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Soft International Economic Law: A New Sovereign?

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ABSTRACT

This article examines the influence of soft law on formal international economic law structures and develops a theoretical framework for understanding its systemic significance within the discipline. The study addresses two intersecting objectives: first, demonstrating that soft laws substantially impact commercial treaties, global financial regulation policies, investment agreements, and dispute settlement institutions; second, establishing that despite this broad influence, international economic law lacks a cohesive theoretical understanding of soft law's systemic weight. The research employs comparative, normative, and analytical methodologies to examine how soft law functions as a contemporary mechanism through which seemingly benign taxonomies exert substantial influence in international economic law. The analysis reveals that soft law operates as a functional alternative when states and international law-makers cannot achieve consensus on treaties or hard law instruments. This study contributes to international economic law scholarship by providing a systematic theoretical framework for understanding soft law's role and demonstrating its significant impact on formal legal structures and regulatory processes.

KEYWORDS

Soft Law, Jurisprudence, Financial Regulation, Taxonomy, Comparative and International Law

JEL CODES

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INTRODUCTION

Although soft laws in International Economic Law [hereinafter I.E.L.], such as agreements, guidelines, declarations, best practices, and draft articles, are not *legally binding*, they significantly impact many principles, doctrines, and concepts in the discipline. These soft laws could be categorized as "soft international economic law". This article analyses the underlying principles and far-reaching legal implications of "soft laws" in I.E.L.[1] The emergent regime of soft I.E.L. invites a thorough scholarly examination to situate its ramifications for the international economic governance system. Thus, the article, which elucidates methods of soft regulation and their alignment with existing structures, has two broad and intersecting goals. First, it argues that "soft laws" influence formal I.E.L. structures and have vital implications for commercial treaties, global financial regulation policies, investment agreements, and dispute settlement processes and institutions. Second—the more ambitious goal—it shows that despite the broad influence of "soft law" in I.E.L., there is a lack of a cohesive theory on "soft laws" and their systemic weight within the discipline. Often, scholars prefer to focus on hard law *rather than* the *so-called* "soft laws." Some others suggest "soft law" is just basic global governance rubrics. Other perspectives and structural difficulties exist, including the treatment of private sources of "soft laws" as limited in their systemic influence.

Equally, empirical ways of measuring the influence of particular soft laws in I.E.L. are scarcely sustainable. For instance, measuring the systemic impact of contractual clauses in private commercial arrangements is difficult. One reason for this difficulty is the issue of privacy and the large amount of data that would be considered in each situation. This is one area where large-scale data analysis or general investigation, relying on new technologies such as artificial intelligence [hereinafter A.I.], could provide basic evidence on any subject of interest. For example, we can examine how soft tax policies or basic pronouncements on tariffs affect capital flows in some market locations or for specific goods within a given market. Yet, the difficulty in engaging in such an empirical study is readily evident. Still, through a comparative, normative, and analytical review, this article addresses some of these issues, emphasising how "soft law"

[1] For general literature on soft law in international law, see Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 Am. J. Int'l L. 443 (1983); *see also* Ignaz Seidl-Hohenveldern, *International Economic "Soft Law"*, 163 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 165 (1979); