaundering.htm (last visited Apr. 10, 2015).

29. *FATF Secretariat*, *supra* note 28.

considers an adequate AML regulatory framework. The current version of the Recommendations covers seven categories, representing the major components of the AML and combating terrorist financing (CFT) regime (collectively AML/CFT).[30] A country that has adopted all of the Recommendations is considered to have a well-designed and comprehensive AML/CFT regime. Recommendations concerning the criminalization of money laundering, oversight of financial institutions, due diligence, suspicious activity reporting, and the aggregation and sharing of information nationally and internationally are particularly important. Compliance with the 40+9 Recommendations is assessed on a country-by-country basis through year-long mutual evaluations. Experts employed by the Secretariat conduct the evaluations and make on-site visits before producing a draft report that is shared with the subject country, FATF members, and observers. After revisions, the Plenary adopts the final report, which is made public. Evaluations are conducted using a consistent methodology and documentation under the direction of the FATF Secretariat, IMF, or World Bank.

If the final evaluation finds that a country's AML/CFT regime is deficient in regard to any of the Recommendations, the country is required to submit a follow-up report after two years, describing improvements made to address observed weaknesses. In the case of serious deficiencies, or where the Plenary finds insufficient progress in remediating observed weaknesses, more frequent reporting may be required.

The FATF's methodology also mandates more frequent reporting when a country is rated as partially compliant or noncompliant on Recommendations 1 (assessing risk), 5 (criminalizing terrorist financing), 10 (customer due diligence), 13 (correspondent banking), or Special Recommendations II or IV (terrorist financing). For example, in 2010, Argentina was found to be deficient nearly across-the-board, and the country was placed on a regular reporting schedule.[31] After its eleventh follow-up report in June 2014, Argentina was found to have significantly improved its AML/CFT regime and was removed from the regular reporting process.[32]

The FATF publicizes the most serious cases after each Plenary, a tactic Brummer refers to as "name and shame."[33] Offending countries may appear on one of two lists. The first list identifies countries that have strategic AML/CFT weaknesses, but have provided a high-level commitment to addressing them. More than a dozen countries appear on this list at any given time. The second list, also known as "the blacklist," identifies two categories of noncompliant countries: (1) those with AML/

30. The categories include assessing policies and promoting national coordination, defining money laundering and permitting confiscation of illicit funds, combating terrorist financing and proliferation, establishing preventative measures, identifying beneficial ownership, defining the powers and responsibilities of authorities and institutions, and fostering international cooperation. Fin. Action Task Force, The FATF Recommendations (Feb. 15, 2012), *available at* http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf [hereinafter 2012 Recommendations].

31. Fin. Action Task Force, Mutual Evaluation Report: Argentina (Oct. 22, 2010), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Argentina.pdf.

32. Fin. Action Task Force, Mutual Evaluation of Argentina: 11th Follow-Up Report (2014), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/FUR%20Argentina_reduced.pdf.

33. Brummer, *supra* note 2, at 640.

CFT deficiencies to which countermeasures apply; and (2) those with deficiencies that have not committed to an action plan or have failed to make sufficient progress against one.

Countries to which countermeasures apply are essentially ostracized from the global financial system; countries that have not committed to an action plan risk a similar outcome. Private actors may consider the FATF's findings in their own assessments of geographic risk, thereby making the delivery of financial services more difficult and costly. The reputational costs for appearing on any of the FATF's lists create a market-based incentive to adopt the Recommendations.

