

ROLE OF SOFT LAW IN ENVIRONMENTAL PROTECTION: AN OVERVIEW

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ABSTRACT: *One of the key features of international law is the outstanding progress of law governing the environment in recent times. From a very reticent start with about no law at law, the global environmental law has developed an enormous complicated field encircling numerous treaties, declarations, general principles, and customary international law rules. It is not clandestine that this significant growth is due to a considerable extent, to the role played by the soft law instruments. Soft law is by its nature the enunciation of a norm in a non-binding written form and is considered to be the charters, resolutions, declarations or recommendations of world community that is not meant to be as binding as the international treaties. It is a core source of international law that has emerged and developed rapidly in the modern era of globalization, particularly to knob the sensitive issues, e.g., trade and commerce, protection of human rights, conservation of environment and so on. Though the idea of soft law has existed for years, scholars have attained at no consensus as to why do states regulate soft law or whether soft law is of a consistent logical category. To some extent, this perplexity replicates a profound diversity in the categories of global agreements and strategic situations that produce them. Despite it is accepted that soft law is a latent device in harmonizing the regime created by hard law and plays a key role in achieving fixed goals regarding the implementation of global environmental law. This article strives to provide a detailed definition of soft law as well as point outs its emergence and development. It also illustrates the legal status, impact, significance, and challenges of soft law. Furthermore, this research focuses on the role of soft law instruments in the conservation of global environment.*

KEYWORDS: Soft Law, Environment, Protection, Violation

INTRODUCTION

The current development of international law has been observing a crucial issue regarding the clash of interest between the implementation and enforcement of soft and hard law instruments worldwide. Despite these conflicts, the world community has become able to determine the significance of the soft law instruments in defining the legal principles and methods. In striving to protect it, it has also conceded that the soft law is a potent weapon to balance the system established by the hard law and plays a vital role in attaining a stable aim in terms of implementation of international environmental law. The soft law provides for agreement of states, general commitments and measures to accomplish besieged objectives in global standpoint. In national aspect, soft law provides an instruction to create frameworks regulating certain behavior, providing enticements to achieve certain results and setting proper responsible institutions in place.¹ Though the soft law instruments are legally non-binding, they create what are received by states as standards of behavior and promote some policies that can benefit the traditional communities. The international norms of soft law were developed in the protection of the human environment soon after the Stockholm Conference through the creation of UNEP.

The protection of global commons from the acts of environmental degradation has been becoming more critical gradually. The environmental predicament has some eccentricities that entail achievement of a new vision of environmental protection—a vision exceeding national borders and embracing the global collective.² The international environmental law has been developed fast during the last part of the twentieth century. Since the Stockholm and Rio Declarations³ were adopted in 1972 and 1992 respectively, a wide consensus of the world community has undertaken the arduous chore of drafting, adopting, ratifying and implementing a plethora of hard and soft law instruments, policy documents at the national, regional and international levels. These sources of international law express many of the aspirations contained within and inspired by both the declarations.⁴ The journey that was started with the Stockholm Declaration concluded in the adoption of the Johannesburg Declaration on Sustainable Development in 2002. During a rather short span of thirty years, the development of international environmental law can be treated as phenomenal. The instrument that laid the foundation for this development is the non-binding Stockholm Declaration on the Human Environment of 1972.⁵

Soft Law: Meaning and Definition

Soft law is a paradoxical term for defining a vague fact. Paradoxical as, from a general and classical viewpoint, the rule of law is generally treated hard, i.e., mandatory, or it completely does not exist. Ambiguous as, the reality thus designated, considering its legal impacts and manifestations, is sometimes complex to recognize plainly.⁶ In other words, soft law is a trouble-maker as it is either not yet or not only law.⁷ International environmental law is a part of the regulations of soft law, not mandatory and basically declarative.⁸ Soft law refers to international norms that are deliberately non-binding in character but still have legal relevance, located in the twilight between law and politics.⁹ Soft law is associated with international law, though more recently it has been transferred to other branches of domestic law as well.¹⁰ In the international law perspective, soft law generally indicates agreements entered into between or among the states which do not amount to international law in the strictest sense. It also includes certain types of resolutions of international organizations that consist of non-treaty obligations which are hence non-enforceable.¹¹ The positivist legal scholars tend to refute the very concept of soft law, as law by definition, for them, is binding.¹² In the words of Chinkin:

“Soft law instruments range from treaties, but which include only soft obligations to non-binding or voluntary resolutions and codes of conduct to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.”¹³

