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The use of soft law in the international legal system in the context of global governance

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1 Introduction

This paper aims to identify the position and role of soft law within the international legal system and for the purpose of global governance. Soft law is an umbrella concept that includes a variety of ideas. It is generally used to refer to ‘law-like’ rules that are not inherently binding, not founded on legal basis and not identified with any particular institutional actors responsible for its adoption, but which may have practical and legal effects.¹ Definitions of soft law are generally based on the lack of a legal obligation to obey in an instrument, namely that an instrument is not in treaty form or part of customary law.² The binding nature of an instrument should not be confused with the precise nature of its content since soft law is not only restricted to abstract principles that may be interpreted inconsistently, but may also consist of technically specific rules that provide clear solutions to particular problems. Other terms have also been used in place of soft law such as “non-binding” or “*de facto*” law to convey how rules of unclear legal status operate as formal law,³ or the more general “non-treaty agreements” to cover a very broad variety of agreements.⁴ However, since neither the customary law nor the Vienna Convention regulates non-binding agreements, there are no clear rules on interpreting or applying these agreements.⁵

The notion of soft law developed in an attempt to classify the multilateral agreements (especially relating to public goods) that lacked the elements of international law after their prevalence grew post-WWII. International lawyers sought to include such agreements into law instead of treating them as non-law.⁶ While soft law was initially used to construct a new international economic structure following the decolonisation process,⁷ the multitude of

¹ Korkea-Aho “EU soft law in domestic legal systems: flexibility and diversity guaranteed?” 2009 Maastricht Journal of European and Comparative Law 274.

² Karlsson-Vinkhuyzen & Vihma “Comparing the legitimacy and effectiveness of global hard and soft law: An analytical framework” 2009 Regulation and Governance 402.

³ Buzzini “The development of international law: Alternatives to treaty-making? Max Planck Institute, 14-15 November 2003” 2004 International Law Forum du droit international 49-50.

⁴ Hillgenberg. “A fresh look at soft law” 1999 European Journal of International Law 500.

⁵ Schachter “The twilight existence of nonbinding international agreements” 1977 The American Journal of International Law 302.

⁶ Raustiala “Form and substance in international agreements” 2005 The American Journal of International Law 588.

⁷ Chinkin “The challenge of soft law: Development and change in international law” 1989 The

influential non-binding instruments has since led scholars to consider their possible legal effects. Instruments characterised as occupying some legally significant grey area between binding and non-binding has been debated since the early 1970s. Scholars have welcomed this concept due to its ability to create legal commitments and expectations and, at the same time, to acquiesce to the realities of overriding political decisions.⁸

Academics have identified soft law as having a variety of forms, including institutional or governmental recommendations, guidelines, opinions, communications, or notices, and explanatory documents accompanying treaties,⁹ or declarations of intergovernmental conferences.¹⁰ This may also include informal exchanges of promises through diplomatic correspondence, as well as formal written non-treaty state agreements.¹¹ The latter may also cover *pacta de contrahendo*, non-self-executing treaty provisions that require further agreement to be effective, and hortatory provisions.¹²

Other forms of soft law relate to processes of international organisations, such as their codes of conduct, guidelines and recommendations, and UN General Assembly resolutions.¹³ This also corresponds with what Guzman and Meyer term 'international common law', being soft law in the form of decisions of international organisations and tribunals that elaborate on binding international rules. Lastly, soft law may appear as rules established by non-state actors.¹⁴ Two principal contemporary forms of soft law used by states are standards adopted at will that operate in the same way as formally approved national regulations, as well as commitments made in informal institutions that do not exist independently of their members, including regional summity that emerged in the 1990s.¹⁵

⁸ International and Comparative Law Quarterly 852-856.
⁹ Klabbers "The redundancy of soft law" 1996 Nordic Journal of International Law 167, 170.
¹⁰ Korkea-Aho 2009 Maastricht Journal of European and Comparative Law 274-275.
¹¹ Boyle "Some reflections on the relationship of treaties and soft law" 1999 The International and Comparative Law Quarterly 902.
¹² Guzman & Meyer "International soft law" 2010 Journal of Legal Analysis 173-174.
¹³ Baxter "International law in "her infinite variety"" 1980 International and Comparative Law Quarterly 554.
¹⁴ Boyle 1999 The International and Comparative Law Quarterly 902.
¹⁵ Korkea-Aho 2009 Maastricht Journal of European and Comparative Law 274-275.
Kirton & Trebilcock "Chapter 1: Introduction: Hard choices and soft law in sustainable global governance"

Certain common features may be attributed to the various forms of soft law instruments. Besides not being binding, Shaffer and Pollack attribute to soft law the qualities of having the form of “a codified instrument that is publicized, issued through an institutionalized process, with the aim of exercising a form of authority or persuasion”.¹⁶ Non-binding agreements usually also focus on substance and exclude consequences applicable to treaties relating to non-fulfilment (such as compensation, enforcement through dispute settlement procedures, and reprisals).¹⁷ However, not all non-binding agreements are necessarily indefinite. “Gentlemen's agreements”, made by government elite or other officials, may commit parties to precise future conduct which they are expected to perform or refrain from, although made on the understanding that they are not binding.¹⁸ Non-treaty agreements are not limited in their scope or purpose. They can be detailed or general in nature; they can promise a single action or a system of cooperation; they can be independent or supplementary to treaties; and they can relate to rules or to procedures. Nevertheless, such agreements must still be in keeping with *ius cogens*, which implies that they function within the legal system rather than outside of it. Further, a degree of commitment can be inferred from non-treaty agreements that connect the future actions of parties.¹⁹

Soft law will be discussed in the context of how, based on the influence of globalisation, the international legal system presently operates as well as the actors that use it to fulfil the function of global governance. Globalisation has expanded the international legal system in subject matter and participants. The international legal system has been traditionally characterised as a system of states of equal standing and whose relations are governed only by the rules they accept to be legally binding on them. Presently, besides states, other active participants in the international system include private sector entities, intergovernmental organisations and non-governmental organisations. Increasingly, international norms bind all

in Kirton & Trebilcock *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004) 3-5.

¹⁶ Shaffer & Pollack “Hard and soft law: What have we learned?” University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 12-17 2.

¹⁷ Hillgenberg. 1999 *European Journal of International Law* 506-507.

¹⁸ Schachter 1977 *The American Journal of International Law* 299.

¹⁹ Hillgenberg. 1999 *European Journal of International Law* 506-507.

these entities, which also contribute to their creation.²⁰ In this paper, references to ‘international’ or ‘global’ actors will include all entities that use and shape the international legal system. With hard law instruments traditionally reserved to regulate relations between states, soft law appears to be a suitable means to create legal relationships between diverse international actors.

As explained further below, global governance generally refers to processes of organised interactive decision-making that extend beyond national borders in order to regulate issues of widespread concern. This objective is common to international actors that seek collective regulation of subject matter for which global cooperation may be desirable, and the international legal system provides an essential means to fulfil the purpose of global governance. For this reason, the use of the international legal system is no longer exclusive to state actors as it directs the interactions of various global players.

Scholars have considered whether non-binding norms are used as strictly alternative means to binding (hard law) instruments in the international legal system or as correlating instruments that fall on a continuum ranging from instruments that are classified as legally binding and those that are deemed to impart a complete freedom of action. It appears that both the form (binding or non-binding) and content (normative or promotional) of instruments determines whether or not they create a legal obligation. It is debatable whether all international instruments (texts) may be considered to form part of the international legal system, since some communications may create future expectations about how an actor may behave without purporting to commit the actor to do anything. Norms refer to rules of conduct and, for the purpose of this paper, references to soft law will indicate only instruments with a normative content.²¹

International law is built on consent between formally equal state participants and does not have the requisite structures of authority to be inherently prescriptive in the same way as

²⁰ Shelton “Law, non-law and the problem of ‘soft law’” in Shelton *Commitment and Compliance – The role of non-binding norms in the international legal system* (2000) 6.

²¹ Shelton in Shelton 4-5.

domestic law. Requiring rigid formality of international law, while necessary to indicate the weight assigned to some rules and commitments more than others, would call into question its entire foundation as law in its strict sense. Therefore, although somewhat a compromise on true legal form, it may be more relevant to also consider international legal rules and commitments in terms of their impact, efficacy and operation over time.²² While adopting the approach of many scholars of placing hard and soft law along a continuum or scale of strength, this paper considers only two determinants of hard and soft law, namely their legal status and their further gradation in terms of their effectiveness in securing observance²³ by states and other actors. Therefore, hard and soft law instruments may be superficially distinguishable on the basis of containing the obligation to be bound, and more substantively comparable in their effectiveness, particularly in light of the evolving and dynamic nature of international law. Effectiveness, therefore, qualifies both hard and soft law instruments in terms of the individual hardness and softness of each.

An important consideration in situating soft law in the international legal system is whether and how these norms are adhered to. International norms may be ‘implemented’ by being incorporated into domestic law through executive, legislative or judicial processes, whereas ‘compliance’ with norms refers to whether the behaviour of international actors corresponds with applicable norms. A further distinction can be made between ‘effectiveness’, referring to the accomplishment of the goals of a norm; ‘monitoring’ and ‘supervision’, referring to the mechanisms through which compliance may be assessed; and ‘enforcement’, referring to the processes through which compliance is assured.²⁴

Ultimately, this paper will assess the extent to which soft law may be accepted as part of the international legal system, both as a construct and in light of the function it fulfils. The

²² Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 12-17 2-3.

