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COMMENTS ON THE NORMATIVE CHALLENGE OF ENVIRONMENTAL "SOFT LAW"

Dinah SHELTON

International environmental law has contributed, perhaps more than any other subject area, to the essential and growing role of non-binding instruments in international law. The following comments examine briefly how soft law instruments relate to hard law sources and why States may be adopting soft law texts more frequently to regulate environmental matters.[1]

I. THE RELATIONS BETWEEN SOFT AND HARD LAW

Non-binding norms are often the precursor to treaty negotiations and sometimes stimulate state practice leading to the formation of customary international law. In fact, environmental soft law plays many roles in relation to hard law, contributing to the current normative complexity of the field. A non-binding normative instrument may do one or more of the following:

- codify pre-existing customary international law, helping to provide greater precision through the written text;
- crystallize a trend towards a particular norm, overriding the views of dissenters and persuading those who have little or no relevant state

[1] Among the extensive publications discussing soft law, see: Abbott K.W. & Snidal D., "Hard and Soft Law in International Governance", 54 *Int'l Org.* 421-456 (2000); Abbott K., "Commentary: Privately Generated Soft Law in International Governance", in *International Law and International Relations: Building Theory and Practice* 166 (Thomas J. Biersteker & al. eds, London and New York: Routledge, 2007); Aust A., "The Theory and Practice of Informal International Instruments", 35 *ICLQ* 787 (1986); Bothe M., "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations", XI *NYIL* 76 (1980); Boyle A.E., "Some Reflections on the Relationship of Treaties and Soft Law", 48 *ICLQ* 901 (1999); Chinkin C.M., "The Challenge of Soft Law: Development and Change in International Law", 38 *ICLQ* 850 (1989); Hillgenberg H., "A Fresh Look at Soft Law", 10 *Eur. J. Int'l L.* 499 (1999); Kirton J.J. & Trebilcock M.J., *Hard Choices, Soft Law* (Burlington, VT: Ashgate, 2004); Lichtenstein C., "Hard Law v. Soft Law: Unnecessary Dichotomy?", 35 *Int'l Law.* 1433 (2001); Oxman B, "Complementary Agreements and Compulsory Jurisdiction", 95 *Am. J. Int'l L.* 277 (2002); Di Robilant A., "Genealogies of Soft Law", 54 *Am. J. Comp. L.* 499 (2006); Shelton D. ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000); Weiss E.B. and Jacobson H. eds, *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge, Mass.: MIT Press, 1998) 771.

practice to acquiesce in the development of the norm;

- precede and help form new customary international law;
- consolidate political opinion around the need for action on a new problem, fostering consensus that may lead to treaty negotiations or further soft law;
- fill in gaps in existing treaties in force;
- form part of the subsequent state practice that can be utilized to interpret treaties;
- provide guidance or a model for domestic laws, without international obligation, and
- substitute for legal obligation when on-going relations make formal treaties too costly and time-consuming or otherwise unnecessary or politically unacceptable.

Non-binding norms have a potentially large impact on the development of international law. Customary law, for example, one of the two main sources of international legal obligation, requires compliance (state practice) not only as a result of the obligation, but as a constitutive, essential part of the process by which the law is formed. In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm. The process of drafting and voting for non-binding normative instruments also or alternatively may be considered a form of state practice.

The interplay between soft law and custom is identified in the first three enumerations above. Some soft law texts purport to do no more than set down in written form pre-existing legal rights and duties.[2] Other instruments may contain a combination of pre-existing law and new developments. It is rare that an entire non-binding instrument is entirely codification or new norms.

Soft law texts also may be drafted to consolidate a trend towards changes in customary law or stamp with approval one among conflicting positions on a legal issue. Efforts in the economic arena to make such changes, from the

[2] The commentary to the UN *Basic principles and guidelines on the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* (approved by the Commission on Human Rights, Res. 2005/35 of 19 April 2005 (adopted 40-0 with 13 abstentions) and endorsed by the General Assembly in 2005, UNGA Res. A/Res/60/147 of 16 December 2005) claims that the principles and guidelines contain no new norms, but instead reflect existing law scattered among a large number of treaties and widespread state practice.