Soft law is defined as a lingering category, “the realm of soft law starts once the legal arrangements are weakened beside one or more of the dimensions of obligation, precision, and delegation.”¹⁴ Hence, if a treaty is not legally binding, it is soft along one dimension. Likewise, if an agreement is formally binding but its content is vague so that the agreement leaves nearly complete discretion to the parties as to its implementation, then the agreement is soft along a second dimension. Finally, if an agreement does not delegate any authority to a third party to monitor its implementation, the agreement again can be soft as there is no third party providing a focal point around which parties can reassess their positions, and thus the parties can expansively justify their acts more easily in legalistic terms with less consequence, whether in terms of reputational costs or other sanctions.¹⁵ Soft law is a non-binding agreement, recommendation or resolution that can be issued by States, NGOs or other global entities, e.g., the UNEP.¹⁶ The glaring examples of soft laws are different resolutions passed by international

organizations and international plans of action or codes of conduct. The area of soft law generally commences once the legal arrangement is weakened along one or more of the dimensions of obligation, precision, and delegation. This weakening might be taken place in changing the degrees along every dimension and in different combinations across dimensions.

Soft law includes UNGA resolutions and other global instruments whose legal status is not clear and it encompasses declarations of principles emanating from an international conference, directive recommendations issued by an international organization, and model rules or voluntary codes of conduct produced by global and regional organizations.¹⁷ Soft law is not legally binding and cannot be enforced in court though it may eventually be hardened into custom, e.g., the UDHR 1948 is a soft law instrument that is now considered to form part of customary international law and international bill of human rights.¹⁸ Though not gives rise to legally enforceable obligations, soft law is generally regarded as being an important source of international law.¹⁹ The shorthand term soft law is used to differentiate this wide class of deviations from hard law and, at the other extreme, from purely political arrangements in which legalization is largely absent. Soft law is frequently dynamic in the sense that it initiates a process and a discourse that may involve learning and other changes over time.²⁰ In the international law perspective, soft law covers the following things:

- a. Most resolutions and declarations of the UNGA;
- b. Elements (e.g., statements, principles, codes of conduct, codes of practice etc.);
- c. Action plans (e.g., Agenda 21); and
- d. Other non-treaty obligations.²¹

Soft Law in International Arena: Emergence and Development

For most of the international practitioners, emergence and development of international soft law instruments is an accredited part of the compromises required when undertaking daily task in the global legal system, where states are sometimes reluctant to sign up or ratify or accede to numerous treaties that might result in national antipathy at over-committing to a global goal.²² Soft law has been around since the 1970s and has become progressively more popular as environmental issues take center stage in the global community.²³ The impetus for the creation of soft law on the environment began with some vigor in 1972 at the UN Conference on the Human Environment, with the passage of documents such as the Stockholm Declaration of the UN on the Human Environment.²⁴

In fact, the growth of soft law norms regarding the environmental protection commenced immediately after the Stockholm Conference, one of the consequences of which was the creation of a special subsidiary organ of the UNGA devoted to the promotion of both global and regional environmental law. This UNEP has played a key role in the promotion of regional conventions aimed at protecting seas against pollution. Though it was not supposed to develop in such a manner, UNEP has also evolved into a standing structure for negotiating draft resolutions sent, after their elaboration, to the UNGA, where their contents have been either passed as is or expressly referred to in resolutions. A leading instance of this phenomenon is provided by the 1978 UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.²⁵

Generally at the regional sphere and particularly in Europe, several global institutions have engaged in vital activities regarding environmental protection: the OECD, which particularly, has adopted a series of recommendations conceived of as a follow-up to the Stockholm Declaration regarding the prevention of transfrontier pollution;²⁶ the EEC which has adopted Programs of Action for the Environment, on the basis of which hard law is later created, principally by means of directive;²⁷ and the COE, that even before the recent, intense global assistance in this field, was possibly the first global intergovernmental organization to bring to the concentration of States the need of protecting the environment.²⁸ The action of NGOs has also contributed to the enunciation of soft law principles regarding the environment. The International Law Association adopted an influential resolution in 1966 known as the Helsinki Rules on the Use of Waters of International Rivers²⁹ which was expanded and enlarged by the same institution in 1982 with the adoption of the Montreal Rules of International Law Applicable to Transfrontier Pollution.³⁰ The Institute of International Law has played an equally important role by promulgating resolutions on the Utilization of Non-Maritime International Waters;³¹ on the Pollution of Rivers and Lakes and International Law;³² and on Transboundary Air Pollution.³³