²³ In the context of developments in financial regulation, David Zaring even finds it unnecessary to limit cooperation to the concept of soft law when considering that both hard and soft agreements, as traditionally conceived, in this field have the same effect of widespread adherence. See Zaring “Informal procedure, hard and soft, in international administration” 2005 Chicago Journal of International Law 594-395.

²⁴ Shelton in Shelton 5.

conclusion reached will identify how soft law may best be used, after considering the characteristics of soft law within the context of the present international legal system and the risks and benefits associated its use. The main focus of this paper is to identify the attributes of soft law. Practical examples of the use of soft law in global governance will be limited to highlighting these attributes and will primarily be drawn from the field of international financial law where soft law instruments and the consequences of their use are prevalent.

2 The contemporary international legal system and its function in global governance

The use of soft law as a means of regulation of international processes has been identified as a product of globalisation. Globalisation is often broadly used to describe the increase of commercial and social cross-border activities, arising primarily out of advances in transport, communication and other technology. However, globalisation indicates more than that, namely the transformation of the international system in ways that are significant to both public and private sectors. This transformation includes changes in the legal system and processes that govern interactions among states. Globalisation is different to economic interdependence in that the latter does not indicate a change in the international system but only refers to the development by which states have become increasingly vulnerable and reactive to the economic actions of other states.²⁵

Globalisation has introduced more actors to the international public arena. This is because the private sector is the principal force behind globalisation, unlike economic interdependence that requires greater coordination among public sector actors (governments) only. While political systems operate to maintain state boundaries, markets do not depend on boundaries for their existence. As a result, globalisation has redefined the role of state actors by changing the international landscape to include the influence of private actors. The extension of traditionally private sector concerns to become subject to domestic as well as transnational public

²⁵ Reinicke & Witte "Interdependence, globalization, and sovereignty: The role of non-binding international legal accords" in Shelton 75-77.

regulation has challenged the ability of states to exercise sovereignty in the conduct of public policy.²⁶

A variety of new developments influence the way in which the international legal system presently addresses major areas of concern. As alluded to above, advances in communication and transport technology have increased the scope of the global agenda by creating awareness through more readily available information. Multilateral regimes have been established to manage common concerns with organs to supervise and monitor implementation and compliance. International actors have also made commitments to obligations that are unilateral in nature, creating new challenges to their enforcement such as in the area of human rights. Consequently, the international legal system has advanced to such a degree as to extend its jurisdiction to individuals, as evidenced by the development of international criminal law. This shows that the traditionally guaranteed boundaries between domestic and international areas of regulation are continuously being eroded.²⁷ As will be discussed below, soft law appears to possess certain useful characteristics as a means of addressing emerging global concerns.

The international legal system may operate for the purpose of global governance. While mindful of the lack of hierarchy and sovereign authority in the international system, the term 'global governance' has been used to express a variety of ideas broadly relating to the organised regulation of relationships that extend beyond national borders.²⁸ A more comprehensive description of global governance is that it is a dynamic and complex process of interactive decision-making that evolves in response to changing circumstances and is characterised by cooperation and accommodation of diverse interests. While global governance has been considered as involving primarily intergovernmental relationships (being the public institutions tasked with responding to issues affecting the global community), contemporary practice shows that governments no longer carry the sole responsibility of regulating global interactions, particularly considering the effects of globalisation.

²⁶ Reinicke & Witte in Shelton 76-82.

²⁷ Shelton in Shelton 6-7.

²⁸ Finkelstein "What Is Global Governance?" 1995 Global Governance 369.

Consequently, there is no single form of or structure for global governance as it involves multiple processes through which both public and private individuals and institutions manage common affairs. This includes both formal institutions that have the power to enforce compliance and informal arrangements that actors agree to or comply with because they are perceived to be in their interest.²⁹

The subject matter of global governance among states is no longer solely characterised by the search for a stable balance of power, but includes aspirations of values such as socio-economic wellbeing due to the influence of globalisation. Human rights, environmental protection and arms control have developed into major areas of international debate.³⁰ Other principal areas of concern on the global agenda for states include the role of cross-border relations through institutions and networks, the existence of universal common values, and the impact of the established global capitalist state-market system.³¹ Continued financial liberalisation demands a consideration of its impact on ecosystems and communities around the world. There is a growing consensus around integrating economic, environmental and social values in global governance, but the out-dated bureaucratic and hard law frameworks of formal intergovernmental organisations lack the capacity to provide an effective response. This has prompted the use of a variety of soft instruments in global governance.³²

3 The meaning of soft law and its position in the international legal system

With the progression of new developments and interactions in international relations such as those mentioned above, scholars have had difficulty in assigning legal value to the actions and decisions made by international actors, and consequently with classifying legally non-binding instruments in relation to conventional sources of international law. Traditionally, international law has been defined in terms of its nature as constituting a source of legal rights and

²⁹ Commission on Global Governance "Our global neighbourhood: The report of the commission on global governance" (1995) accessed at <http://info.worldbank.org/etools/docs/library/34565/docs/7th.pdf>.

³⁰ Shelton in Shelton 6.

³¹ Sorensen "What Kind of World Order? The International System in the New Millennium" 2006 Cooperation and Conflict: Journal of the Nordic International Studies Association 345-356.

³² Kirton & Trebilcock in Kirton & Trebilcock 3-5.

obligations for its subjects, as well as in terms of its function of governing international relations. This characterises international law as the interdependence of both a normative order and an aspect of global interaction. Similarly to domestic law, international law consists of content that requires positive action or to refrain from action, an indication of its authority as law, and a communicated intention to make the authority effective rather than aspirational.³³ Consequently, the legal significance of international norms both determines and depends on their effectiveness in enabling international law to fulfil its functions.³⁴

The complexity of contemporary international law-making has led to considerable debate regarding the definition and legal status of soft law and whether new criteria should be developed according to which rules may be classified. If viewed broadly as a consequence of decision-making, international law should be considered to be dynamic rather than static, and the application of Article 38 of the International Court of Justice Statute should not only cover the law as it existed in 1945.³⁵ Although the actuality of international law sources is less indisputable than in domestic legal systems, their development and/or continued existence is a matter of fact that may be subject to change. While it has been noted that traditional sources of international law have to be strictly defined rather than elastic in order for international law to provide certainty and be recognised as rules of law, it is also evident that traditional sources are inadequate to characterise all the activities with a law-making capacity that occur in the international arena. For this reason, soft law has supplemented traditional sources of law by identifying the existence of a 'grey area' in international law consisting of non-binding instruments with legal implications for which traditional sources cannot account. However, soft law inherently implies uncertainty as to its scope and legal consequences due to its informal attempt to solve the weaknesses of traditional sources or to adapt international law to changes in the international legal system.³⁶ This indicates the dilemma of the international legal system

³³ Reisman "A Hard Look at Soft Law" 1988 Faculty Scholarship Series Paper 373 & 375, accessed at http://digitalcommons.law.yale.edu/fss_papers/750.

³⁴ Weil "Towards Relative Normativity in International Law" 1983 American Journal of International Law 413.

³⁵ Buzzini 2004 International Law Forum du droit international 48-50.

³⁶ Hoof "Rethinking the Sources of International Law" (1983) 179-180, 189-190 & 195.

being required to simultaneously adjust to and provide the means to manage new developments.

Since soft law instruments do comply with some of the traditional criteria that establish legal rules, they cannot be regarded as irrelevant in law. While conventional agreements require the intention to create binding legal rights and obligations in order to have legal effect, the absence in soft law instruments of the required intention to be bound makes it difficult to determine the implicit intention of parties in order to give soft law legal force.³⁷ Therefore, soft law only acquires legal force on being transformed into hard law or if the traditional sources of international law are deemed to have changed.³⁸ The idea that coherent and consensual legal norms can exist without creating rights and duties may be difficult to comprehend.³⁹ The lack of consent to create binding obligations suggests that soft law cannot be regarded as a distinct source of international law. Nevertheless, since soft law facilitates and promotes such consent, it still remains legally relevant and governed by international law.⁴⁰

However, the extent to which the legal consequences attached to sources of international law apply to soft law may vary. Where instruments are required to be directly enforceable after their conclusion, their legal status becomes of primary concern. However, it is the practical and intended impact of soft law instruments, and not their enforceability, that gives soft law its implicit legal relevance and may carry greater value than legal force. This is because international actors assign legal significance to agreements early on during negotiations. This allows hard and soft law to be categorised as arranged along a continuum or spectrum that constitutes international law. This approach does not prejudice the value of various types of legal and normative instruments and instead considers the relative interaction and bearing in the international legal system of hard and soft law.⁴¹

³⁷ Schachter 1977 *The American Journal of International Law* 296-297.

³⁸ Olivier "The relevance of 'soft law' as a source of international human rights" 2002 *Comparative and International Law Journal of Southern Africa* 294-295.

³⁹ Baxter 1980 *International and Comparative Law Quarterly* 549.

⁴⁰ Olivier 2002 *Comparative and International Law Journal of Southern Africa* 307.

⁴¹ Shaffer & Pollack "Hard vs. soft law: Alternatives, complements and antagonists in international governance" 2009-2010 *University of Minnesota Law Review* 716-717.

Abbott and Snidal⁴² view international law as consisting of continuous gradations of hardness and softness in its entirety. In this sense, hard law comprises three aspects, being: legally binding obligations; that are (or can be made) precise; and that delegate authority for interpreting and implementing the law to supranational entities as third parties. Thus, legal arrangements where one or more of these three dimensions is weakened are deemed soft.⁴³ These components have different effects in that making an international agreement binding may reinforce the commitment domestically, while precise content may make noncompliance easier to detect thereby assisting monitoring and enforcement, and delegation enables enforcement and clarifies incomplete contracts. This multidimensional approach has been praised by some for allowing assessments of strengths and weaknesses in using alternative combinations of hard and soft law components to address particular challenges.⁴⁴ If the consequences that may be expected to follow the conclusion of an instrument are analysed, the legal weight of texts on their conclusion becomes irrelevant.