Declaration on Permanent Sovereignty over Natural Resources,[3] to the General Assembly Declaration on the Establishment of a New International Economic Order[4] and the Charter of Economic Rights and Duties,[5] demonstrate that these efforts can be highly contentious and not always entirely successful. For the soft law texts to become hard law, conforming state practice is needed among states representing different regions and the major legal, economic and political systems.

Compliance with entirely new non-binding norms can lead, even rapidly, to the formation of customary international law. In recent years, non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to precede or accompany States practice, assisting in establishing the content of the norm.[6] A declaration may reflect an ideal, moving away from emphasizing state practice to greater reliance on *opinio juris*.[7] Whether a declaration provides a statement of what customary law is or should be cannot be determined by reference to mandatory or permissive words alone, although language is important as a reflection of the drafters' intent. Declarations, however, often reflect a deliberate ambiguity between actual and desired practice and are designed to develop the law. Notably, soft law instruments that seem to rely on principles of future obligation rather than reflecting existing state practice allow more states to participate in the formation of the law than would be the case if conduct alone were relevant.[8] This process "democratizes" the law-making process and precludes the rules being made solely by those States capable of state practice in new fields, especially those involving new technologies.

The relationship between soft law and treaties is also complex. In probably the large majority of instances, soft law texts are linked in one way or another to binding instruments. As the fourth category above summarizes, soft law can initiate a process of building consensus towards binding obligations needed to resolve a new problem. In environmental law, Principle 21 of the Stockholm Declaration on the Human Environment,[9] which is

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[3] UNGA Res. 1803 (XVII) of 14 December 1962, Permanent Sovereignty over Natural Resources, UN GAOR. Supp. No. 17, at 15, Doc. A/5217 (1963).

[4] UNGA Res. 3201(S-VI), 6 (Special) of 1 May 1974, UN GAOR, Supp. (No. 1) 3, Doc. A/9559 (1974).

[5] UNGA Res. 3281 (XXIX) of 12 December 1974, Charter of Economic Rights and Duties of States, UN GAOR, 29th Sess., Supp. No. 31, at 50, Doc. A/9631 (1975).

[6] E.g., the UN General Assembly Ban on Driftnet Fishing in UNGA Res 46/215 (2001).

[7] Roberts A.E., "Traditional and Modern Approaches to Customary International Law: A Reconciliation", 95 *Am. J. Int'l L.* 757, 765 (2001).

[8] An example of this can be seen in the development of the law of outer space, which occurred when few states engaged in space activities, but many more participated in the drafting and adoption of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, UNGA Res. 1962 (XVII).

[9] Stockholm Declaration of the United Nations Conference on the Human Environment, 5-16June 1972, Doc. A/CONF.48/14 (1972).

repeated almost *verbatim* in the Rio Declaration on Environment and Development, is included not only in the preambles to many multilateral treaties, but also appears Article 3 of the Convention on Biological Diversity.[10] Thus, the adoption of non-binding norms can and often does lead to similar or virtually identical norms being codified in subsequent binding agreements. Indeed, the process of negotiating and drafting non-binding instruments can greatly facilitate the achievement of the consensus necessary to produce a binding multilateral agreement. The 1998 Rotterdam Convention on Prior Informed Consent provides an example.[11]

In the environmental field, non-binding instruments also act interstitially to complete or supplement binding agreements. Sometimes this is foreseen in the agreement itself, e.g., the Bonn Convention on Migratory Species of Wild Animals[12] and the Antarctic Treaty[13] regime. In other instances, the non-binding accords may appear relatively independent and free-standing, but upon examination make reference to existing treaty obligations, as is the case for example, with the Helsinki Accords that led to the Organization for Security and Cooperation in Europe (still lacking a treaty basis).