As with other areas in which soft law plays a part, repetition is a very important factor in the international environmental soft lawmaking process. All of the international bodies referred to above should be viewed, as far as their recommendatory action in this field is concerned, as transmitting basically the same message. Cross references from one institution to another, the recalling of guidelines adopted by other apparently concurrent international authorities, recurrent invocation of the same rules formulated in one way or another at the universal, regional and more restricted levels, all tend progressively to develop and establish a common international understanding. In consequence of this process, conduct and behavior which would have been considered challenges to State sovereignty twenty years ago are now accepted within the mainstream.³⁴

By means of illustration, four substantial examples of this phenomenon in the context of international environmental soft law are examined. An example involves the principle of information and consultation. This principle usually manifests itself as an obligation whereby States must inform and consult one another, prior to engaging in any activity or initiative that is likely to cause transfrontier pollution, so that the country of origin of the potentially dangerous activity may take into consideration the interests of any potentially exposed country. The principle of information and consultation has been reiterated for almost twenty years by the different organizations cited above as well as by others. It can be found in many recommendations or resolutions: the aforementioned 1978 UNEP Draft Principles of Conduct on Shared Natural Resources; UNGA resolutions 3129 (XXVIII) of December 1973 and 3281;³⁵ OECD Council recommendations on Transfrontier Pollution and the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution.³⁶ These soft law instruments, as is the case with others usually referred to in the general context of the soft law phenomenon, are in many respects rather heterogeneous in nature. Their substantial convergence does not create a new binding rule of international environmental law.

Reasons of Growth of Environmental Soft Law

Dupuy (1991) has offered three main reasons for the rapid growth of soft environmental law:

- i) The first reason is described as structural in nature and results from the existence and development of a network of permanent institutions at international and regional levels. In this area, the UN has played a significant role by offering a standing structure that makes possible the organization of permanent and on-going political, economic, and normative negotiations among member states.³⁷
- ii) The second reason is the diversification of the components of the world community. The arrival of developing countries on the international stage has triggered a shift in the majority's power. Soft law instruments, such as resolutions, recommendations and, declarations, are looked at with great enthusiasm as the means for modifying main rules and principles of the international legal regime.
- iii) The third reason is the rapid evolution of the international economy and the growing phenomenon of global interdependence, combined with progress in science and technology, creating a need for new branches of international law. These new elements of international law are that they are adaptable and applicable to each new level of technological achievement.

Some Soft Environmental Law Instruments in International Law

Numerous soft law instruments on the environment have been adopted, e.g., the 1982 World Charter for Nature, the 1992 Rio Declaration on Environment and Development, and the 2002 Johannesburg Declaration. In 1987, the UNGA adopted the Environmental Perspective to the Year 2000 and beyond as a framework to guide national action and international co-operation in policies and program aimed at achieving environmentally sound development. During this period, UNEP also developed various soft law instruments:

- a) The Montreal Guidelines for the Protection of the Marine Environment against Pollution from Land-based Activities, 1985;
- b) The Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes, 1987; and
- c) The London Guidelines for the Exchange of Information on Chemicals in International Trade, 1989.

Another landmark in the history of international environmental law is the UN Conference on Environment and Development in Rio de Janeiro, Brazil in 1992. The main aim of the conference was, to intricate the strategies and measures to stop and cancel the effects of environmental degradation in the context of strengthened domestic and global attempts to promote sustainable development.

Declaration of the UN Conference on the Human Environment (Stockholm Declaration, 1972)

In 1972, the UN Conference on the Human Environment convened in Stockholm, culminating in the issuance of 26 principles regarding humans and their environment.³⁸ Two of these principles could bear on the question of whether global environmental law applies during armed conflict. First, Principle 21 provides the foundational principle of the conference that, "States have, in accordance with the Charter of the UN and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies,

and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”³⁹ It was noted that the Trail Smelter Principle arose in the bilateral context, while Principle 21 of the Stockholm Declaration was extended to form a general obligation to all.⁴⁰ More directly related to armed conflict is Principle 26, which in the interest of protecting the world from nuclear weapons and other methods of mass destruction, instructs States to “strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.”⁴¹

World Charter for Nature, UNGA Resolution 37/7 (1982)