As of June 2014, four countries—Algeria, Ecuador, Indonesia, and Myanmar—were found to have deficiencies warranting attention by both FATF members and non-members.[34] The FATF has identified two jurisdictions, Iran and the Democratic People's Republic of Korea, for which members and non-members are encouraged to apply countermeasures under Recommendation 19.[35] Countermeasures may include steps that are "gradual, proportionate, and flexible" and are designed to compel an offending state to commit itself to remediating its AML/CFT weaknesses under the FATF's supervision.[36] These measures may include: increasing requirements for financial institutions doing business with customers in the jurisdiction; increasing reporting of suspicious activities; limiting access to FATF-member economies for banks based in the noncompliant jurisdiction; and publicizing money laundering risks associated with the jurisdiction to non-financial sectors.[37] Iran and North Korea appear to be perennial members of these lists. However, other countries, such as Nauru (listed from 2001 to 2005), Ukraine (listed from 2001 to 2002), and Myanmar (listed from 2003 to 2004), have been successful in being delisted through domestic reforms aimed at implementing some or all of the Recommendations.[38]

In 2012, the FATF revised its 40+9 Recommendations and adopted a more explicit risk-based (as opposed to rules-based) approach to AML/CFT.[39] In 2013,

34. *FATF Public Statement*, Fin. Action Task Force (June 27, 2014), http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2014.html.

35. *Id.* Recommendation 19 reads, in part: "Countries should be able to apply appropriate countermeasures when called upon to do so by the FATF. Countries should also be able to apply countermeasures independently of any call by the FATF to do so. Such countermeasures should be effective and proportionate to the risks." 2012 Recommendations, *supra* note 30, at 19.

36. Fin. Action Task Force, Annual Review of Non-Cooperative Countries and Territories 2006–2007: Eighth NCCT Review, at 4 (Oct. 12, 2007), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/2006%202007%20NCCT%20ENG.pdf.

37. *Id.*

38. *See id.* Even though the FATF may lift a recommendation for countermeasures, member states may choose to impose countermeasures for a longer period of time. For example, the United States did not lift sanctions against Myanmar until 2012. *See* Annie Lowrey, *U.S. Sanctions on Myanmar Formally Eased*, N.Y. Times (July 11, 2012), http://www.nytimes.com/2012/07/12/world/asia/us-sanctions-on-myanmar-formally-eased.html.

39. A risk-based approach to anti-money laundering and combating terrorist financing (AML/CFT) permits financial institutions and other actors to concentrate their due diligence, monitoring, and reporting efforts on customers, products, and geographies assessed as high risk for money laundering or terrorist financing,

the FATF issued a revised methodology, placing a greater emphasis on measuring the effectiveness of countries' AML/CFT regimes.[40] Under the revised methodology, in addition to technical compliance with the 40+9 Recommendations, examiners are required to consider qualitative aspects of a country's AML/CFT regulatory system. Therefore, a country that passes a law against money laundering may be found to be technically compliant, but an absence of prosecution under that law may signal a lack of effectiveness requiring further action.

C. Outcomes and Limitations

Since 1989, the FATF has had remarkable success in building a global consensus around the appropriate content of AML/CFT regulations and creating both negative and positive incentives for compliance with the 40+9 Recommendations. There is a strong relationship between the FATF's efforts and the adoption of more consistent AML/CFT frameworks globally.[41] In February 2014, the FATF Plenary removed Antigua and Barbuda, Bangladesh, and Vietnam from its ongoing monitoring process due to significant progress made on their action plans.[42] Other countries' AML/CFT systems have improved under the FATF's supervision and were de-listed in the following years: Nigeria (2013), India (2013), Ukraine (2011), Israel (2002), and Russia (2002).

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whereas a rules-based approach would require a more rigid approach to compliance and examination. *See* FATF Recommendations, *supra* note 30.

40. Fin. Action Task Force, Methodology: For Assessing Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems (Feb. 2013), *available at* http://www.fatf-gafi.org/media/fatf/content/images/FATF%20Methodology%2022%20Feb%202013%20.pdf [hereinafter Methodology].

41. Committing to the Recommendations, consenting to the mutual evaluation process, and agreeing to take an active part in the FATF's work are all prerequisites of membership in the FATF and the FSRBs. *See Process and Criteria for Becoming a FATF Member*, *supra* note 26.