Using non-binding texts to give authoritative interpretation to treaty terms is particularly useful when the issues are contentious and left unresolved in the treaty itself. Article 8 j) of the Convention on Biological Diversity, which concerns respect for traditional knowledge as well as access to it and the sharing of benefits from its use, is one example where fundamental disagreements resulted in a provision that is complex, ambiguous and close to contradictory in its terms. Later negotiations during the Conferences of the Parties led to drafting the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (COP dec. VI/24, April 2002), a detailed attempt to resolve some of the outstanding issues through the use of soft law.

Other non-binding instruments adopted by State parties similarly "authoritatively interpret" the obligations contained in pre-existing treaty provisions. The World Bank Operational Standards seem intended to give guidance to employees in furthering the mandate of the World Bank as set forth in its constituting treaty. The examples of the Inter-American and Universal Declarations of Human Rights, as they relate to the OAS and UN Charters also can be cited as examples.[14]

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[10] Convention on Biological Diversity, 5 June 1992, 31 *ILM* 818 (1992).

[11] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 30 *ILM* 1 (1999).

[12] Convention on the Conservation of Migratory Species of Wild Animals, 19 *ILM* 15 (1980).

[13] Antarctic Treaty, 402 *UNTS* 71.

[14] In the case of the UDHR, the final declaration of the UN's International Conference on Human Rights (1968) proclaimed that "[t]*he Universal Declaration of Human Rights* (...) *constitutes an obligation for*

Soft law norms also may become "hard" law through adoption by states in their domestic law, or by the incorporation into private binding agreements. The latter occurs most frequently with standards governing contracts or other business activities. The work of UNIDROIT in preparing draft conventions, model laws and principles based on comparative legal analysis help fill the need for harmonization in transnational business interactions, providing reliable contractual terms and obligations and minimizing legal uncertainties and linguistic misunderstandings.[15] The UNIDROIT contract principles provide a catalogue of rules found in national and international contract law and may be used in a number of ways: (1) expressly incorporated in binding contract; (2) a supplement to domestic contract law; (3) model code for the development of further national and international law; (4) basis for further harmonization and (5) part of formation of *lex mercatoria* (customary international commercial law).[16]

The last category listed above is perhaps the most interesting, because the extent to which members of the international community are willing to accept informal commitments and non-binding expressions of expected behavior in their relations with others may reflect a maturing of the legal system and international society. In on-going cooperative relationships not all commitments need to be expressed as legally-binding obligations. Clearly, there are instances of free-standing normative instruments that are neither related to nor intended to develop into binding agreements. The proliferation of Memoranda of Understanding generally can be included here. Such agreements often reflect an incremental approach to addressing problems, allowing consensus to be built ultimately to achieve hard law.

Once adopted, then, the soft law can be cited as a reflection of pre-existing customary law, in which case the normative contents, but not the text itself, may be taken as legally binding. The norms also may begin the process of creating new custom, or be relied upon in subsequent treaty negotiations. They may also have an impact on the resolution of disputes, without constituting either treaty of custom, especially in new subject areas of international

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members of the international community." This proclamation can be seen as simply another resolution unsuccessfully trying to make law out of a prior resolution (non-law plus non-law can never equal law), or as support for the view that the Universal Declaration constitutes an authoritative interpretation of the human rights obligations in the UN Charter, or as a statement of *opinio juris* which together with state practice demonstrates that the UDHR, or at least some parts of it, have become customary international law. The consequences flowing from each of the three positions are radically different. If the UDHR is not law, it creates no binding obligations for any state; if it is an authoritative interpretation of the UN Charter's human rights provisions it is binding on all UN member states; if it is customary international law, it binds even those states that are not members of the UN.

[15] Meyer L., "Soft Law for Solid Contracts? A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization", 34 *Denver J. Int'l L. & Pol'y* 119, 122 (2006).