This view also classifies as soft those instruments that are cast in the form of treaties but lack legal content (such as by providing for general goals, planned action or gradual acquisition of standards). This understanding of hard and soft law de-emphasizes legality, focusing instead on the clarity of all international obligations and their likelihood to constrain state behaviour. However, Guzman and Meyer reject this approach to soft law. They also view soft law as consisting of a spectrum, but one that falls between the distinct categories of fully binding treaties and fully political positions. In their view, soft law comprises “non-binding rules or instruments that interpret or inform our understanding of binding legal rules or represent promises that in turn create expectations about future conduct”.⁴⁵

Identifying soft law on the basis of either the content or the form of instruments distinguishes between ‘soft substantive law’ (which may even be contained in treaties) and ‘soft instruments’

⁴² Abbott & Snidal “Hard and soft law in international governance” 2000 International Organization 424.

⁴³ Abbott & Snidal 2000 International Organization 421-422.

⁴⁴ Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 12-17 4, 6-7.

⁴⁵ Guzman & Meyer 2010 Journal of Legal Analysis 173-174.

(the content of which may not be soft at all).⁴⁶ In order to explain the existence of both aspects as part of international law, the 1980s saw the emergence of a practical approach to classifying soft law in accordance with the extent to which international law instruments are binding. Therefore, instruments were compared on the basis of either having substantively or procedurally soft but binding rules or themselves being non-binding in form regardless of the nature of their content.⁴⁷ The former have also been termed 'legal soft law' and the latter 'non-legal soft law'.⁴⁸ Legal soft law contained in treaties may be characterised by their abstract, noncommittal or aspirational nature.⁴⁹ However, it is the author's opinion that soft content is not the defining characteristic of soft law and only becomes relevant to determine whether a soft instrument contains a norm that commits the parties to the instrument to take or refrain from action.

Defining soft law as non-legal instruments reflects the difficulty of distinguishing law from non-law or identifying when acts become law.⁵⁰ The dilemma in accepting soft law as part of international law lies in determining and agreeing on the exact nature of international law itself. While lawyers, faithful to their discipline, may view international law as objective, its lack of a clear hierarchy and centralised authority means that far too much weight is placed on the interests, intentions and consensus of individual participants in rulemaking to characterise the majority of international law as universally applicable and impartial. In order for international law to be effective, the norms applicable to each circumstance must be considered independently of any other, which inevitably makes its application uncertain and not subject to legal precedent. This means that the body of international law can only be created *ex post facto* because responses to each event at the level of so many competing diverse interests will always take into account the particular circumstances present at the time. What, then, is the purpose of making a document explicitly legally binding and speaking of international legal rights and obligations at all? It appears that binding international law instruments merely

⁴⁶ Buzzini 2004 International Law Forum du droit international 49-50.

⁴⁷ Footer "the (re)turn to 'soft law' in reconciling the antinomies in WTO law" 2010 Melbourne Journal of International Law 245.

⁴⁸ Chinkin 1989 The International and Comparative Law Quarterly 851.

⁴⁹ Footer 2010 Melbourne Journal of International Law 248.

⁵⁰ Weil 1983 American Journal of International Law 414-415.

convey expectations of future behaviour with an element of certainty that is lacking in soft instruments, even though true legal certainty may only develop over time.

3.1 Arguments rejecting the concept of soft law

Critics of soft law do not recognise it as a feature of international law since it combines the legality of agreements with the content of their terms, or causes with effects of behaviour. Accordingly, the value of non-legal norms lies merely in their ability to create order that is necessary for international society to function. It is claimed that in order to understand the relevance of legality for state practice, it needs to be viewed as binary rather than a spectrum in nature. The criticism is that the soft law neither exists as a category in fact nor accurately reflects the intentions of the parties to an agreement in practice.⁵¹ This makes the notion of soft law not only unacceptable in theory, but also unnecessary. Arguments opposing soft law include that it assumes the existence of multiple international legal orders, or layers to a single legal order, that states have a choice in using. Where soft law is applied as if it were hard law, its existence as a distinct form of law is discredited, regardless of the weight it assumes during law-making.⁵²

While imprecise but binding commitments may leave their content open to interpretation or allow discretion in their implementation, it has been argued that such provisions should be viewed as *legal standards* rather than *soft rules* since their intended legal quality remains unaltered. This is because legal obligations can still exist even if they are unenforceable. It is claimed that international law cannot be defined as comprising only those rules that affect state behaviour because this defeats the purpose of identifying the influence of international law. In order to avoid the circular logic of whether the binding nature of rules determines their effect or vice versa, it is argued that the existence of international law must be ascertained before its effect. This is because legal status is not the only aspect of international agreements that influences state behaviour in their attempt to organise and sustain cooperation, nor is law the only way to shape conduct. Consequently, some scholars reject the idea that formally non-

⁵¹ Raustiala 2005 *The American Journal of International Law* 582, 586-587.

⁵² Klabbers 1996 *Nordic Journal of International Law* 168-169, 179.

legal agreements are somehow ‘quasi-legal’, asserting instead that the choice between making legal and non-legal agreements should be seen as a choice between using and avoiding use of law.⁵³

The need for credibility of instruments, which is understood as indicating greater likelihood of compliance, has been used as the dominant explanation for states choosing to make legally binding agreements. Credibility is the primary concern due to the lack of central body to enforce agreements in the anarchic international system. Legally binding agreements are generally perceived to be more credible because the intention to be governed by international legal rules shows that a commitment is made with a greater degree of solemnity. This consequently is said to increase the actual likelihood of compliance with the commitment.⁵⁴ The idea of assigning degrees of legal force to acts may undermine certain features of international law identified as allowing it to perform its functions of regulating international relations and cooperation, including voluntarism that makes rules binding on states out of their free will and certainty of rules as existing positive law.⁵⁵ It is precisely that states intentionally make an agreement legally non-binding as equal sovereign parties that makes it inappropriate to apply to such instruments an objective test that disregards the original intention.⁵⁶

3.2 Arguments in support of the concept of soft law

Proponents of soft law argue that non-binding instruments in essence have the same goal as binding instruments, namely to stabilise the international system and make state behaviour more predictable, even if soft law does so to a lesser extent.⁵⁷ Hard law is recognised as having definite and anticipated consequences from the outset, but the outcomes of soft law may depend on a variety of factors, including the legal and institutional context within which it is employed,⁵⁸ and the perceived shared gain of compliance as well as political and economic

⁵³ Raustiala 2005 *The American Journal of International Law* 588-590.

⁵⁴ Raustiala 2005 *The American Journal of International Law* 592.

⁵⁵ Weil 1983 *American Journal of International Law* 420-421.

⁵⁶ Aust “The Theory and Practice of Informal International Instruments” 1986 *International and Comparative Law Quarterly* 806.

⁵⁷ Olivier 2002 *Comparative and International Law Journal of Southern Africa* 298.

⁵⁸ Korkea-Aho 2009 *Maastricht Journal of European and Comparative Law* 289.

forces.⁵⁹ Ultimately, the same considerations of the value of the instrument are taken into account for both hard and soft law agreements.⁶⁰

Like hard law, soft law assists participants in international relations to make reasoned choices about how to act by guiding expectations about the behavioural restraints others are willing to accept,⁶¹ which expectations create legal consequences⁶². Even a 'political' commitment made by a state implies that it will be internalised legislatively or administratively as instructions to officials to act accordingly, thereby limiting behaviour. Mutual commitments between states create the presumption and expectation that their subject matter is no longer discretionary or exclusively of domestic concern. This entitles each party to the agreement to critique the conduct of others, which reinforces the perceived existence and operation of the commitment. However, this is only possible where compliance is substantial and widespread since the agreement may be terminated through non-observance.⁶³ While this characteristic of soft law may be sufficient to discredit it as law by domestic standards, it is not inconsistent with the nature of international law.

Regardless of their characterisation, the importance attached to rules in international practice is not determined by their nature since compliance often depends largely on political circumstances,⁶⁴ including the extent of international consensus about the existence of a norm and the resource capacity to comply.⁶⁵ This is because the international legal system relies on a process of self-help for its creation and enforcement, resulting in obligations being determined largely by the individual perceptions of its subjects. Therefore, interpretations of what obligations entail have legal effect in so far as they shape the understandings of states as to what constitutes their own appropriate behaviour as well as that of others.⁶⁶ This means

⁵⁹ Baxter 1980 *International and Comparative Law Quarterly* 551.

⁶⁰ Goldsmith & Posner "International agreements: A rational choice approach" 2003 *Virginia Journal of International Law* 119.

⁶¹ Chinkin 1989 *The International and Comparative Law Quarterly* 865.

⁶² Guzman & Meyer 2010 *Journal of Legal Analysis* 172-174.

⁶³ Schachter 1977 *The American Journal of International Law* 303-304.

⁶⁴ Olivier 2002 *Comparative and International Law Journal of Southern Africa* 297.

⁶⁵ Brown Weiss "Conclusions: understanding compliance with soft law" in Shelton *Commitment and Compliance – The role of non-binding norms in the international legal system* (2000) 537-538.

