

# FROM STOCKHOLM TO RIO: THE CONTRIBUTION OF SOFT LAW TO THE DEPLOYMENT OF INTERNATIONAL ENVIRONMENTAL LAW

Written by *Thanapat Chatinakrob*

*LLM Student (Queen Mary, University of London); LLM and LLB (Thammasat)*

---

## ABSTRACT

This essay addresses the contributions of the soft law concept as a gap filler in international environmental law which is the youngest branch of international law. The essay analyses the distinct roles of soft law in law making and case support through the operation at international, regional and domestic levels. It will also take into account a remarkable contributor as a self-transformer which changes its status from the soft into the hard instrument.

**Keywords:** Soft Law; Law-making Process; Stockholm Declaration; Rio Declaration

## INTRODUCTION

Soft law has played a key role in environmental protection for years and has been introduced by international and regional bodies, as well as State and non-State actors. This essay will cover the roles and effects of soft law in the deployment of international environmental law ('IEL'), beginning with an analysis of its perplexing definition, its creation, which stems from diversified supporters, and its effect in the development of environmental principles. It will then explore the application of soft law by international organisations, States and international courts to illustrate its contribution to IEL. The essay will end by considering its non-binding status and potential transformation to a hard position.

## THE CONCEPT OF INTERNATIONAL ENVIRONMENTAL SOFT LAW

To understand the fundamentals of this concept, it is necessary to dissect the structure of soft law. First, its definition reflects a paradoxical meaning resulting in a controversial issue among environmental scholars. The soft lawmaking process is also vague, because it does not serve as a source of international law under the Statute of the International Court of Justice ('ICJ'). In addition, its soft enforcement exceptionally influences legislation, judgments, and State practices.

### *Definition of Soft Law*

Since World War II, the concept of soft law has been developed and supported by the United Nations ('UN'). Elias and Lim support its existence by affirming that soft law is an incident outcome from the international community's growth, resulting in a reduction of the level of homogenous identity and social quality and changing community structures.<sup>1</sup> Because of its effect, soft law has been a developing controversy for a long time.

The term 'soft law' is perplexing, because when it comes to law, generally it is employed as a hard instrument. Elias and Lim contend that soft law challenges the formation and balance of

---

<sup>1</sup> Olufemi Elias and Chin Lim, 'General Principles of Law', 'Soft' Law and the Identification of International law' [1997] XXVIII *Netherlands Yearbook of International Law* 46.

the international legal order because it has an obscure status between *lex lata* and *lex feranda*.<sup>2</sup> This argument reflects the difficulty in identifying its status because no one can confirm if soft law is actually a law. Indeed, hard law requires compulsory operation, while soft law does not. This soft instrument has no legally binding force, but it might still be defined as a law because both soft and hard laws share binding effects even in different approaches in the development of legal grounds. Such a feature renders such law different from a political statement or moral thought.<sup>3</sup>

What has been clear is the term 'soft law' is applied to fill a gap in an ambiguous situation where there is no applicable law. This concept is supported by several scholars. McNair coined this term as broad abstractness outlining some unclear legal principles through judicial interpretation.<sup>4</sup> Dupuy also asserts that soft law is a paradoxical term for describing an ambiguous circumstance.<sup>5</sup> It can be implied from McNair and Dupuy that soft law can clarify both unclear legal provisions and situations where applicable law is unsettled. This is directly applied to international environmental issues because IEL is a new field of international law, resulting in few legally binding instruments, in which means that no legally binding instrument covers every aspect of environmental protection. International environmental soft law, then, has a role in prevent such problems.

Some environmental scholars have created definitions for soft law by introducing its characteristics. Boyle believes that soft law is a non-binding agreement that is used to support treaty-making processes. Even if it is unenforceable, it has a role in dispute resolution.<sup>6</sup> What he attempts to prove demonstrates that soft law is law by its characteristics because it has effects

---

<sup>2</sup> *Ibid* 45.

<sup>3</sup> Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (Hart Publishing 2011) 290.

<sup>4</sup> Dupuy quotes that McNair coined the soft law term in Pierre-Marie Dupuy, *Declaratory Law and Programmatic Law: From Revolutionary Custom to 'Soft Law'*. in Robert J Akkerman (ed), *Declarations on Principles, A Quest for Universal Peace* (Sijthoff 1977) 252.

<sup>5</sup> Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' [1990] 12(2) *Michigan Journal of International Law* 420.