[16] *Ibid.* at 134-135.

concern: "*Most international environmental issues are resolved through mechanisms such as negotiations, rather than through third-party dispute settlement or unilateral changes of behavior. In this second-party control process, international environmental norms can play a significant role by setting the terms of the debate, providing evaluative standards, serving as a basis to criticize other states' actions, and establishing a framework of principles within which negotiations may take place to develop more specific norms, usually in treaties*".[17]

II. WHY ARE STATES ADOPTING ENVIRONMENTAL SOFT LAW?

The increasing use of non-binding normative instruments in international environmental law is evident. There are several reasons why States may choose to use soft law over a treaty or doing nothing. First, the emergence of global resource crises such as anthropogenic climate change and crashing fisheries require rapid response, something difficult to achieve by treaty, given the long process required to negotiate and achieve wide acceptance of binding instruments. Non-binding instruments are faster to adopt, easier to change, and more useful for technical matters that may need rapid or repeated revision. This is particularly important when the subject matter may not be ripe for treaty action because of scientific uncertainty or lack of political consensus.[18] In such instances, the choice may not be between a treaty and a soft law text, but between a soft law text and no action at all. Soft law may help mask disagreements over substance, overcome competing visions of organizations' purposes and resolve institutional crises.[19]

Another reason for recourse to soft law is growing concern about the 'free rider', the holdout state that benefits from legal regulation accepted by others while enhancing its own state interests, especially economic, through continued utilization of a restricted resource, such as depleted fish stocks, or by on-going production and sale of banned substances, such as those that deplete stratospheric ozone. The traditional consent-based international legal regime lacks a legislature to override the will of dissenting states, but efforts to affect their behavior can be made through the use of "soft law". International law permits states to use political pressure to induce others to change their practices, although generally states cannot demand that others conform to legal norms the latter have not accepted. Non-binding

[17] Bodansky D., "Customary (and not so Customary) International Environmental Law", 3 *Ind. J. Global Legal Stud.* 105, 118-119 (2005).
[18] Raustiala K., "Form and Substance in International Agreements", 99 *Am. J. Int'l L.* 581-582 (2005).
[19] Schäfer A., "Resolving Deadlock: Why International Organizations Introduce Soft Law", 12 *Eur. L. J.* 194 (2006).

commitments may be entered into precisely to reflect the will of the international community to resolve a pressing global problem over the objections of one or few states identified as among those responsible for the problem, while avoiding the doctrinal barrier of their lack of consent to be bound by the norm. The actions of the United Nations General Assembly banning driftnet fishing, for example, were directed at members and non-members of the United Nations whose fishing fleets decimated dwindling fish resources through use of the driftnet "walls of death". The international community made clear its resolve to outlaw driftnet fishing and enforce the ban, albeit it was not contained in a legally binding instrument.[20]

Non-binding instruments are also useful in addressing new topics of regulation that require innovative means of rule-making with respect to non-states actors, who generally are not parties to treaties or involved in the creation of customary international law. The emergence of codes of conduct and other "soft law" on corporate social responsibility, including for environmental protection, reflects this development. The 2003 Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights, exemplifies such texts; the Sub-Commission asserted that the Norms are not entirely voluntary, but instead provide corporations with an authoritative code of conduct.

In other instances, soft law texts allow non-state actors to sign the instrument and participate in compliance mechanisms, both of which are far more difficult to do with treaties. The Voluntary Principles for Security and Human Rights in the Extractive Industries, for example, was negotiated between the US and UK governments, major human rights NGOs such as Amnesty and Human Rights Watch, and oil and gas companies, including BP, Chevron/Texaco, and Royal Dutch/Shell.[21]

Moving furthest away from traditional international law, some soft law is negotiated and adopted exclusively by non-state actors, establishing a type of private governance. Private soft law has the same advantages as state-generated norms of cost reduction and speed in reaching agreement, reduced sovereignty costs, opportunities for compromise, but also adds possibility of muting or delaying states' opposition. The Global Reporting Initiative, for example, is a disclosure initiative of CERES (Coalition for Environmentally

[20] The same approach may be taken with respect to norms that reflect widely and deeply held values, such as human rights or humanitarian law. See: Olivier M., "The Relevance of 'Soft Law' as a Source of International Human Rights", XXXV *CILSA* 290-307 (2002).