42. *Outcomes from the Meeting of the FATF Plenary*, Fin. Action Task Force (Feb. 14, 2014), http://www.fatf-gafi.org/documents/news/plenary-outcomes-feb-2014.html. For example, in June 2013, the FATF issued the following statement regarding Vietnam:

> Vietnam has taken steps towards improving its AML/CFT regime, including passage of its counter-terrorism legislation. However, despite Vietnam's high-level political commitment to work with the FATF and [the Asia/Pacific Group (APG)] to address its strategic AML/CFT deficiencies, Vietnam has not made sufficient progress in implementing its action plan, and certain strategic AML/CFT deficiencies remain. Vietnam should continue to work with the FATF and APG on implementing its action plan to address these deficiencies, including by: (1) establishing and implementing adequate procedures to identify and freeze terrorist assets; (2) making legal persons subject to criminal liability in line with international standards; and (3) strengthening international co-operation.

By February of 2014, the Plenary determined that Vietnam had made progress against the specific action items and chose to remove the country from the regular review process. *See FATF Public Statement*, Fin. Action Task Force (June 21, 2013), http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/public-statement-june-2013.html.

The FATF's influence goes beyond the effectiveness of its naming and shaming tactics. Its work has been endorsed by intergovernmental partners that include the IMF, United Nations, World Bank, and G20. Furthermore, several of the 40+9 Recommendations incorporate the requirements of United Nations Security Council resolutions targeting terrorist financing. The Recommendations also require members to become a party to international agreements, such as the Convention against Transnational Organized Crime (the Palermo Convention), the Convention against Corruption, and the International Convention for the Suppression of the Financing of Terrorism, which (among other things) commit U.N. member states to take coordinated action against international financial crimes.

Finally, the FATF has acquired tremendous authority by aligning itself with U.S. national security strategies. Many core Recommendations contain provisions that have been a part of U.S. federal law since 1970.[43] Furthermore, the Nine Special Recommendations were adopted in coordination with U.S. efforts to combat terrorist financing following the attacks of September 11, 2001.[44]

Despite its successes, the international AML/CFT regime promoted by the FATF is not without critics. Some commentators argue that the FATF imposes unreasonable or inappropriate expectations on developing countries.[45] Others note that the FATF has unreasonably applied the 40+9 Recommendations to lawyers without considering attorney-client privilege and other ethical considerations. A 2014 report by the Center on Law & Globalization, a partnership between the University of Illinois College of Law and the American Bar Association, suggests that there is little evidence that the global AML/CFT regime (under the FATF and IMF) has achieved its stated goals, and that the regime created significant costs for both private and public actors in the process.[46] According to the authors:

> To date there is no substantial effort by any international organization, including the IMF, to assess either the costs or benefits of the AML/CFT regime. The FATF system has proceeded as if it produces only public and private goods, not public or private "bads" or adverse by-products against which the "goods" have to be weighed. . . . There needs to be more open acknowledgement of actual and potential financial costs of AML/CFT controls, their potential misuse by authoritarian rulers, and possible adverse effects on populations that rely on

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43. *See, e.g.*, 31 U.S.C. § 5311 (1970).

44. Juan Zarate, former deputy assistant to the president and deputy national security advisor for combating terrorism, describes the importance of the FATF to the U.S. national security offensive in his recent book. *See generally* Juan C. Zarate, Treasury's War: The Unleashing of a New Era of Financial Warfare (2013).

45. *See, e.g.*, James Thuo Gathii, *The Financial Action Task Force and Global Administrative Law*, J. Prof. Law., 2010, at 197, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1621877.

46. Terence C. Halliday et al., Global Surveillance of Dirty Money: Assessing Assessments of Regimes to Control Money-Laundering and Combat the Financing of Terrorism (Jan. 30, 2014), *available at* http://www.lexglobal.org/files/Report_Global%20Surveillance%20of%20Dirty%20Money%201.30.2014.pdf.

> remittances and the informal economy, as well as potential negative impacts on [non-governmental organizations] and parts of civil society.[47]

D. *Technical Compliance Versus Effectiveness*

The FATF has described a widely accepted AML/CFT framework and moved the world toward consistency in laws and regulations. However, the FATF's methods have not proven to be effective in achieving perfect compliance with the Recommendations. Implementation is uneven and an impasse may have been reached with respect to key Recommendations relating to gatekeepers—including the legal profession.

In 2006, the most recent U.S. Mutual Evaluation Report found that the country had failed to implement some of the 40+9 Recommendations targeting financial gatekeepers, which include attorneys, accountants, and casinos.[48] Although generally a leader in AML/CFT regulation and compliance, the United States was found to be noncompliant with three Recommendations and only partially compliant with two. With the fourth round of evaluations approaching, it remains to be seen whether the United States will fully comply with all of the 40+9 Recommendations and, if not, whether the country will face countermeasures or other sanctioning actions from the FATF.[49] Given the FATF's recently revised methodology, it is possible that the United States will be found technically noncompliant with the Recommendations, yet somehow effective at achieving the Recommendations' overall goals.[50]

IV. CONCLUSION

Proponents of soft law in international financial regulation argue that soft law is flexible, quickly deployable, and capable of incentivizing nations to make good on their promises. Furthermore, it avoids many of the difficulties associated with treaty-based lawmaking including the need for lengthy negotiations, the challenge of

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47. *Id.* at 7. For example, the report noted that Mauritius required twenty-five staff members for its national financial intelligence unit, "a significant component of its financial regulatory resources, especially for largely non-prudential regulation." Meanwhile, resources were diverted from staff and the purchase of technology needed for compliance with increased AML/CFT regulations to the detriment of other economic activities. *Id.* at 48.

48. Fin. Action Task Force, Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: United States of America (June 23, 2006), *available at* http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20US%20full.pdf.

49. In the absence of specific legal and regulatory requirements, the American Bar Association's Task Force on Gatekeeper Regulation and the Profession has issued the Voluntary Good Practices Guidance, instructing attorneys on how to apply a risk-based approach to anti-money laundering and terrorist financing in light of the FATF Recommendations. *See* Am. Bar Ass'n, Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing (2010), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/voluntary_good_practices_guidance.authcheckdam.pdf; *see also* Am. Bar Ass'n Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 463: Client Due Diligence, Money Laundering, and Terrorist Financing (May 23, 2013), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_463.authcheckdam.pdf.

50. *See* Methodology, *supra* note 40, at 16.

overcoming domestic resistance, and inconsistencies in adoption. In his article *Against Consent*, Guzman concludes that the international community may be well served by exploring alternatives to consent-based (i.e., treaty-based) approaches to critical global problems ranging from weapons proliferation to global warming. The treaty system has failed to produce robust, sustainable, and timely solutions to these issues. While imperfect, the greatest short-term value could be derived from the work of international organizations. Guzman writes:

> International organizations are a well-established part of the international system, and are already engaged in a wide range of soft-law activities. The best response to the consent problem in the short term would be for [international organizations] to, at the margin, become more aggressive and speak with a stronger voice. States and commentators, in turn, should bolster these efforts. We should acknowledge the critical role that [international organizations] have to play, and we should put more pressure on reluctant states to follow the [their] recommendations, guidelines, proposals, and so on.[51]

The FATF demonstrates that under the right conditions, it is possible to achieve substantial, albeit imperfect, legal and regulatory coordination across the globe. Through more than two decades of sustained promotion, evaluation, and enforcement of the 40+9 Recommendations, the FATF and its members have managed to bring uniformity to most national AML/CFT regimes. It seems that hard law, whether by a treaty or other international agreement, need not be one of the conditions for effective international regulation.

51. Andrew T. Guzman, *Against Consent*, 52 Va. J. Int'l L. 747, 789 (2012).