Developed by IUCN, the World Charter for Nature was adopted through a UNGA Resolution in 1982. The resolution directly addresses the need to prohibit environmental harm resulting from armed conflict. Principle 5, which is one of the document’s general principles, mandates that “nature shall be secured against degradation caused by warfare or other activities.”⁴² Principle 11 then states that “activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used,” with subheadings covering specific types of harm and the need to rehabilitate degraded areas.⁴³ Finally, regarding implementation, Principle 20 declares that, “military activities damaging to nature shall be avoided.”⁴⁴ These provisions are clearly intended to prohibit environmental harm during armed conflict - the question is whether that directive is limited to the principles contained within the resolution, or whether they could provide a bootstrapping argument for broader applicability of international environmental law. Though non-binding, the resolution bears weight as a normative expression.⁴⁵

Declaration on Environment and Development (Rio Declaration) (1992)

In 1992, shortly after the 1990 - 1991 Gulf War reignited global concern about the treatment of the environment during armed conflict, the UN Conference on Environment and Development convened in Rio de Janeiro, Brazil.⁴⁶ Among the various impacts of the conference was the Rio Declaration, which delineates principles of sustainable development and recognizes that environmental protection is essential to long-term social and economic welfare. The Rio Declaration confirmed and revised Principle 21 of the Stockholm Declaration, altering the emphasis of the sovereign right of exploitation “pursuant to their own environmental policies” to a right limited by “their own environmental and developmental policies.” This right is not overtly limited to times of peace. The Declaration increased the perceived relative weight of the principle by making it Principle 2 in the Declaration, preceded only by a declaration that human health and productivity are the primary focus of sustainable development.⁴⁷ It is noted that a direct interpretation of the principle “imposes responsibility for environmental damage during armed conflict even when such damage is justified under the law of armed conflict and humanitarian law,” besides duty for any incidental harm to areas of non-national jurisdiction.⁴⁸

Program of Action for Sustainable Development (Agenda 21, 1992)

Another important document adopted at the 1992 Rio Conference was Agenda 21, a plan of action to implement sustainable development across all levels of national and international governance. The vast majority of the document focuses on peacetime issues and does not mention environmental protection during armed conflict. Within the section detailing the means of implementation, Article 39.6 states that “measures in accordance with international

law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law.” The article then specifies that the UNGA and Sixth Committee, taking into consideration the expertise and duties of the ICRC, should handle such efforts.⁴⁹

World Summit on Sustainable Development (2002)

In 2002, the World Summit on Sustainable Development was held in Johannesburg, South Africa. The Summit affirmed the principles of the Rio Declaration and Agenda 21, but did not issue any additional recommendations, resolutions or declarations directly related to environmental protection during armed conflict.⁵⁰

UNEP Governing Council Decision (2005)

At the 23rd Governing Council of UNEP, it was recommended that the organization fortify its capacity to address post-conflict environmental concerns, principally by undertaking post-conflict assessments, promoting clean-up of environmental hotspots and mainstreaming environmental concerns into the humanitarian and recovery assistance of the UN.

Soft and Hard Environmental Law: Distinctions

Soft and hard law compare greatly to written and unwritten law. Most of the issues that pertain to soft law have to do with international affairs rather than domestic affairs. Soft laws can be binding in many ways, but they are not fast and true.⁵¹ Hard international law generally refers to agreements or principles that are directly enforceable by a national or international body. While soft international law refers to agreements or principles that are meant to influence individual nations to respect certain norms or incorporate them into national law. Soft international law by itself is not enforceable. It serves to articulate standards widely shared, or aspired to, by nations.⁵² However, the following distinctions are observed between the soft and hard environmental law instruments:

- a. Soft laws often are unwritten rules that international powers follow. They become hard laws when there is a need for more stringent enforcement. However, frequently soft law morphs into hard law.
- b. The parties agree to negotiate using soft law but without the confines of binding written law. It makes the responsibility of the agreement easier to accept. Hard law locks them in, so soft law creates an easier package to accept.
- c. Treaties and international agreements all take a lot of time to prepare and confirm. Soft law reduces the paperwork and gets in practice right away. The agreement goes faster by using soft law.
- d. Many of the rules that influence the international waters are created with soft law. It is not as harsh as hard law, so state parties show interest on them.
- e. Domestic soft law is often used as an example of acceptable practice. Once used successfully in a court of law it becomes a precedent that has a potential for becoming hard law if not countered.
- f. Soft law is frequently used in environmental cases. Hard law is also used, but many soft law treaties are found on the issue.