[21] Williams C.A., "Civil Socicty Initiatives and 'Soft Law' in the Oil and Gas Industry", 36 *NYU J. In'tl L. & Pol'y* 457, 477-478 (2004).

Responsive Economics). It uses shareholder activism to get companies to produce environmental reports and implement environmental management systems. The reporting format was developed by companies around the world, NGOs, accounting firms, institutional investors and labor. By March 2004, 416 companies published reports based in part or totally on the Guidelines, although only 18 reported themselves fully in accordance with the principles.[22] Effective measures and compliance seem to come from integrated systems in which governments, international organizations and non-state actors are involved.

Soft law instruments adopted subsequent to a treaty are useful in allowing treaty parties to authoritatively resolve ambiguities in the binding text or fill in gaps, without the cumbersome and lengthy process of treaty amendment. This is part of an increasingly complex international system with variations in forms of instruments, means, and standards of measurement that interact intensely and frequently, with the common purpose of regulating behavior within a rule of law framework. The development of complex regimes is particularly evident in international management of commons areas, such as the high seas and Antarctica, and in ongoing intergovernmental cooperative arrangements. For the latter, the memorandum of understanding has become a common form of undertaking, perhaps *"motivated by the need to circumvent the political constraints, economic costs, and legal rigidities that often are associated with formal and legally binding treaties"*.[23]

The European Union has turned to soft law to introduce some flexibility into its regulatory system in the face of adhesion by new member states with weaker economies and political institutions. The EC thus has moved to deregulate and "simplify", ostensibly to remove "outdated" and "unnecessary" regulation, in the process advocating "soft law" as an alternative to traditional regulatory instruments such as directives.[24] The result has been controversial, especially as a means to improve the deteriorating working environment in Central and Eastern Europe. Critics say the non-legal alternative fails to take into account the significant imbalance in power between employers and employees and "[a]*s such the necessary supports for various forms of soft law initiative and self-regulations within*

[22] *Ibid.*, at 461.

[23] Johnston D.M., *Consent and Commitment in the World Community* xxiv (Irvington-on-Hudson, NY: Transnational, 1997).

[24] Commission of the European Communities, Action Plan "Simplifying and Improving the Regulatory Environment", Brussels, June 5, 2002, COM(2002)278 final; Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "Updating and Simplifying the Community *Acquis*", Brussels, February 11, 2003, COM(2003) 261 final.

an enterprise are absent".[25] If true, this could be an example of moving from hard law to soft law in order to weaken pre-existing standards.

Three further reasons may explain the increasing use of soft law. First, soft law is all that states can do some settings. International organizations in which much of the modern standard-setting takes place generally do not have the power to adopt binding texts. Second, non-binding texts serve to avoid domestic political battles because they do not need ratification as treaties do. Third, soft law can give the appearance that states are responding to a problem where public pressure has been exerted, while in fact the form and contents of the instrument adopted are designed to create little in the way of obligation.[26]

III. COMPLIANCE

Assertions that states are bound by law require identifying the process by which legal rules and principles are authoritatively created. If states expect compliance and in fact comply with rules and principles contained in soft law instruments as well as they do with norms contained in treaties and custom, then perhaps the concept of international law, or the list of sources of international law, requires expansion. Alternatively, it may have to be conceded that legal obligation is not as significant a factor in state behavior as some would think. A further possibility is that law remains important and states choose a soft law form for specific reasons related to the requirements of the problem being addressed, as noted above, and unrelated to the expectation of compliance.