<sup>6</sup> Alan Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' [1999] 48(4) *International and Comparative Law Quarterly* 902-06.

in conflict settlement? For example, the 1982 United Nations Convention on the Law of the Sea ('UNCLOS') refers to agreed-upon conciliation procedures that have no legally binding effect but lead to dispute prevention.<sup>7</sup> Fitzmaurice also highlights that this soft characteristic is flexible, resulting in no control from the principle *pacta sunt servanda* and the requirements of customary international law.<sup>8</sup> This may imply that there is still room to explore and develop soft law instruments. Furthermore, disputing parties often apply soft law's adjustable abilities before international tribunals. Jennings' observation reveals that a State interprets a provision by seizing an opportunity from the malleable characteristic of soft law.<sup>9</sup> His interpretation is inclined to remain steady even though this argument was made almost 40 years ago because soft law has a contemporary characteristic that can be altered through the generations.

On the other hand, there are some arguments that refute the definition or even the very existence of soft law. According to the definition provided by Weil, soft law should be used for imprecise and autonomous doctrines. Thus, such term is not a law at all because he claims that to describe a term as a law, there should be at least compulsion in practice.<sup>10</sup> However, Weil fails to acknowledge the significance of its role in the deployment of international law. Some international grounds, especially IEL, have insufficient binding or compelling rules by which to operate. If soft law's definition is that narrow, there may be no instrument in order to exercise to protect the environment. Nollkaemper further argues that soft law makes no legal rules. Even if it has binding force or supports a law making process, it is still a non-legal instrument.<sup>11</sup> Nollkaemper correctly argues that States may decide to comply with any binding or non-

---

<sup>7</sup> The 1982 United Nations Convention on the Law of the Sea, art 284.

<sup>8</sup> Malgosia A. Fitzmaurice, 'International Protection of the Environment' [2001] 293 *Recueil des Cours de l'Académie de Droit International* 124.

<sup>9</sup> Robert Yewdall Jennings, 'What Is International Law. How Do We Tell It When We See It' [1981] *Annuaire Suisse* 67.

<sup>10</sup> Prosper Weil, 'Towards Relative Normativity in International Law' [1983] 77(3) *American Journal of International Law* 414-15.

<sup>11</sup> André Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* (Martinus Nijhoff Publisher 1993) 201-02.

binding rules upon their mutual arrangements.<sup>12</sup> Even Weil and Nollkaemper's interpretation rejects the definition of soft law provided by several scholars. Instead, these scholars accept the binding effect of soft law.

In summary, it has been shown from the arguments mentioned above that defining the term 'soft law' is problematic, and this has been an unsettled issue that has been a source of much criticism among international legal scholars for a very long time. However, what we can learn is that even though there are some scholars who believe that soft law should not qualify as law, they all agree that such a term has the binding effect of clarifying legal provisions or situations where there is a lack of applicable law, and its flexible characteristic might also serve to settle disputes between States.<sup>13</sup>

### ***Creation of Soft Law***

Unlike sources of international law, soft law cannot be regulated in accordance with Article 38 of the ICJ Statute. According to the Statute, only international conventions, international customs and general principles of law recognised by civilised nations, including judicial decisions and the teaching of publicists, are qualified as sources of international law.<sup>14</sup> It is clear that the ICJ Statute limits the scope of international instruments. However, various forms of international law do not rely solely on the Statute. Jennings believes that it is absurd to only consider Article 38 as the source of international law.<sup>15</sup> From Jennings' perspective, it is implied that such rule of the ICJ, which is one of the dispute settlement organs under the United Nations' system, should not be considered as the exclusive source of international law.

In the IEL field, it is hard to form complete formalism from the soft lawmaking concept. Augusto and Castañeda's argument relies on the unique features of the IEL. They point out that

---

<sup>12</sup> Fitzmaurice (n 8) 127.

<sup>13</sup> Weil (n 10) 414-15.

<sup>14</sup> The Statute of the International Court of Justice, art 38.

<sup>15</sup> Robert Yewdall Jennings, 'The Identification of International Law' in Cheng (ed), *International Law: Teaching and Practice* (Stevens 1982) 3.

IEL documents are adopted through consensus, resulting in various effects.<sup>16</sup> The authors also provide examples of a situation where the parties are in conflict with a decision to allow the main interest, abstaining from initial consent, as well as a situation where the consensus is deceitfully introduced as a unanimous expression of the general will of the international conference.<sup>17</sup> This might lead to an alternative effect of subjects refraining from decisions reached by the exceeded majority. Redgwell also posits that with regard to legal instruments, IEL treaties are not fixed agreements but have a dynamic status which evolves over time.<sup>18</sup> Relying upon Redgwell's argument, it can be also implied that the key feature of the international environmental soft law is its flexibility, which fits into the IEL characteristic. Handl also reaffirms that the IEL-making process is complicated and takes more time than other international law fields.<sup>19</sup> This argument is also true because environmental problems relate not only to matters of law, but also to matters of current fact, which change continually. By the end of the Stockholm Conference in 1972, several environmental frameworks had been widely initiated. The United Nations Environment Programme ('UNEP'), for example, was established as one of the specialised UN agencies to exercise its competence in environmental issues. International organisations, such as the Organisation for Economic Cooperation and Development ('OECD'), also adopted provisions on environmental protection for the Stockholm Declaration.<sup>20</sup> In terms of regional institutions, the European Economic Community ('EEC') endorsed Programmes of Action for the Environment, which later became a directive.<sup>21</sup> In addition, an attempt to support environmental protection by certain sectors led

---

<sup>16</sup> Fabián Augusto and Cárdenas Castañeda, 'A Call for Rethinking the Sources of International Law: Soft Law and the Other Side of the Coin' [2012] *XIII Anuario Mexicano de Derecho Internacional* 362.

<sup>17</sup> *Ibid.*

<sup>18</sup> Catherine Redgwell, 'Multilateral Environmental Regimes: Dynamic Sectoral Legal System' in Gowlland-Debbas (ed), *Multilateral Treaty-Making, the Current Status of Challenges to and Reforms Needed in International Legislative Process* (Martinus Nijhoff Publishers 2000) 91.

<sup>19</sup> Günther Handl, 'Environmental Security and Global Change: The Challenge to International Law' [1990] 1 *Yearbook of International Environmental Law* 4.

<sup>20</sup> Dupuy (n 5) 423.

<sup>21</sup> *Ibid.*

to the United Nations Conference on Environment and Development ('UNCED'), or the Rio Conference, in 1992. This conference was also a cumulative push away from the non-legally binding Stockholm Declaration. By ways of illustration, the soft law making process has an exceptional feature which is 'repetition,'<sup>22</sup> creating impacts on the deployment of the IEL.

In Dupuy's discussion on soft law, he summarises that cross-referencing of the same information, rethinking some rules adopted by other entities and repeating the same guidelines at the international, regional, or limited level have contributed to the soft law making process.<sup>23</sup> These factors are literally significant for allocating soft law instruments, especially repeating the same rules at influential organisations, because they can build upon the impact and support such rules, resulting in environmental deployment. Some soft instruments have been developed into hard law, such as a treaty or a customary international law. This process is called 'transformation'. For example, the 1988 Baltic Sea Ministerial Declaration hardened into the 1992 Helsinki Convention on the Protection of the Environment of the Baltic Sea Area.<sup>24</sup> This example challenges the developing status of the soft law making process, indicating that soft law might have legally binding force if it meets the requirements to become hard law.

Regarding its creation, soft law seems to be made for solving future dilemmas rather than addressing current complexities, programming rather than prescriptions, and instructing rather than limiting interpretation.<sup>25</sup> However, there are also some situations that do not follow such concepts. Considering the substance of non-legally binding instruments that are specifically provided and leave no room for interpretation, Dupuy's example from the meetings of the OECD Council Recommendation C(74)224 on Some Principles Concerning Transfrontier Pollution, parties to the group meetings treated provisions carefully, and in particular, some

---

<sup>22</sup> *Ibid* 424.

<sup>23</sup> *Ibid*.

<sup>24</sup> Fitzmaurice (n 8) 129.

<sup>25</sup> Dupuy (n 5) 428.

parties identified the possibility of making reservations to such contexts.<sup>26</sup> This may imply that such soft law has impacts on States even if it is not a legally binding instrument.

This section has reviewed key aspects of soft law creation. It is generally known that soft law fails to be a source of international law in accordance with Article 38 of the ICJ Statute. However, the ICJ is not a world dispute settlement forum. According to Dupuy, Redgwell and Handl, the soft lawmaking process, especially in the IEL arena, is very flexible in order to conform to the dynamic character of the IEL. Its main characteristic, repetition, crosses links with the strength of the soft law role, which may sometimes transform into a legally binding instrument.

### ***Effect of Soft Law***

Regarding the term ‘effect,’ it is not necessary to focus only on the scope of the legal effect. The concept of soft law has no legally binding force, but several international scholars believe that the instrument has effects on international law. Fitzmaurice takes issue with the contention that such effects will be strengthened if the soft instruments link with good faith, estoppel and the claim of national jurisdiction exclusion.<sup>27</sup>

Taking each element separately, according to Mensbrugge’s view of the good faith principle, States often comply with soft instruments in good faith when they intend to change their status into hard laws.<sup>28</sup> This is a basic procedure for States to support their will in order to adopt new legally binding instruments. One example can be extracted from a case for sea turtle protection, namely, the *US-Shrimp* under the dispute settlement body of the World Trade Organisation. In this case, its Appellate Body applied the soft law instrument to interpret ‘unjustifiable discrimination’ under the chapeau of Article XX of the General Agreement on Tariffs and

---

<sup>26</sup> *ibid* 429 and see the OECD Council Recommendation C(74)244 Annex (1974) stating that Spanish delegates made its own reservation to this Recommendation which was withdrawn later.

<sup>27</sup> Fitzmaurice (n 8) 128.

<sup>28</sup> Yves van der Mensbrugge, ‘Legal Status on International North Sea Declarations’ in Freestone and Ijlstra, *The North Sea: Perspective on Regional Environmental Cooperation* (Martinus Nijhoff Publishers 1990) 21.



Trade ('GATT') as a means to good faith negotiation.<sup>29</sup> The Appellate Body also ruled that applying the same regulatory policy on the use of the turtle excluder devices by the United States among exporting countries, without alternative measures, was unjustifiable discrimination.<sup>30</sup> It can be implied that the introductory clause of Article XX of GATT was clarified by the effect of soft environmental law.

The estoppel principle has been applied by the ICJ. For example, in the *North Sea Continental Shelf* case, the Court responded to the estoppel principle when it referred to any conduct, declarations or acts committed by a State that showed the acceptance of some points or issues.<sup>31</sup> This is really important, because this factor seems politic. Virally challenges the widely held view that estoppel is derived from the good faith principle and applied in political perspectives rather than by law in the Court.<sup>32</sup> McGibbon, cited in Fitzmaurice's *Recueil des Cours*, rejects the relationship between them by arguing that estoppel should be considered as an independent element for weighing distinctions from good faith.<sup>33</sup> What he means is that it depends on the intention of a State who rules and limits the principles. Thus, soft law is a dependent concept on which a State can rule in its own direction.

Unlike McGibbon, Boyle maintains his argument by introducing the term 'soft enforcement'.<sup>34</sup> By way of illustration, a classic example of this enforcement is the UNCLOS. The level of enforcement depends on the choice of forums for dispute settlement. According to paragraph 1 of Article 235, States have a duty to protect and preserve the marine environment under international law. This rule is generally accepted by States, whether or not they are parties to

---

<sup>29</sup> WTO, *United States—Import Prohibitions of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R [164].

<sup>30</sup> *Ibid.*

<sup>31</sup> *North Sea Continental Shelf (Germany v Denmark and Netherlands)* (Judgment) [1969] ICJ Rep 3 [26].

<sup>32</sup> Fitzmaurice (n 8) 128 and Michel Virally, 'La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et les textes qui en sont dépourvus' [1983] 1 *Annuaire de l'Institut de droit international* 356.

<sup>33</sup> *ibid* and Iain McGibbon, 'Estoppel in International Law' [1958] 7(3) *International and Comparative Law Quarterly* 468-513.

<sup>34</sup> Boyle (n 6) 909.

the Convention. This provision thus far supports the idea that there is enforcement in the form of State compliance. Another example is the non-compliance procedure for the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. This procedure might be called upon by any of the parties to the protocol if they believe that compliance issue arise, and the non-compliance procedure was requested several times, especially from Russia and countries in the Soviet Union.<sup>35</sup> There were varied measures adopted at the Meeting of the Parties, such as recommendations, assistance and funding. These documents were applied by State parties as soft enforcement.

Another effect of soft law is the causal link with international responsibility. According to Dupuy, a State applies soft law in the context of due diligence in relation to other States.<sup>36</sup> Such a relation can be expressed in various ways, including meetings with stakeholders before concluding treaties, notification of a polluting accident, the remedy to procedures of environmental impact assessments and non-discrimination measures, and equality of a sufferer's treatment.<sup>37</sup> The rules employed by these sources might not be defined as law, but they have an effect on a State's responsibility. The soft effect thus influences States to take responsibility to protect and preserve the environment and compensate for any environmental damage.

Considering the effect of soft law from a clearer perspective, one progressive development can be found from the development of the Baltic Sea Ministerial Declaration. In 1988, the Declaration on the Protection of the Marine Environment of the Baltic Sea was signed. However, its status was ambiguous since this document was not registered with the UN Secretariat in accordance with Article 102 of the UN Charter but it had the effect of the municipal order of Germany.<sup>38</sup> In addition, the detailed plan on requirements to protect the Baltic Sea from the sewage treatment plants was adopted by Germany, Sweden, Denmark and

---

<sup>35</sup> *Ibid* 910.

<sup>36</sup> Dupuy (n 5) 434.

<sup>37</sup> *Ibid*.

<sup>38</sup> Fitzmaurice (n 8) 129.