- g. While the ability to enforce soft law is not as strong as that of hard law, issues about humane treatment of animals and treaties that involve the issue are found in soft law.
- h. It may be easier to reach agreement when the form is soft law as states are usually reluctant to bind themselves to treaties that may restrict their sovereignty and eventually lead to sanctions in case of violation of the treaty provisions.
- i. The soft law agreements vary from hard law in that they do not require formal ratification by states and, hence, can have a more direct and rapid influence on the practice of states than treaties.

Though global environmental treaties exist, there has been an emergence of several environmental soft laws that cover topics including pollution, global warming and endangered species. Hard law, to the contrary, is a legally binding obligation that is clearly written and can be interpreted by a third party. A treaty is such an example and as illustrated by the Vienna Convention hard law is created through formal negotiations and procedures thus subjecting it to scrutiny.

Environmental Soft Law: Whether Desirable or Avoidable?

Soft law is deemed to be a new, typical and pathological experience; but what it refers to is not, nor is it a normally global phenomenon. In some cases, it may carry out incredibly vital legal functions.⁵³ The prevalence of the phenomenon seems to have complicated the work of global advocates more from the nature and complexity of international law itself. It is interesting to note that many people who use the term soft law negatively often are concerned less with the alleged conjured nature of certain prescriptions that deem to be law and much more with the replacement of political power in certain global lawmaking areas. In various means all the norms we are subjected to as individuals, and the norms that are subjected to as advisers to more composite entities, are soft in various ways, and we make calculations as to which must be complied with and which must not. Different international soft norms are purposely and functionally soft and they would be unfeasible were they made much harder.

International law typically provides us with huge instances of soft law. They are soft, and so far they execute a crucial role in the global system. In some cases, the drafters globally select a soft method or accomplish the same effect by adopting a soft means of enforcement. An extensive amount of soft law can be attributed to differences in the economic structures and economic interests of developed, as opposed to developing countries. Many soft law instruments are to be found in the law of international organizations, along with the decisions of their organs. If soft law does not harden up, soft law performs important functions and given the structure of the international system, we could barely operate without it. Normatively varies in three other ways that complicate the discussion of what is now referred to as soft law. One fact has to do with the confusion of promoting new law and actually making new law. As international law for the most part is created in customary procedures, the line between the agitation for new norms and when those new norms become accepted is enormously distorted.

It is not rebuffing that in any global milieu recognition of the segregation line between law and non-law may form a difficult task, given the nature of the global law-making process as often informal and basically decentralized. But any conceptualization of the complex indicia of international law in terms of 'hard vs. soft' law is inherently problematical. Moreover their basic ambiguity, the notions imply a graduation of normatively which is logically untenable.

An alleged norm either constitutes a legal prescription or it does not. Legal norms are carried by expectations of authority and of control. Soft law, typically exemplified in the ascription of legal status to resolutions or decisions of international organizations, casual global understandings, or other global agreements entered into by states in this regard. It is an over-inclusive idea and thus blurs the key characters of legal norms. The impact is a loss of clarity regarding the status of the concerned norm. The idea of soft law, whether by design or by default, is thus apt to advance legal pretensions. To that extent entitlements are routinely negotiable. For instance, in obvious analogy to soft law, some commentators have begun to talk about soft responsibility in the sense of a responsibility that ranks lower than classic responsibility in terms of its normative contents. A similar tendency seems to permeate some of the work of the International Law Commission (ILC).⁵⁴

Environmental Soft Law: Legal Status and Significance

Though soft law instruments are non-binding in the area of international law, their utility and significance cannot be denied. International law Scholars Kenneth W. Abbott and Duncan Snidal argue that hard international law is not always preferable to soft law. Soft law can reduce contracting costs and threats to sovereignty, while still providing a number of benefits. Softer law has lower contracting costs. All agreements require learning about the issue, bargaining, drafting language, etc.⁵⁵ The various declarations and documents arising out of international conferences such as the 1972 Stockholm Conference and the 1992 Rio Conference have the legal status of soft law but in reality they now represent something close to codification of the fundamental elements of international environmental law.⁵⁶ Soft law offers many advantages over the more traditional forms of hard law, or treaties, and has been touted as a more effective alternative.⁵⁷ The fact that treaties tend to be narrowly drawn, take longer to negotiate, are limited in their application until ratification, and lack enforcement mechanisms to promote compliance suggests the need for effective alternatives that can respond to the immediate environmental threats of the global village.⁵⁸

Soft law can offer a general package based on consensus to deal with an environmental problem at a transaction cost much less than that normally required for multilateral agreements. The practical advantages of soft law are its non-legally binding and discretionary character. Soft law facilitates the further development of international environmental law, as states may not be ready to enter binding legal agreements on a particular environmental issue.⁵⁹ Indeed, the possibility of more detailed strategies being devised, as opposed to the generality of treaties, appears to be greater due to soft law's non-binding nature. Soft law can permit countries to move faster in addressing environmental issues. Its flexibility encourages the quick response to rapid changes in scientific understanding of environmental and developmental issues.⁶⁰ A State participating in the creation of international law is faced with many other than strict legal norms and principles.

The nebulous nature of soft law should not lead to it being summarily dismissed as a useless mechanism to deal with environmental issues. The idea of ambiguity may be anathema to international positivists, but it can promote valuable feelings of international comity and cooperation. The ambiguity of standards may render third-party adjudication almost impossible.⁶¹ An example of this is the Helsinki Declaration on the Protection of the Ozone Layer issued in 2 May 1989, which provided the background for the hard amendments to the 1990 Montreal Protocol on Substances that Deplete the Ozone Layer.⁶² Soft law offers precedents to states seeking environmental measures' introduction into domestic legislation. If a large number of states do this, then a particular piece of soft law may be justifiably held to

be part of international customary law.⁶³ As noted by Dupuy (1991), “cross-references from one institution to another, the recalling of guidelines adopted by other apparently concurrent international authorities, recurrent invocation of the same rules formulated in one way or another at the universal, regional or more restricted level, all tend progressively to develop and establish a common international understanding.”

Certainly, political decision makers can be influenced by soft law solutions. Soft law emerges in the public forum and is perceived as having political consequences. For this reason, soft law pronouncements should not be underestimated. An example of this is the Langkawi Declaration on the Environment, issued by the Heads of Governments of the Commonwealth in 1989.⁶⁴ Palmer has argued that because of the Langkawi Declaration on the Environment New Zealand and other Pacific countries in the Commonwealth relied upon Commonwealth support on the 1990 debate of UNGA Resolution on Large-Scale Pelagic Driftnet Fishing and Its Impact on the Living Marine Resources of the World’s Oceans and Seas.⁶⁵ This ensures that soft law is kept as close as possible to the high end of the spectrum in terms of strengthening the resolve of nations to protect the environment.⁶⁶

Enforcement of Soft Environmental Law

It was pointed out in a recent article on international environmental law, “There is a flurry of international environmental lawmaking efforts already underway. If these laws are to be successful enforcement mechanisms must be established.”⁶⁷ International environmental law does have enforcement mechanisms, but it is not wholly surprising that the author seems unaware of them. Most enforcement of international law is not done through enforcement institutions, therefore acts of enforcement are less visible at the international level than at the domestic level. In addition, international law is not enforced as often as domestic law.⁶⁸ There are arguments against using the few enforcement mechanisms available in international law to enforce international environmental law. Indeed, several reasons support avoiding coercive enforcement:

- (1) First, for much environmental damage, there is no violation of a prohibitory rule which could lead to the taking of enforcement action. “The largest part of industrial activity which causes pollution is not and should not be held wrongful.” Even for many activities that should be held wrongful, the international community has not agreed on a basic conceptual approach to environmental regulation. The attempt to create general binding rules at the Conference on Environment and Development in Rio de Janeiro failed.⁶⁹ Instead, “soft law” documents were produced which were not subject to enforcement.⁷⁰
- (2) A second reason against enforcement is that oftentimes either a state responsible for environmental harm is not a party to a relevant treaty, or the treaty places no binding obligation on the state to prevent the damage. For example, the USA is a party to the Long-Range Transboundary Air Pollution Treaty.⁷¹
- (3) A third argument against enforcement is the tendency in the literature to conflate the fact that the environment is steadily worsening with the view that international environmental rules are not being observed. It is not that states are intentionally violating important, substantive environmental protection rules,⁷² “rather the rules are inadequate to protect the environment.”⁷³

Legal Impact of Soft Environmental Law

Before we specifically analyze regarding soft law, it is worth clarifying what soft law is about from a specific legal standpoint, when it appeared, and how it has been received and debated among legal scholars and law practitioners. Soft law is typically embodied within non-binding legal instruments, e.g., recommendations or declarations, resolutions, codes of conduct, guidelines, and opinions.⁷⁴ Most of these instruments take the form of written instruments generally produced by global organizations, e.g., OECD, WTO, IMF, or the World Bank, just to name a few of the most influential actors in economic globalization, occasionally depicted as “informal global legislators”.⁷⁵ Actually soft law instruments are mostly used in many fields of law, e.g., trade law, environmental law, administrative law, tort law, human rights law, and even criminal law.