⁶⁶ Guzman & Meyer 2010 *Journal of Legal Analysis* 174.

that different interpretations of norms are more nuanced than is implied by characterising them as hard or soft law and are merely influenced, rather than determined, by the interacting components of their terms (such as obligation, precision and delegation as identified by Abbott and Snidal above).⁶⁷

This recognises that soft law agreements may be even more effective than hard law instruments in producing a particular behaviour or outcome depending on the circumstances.⁶⁸ States can also be pressured into adopting international standards and codes by international organisations using such soft law as benchmarks in international assessments or observance reports. In this way, international soft law can serve as norms of “best practice” that can be adhered to for a variety of reasons, from appreciation of their benefits to feeling compelled to demonstrate their cooperation.⁶⁹ The political effect of soft law may include the encouragement of non-parties to conform to a norm in order to gain a benefit or avoid a consequence.⁷⁰ Over time, soft law instruments may have more far-reaching consequences, such as shaping future discussions and negotiations, taking subject matter out of the exclusive domestic control of the state, limiting the scope of future negotiations to exclude certain arguments, or guiding prevailing trends in thought.⁷¹

Definitions that consider the impact of soft law may help to explain its legal character. One definition provides that soft law consists of those non-binding agreements that are made with the view that they will be given legal force, either in domestic or international law by being

⁶⁷ Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 12-17 16.

⁶⁸ Determining the effectiveness of an instrument allows the impact of its components such as its depth to be assessed, whereas a focus on mere compliance has the danger of overstating the value of a shallow norm. Effectiveness may be distinguished from compliance in that compliance only refers to behavioural conformity with a rule whereas effectiveness identifies the direct cause of a particular behaviour, whether or not this would qualify as compliance. See Raustiala & Victor “Conclusions,” in Victor, Raustiala & Skolnikoff *The implementation and effectiveness of international environmental commitments: Theory and practice* (1998). 686 and Raustiala “Compliance and effectiveness in international regulatory cooperation” 2000 Case Western Reserve Journal of International Law 398, as discussed in Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 12-17 16-18.

⁶⁹ Ferran & Alexander “Can soft law bodies be effective? Soft systemic risk oversight bodies and the special case of the European systemic risk board” 2011 University of Cambridge Faculty of Law Legal Studies Research Paper Series 4-8.

⁷⁰ Gruchalla-Wesierski “A Framework for Understanding ‘Soft Law’” 1984 McGill Law Journal 52-69.

⁷¹ Baxter 1980 International and Comparative Law Quarterly 565.

“related to, derivative of, or the basis for a legal obligation”.⁷² Legal effect may be distinguished from legally binding force as a matter of degree in that binding instruments guarantee their enforceable application, while effective instruments potentially create legitimate expectations for individuals and businesses, or clarify the terms of hard law.⁷³ Soft law instruments have also been described as agreements without *independent* legal effect but which create obligations that are expected to be given “some indirect legal effect” by being incorporated into binding instruments.⁷⁴

4 The benefits and risks of using soft law

The choice between using hard and soft law in international instruments is influenced by the different practical advantages offered by each. The choice of form of cooperation is also influenced by each party’s concerns about how the benefits and interests of an agreement will be distributed and how best to secure their desired outcomes.⁷⁵ The advantages of soft law instruments include the speed with which they can be concluded, the preciseness of their subject matter and the ease with which they may be adapted over time to changing or uncertain circumstances.⁷⁶ However, the benefits of soft law must be weighed against the risks that may arise from its use, including its lack of legitimacy due to its informal process and certain unforeseen consequences that may develop.

Soft law may not only be a useful indicator of future legal developments,⁷⁷ but can also direct the development of a new issue-area by minimising the risk of requiring a legal response to potential problems. The ultimate allure of soft law is that it is best able to accommodate diverse actors and interests. This is particularly significant in light of the horizontal operation and consensual nature of international law.⁷⁸ Soft law instruments can generate information

⁷² Meyer “Soft law as delegation” 2009 Fordham International Law Journal 888.

⁷³ Korkea-Aho 2009 Maastricht Journal of European and Comparative Law 275.

⁷⁴ Meyer 2009 Fordham International Law Journal 890.

⁷⁵ Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 12-17 6, 8 & 10.

⁷⁶ Meyer 2009 Fordham International Law Journal 939.

⁷⁷ Buzzini 2004 International Law Forum du droit international 50.

⁷⁸ Buncic & Filipovic “The future of international financial business: Global regulatory framework” 2011

that can develop common understanding in uncertain circumstances.⁷⁹ This provides states with the opportunity to discover the consequences of their agreements.⁸⁰ Therefore, due to the dynamic nature of international law, soft law encourages greater cooperation among actors than hard law, which may lead to the development of legal rules of greater value,⁸¹ as well as norms and undertakings that apply to a greater collective.⁸² However, it is the uncertainty associated with soft law in light of the lack of rules regulating its use that makes it necessary to take into account its potentially detrimental consequences in order to fully evaluate its significance within the international legal system.

4.1 The benefit of simplifying negotiation, facilitating agreement and allowing quick process

While hard law reduces post-agreement costs of managing and enforcing commitments, soft law lowers contracting costs of negotiation and domestic approval.⁸³ Treaties, as the most serious and deliberate forms of agreement, are time-consuming to conclude. Where international actors enter into informal agreements with the view that they will be easier to renegotiate and less costly to abandon, it speeds up the process of negotiation. In this sense, informal agreements accommodate international cooperation⁸⁴ by making states less hesitant to enter into an agreement with the expectation that they may terminate it at any time. Further, since soft law instruments are not subject to ratification and therefore are not required to be aligned with or justified in domestic law to apply between parties, they also speed up the process of compliance.⁸⁵

⁷⁹ African Journal of Business Management 3755.
Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23 721.

⁸⁰ Abbott & Snidal 2000 International Organization 435.

⁸¹ Meyer 2009 Fordham International Law Journal 939.

⁸² Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23 721.

⁸³ Abbott & Snidal 2000 International Organization 426, 434-437.

⁸⁴ Lipson "Why are Some International Agreements Informal?" 1991 International Organization 514-522, 538.

⁸⁵ Gabriel "The advantages of soft law in international commercial law: The role of UNIDROIT, UNCITRAL, and The Hague Conference" 2009 Brooklyn Journal of International Law 664-665.

While imperfect information and incentives to abandon influence all kinds of international negotiations, informal agreements provide a simpler, more convenient alternative to treaties.⁸⁶ Soft law instruments are often preferred by state actors that wish to retain their ability to make independent decisions on issues that may infringe on their national autonomy,⁸⁷ by providing states with the opportunity to learn about the consequences of their agreement and minimising the restrictions of authority over significant decisions that binding obligations impose. While sovereignty costs are relatively low in commitments that serve only to limit a state's behaviour, they are highest when agreements impinge on a state's internal relations with its citizens or territory.⁸⁸

Domestic factors influencing the choice of law include the differences among states in their preparedness to carry out hard legal commitments through available institutions, laws and human resources. Thus, the use of soft law may be preferable to excluding certain types of states (such as developing countries) from the agreement.⁸⁹ A state party's choice to enter into a non-binding arrangement may also reflect a compromise between domestic interest groups that wish the state to enter into a hard legal commitment and those that oppose any commitment at all.⁹⁰

Soft law instruments also cause parties to cooperate more readily by reducing concerns about consequences.⁹¹ It is difficult to anticipate all the consequences of hard law agreements in new and complex issues that arise. While agreements that fix their outcomes may be desirable in areas of regulation such as arms control, they are unsuitable as well as unlikely in situations of uncertainty. States may avoid making binding commitments in order to first assess the impact of rules in practice by retaining the right not to employ the rules to avoid unwanted outcomes. Soft law leaves states free to make unreserved agreements by allowing them to only comply

⁸⁶ Lipson 1991 *International Organization* 514-522, 538; Boyle 1999 *The International and Comparative Law Quarterly* 902-903.

⁸⁷ Abbott & Snidal 2000 *International Organization* 423, 436.

⁸⁸ Abbott & Snidal 2000 *International Organization* 426, 434-437.

⁸⁹ Abbott & Snidal 2000 *International Organization* 445.

⁹⁰ Guzman "The Design of International Agreements" 2005 *The European Journal of International Law* 593.

⁹¹ Shaffer & Pollack *University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23* 719.

with aspects of rules that they identify as beneficial in situations where incomplete knowledge about outcomes exists and contexts may differ. Thus soft law also allows states to make adaptable commitments that do not need to accommodate diverse national contexts within their scope at the outset. This is particularly important when considering that the degree of difference in capabilities and interests among states increases with the number of parties involved in negotiations.⁹²

Soft law also facilitates agreement by being able to accurately address complex issues by eliminating the parties' concerns that the commitment will constrain their future freedom to act. In order to encourage its adoption, hard law may compromise on substance by diluting its content to what would accommodate and be acceptable to all states potentially to be parties to it. Therefore, the outcome of treaties often boils down to a rigid lowest common denominator agreed to by all, which is not comprehensive enough to respond to complex challenges.⁹³ While this may restrict the usefulness of hard law in finding the best solution for a particular problem, soft law is able to pay closer attention to addressing the issue by considering diverse interests in the absence of political motivates.⁹⁴ By allowing participation of a variety of actors in its formulation, soft law permits cooperation on topics that require expertise and concern specific aspects of broader fields in international law.