Finland.<sup>39</sup> This concept to reduce marine pollution then became a non-legally binding instrument which is respected by most countries, including Eastern European countries, which has difficulty accepting binding rules.<sup>40</sup> The Baltic Sea Declaration was adopted in 1990 and transformed its status to the Helsinki Convention on the Protection of the Environment of the Baltic Sea in 1992.<sup>41</sup> It can be concluded that the effect of the soft instrument depends on the intention of the State parties, and if there is sufficient combined intent, such power can lead to the transformational process of the non-legally binding soft instrument into legally binding hard law.

To conclude, non-legally binding soft law has a huge impact on the deployment of the IEL. As discussed above, almost all international legal scholars accept the existence of the roles and effects of international environmental soft instruments. It has also been shown that the intention of States acts as a contributing factor to enhance its effect; in the case of soft law that is applied for several times, the soft law then aids in the improvement of that specific principle, and if such action is sufficient, the provision might harden into a legally binding rule in the international law system.

## **THE CONTRIBUTION OF INTERNATIONAL ENVIRONMENTAL SOFT LAW**

As explained earlier, the IEL seems to be the youngest branch; therefore, legal provisions to protect the environment are rarely binding. It is the responsibility of soft law to fill such gaps beforehand. Such a contribution is illustrated by three major roles of soft law as a ‘Law-making Supporter’, a ‘Case Supporter’ and a ‘Self-Transformer’. Recognising the IEL, there are a number of soft laws contributing to its deployment. However, the best example can be examined from the ‘No Harm’ principle derived from Principle 21 of the 1972 Stockholm

---

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* 130.

<sup>41</sup> *Ibid* 131.

Declaration and guaranteed by Principle 2 of the 1992 Rio Declaration, which has substantially contributed to the IEL.

### *As the Law-making Supporter*

As discussed in the section on soft law creation, it is clear that from Dupuy that repetition is a significant element in the soft law making process.<sup>42</sup> To evaluate this concept in practice, the author will examine a notable example, which is the ‘No Harm’ principle. This principle is officially provided in context by Principle 21 of the Stockholm Declaration, which states that:

*States have ... 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.*

This principle clearly states that applying ‘no harm’ activities covers not only their own jurisdiction, but also the area of other States and beyond the limits of their jurisdiction. This implies that States have duties to cause no harm to the environment within every area. It is also a very substantial challenge for all States to cooperate to avoid any damages to the world environment. However, this principle has never been adopted as a binding treaty under the Stockholm Declaration. With the effort from several States and non-State actors, this principle was then revived by Principle 2 of the Rio Declaration with the same wording as the Stockholm Declaration. By way of illustration, these attempts represent the first influence of the ‘No Harm’ principle as a soft instrument that has a continuous effect on environmental protection at the international level.

On the question of the supporting lawmaking role of the ‘No Harm’ principle as the soft law applied to the deployment of the IEL, it is clear that this rule is applied to international communities. This principle is a supporter of another law. That is to say, this refers to both binding and non-binding instruments at the international, regional and national levels. As mentioned earlier, the ‘No Harm’ principle was first brought into written form by Principle 21 of the Stockholm Declaration. It was then restated by Principle 2 of the Rio Declaration,

---

<sup>42</sup> Dupuy (n 5) 424.

including some international environmental agreements, examples<sup>43</sup> of which can be seen below.

(a) *UN General Assembly ('UNGA') Resolution No. 3129 on Co-operation in the field of the environment concerning natural resources shared by two or more States (1973)*

This UNGA Resolution clearly reaffirms the 'No Harm' principle from the Stockholm Declaration in its preamble. This Resolution aims to affirm cooperation with conservation and reductions in the exploitation of environmental resources. It can be noted that its framework is still broad. However, it is the first step towards the creation of the 'No Harm' principle, which occurred only one year after the conclusion of the Stockholm Conference in 1972.

(b) *UNCLOS (1982)*

Several articles under the UNCLOS reflect the attempt to reduce the harm to the marine environment<sup>44</sup>, especially Article 145, which relates to measures to protect the marine environment from harmful effects, stating that: 'Necessary measures shall be taken ... to ensure effective protection for the marine environment from harmful effects ... the Authority shall adopt appropriate rules, regulations and procedures ...' This wording creates strict obligations to States to respect and protect the marine environment and comply with the soft provision of the 'No Harm' principle.

---

<sup>43</sup> Note that in respect to all contribution to the deployment of the IEL, there are a number of international conventions and instruments which this paper cannot cover and analyse all aspects, such as *the 1985 Vienna Convention for the Protection of the Ozone Layer*, *the 1992 Convention on Biological Diversity*, *EC Directive 75/442/EEC on waste* and *EC Directive 94/62/EEC on packaging and packaging waste* and some domestic laws, such as *the 1983 Swiss Federal Act*, *the 1991 Danish Environmental Protection Act No. 358*, *the 1993 Dutch Environmental Act*, *the 1998 Swedish Environmental Code*, *the 1999 Belgium Federal Act*, *the French Environmental Code*, *the interpretation from Greek High Administrative Court in its Constitution* and *the 1990 US Pollution Prevention Act*. It shows only significant international instruments for the purpose of this study.