Using data from 107 countries, one study sought to explain why countries comply with soft law standards. The results showed reputational considerations were significant, but also found a consistent positive effect of democratic systems on implementation: "*Countries implementing the Basle Accord are wealthier, have higher savings, are more likely to have a current account surplus, are more democratic, less corrupt, and have less divided government*",[27] with democracy consistently outperforming all other explanatory variables.[28] Domestic institution-building is thus of paramount importance to ensure compliance with political as well as legal agreements.

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[25] Woofson C., "Working Environment and 'Soft Law' in the Post-Communist New Member State", 44 *JCMS* 195- 196 (2006).
[26] Graubart J., "Giving Meaning to New Trade-Linked 'Soft Law' Agreements on Social Values: A Law-in-Action Analysis of NAFTA's Environmental Side Agreement", 6 *UCLA J. Int'l & Foreign Aff.* 425 (2001-02).
[27] Ho D.E., "Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?", *J. Int'l Econ. L.* 647, 672 (2002).
[28] *Ibid.*, at 676.

Transnational NGO coalitions can assist to mobilize and empower affected groups, with the possibility of enmeshing governments in a web of norms and pressures from above and below to implement non-binding instruments.

In some instances, good compliance with non-binding norms and instruments is evident and probably would not have been better if the norms were contained in a binding text. In fact, in many cases the choice would not have been between a binding and a non-binding text, but between a non-binding text and no text at all. In instances where the choice is presented, there is some evidence that there may be less compliance with non-binding norms, but that the content of the instrument is likely to be more ambitious and far-reaching than would be the product of treaty negotiations, so the overall impact may still be more positive with a non-binding than a binding instrument.

CONCLUSION

From the perspective of state practice, it seems clear that resolutions, codes of conduct, conference declarations, and similar instruments are not law, soft or hard, albeit they are usually related to or lead to law in one manner or another. State and other actors generally draft and agree to legally non-binding instruments advertently, knowingly. They make a conscious decision to have a text that is legally binding or not. In other words, for practitioners, governments, and intergovernmental organizations, there is not a continuum of instruments from soft to hard, but a binary system in which an instrument is entered into as law or as not-law. The not-law can be politically binding, morally binding, and expectations can be extremely strong of compliance with the norms contained in the instrument, but the difference between a legally binding instrument and one that is not appears well understood and acted upon by government negotiators. Although a vast amount of resolutions and other non-binding texts includes normative declarations, so-called soft law is not law or a formal source of norms. Such instruments may express trends or a stage in the formulation of treaty or custom, but law does not have a sliding scale of bindingness nor does desired law become law by stating its desirability, even repeatedly.

The considerable recourse to and compliance with non-binding norms may represent an advance in international relations. The on-going relationships among states and other actors, deepening and changing with globalization, create a climate that may diminish the felt need to include all expectations between states in formal legal instruments. Not all arrangements in business, neighbourhoods, or in families are formalized, but are often governed by informal social norms and voluntary, non-contractual

arrangements. Non-binding norms or informal social norms can be effective and offer a flexible and efficient way to order responses to common problems. They are not law and they do not need to be in order to influence conduct in the desired manner.

The growing complexity of the international legal system is reflected in the increasing variety of forms of commitment adopted to regulate state and non-state behavior in regard to an ever-growing number of transnational problems. The various international actors create and implement a range of international commitments, some of which are in legal form, others of which are contained in non-binding instruments. The lack of a binding form may reduce the options for enforcement in the short term (i.e., no litigation), but this does not deny that there can exist sincere and deeply held expectations of compliance with the norms contained in the non-binding form.

There is no "recipe" for success that will ensure the effective resolution of international problems and conflicts. While there may be particular factors that appear to influence state and non-state behavior, determinants of implementation, compliance, and effectiveness vary in a single subject area and for a single legal instrument. Ultimately, the issue centers on how to prevent and resolve conflict and promote international justice. In the end, the international legal system appears to be a complex, dynamic web of inter-relationships between hard and soft law, legal norms given greater or lesser priority, national and international regulation, and various institutions that seek to promote the rule of law.