4.2 The benefit of flexibility and adaptability

Soft law is flexible in a variety of ways. Not only do soft law instruments grant states the freedom to choose suitable rules and apply them as they deem appropriate, they are also adaptable in content by being easy to change during their implementation in order to fit particular domestic conditions. They also remain flexible by providing the opportunity to react quickly to changing circumstances, which is particularly valuable to the emerging challenges that global governance frequently aims to address.⁹⁵ Norms with voluntary consequences have

⁹² Abbott & Snidal 2000 International Organization 441-442, 444-445.

⁹³ Reinicke & Witte in Shelton 88.

⁹⁴ Gabriel 2009 Brooklyn Journal of International Law 663.

⁹⁵ Ferran & Alexander 2011 University of Cambridge Faculty of Law Legal Studies Research Paper Series 4-8.

the additional advantage of being able to continually adapt to the changing needs of multinational entities, civil society, governments and other stakeholders.⁹⁶

Agreements that reduce the penalty for making unilateral changes to commitments make law more receptive to political realities, such as power relations. By making agreements flexible, states recognise that changing political conditions may influence compliance with, as well as the content of, legal obligations. Provisions that can enhance flexibility in treaties include escape clauses, withdrawal clauses, incorporation of a plan to renegotiate, and reservations. Such provisions give greater incentive for actors to commit to an agreement, and are implicit in soft law instruments.⁹⁷

It has been suggested that by choosing soft law, states may consider the relative value of making agreements more or less flexible as against their credibility. The function of soft law becomes most evident when it is accepted that legal obligations are usually only desirable if they can be altered to suit changed conditions. Not only may actors choose not to comply with existing rules that they find unfavourable in changed circumstances, but they may also act as legislators by re-evaluating the adequacy of such rules. Soft law becomes valuable as a method of designing international agreements when states recognise the possibility of future change in an issue-area where collective regulation is still desirable and wish to avoid the costs of renegotiation or noncompliance. Thus, soft law offers flexibility in the sense of allowing agreements to evolve over time without requiring explicit renegotiation. This also allows states to use soft law when they expect their entire agreement to be desirable only temporarily.⁹⁸

The pressure of fierce competition among states for financial resources has been identified as a factor prompting governments to agree on international standards to govern national regulators. Such non-binding regulatory standards and the advance of institutions that produce them have been viewed as “arguably the most important trend in international legal

⁹⁶ Vendzules “The struggle for legitimacy in environmental standards systems: The OECD guidelines for multinational enterprises” 2010 Colorado Journal of International Environmental Law and Policy 453-454.

⁹⁷ Meyer 2009 Fordham International Law Journal 897, 900-905 & 911.

⁹⁸ Meyer 2009 Fordham International Law Journal 891, 893, 900, 908 & 910.

governance since the end of the Cold War”.⁹⁹ This system of international financial standards has also developed to promote financial stability. It is characterised by an international consensus on key elements of a sound financial system, principles and practices created by international groups of technocrats, the use of the market system to create incentives for states to adopt established principles, and the promotion of principles through multilateral financial institutions and banks.¹⁰⁰

Therefore, the flexibility of international financial law allows it to promote cross-border practices by reducing the cost of reaching agreement and strengthening domestic regulatory systems. Further, international financial regulations allow states to adjust and apply already developed principles, standards, and rules of good governance, such as those championed by the World Bank and International Monetary Fund, to suit domestic needs.¹⁰¹

4.3 The benefit of allowing multi-stakeholder participation

Private stakeholders (ranging from experts to the public) may not only adopt soft law norms, but also influence their content.¹⁰² Individuals and private groups are most responsible for both creating and resisting new international agreements, depending on the purpose to be served. They include traditional interest groups, academics and NGOs committed to normative values. While private actors often seek hard legalisation to increase the costs of violation, activists place greater emphasis on precise statements supportive of a normative discourse that can hold governments accountable by exposing discrepancies in their conduct, even though they cannot be invoked as law.¹⁰³ It has been argued that voluntary codes of conduct have emerged as a transnational regime due to the lack of capability that binding state regulations have in effectively restricting the behaviour of companies.¹⁰⁴ NGOs and civil society may engage in standards regimes when they believe that doing so will result in action and that set

⁹⁹ Meyer 2009 Fordham International Law Journal 888-889.

¹⁰⁰ Arner & Taylor “The global financial crisis and the Financial Stability Board: Hardening the soft law of international financial regulation?” 2009 University of New South Wales Law Journal 491-492.

¹⁰¹ Brummer “How International Financial Law Works (and How it Doesn't)” 2011 The Georgetown Law Journal 281-284.

¹⁰² Korkea-Aho 2009 Maastricht Journal of European and Comparative Law 283.

¹⁰³ Abbott & Snidal 2000 International Organization 450-454.

¹⁰⁴ Calliess “Transnational Corporations Revisited” 2011 Indiana Journal of Global Legal Studies 610-611

standards are sufficiently worthwhile to encourage compliance with. Multinational entities may implement the standards if they believe that they are not too burdensome and that compliance or noncompliance will impact their business.¹⁰⁵

Therefore, soft law can be flexible in yet another way, namely by allowing groups and bodies that lack the authority to enter into treaties but have appropriate expertise, to directly contribute to standard-setting.¹⁰⁶ Non-state actors who may make use of soft law instruments include international secretariats, state administrative agencies, sub-state public officials, business associations and nongovernmental organizations.¹⁰⁷ The value of cooperation through institutional networks is that skilled technocrats rather than uninformed political elite guide decision-making without time-consuming formality.¹⁰⁸ However, standards that are created or elaborated on by non-state actors may only amount to soft law if they are somehow relied upon by states, either by being explicitly accepted or applied internally or by influencing the behaviour of states in international relations. This may be difficult to ascertain if states do not make the instruments on which their laws and policies are based explicit.

International financial law is formulated through the cooperation and competition of diverse regulatory actors from different institutional forms of government. Actors include national financial authorities, who consist of a broad group, including regulatory supervisors and agencies, finance ministers and central bank governors that administer monetary policy and supervise financial institutions domestically. Internationally, these actors may draft instruments in respect of transnational financial interaction and participate in international institutions to generate global best practices, which they implement domestically. Such international interaction, traditionally only performed by political elite, brings technocratic skill to the highest level of the rulemaking process. They may interact individually or through global agenda- and standard-setting bodies that coordinate policy or international financial

¹⁰⁵ Vendzules 2010 *Colorado Journal of International Environmental Law and Policy* 458-459.

¹⁰⁶ Ferran & Alexander 2011 *University of Cambridge Faculty of Law Legal Studies Research Paper Series* 4-8.

¹⁰⁷ Shaffer & Pollack *University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23* 719.

¹⁰⁸ Brummer "Why soft law dominates international finance—and not trade" 2010 *Journal of International Economic Law* 634.

institutions that monitor and evaluate compliance by governments with international standards and best practices.¹⁰⁹

According to Anne-Marie Slaughter, global governance aimed at cooperative problem-solving is the result of networking by individuals and groups empowered by improved communications technology. This has diminished traditional centralised state authority into separately functioning components, namely courts, regulatory agencies, executives and legislatures, that network directly with their counterparts in other states to solve complex contemporary problems such as bank failure, organised crime and environmental degradation. An example of such transnational government networks is the Basel Committee on Banking Supervision. The Basel Committee was established by agreement between twelve central bank governors of states holding major financial power, who in 1988 adopted the first capital adequacy standards for banks under their supervision (Basel I), that have progressively been developed into more complex requirements.¹¹⁰

Financial regulatory agreements that express specific intended actions (comprising bilateral or multilateral memoranda of understanding, or codes of conduct and best practices) are often necessarily non-binding since they are entered into by non-state actors (such as regulatory agencies, supervisors, and finance ministries).¹¹¹ These actors hold the advantage that, as appointed specialists, they hold specific expertise and are not constrained by politics in the same way as elected officials are.¹¹² The Basel Committee's standards are adopted with the view of being implemented domestically and serve the purpose of coordinating the enforcement of national laws through collaboration with foreign equivalent regulators. To the extent that such transnational government networks represent national interests, they grant flexibility to governments to manage through their components situations where advances in transport and technology have made it challenging to enforce national law.¹¹³

¹⁰⁹ Brummer 2011 *The Georgetown Law Journal* 273-281.

¹¹⁰ Slaughter "The Real New World Order" 1997 *Foreign Affairs* 183-185, 190-191.

¹¹¹ Brummer 2011 *The Georgetown Law Journal* 284.

¹¹² Lyngen "Basel III: Dynamics of State Implementation" 2012 *Harvard International Law Journal* 521.

¹¹³ Slaughter 1997 *Foreign Affairs* 195.

Multilateralism has also been viewed as a suitable response to emerging technical complexities and fast-changing public policy requirements that arise out of globalisation. Therefore, international organisations and institutions have the purpose of managing the interdependence of states in their relations through far more dynamic cooperation than states would otherwise manage through their cumbersome political processes.¹¹⁴

4.4 *The risk of unaccountable actors and rules lacking legitimacy*

Legitimacy is about the justification of authority. There are at least two dimensions to legitimacy. Legitimacy may refer to the validity of political decisions on the one hand and to societal acceptance of political decisions on the other. The legitimacy of a norm is created through factors including being sourced in expertise, conforming with existing, well-institutionalised norms, enabling the participation of various actors in global governance, ensuring that actors will be held to account domestically on international issues, being developed and implemented through a process of transparent, democratic participation, and having the perception of being just. However, requirements such as state consent, transparency and public participation may hinder effective implementation of norms.¹¹⁵ Therefore, while the legitimacy of soft law instruments may be undermined to the extent that they may have legal effect without state consent to be binding, may be created by actors that do not have the capacity to represent that state, and may be implemented domestically without undergoing formal procedures of ratification, they nevertheless may generate more effective compliance than legitimate hard law, particularly in circumstances requiring prompt international cooperation.