In contrast to extensive assumptions and despite their recent explosion, soft law technologies are not completely new. Despite such allegedly remote sources, soft law has acquired considerable popularity under neoliberal globalization.⁷⁶ The soft law enthusiasts consider that “the soft law approach offers many advantages: timely action when governments are stalemated; bottom-up initiatives that bring additional legitimacy, expertise, and other resources for making and enforcing norms and standards; and an effective means for direct civil society participation in global governance”.⁷⁷ Hence, for enthusiasts soft law is likely to “produce more effective global governance promoting economic openness, environmental enhancement, and so cohesion”. Reviewing the soft law literature produced by international law practitioners, it is possible to detect two major concerns that deserve critical consideration. They both refer to the “means to ends relation”⁷⁸ and are closely interconnected. Two different sets of problems must be considered with respect to a discussion of the legal impact of international Soft law:

- (1) The first set of problems concerns the question of the influence of soft law on the general international law making process.
- (2) The second set of problems is twofold: even before their evolution into hard laws, do existing soft regulations have any influence on the definition of the content of international law? If so, does this have any impact on the international responsibility of States for the commission of wrongful acts?

It should be noted that the international environment law explored and used as an instance here merely because it provides a fertile ground for analysis and not because it is a field in which soft law presents any particular theoretical or technical problems. The law making process is a long term process. This remains true even if the notion of “long-term” is a relative one - the prevailing conception of “long-term,” as hinted by the International Court of Justice in the Continental Shelf case, is one which has tended to shorten over the last decades⁷⁹. It is adequately clear that the creative process of customary rules enables different heterogeneous elements to participate in the crystallization of the new custom. It becomes equally obvious that the accumulation of recurrent resolutions can greatly contribute to the creation of such a new general customary rule. It should also be noted in this context that positive cross endear between treaties a resolutions are of real importance in this respect. In the context of soft instruments, any one could say, using the classical working of legal theory in regard to the creation of custom that the cumulative enunciation of the same guideline by numerous non binding texts helps to express the opinion of the world community.

This last observation, though different in character, should be viewed in light of the one made in 1986 by the International Court of Justice with regard to several important resolutions adopted by the UNGA. “The effect of consent to the text of such resolutions may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.”⁸⁰ One should certainly not systematically go that far in interpreting the frequent repetition of “soft” rules indifferent kinds of texts. However, taking into account the criteria outlined earlier at. This conclusion is somewhat problematic; however, if one takes into account the rather dogmatic concepts and legal categories presented by the classical theory identifying the “two elements” of customary law when analyzing the soft law phenomenon.⁸¹ This classical theory has been systematized by the positivist school to explain a law-making process in which the measure and conception of time was substantially different, and the rule of Law appeared as the end product of a long and careful ripening process.

Today, even given the heterogeneity of the modern law-making process, it would not be entirely correct to conclude that the relative importance of these two elements has been reversed so that the voicing of opinions takes precedence over the material element of State practice. It would be more consistent with the reality of this process to say that, through the channel of steadfast institutionalized negotiation state practice is modeled by the constant pressure of diplomacy. In this respect, general international law-making is no longer, if it has ever effectively been, a process characterized by the explicit recognition of “general practice accepted as law.”⁸² Consequently soft law must be viewed in light of the interaction of competing legal strategies pursued by different categories of States whose varied interests are not always considered by other States to be converging. In invent it is evident that part of today’s soft law is hard law of tomorrow.

Soft Law and the Protection of Environment

The UN family of institutions has spearheaded legislation and adoption of international environmental regulations that inclines toward the dimension of soft law. These institutions provide the global community with a standing structure of organization that controls permanent and ongoing political, economic and essential negotiations among the member States of the international community.⁸³ Moreover, the important role of NGOs offers an effective complement to the present intergovernmental

Framework by creating a dynamic inter-state diplomacy and global public opinion. Environmental strategists have opted for soft law because of the diversification of the components of the world community. The need of including underdeveloped countries on the international environmental plans has made it necessary to adapt and re-examine the diverse international traditional norms that had not been elaborated when these countries were not part of the global environmental protection team.⁸⁴ The starting point for associating human rights with environmental issues dates back to the 1970s, with the preparation of the Stockholm Declaration on the Human Environment.⁸⁵ Principle 1 of the Declaration states:

*“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”*⁸⁶

This grand statement might have provided the basis for subsequent elaboration of a human right to environmental quality,⁸⁷ but it was not repeated in the 1992 Rio Declaration, which

makes human beings the 'central concern of sustainable development' and refers only to their being 'entitled to a healthy and productive life in harmony with nature.'⁸⁸ As Dinah Shelton noted at the time, the Rio Declaration's failure to give greater emphasis to human rights was indicative of uncertainty and debate about the proper place of human rights law in the development of international environmental law.⁸⁹

Furthermore, these new states have teamed up to lobby for the utilization of soft instruments like resolutions and recommendations of global bodies with the intention of adjusting various regulations and principles of the global legal order.⁹⁰ The underdeveloped and developing states prefer soft law regulations because they seem friendly especially when compared with the hard law principles. The strategy has also been encouraged by the development of new field of practices created by the endless development of science and technology. These situations have highlighted that the environmental law demands a versatile scheme in order to realize its objectives. Hence international law associated with the protection of human environment present a legislation section area in which soft regulations have dominated.

Mceldowney argue that the present body of global environmental law has entirely emerged from the principles of soft norms.⁹¹ Particularly, these regulations emphasize a broad-spectrum of sociological and juridical concepts that align with the idea of soft law. For instance, the Rio+20 schemes prioritize some soft ideologies proposed by the 1972 Stockholm Declaration that has informed UN conferences on the Human Environment. Many of their principles rely upon the idea of governments justifying their legal rights and duties. Provisions that are based on such undertakings have informed the Rio20 guidelines for ensuring effective protection of the environment.⁹²

Some Recommendations Regarding Environmental Soft Law

- i) Monitoring and follow up is indispensable for the fulfillment of the aim of adoption of soft law instruments.
- ii) Domestic and regional implementation mechanisms associated with soft laws work better than that of global especially in case of environmental issues.
- iii) As far as rights to environment is concerned, soft law should first be implemented at national level.
- iv) More public awareness should be created about the characteristics of soft law.
- v) If any problem arises regarding the implementation process of soft law more state parties should be informed of these problems so that a more participatory solution would emerge.
- vi) Leadership is an important factor in fulfilling the purpose of soft law. It has been experienced in many environmental norms, which ultimately fail because no state party took a leadership role in the protection of environmental issues.
- vii) In obtaining compliance with soft law, participation of all state parties equally in this is very much important.

- viii) Another thing which can be done in utilizing soft law properly is to make it transparent. State party should be aware about its loopholes and weakness.
- ix) Financial incentives should be improved to implement Soft law in all level equally.
- x) The naming of soft law is an important factor to improve its implementation and thus creates higher expectation to people.
- xi) In order to implement soft law properly, norms of abstention are more effective than norms that require action.
- xii) To legitimate soft law it should be linked with hard law. In most of the studies, it has been observed that hard law could play a big role in implementing soft law.
- xiii) Regulation of soft actors is easier than regulation of non-state actors. So soft law should be implemented first at non-state issues.
- xiv) Soft law should be implemented preferably in common areas. Because, comparing to intrusive and domestic regulations, norms on common areas are easier to be complied with.
- xv) For the better compliance of soft law, precise obligations should be imposed on state parties. Vague agreements do not work properly.
- xvi) Soft law should not be considered a normative sickness but rather a symbol of contemporary times and a product of necessity.

Concluding Remarks

It can be argued that, soft law instruments play a pivotal role in the growth of international norms in environmental protection. They should not be undervalued by the fact that they do not create *per se* binding rules. They function in a more indirect manner, by persuasion, not by coercion. Practice reveals that they have a genuine control on the practice of states; through encouraging them to implement the common standards proposed and may create binding norms, either by leading to a treaty or by being recognized as customary law.⁹³ In fact soft law instruments provide at present the only realistic means of dealing with environmental issues at international level. The soft law instruments have traditionally been referred to the fringes of academic international law discourse, despite its significance in the actual practice of states. This is because soft law has not been seen as real international law. In fact, so little attention has been paid to soft law that its place within the framework of international law remains uncertain.⁹⁴ Soft law has widely been criticized and dismissed as a factor in international affairs. Realists focus on the absence of an independent judiciary with supporting enforcement powers to conclude that all international law is soft and is therefore only window dressing.⁹⁵

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