<sup>44</sup> Besides Art 145, please also see, for example, Article 207 (Pollution from land-based sources), Article 221 (Measures to avoid pollution arising from maritime casualties) and Article 234 (Ice-covered areas).

(c) *Convention on the Protection and Use of Transboundary Watercourses and Lakes (1992)*

Even this Convention uses the term ‘transboundary impact’ instead of ‘transboundary harm’, but it is the same concept as the ‘No Harm’ principle. This soft law is applied to the transboundary watercourses and lakes stated under Article 2: ‘... 2(a) The Parties shall, in particular, take all appropriate measures to prevent, control and reduce pollution of waters causing or likely to cause transboundary impact ...’ One really important point from this Convention is that this specific ‘No Harm’ soft concept is provided under the first part which is a general provision that all parties are obligated to respect. From this perspective, it can be seen that the ‘No Harm’ concept has been developed with the support of soft law.

(d) *UN Convention on the Law of Non-navigational Uses of International Watercourses (1997)*

The International Watercourses Convention has been conducted in the same way to protect against significant harm. This obligation not to cause significant harm from this Convention shares the same notion as that of the ‘No Harm’ principle. This is illustrated in Article 7, which states that: ‘1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.’ This provision clearly shows that the concept of the ‘No Harm’ principle is applied directly to the watercourse issue. It also includes the term ‘significant harm’ in the context<sup>45</sup>, thereby limiting scope of harm by indicating that every harm does not fall under the obligation of the Convention. In other words, significant harm, which the provision defines, includes harm to human health or safety, harm to the use of the waters for beneficial purpose and harm to the living resources of the watercourse. It is implied that the soft concept of ‘No Harm’ was developing through this Convention.

(e) *International Law Commission (‘ILC’) Draft articles on Responsibility of States for Internationally Wrongful Acts (2001)*

This Draft articles seem to set its status far from the ‘No Harm’ principle, but it actually does not. According to Article 31: ‘1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.’ The commentary to this Draft articles directly mention harm and damage to the environment, such as a fishery not in

---

<sup>45</sup> UN Convention on the Law of Non-navigational Uses of International Watercourse, art 21.

season.<sup>46</sup> It is implied that even though the content of the Article does not state the ‘No Harm’ concept, it can be interpreted indirectly to cover environmental issues.

(f) *ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities (2001)*

The preamble of this Draft articles refer directly to the Rio Declaration on the ‘No Harm’ concept. All articles lead to the protection of transboundary harm, especially Article 3, stating that: ‘The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.’ This is based on the core environmental principle ‘*sic utere tuo ut alienum non laedas*’ derived from Principle 21 of the Stockholm Declaration.<sup>47</sup> From this Article, it can be observed that this Article provides the responsibility for States to prevent significant harm to the environment. This obligation can be classified as due diligence, indicating that States have their own discretion to prevent significant harm. Beyerlin and Marauhn define it as a requirement for States to fulfil the obligation to prevent the transboundary harm intentionally.<sup>48</sup> This argument is also supported by Handl, who argues that States should provide the best available technology and the best environmental practices to fulfil this obligation.<sup>49</sup> This practice leads to the ‘No Harm’ principle’s compliance among States, which is only a non-binding obligation.

As explained in the commentary of the Draft articles, States have a responsibility, to the best of their abilities, to minimize transboundary harm.<sup>50</sup> However, this does not mean that there will be no harm. For example, the United Kingdom provides the definition of due diligence in the *Alabama* case as follows: ‘such care as Governments ordinarily employ in their domestic

---

<sup>46</sup> ILC, ‘Report of the International Law Commission on the work of its 53rd session’ UN Doc A/56/10 [91]-[94].

<sup>47</sup> ILC, ‘Report of the International Law Commission on the Work of its 53rd Session’ UN Doc A/56/10 [153]-[155].

<sup>48</sup> Beyerlin and Marauhn (n 3) 42.

<sup>49</sup> Günther Handl, ‘Transboundary Impacts’ in Bodansky and others (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press 2008) 531, 533, 538.

<sup>50</sup> ILC (n 47) *ibid* 154.

concerns.<sup>51</sup> The tribunal believes that such an interpretation creates a limitation on the international responsibility of the United Kingdom, resulting in a disregard of the obligation to modify the insufficiency of its municipal law.<sup>52</sup> It can be concluded at this point that even though States can settle the level of protection of transboundary harm, the Court seems to have a minimum standard that might be higher than domestic regulations.