In international law, legitimacy is used to explain widespread compliance with international legal obligations. Traditionally, the legitimacy of international law is established by state consent. Therefore, the legitimacy of a norm is strengthened though widespread consensus that is evidenced in formal agreements.¹¹⁶ However, if this conception were to be accepted as

¹¹⁴ Reinicke & Witte in Shelton 85-86.

¹¹⁵ Karlsson-Vinkhuyzen & Vihma 2009 Regulation and Governance 408-413.

¹¹⁶ Gualtieri "The system of non-proliferation export controls" in Shelton Commitment and Compliance – The role of non-binding norms in the international legal system (2000) 478-480.

correct, contemporary international relations poses some challenges to the legitimacy of international law in general, and soft law in particular. This is because state consent is, at best, indirect in respect of instruments adopted by bodies of incomplete global membership, through long chains of delegation, and through majority votes. The fact that, in addition to these shortcomings of international processes, soft law does not need to be ratified but is often effective and may affect even those states that had not participated in its adoption (such as when it becomes integrated into the legal instruments of institutions or comes to shape the discourse around an issue area), places considerable doubt on soft law being a legitimate exercise of authority.¹¹⁷

It is necessary to distinguish soft law established by all official entities, including international organisations, states, administrative agencies and sub-national entities, from those rules created by private interests. This is because instruments entered into by state representatives that have repercussions for states in terms of public international law inevitably pass through domestic processes of government notice or approval, while the purpose and consequence of soft law instruments entered into by private actors operate in the domain of public international law without carrying the same implications for states and the global community at large. Where private actors form part of the negotiation and adoption process of rules of public interest and impact, their democratic authority to make such rules (and the consequent legitimacy of them) must be considered in determining the validity of these rules as international law. The concern of legitimacy is greater in respect of private actors than public officials who enter into unratified soft law agreements. This is because the latter are in principle accountable to their government through their office for their decisions when it comes to implementing the agreements domestically, while the former can agree to soft law instruments without their existence and significance even coming to the attention of the public.

Soft modes of governance seem to produce uncontroversial definitions of sound policies and the common good through inclusive and deliberative policy-making. However, in light of social, political and economic diversity of modern societies, uncontroversial and authoritative

¹¹⁷ Goldmann “We need to cut off the head of the king: Past, present, and future approaches to international soft law” 2012 *Leiden Journal of International Law* 4.

definitions of the public good are close to impossible to achieve. At the domestic level, the existence of conflicting public interests raises the question of whether soft law norms can be considered to be democratically legitimate without parliamentary and societal input. This is because it is often unclear who decides on the membership in soft governance networks and whose expertise is drawn on.¹¹⁸ Further, soft law instruments are often established behind the scenes,¹¹⁹ without requiring publication. This lack of public awareness of potentially influential but invisible rules clearly affects their domestic acceptance.

Globalisation has had the effect that public power has become diffused among corporations and other actors, in that private actors are exercising traditionally public functions (and should arguably be held accountable to the same standards as public officials), and sizable and wealthy corporations appear to be increasingly influential. Governments also delegate public tasks to private actors and seek to influence the behaviour of private actors through regulatory agreements. Other private body influences include the setting of standards that are adopted by governments and industries, such as sets of human rights principles. While the exercise of authority through informal regulation reflects the 'deformalization' of global politics, it also creates uncertainty as to whether such authority is being exercised on a valid basis and in an acceptable manner.¹²⁰

There are various degrees to which private actors influence or create policy through soft modes of governance as opposed to state executives. Hard legal instruments are assumed to be "subject to established procedures of input legitimation through the formal and informal processes of, *inter alia*, parliamentary control, stakeholder interest representation, and open public debates in the media or other channels". However, the more influential private actors are in political decisions, the greater the need for democratic control of soft modes of governance becomes, since private actors are unelected and not subject to democratic

¹¹⁸ Borrás & Conzelmann "Democracy, legitimacy and soft modes of governance in the EU: The empirical turn" 2007 *Journal of European Integration* 535.

¹¹⁹ Aust 1986 *International and Comparative Law Quarterly* 787.

¹²⁰ Klabbers "Reflections on Soft International Law in a Privatized World" 2005 *Finnish Yearbook of International Law* 289-319 accessed at http://www.helsinki.fi/eci/Publications/Klabbers/JKSoft_law_and_public.pdf.

scrutiny.¹²¹ Non-state actors may represent objectives that are divergent from those pursued by governments and can thus influence broader agenda-setting. Since civil society plays the role of ensuring that governments fulfil their obligations, non-state actors can also limit state discretion regarding soft law by informally monitoring the implementation of soft law standards, depending on their degree of participation in the creation of national rules and policies.¹²² Thus, given that soft instruments of governance “indirectly but substantially affect political actors’ value orientations, behaviour and public policy,” they require democratic legitimacy.¹²³

International financial law in particular is mostly informal, in the sense that it is sourced in the agendas set by intergovernmental institutions or transnational government networks operating on consensus and coordinated by actors other than heads of states.¹²⁴ The coercive nature of international financial law raises questions as to its legitimacy, viewed as requiring representatives to be held accountable for the decisions they take on behalf of others. Since policymakers in regulatory authorities are not elected and not easily removed, they are considered to be unaccountable to the public.¹²⁵ While treaties are often able to increase the transparency of actions by parties by creating institutional structures,¹²⁶ there is a clear lack of public legitimacy in the creation of global soft law by private actors. This requires mechanisms (such as inclusive participation and complaints procedures) to be put in place as a minimum to ensure the accountability of private actors for the possible large-scale public impact that their global soft law instruments may have.

For example, with regard to the Basel Committee’s Accords, while the Committee’s members of central bankers and bank regulators are in some way accountable to the government, they are unelected and therefore not accountable to the general public. Yet where central bankers enjoy a high level of political independence, they exercise public power by creating and

¹²¹ Borrás & Conzelmann 2007 *Journal of European Integration* 536-537.

¹²² Korkea-Aho 2009 *Maastricht Journal of European and Comparative Law* 285-286.

¹²³ Tsakatika “A parliamentary dimension for EU soft governance” 2007 *European Integration* 550.

¹²⁴ Brummer 2010 *Journal of International Economic Law* 627.

¹²⁵ Brummer 2011 *The Georgetown Law Journal* 304-311.

¹²⁶ Brummer 2010 *Journal of International Economic Law* 625.

agreeing to implement regulations that impact on domestic economies and may need to be taken into account in subsequent government policy-making. The danger of this is that legislatures may be kept out of the decision-making process on commitments related to monetary policy that may have potentially burdensome consequences and that may be beyond the control of governments. This is because the regulations agreed upon are in respect of internal measures to be taken by financial institutions which may lack transparency.¹²⁷

Some scholars emphasise the need to ensure the legitimacy of the content of norms. It has been argued that, while consultation with and participation of other actors (such as civil society, social partners and local levels of governance) are desirable in the process of policymaking and implementation to encourage public debate and diverse views and fill gaps in representation among other things, “the horizontal and network-like forms of parliamentary accountability offered by open coordination cannot replace parliamentary accountability in terms of input legitimacy. This is because benchmarking, practices of transparency and peer review taken together fall short of being political, public and comprehensive.”¹²⁸ However, others feel that the actions of non-state actors in international regulatory cooperation are inextricably linked to the interests of the state to which they belong, dismissing concerns over legitimacy and lack of control over regulators.¹²⁹

4.5 The risk of possibly interfering or conflicting with existing law

While soft law often complements existing norms, emerging norms can also be at odds with established rules. This may not only unintentionally undermine existing hard law rules and create confusion or reduce certainty as to which norms are applicable in any given situation, but also create the opportunity for states to “use both soft and hard legal provisions strategically and often antagonistically to shape and reorient international law in line with their substantive preferences”.¹³⁰ However, the lack of uniformity of norms may be viewed as

¹²⁷ Barr & Miller “Global administrative law: The view from Basel” 2006 *European Journal of International Law* 17-19.

¹²⁸ Tsakatika 2007 *European Integration* 550, 562 & direct quote from 557.

¹²⁹ Zaring 2005 *Chicago Journal of International Law* 593-594.

¹³⁰ Shaffer & Pollack *University of Minnesota Law School Legal Studies Research Paper Series Research Paper*

servicing the function of accommodating and establishing balance between discordant but powerful political interests rather than an indication that the international legal system is out of control.¹³¹

4.6 The risk of being unrepresentative of all interests and the possibility of unintended consequences

Soft law may be used to address specific issues with global consequences outside of the global intergovernmental organisations and processes, such as the UN, that are designed to represent and consider the interests of the entire international community. This is evidenced in international financial law where membership of international standard setters appears to be limited to wealthier states who consequently dominate rulemaking on issues that should involve international cooperation. This may be understandable in that such countries have technical expertise and their participation is arguably legitimised by the streamlined and experienced decisions that they produce. Further, complex international financial rules may impact these wealthier states more than others, which may make it appropriate for them to make these rules. However, the limited number of countries participating in setting global standards indicates the lack of legitimacy of these international financial rules.¹³²

It has been argued that, while powerful states may benefit the most from agreements, soft law regimes must still be less costly to weaker states than noncompliance to ensure continued cooperation.¹³³ Further, rules perceived to be illegitimate or biased will not have persuasive value in any event. However, international rules that favour the interests of those with direct policy input allow such states to prevent the production of global welfare-enhancing rules that may disadvantage them.¹³⁴ Since states have different interests, they negotiate for the specific terms of cooperation that will be most beneficial to them, economically and politically. Where agreement on a common standard will benefit all parties concerned, the distribution of costs

No. 12-17 12-13.

¹³¹ Reisman 1988. Faculty Scholarship Series. Paper 750 376.

¹³² Brummer 2011 The Georgetown Law Journal 304-311.

¹³³ Meyer 2009 Fordham International Law Journal 921.

¹³⁴ Brummer 2011 The Georgetown Law Journal 304-311.

and benefits in respect of cooperation will depend on the ability of states to secure support for their preferred terms. The alternative would amount to being forced to adopt the terms of others.¹³⁵ Thus, the impact of power is that the distribution of benefits tends to be proportionate to the relative bargaining power states may hold.¹³⁶ While it has generally been accepted that dominance is a significant factor in determining the content of legal obligations, power may also help to determine the chosen form of agreement.¹³⁷

In this regard, informal agreements have often been viewed as a result of power relations in that they allow states in stronger positions to use commitments opportunistically and exit them cheaply.¹³⁸ Mechanisms that allow extensive flexibility may undermine cooperation by providing an unrestricted opportunity to act in self-interest.¹³⁹ In the context of international financial regulatory organisations, David Zaring suggests that the global non-binding standards that these organisations recommend are devised by the already compliant developed world to be followed by the emerging market economies of developing states as sound practices. Such regulatory standards can be viewed negatively as an instrument of imperialism or positively as advising developing states on how to avoid the mistakes that developed states have already made. Regardless of how the standards are perceived, the most powerful states formulate the guidance that is dispensed by these international organisations, to be accepted at will by developing states. As a result, developing countries may be motivated to adopt the soft standards in the hopes of gaining approval from wealthier states and entities that pay attention to the organisations, thereby encouraging investment in their markets.¹⁴⁰ This may have the unintended consequence of weaker states employing rules that are to their detriment under the belief that they are, paradoxically, compelled to choose them in order to benefit in other ways.

¹³⁵ Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23 731-735.

¹³⁶ Meyer 2009 Fordham International Law Journal 918-920.

¹³⁷ Meyer 2009 Fordham International Law Journal 918-920.

¹³⁸ Brummer 2010 Journal of International Economic Law 630.

¹³⁹ Helfer "Flexibility in international agreements, in international law and international relations: Taking stock" in Dunoff & Pollack, forthcoming 2012 2 accessed at: http://scholarship.law.duke.edu/faculty_scholarship/2452.

¹⁴⁰ Zaring 2005 Chicago Journal of International Law 551, 580-585.

4.7 *The risk of being de facto binding and enforceable in implementation*

In practice, soft law standards can operate against the will of parties that adhere to them, particularly when it is beneficial to other international actors to secure widespread compliance. Widespread compliance of soft instruments may be desired by state and non-state actors in fields of law concerning common public goods such as environmental protection and human rights. However the widespread operation of some rules may be particularly disadvantageous to weaker states where they are forced to comply with existing standards to the detriment of their economies.

Noncompliance with international standards can result in sanctions from international organisations or other actors that has the effect of compelling states to comply with such 'voluntary' standards. Such institutional mechanisms can come in the form of World Bank and International Monetary Fund conditions (that require compliance with certain standards) for receiving loans or as standards for membership in an organisation that can offer the benefit of access to expertise and technical support, enforcement assistance, and expanded policy reach. Institutions can also isolate members by "naming and shaming" those who fail to comply with standards.¹⁴¹

The freedom of soft law allowing actors to apply rules agreed upon as and when appropriate is subject to the constraints of legitimate expectations created by any agreement, particularly those that enhance existing human rights and perceived public goods (where a subsequent selective approach in implementation may be viewed as an infringement or violation). Therefore, the conclusion that soft law safeguards national freedom of action may be challenged by the legal effect of explicit terms contained in soft law instruments, as well as the role of non-state actors in carrying out soft law rules. Further, particularly in the regional context of the European Union (EU), soft law may be given judicial recognition in case law, thereby constraining national legislative freedom. Soft law may also be institutionalised as part of the EU legal framework by being incorporated into hard law provisions, which impacts on actors' perceptions of the status of such soft law. Therefore, the perceived status of soft law

¹⁴¹ Brummer 2011 The Georgetown Law Journal 284-293.

may be altered through measures other than state consensus, including their content, direct implementation by non-state actors, judicial application and inclusion within legal and institutional frameworks.¹⁴² The reliance by external parties on soft law instruments that have become established in the international legal system through widespread use may have severe consequences that are not of their choosing.

4.8 *The risk of having weak legal enforcement mechanisms*

Some areas of international law require clear, uniform and enforceable rules that soft law instruments are by their nature unable to provide. Since domestic law provides the basis for enforcing international law and soft law does not require incorporation into domestic law, its use is unpredictable and impossible to ascertain in advance.¹⁴³ Soft law instruments lack the additional value of domestic legislative ratification to ensure public commitment to international treaties. Public approval, as opposed to merely an assurance made by the executive of the day, may indicate a greater likelihood of a state complying with an agreement in the long-term.¹⁴⁴

Therefore, where soft instruments are relied on with the expectation of cooperation from other parties, irrecoverable costs may be incurred should others not follow through with commitments. One of the advantages of hard law instruments is that they generate more credible commitments from states by making it more costly for them to renege. Such instruments also facilitate monitoring and enforcement of commitments, particularly through dispute settlement bodies.¹⁴⁵ Conversely, one of the greatest challenges of using soft law is the difficulty of ensuring that states live up to their commitments. Using soft law to facilitate agreement necessarily involves a compromise on the strength of the commitment made.¹⁴⁶ Thus, while performance of treaties is at least anticipated from the onset because the consequences of non-performance are clear, the non-binding nature of soft law agreements

¹⁴² Korkea-Aho 2009 Maastricht Journal of European and Comparative Law 272-273.

¹⁴³ Gabriel 2009 Brooklyn Journal of International Law 669-670.

¹⁴⁴ Goldsmith & Posner 2003 Virginia Journal of International Law 124.

¹⁴⁵ Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23 718-719.

¹⁴⁶ Abbott & Snidal 2000 International Organization 446.

makes them unreliable as the extent of their actual performance can only be ascertained over time. .

Treaties may be enforced through both hard enforcement mechanisms of dispute settlement such as compulsory binding dispute settlement and soft means of enforcement that attempt to avoid disputes by securing an agreed solution. The former mechanism seeks to enforce the responsibilities of the parties, while the latter relies on incentives or the risk of agreed rights being suspended or terminated.¹⁴⁷ However, treaties have been known to face difficulties of noncompliance and self-enforcement as much as informal agreements, particularly in situations where “monitoring is difficult, enforcement is costly, and expected gains from noncompliance are immediate and significant.”¹⁴⁸ After all, state conduct is what gives meaning to any international agreement.¹⁴⁹ Nevertheless, the often subjective and discretionary nature of soft law content makes it unsuitable for adjudication.¹⁵⁰

Therefore, departure from non-treaty agreements is preventable only through indirect means such as political pressure through action short of reprisals and obligations set as preconditions to obtaining services.¹⁵¹ Domestic and international monitoring (watchdog) or follow-up agencies play a role in soft means of enforcement by lobbying governments and corporations to adopt soft law instruments and documenting their violations. In view of the fact that adjudication has never been the principal way of resolving international disputes, particularly in economic matters, its absence from soft law is not a major disadvantage.¹⁵² The consequence of an undertaking made without a legal effect is not self-evident but based on state practice. What is evident in practice is that while parties may not be held legally responsible through judicial remedies for noncompliance (whether reparations or sanctions), these agreements are also not intended to leave parties free to do as they please.¹⁵³

¹⁴⁷ Boyle 1999 *The International and Comparative Law Quarterly* 909.

¹⁴⁸ Lipson 1991 *International Organization* 514.

¹⁴⁹ Baxter 1980 *International and Comparative Law Quarterly* 561.

¹⁵⁰ Chinkin 1989 *The International and Comparative Law Quarterly* 862.

¹⁵¹ Hillgenberg. 1999 *European Journal of International Law* 511.

¹⁵² Chinkin 1989 *The International and Comparative Law Quarterly* 862-863.

¹⁵³ Schachter 1977 *The American Journal of International Law* 300.

5 Conclusion and Recommendations on the ideal use of soft law

Soft law is understood to refer to non-binding normative instruments that, consequently, indicate the degree of commitment made by parties only over time. Such informal agreements have developed without any clear rules in international law directing its use, with the result that they are used by a variety of actors to address issues that are of both public and transnational concern, without any limitations and guidance on their reliability. The difficulty of this is that effective soft law instruments shape expectations about public policies and the future behaviour of states without their formal consent as required by the traditional sources of international law, namely treaties and customary international law.

Identifying expectations helps to place soft law instruments within the framework of international law by detaching their practical legal significance from their legal status, which otherwise regards them as ineffective 'political' or 'moral' rules¹⁵⁴. Non-treaty arrangements will continue to have legal effect between parties for as long as the parties intend this and continue to cooperate.¹⁵⁵ According to this view, parties adopt particular rules and principles in soft law instruments without predetermining whether, how and for how long they will be applied. Since states rationally choose their desired form of cooperation, soft law should not be viewed as inferior to hard.¹⁵⁶ Since the value of soft law instruments in the international legal system cannot be determined objectively prior to their use, their position in international law is conditional on the subsequent conduct of the parties. The continuation of its original persuasive value often depends on its subsequent domestic implementation by states that shapes how the instrument is to be perceived at any given time.