To conclude, it can be seen from some distinguishing examples above that the ‘No Harm’ concept from the Stockholm and Rio Declarations, which is a soft law, has supported the lawmaking processes of various international binding and non-binding instruments, especially the UNCLOS and the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. It can also be said that this principle is one of the most significant examples in favour of the deployment of the IEL as the ‘lawmaking supporter’.

### *As the Case Supporter*

Another role of the ‘No Harm’ principle as soft law is its supporting role in international courts and tribunals. One significant case that this rule was applied to is the famous *Trail Smelter* case between the United States and Canada limiting all States not to cause pollution-related damage both in and outside their territories. This arbitral tribunal in Washington D.C. found that:

*... under the principles of international law, as well as the law of the United States, no State has the right to use or permit the use its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*<sup>53</sup>

There is no doubt that the ‘No Harm’ concept has been under development for a very long time since there was no Principle 21 of the Stockholm Declaration in 1972. It can also be examined

---

<sup>51</sup> Alabama Claims Arbitration 1872, in John Bassett Moore, *Papers relating to the Treaty of Washington, Vol IV – Geneva Arbitration* (U.S. Government Printing Office 1872) 612.

<sup>52</sup> *Ibid* 613.

<sup>53</sup> *Trail Smelter (United States v Canada)* (1941) 3 RIAA 1965.



from the development of this principle through several distinguished international courts and tribunals, some of which are illustrated below.

(a) *ICJ*

The ICJ is currently one of most significant international courts that make contributions to international law development. For the 'No Harm' principle, the Court has endorsed this principle in several cases. For instance, in the Judgment of 9 April 1949 on *Corfu Channel (United Kingdom v Albania)* case, the Court stated that: '... every State's obligation not to allow knowingly its territory to be used for acts contrary to the right of other States.'<sup>54</sup> This sentence does not directly clarify the existence of the no harm concept, but it leads to the development of operations by a State towards another State that such activity cannot affect the right of another State. This ICJ guideline is really important because it is an early attempt to rule on no harm to other States.

The second case can be found in the 1996 Advisory Opinion on *the Legality of the Threat or Use of Nuclear Weapons* case. The Court guaranteed the substantive obligation of the 'No Harm' principle as a part of the corpus of international law relating to the environment.<sup>55</sup> The Court affirmed that:

*... the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or areas beyond national control is now part of the corpus of international law relating to the environment.*

It can be implied from the Court's statement that environmental protection has been respected, and it is also the general obligation that every State should comply with it. This is a clear progressive development of the 'No Harm' soft rule applied by the international court.

Additionally, in the *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* case, the Court reintroduced the stance of the 'No Harm' principle from *the Legality of the Threat or Use of Nuclear Weapons* case that States' obligation to ensure that activities within their jurisdiction

---

<sup>54</sup> *Corfu Channel (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4 [22].

<sup>55</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [29].

and control respect the environment of other States or of areas beyond national control is of great significance for both States and the whole of mankind.<sup>56</sup> It is clearly seen that the Court developed the role of the ‘No Harm’ principle and extended the players who have a duty to cause no harm to the environment to include every human.

Furthermore, in the latest *Pulp Mills (Argentina v Uruguay)* case, the ICJ affirmed that the ‘No Harm’ principle is a customary law, and all states must exercise due diligence to use all means to avoid harmful transboundary activities in any territories by stating that:

101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ (*Corfu Channel (United Kingdom v Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation ‘is now part of the corpus of international law relating to the environment’ (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29).<sup>57</sup>

This paragraph can be divided into two sub-parts. In the first part, it is implied from the Court’s interpretation that the prevention principle is now customary international law. This is quite important because the Court admits the status of the soft instrument to have a legally binding effect. Another aspect to consider is that the Court reaffirms the guidelines that the Court from previous *Corfu Channel* and *Legality of the Threat or Use of Nuclear Weapons* cases made in the judgment and advisory opinion. This reference has strengthened the effectiveness of the ‘No Harm’ principle in a productive way.

---

<sup>56</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 [53].

<sup>57</sup> *Case Concerning the Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 [101].

(b) *International Tribunal for Law of the Sea (‘ITLOS’)*

In addition to the ICJ, the ITLOS shaped the role of this principle in several cases, especially in the *MOX Plant (Malaysia v Singapore)* case. The tribunal included in the judgment the obligation of States to evaluate the risk of potential effects of their activities which may cause harm to the marine environment.

84. *Considering* that, in the view of the Tribunal, prudence and caution require that Ireland and the United Kingdom cooperate in exchanging information concerning risks or effects of the operation of the MOX plant and in devising ways to deal with them, as appropriate.<sup>58</sup>

This case is one of the best examples of how the international tribunal takes the risks of the marine environment into consideration. Even though the Tribunal did not state clearly the status of the ‘No Harm’ rule in its Order, applying the UNCLOS, which aims to protect harm to the environment, this case leads to the concern of marine environmental harm, which is essentially the same concept as the ‘No Harm’ soft principle from the Stockholm and Rio Declarations.

(c) *European Courts*

Among regional courts and tribunals, the European Courts apply the ‘No Harm’ principle the most. For example, in *the Commission v Belgium* case in the European Court of Justice (‘ECJ’), the Court ruled that environmental damages should be a top concern, and the whole community has an obligation to take proper measures to limit the transport of waste.<sup>59</sup> This judgment shows that the responsibility to prevent harm belongs not only to international communities, but also to local governments. Additionally, in the *Joined Cases Francesca Bizarro et Paolo Liruzzi*, the ECJ affirmed the obligation of States to comply with the ‘No Harm’ rule which aims to reduce harm from the uncontrolled disposal of waste<sup>60</sup>. The ECJ from these cases admits the existence of the ‘No Harm’ concept, resulting in the strengthening of the effective status of the soft instrument.

---

<sup>58</sup> *MOX Plant Case (Ireland v United Kingdom)* (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001 [84].

<sup>59</sup> Case C-2/90, *Commission v Belgium* [1992] ECR I-1 [34].

<sup>60</sup> *Joined Case C-175/98 and C-177/98, Francesco Bizzaro et Paolo Liruzzi* [1999] ECR I-6881 [52]-[53].

Thus far, this section has argued that the contribution of the ‘No Harm’ principle as soft law supports not only the lawmaking process, but also cases to which international courts generally apply the ‘No Harm’ soft instrument. In particular, the ICJ, the UN major organ, has applied soft law and developed its role in its cases for almost 70 years which can be seen from the *Corfu Channel* case, the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the *Gabčíkovo-Nagymaros Project* case and the *Pulp Mills* case. This consequently guarantees the role of soft law as the ‘case supporter’.

### *As the Self-Transformer*

As pointed out in the creation of international environmental soft law section, it is possible that soft law can transform into hard law. It can also be seen from the above section that the ‘No Harm’ principle is often applied in both lawmaking processes and in international cases. These contributions lead the ‘No Harm’ soft instrument to transform itself into hard law.

The Court in the *Gabčíkovo-Nagymaros Project* case recognised the status of the ‘No Harm’ soft law as the customary rule by stating that the following<sup>61</sup>:

*... in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this kind of damage. .... Owing to new scientific insights and to a growing awareness of the risks for mankind ... new norms and standards have been developed, set forth in a great number of instruments during the last two decades. ... Such norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past*  
...<sup>62</sup>

This means that the Court accepts the ‘No Harm’ principle as a customary international law stipulating that all States shall protect against damage and harm to the environment. This also

---

<sup>61</sup> Nicholas De Sadeleer, *Environmental Principles From Political Slogans to Legal Rules* (Oxford University Press 2002) 66.

<sup>62</sup> *Gabčíkovo-Nagymaros* (n 56) [140].

demonstrates how the ‘No Harm’ rule has been developed by the ICJ, resulting in the deployment of the IEL.

Moreover, in the *Pulp Mills* case, the ICJ officially admitted that the ‘No Harm’ principle is the customary law, and that all states must employ all procedures to prevent and abstain from harm to environment by stating that:

*... the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. ... A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. ...*<sup>63</sup>

This paragraph from the judgment clarifies the customary status of the ‘No Harm’ principle, and it arrives at the conclusion, without doubt, that this principle has transformed itself from the soft law instrument, which has no legally binding status, to customary international law, which is a component of sources of international law in accordance with Article 38 of the ICJ’s Statute. This also means that the ‘No Harm’ rule has legally binding force and no State can deny this obligation.

To conclude, the examples above are part of the opinions that support the customary status of the ‘No Harm’ principle, which represented soft law. There are also other legal and non-legal documents that express the same idea as the two judgments from the ICJ. Soft law’s final contribution in this paper thus deploys the development of the sources of the IEL.

## CONCLUSION

International environmental soft law, as discussed and analysed above, is a useful non-binding instrument that contributes to the deployment of the IEL. Although this concept is still debatable, international environmental scholars, including Dupuy, agree that it is sufficiently clear that this rule has roles and creates impacts to law making processes and supports IEL cases. The example of the ‘No Harm’ principle which is derived from the Stockholm to Rio

---

<sup>63</sup> *Pulp Mills* (n 57) [101].

Conference is the best illustration reflecting the development of soft law through the international law making process, especially the UNCLOS and the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. Additionally, it reflects the usage of international bodies, such as the ICJ and the ITLOS, to enforce this principle in practice. As a result, this soft principle has transformed itself into the binding customary rule, which is classified as the source of international law.