To the extent that soft law is used for the purpose of global governance, the attributes of soft law permit complex and fast-changing issues arising out of globalisation to be effectively addressed by actors most suited to address them. In sum, the benefits of soft law instruments

¹⁵⁴ While this paper maintains the 'legal' authority of soft instruments, see for a discussion of a possible alternative approach to categorising authoritative international instruments: Goldmann 2012 Leiden Journal of International Law 2.

¹⁵⁵ Hillgenberg. 1999 European Journal of International Law 502-505.

¹⁵⁶ Guzman 2005 The European Journal of International Law 610-611.

identified by scholars include that: they are flexible in times of uncertainty and adaptable over time; they encourage more meaningful cooperation in general by excluding enforceability; they are less constrained by national sovereignty and allow discretion in sensitive areas; they simplify and reduce the costs of negotiation; they are sensible to use when coordination is required and the substance of rules is not contested; and they can be used by non-state actors in transnational governance, either to supplement or replace state jurisdiction.¹⁵⁷ The advantages of soft law instruments may be summarised as convenient, primarily because they escape the costs and burdens of formal process such as the requirements of publication of the instrument domestically, or its registration with the UN in accordance with Article 102 of the UN Charter,¹⁵⁸ while still being capable of establishing effective norms.

However, the convenience that allows soft law to circumvent the structures and processes that operate to give order to the international legal system may be more disruptive than helpful in particular circumstances. This paper has identified some disadvantages to the use of soft law where public interests are affected. The risks of using soft law include situations where expectations are created by the existence of soft law instruments that are unreliable on account of the rules lacking legitimacy, not being implemented domestically by the state, contradicting existing accepted norms (whether domestic or international), being exclusive of the interests of affected members of the international community that did not participate in their creation, and being either too easy to resile from or becoming compulsory where they enjoy widespread effect.

Consequently, soft law instruments, despite being voluntary, may both influence the development of international law even when not observed, and have negative consequences when they show widespread observance. Without limitations on participants and topics, soft law blurs the boundaries between public and private actors, whether official or not recognised, and various issue areas in international law. Therefore, despite the clear benefits soft law provides, there is a real danger of these instruments being misused by powerful actors to

¹⁵⁷ Shaffer & Pollack University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 12-17 7.

¹⁵⁸ Aust 1986 International and Comparative Law Quarterly 789-790, 792.

further their interests in the absence of any rules on their creation, scope and consequences. A further concern created by the lack of regulation of soft law is how an effective soft instrument should be treated where it is contrary to or an amendment of existing hard law.

In order to accurately reflect contemporary needs and practice, the legal consequences that may arise from non-binding agreements, as opposed to the legal rights and obligations contained in treaties,¹⁵⁹ must be acknowledged. This distinction becomes minimal, however, when either form of instrument is both implemented and effective. Since soft law has distinct advantages to hard law, the author agrees with what seems to be the prevailing view in literature that there are appropriate roles for both types of instruments in developing international law.¹⁶⁰ This is because international law operates on a case-by-case basis rather than universally and the impact of globalisation may require faster responses to emerging issues than traditional sources of international law may allow.

It may be useful to consider the circumstances where soft law instruments may have the greatest chances of securing compliance. A soft law norm is more likely to be complied with if it is derived from, amplifies or interprets a binding obligation (thus providing detailed rules and technical standards to more open-ended treaties, particularly in environmental law),¹⁶¹ or it forms part of a complex regime rather than being self-standing. Also, a high level of moral content or popular support for a soft law norm can foster compliance.¹⁶²

Soft law may ideally be used in issue-areas of public concern that require global coordination but are already implemented domestically. The use of soft law is justified in solving a straightforward coordination problem, where it may be more sensible to use soft law to reduce certain costs even though regulatory rules may be chosen through any method.¹⁶³ Areas requiring information exchanges or coordinated action may be described as procedural agreements of international public administration rather than law as they do not form part of

¹⁵⁹ Aust 1986 *International and Comparative Law Quarterly* 811.

¹⁶⁰ Gabriel 2009 *Brooklyn Journal of International Law* 672.

¹⁶¹ Boyle 1999 *The International and Comparative Law Quarterly* 905.

¹⁶² Williamson "Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses" 2003 *Chicago Journal of International Law* 76-78.

¹⁶³ Guzman & Meyer 2010 *Journal of Legal Analysis* 176.

any category of international law.¹⁶⁴ Nevertheless, softer forms of agreement may be useful in situations where legislators value coordination but do not place particular importance on its substance.¹⁶⁵ In such situations, little incentive exists for states to defect from the commitments agreed upon.¹⁶⁶ This is because, whereas cooperation may be at the expense of satisfying immediate self-interest, coordination is aimed at maximising the self-interests of states mutually.¹⁶⁷

Further, soft law may also be optimally used in technically complex matters, where a coordinating body is often used to facilitate rapid standard setting.¹⁶⁸ States tend to delegate authority to provide information, change rules or produce standards to organisations in fields requiring technical coordination since such areas have minimal impact on sovereignty.¹⁶⁹ Cooperation in technical issue-areas (such as those addressed in financial regulation) often requires particular knowledge and skill, which non-state actors may be more qualified to address since national legislators without specialist knowledge may be inexpert about technical and complex issues. Such technical financial areas may be amenable to international regulatory cooperation by sub-state actors, provided that there is low national political interest in the manner of their regulation.¹⁷⁰ Where such cooperation may impact on public interest and policy, soft law created by non-state actors may be counter-productive to the actions of the state.

The use of soft law may also be favourable in situations where changing circumstances require rules to be adapted. Lawmakers are generally mandated to produce laws that reflect change, either to develop the existing law to suit contemporary circumstances or to remedy ambiguous and inaccurate rules. In such cases of updating the law, soft law is advantageous to use because prior and existing rules do not restrict its content.¹⁷¹ International agencies are best

¹⁶⁴ Baxter 1980 *International and Comparative Law Quarterly* 556.

¹⁶⁵ Zaring 2005 *Chicago Journal of International Law* 596.

¹⁶⁶ Raustiala 2005 *The American Journal of International Law* 593.

¹⁶⁷ Goldsmith & Posner 2003 *Virginia Journal of International Law* 116.

¹⁶⁸ Abbott & Snidal 2000 *International Organization* 441.

¹⁶⁹ Abbott & Snidal 2000 *International Organization* 443.

¹⁷⁰ Zaring 2005 *Chicago Journal of International Law* 596.

¹⁷¹ Gabriel 2009 *Brooklyn Journal of International Law* 661.

suites to recommend international standards that allow states and private actors to coordinate their policies since they provide decentralised bargaining, expertise and data collection.¹⁷² In this regard, soft law lends itself to being able to select rules indiscriminately to suit the particular needs under consideration. When used with circumspection, soft law has the distinct advantage of providing a variety of options from which the best, rather than possible or satisfactory, solution for a specific issue can be chosen.¹⁷³ While there is a concern that disregard for harmony may produce conflicting norms as discussed above, this could be avoided by ensuring that state actors implement the adopted soft law instruments.

As has been demonstrated in this paper, non-binding instruments may also be preferred where there is no consensus governing an issue area or where actors have no formal authority or desire to produce collaborative legislation, but the issue still requires global guidance. In this way, soft law may serve the purpose of information-sharing rather than acting as a mechanism of command and control in the same way as hard law, provided that the use of developed standards is unconditional.¹⁷⁴

Authors have noted also that hard and soft legal rules can often interact as complements of each other. Not only can soft law act as a supplement to fill in the gaps in existing hard law instruments, but it can also be used as a foundation for subsequent treaties and develop into customary norms.¹⁷⁵ While it is not inevitable that hard law will evolve from soft law, hard law is more likely to develop from soft law than to be created on its own¹⁷⁶ Therefore, the risks of using soft law, such as potential conflict with existing law, will be reduced where soft law is used by states with the express intention, regardless of how effective it becomes, of functioning subordinately to existing hard law, or serving as a precursor to hard law instruments.

Therefore, it is a matter of fact that the traditional distinction between hard and soft law in global governance has gradually become less clear as attention turns away from the legal status

¹⁷² Abbott & Snidal 2000 *International Organization* 443.

¹⁷³ Gabriel 2009 *Brooklyn Journal of International Law* 663.

¹⁷⁴ Korkea-Aho 2009 *Maastricht Journal of European and Comparative Law* 280.

¹⁷⁵ Shaffer & Pollack *University of Minnesota Law School Legal Studies Research Paper Series Research Paper No. 09-23 721-722*.

¹⁷⁶ Abbott & Snidal 2000 *International Organization* 447.

of agreements and towards their effectiveness. Accordingly, the existence of soft law presents national lawmakers with the choice of either developing more centralised international coordination, or allowing informal cooperation to progress in certain fields.¹⁷⁷ Consequently, this paper suggests not only that soft law instruments are increasingly being used as acceptable sources of international law, but that their use may be ideal in circumstances where they are chosen with due consideration of the consequences.

In particular, when choosing to use a soft law instrument, due regard must be given by international actors to the purpose to be served by the instrument, where soft law may ideally be used in areas that bear little impact on national sovereignty such as coordination. Further, due consideration should be given to how domestic interests, policies and laws may be affected by the instrument coming into effect. Further, to the extent that no-state actors are involved in the creation of the instrument, some form of domestic approval should be required in order to avoid the consequences flowing from the instrument lacking legitimacy.

(14 590 words)

¹⁷⁷ Zaring 2005 Chicago Journal of International Law 595.

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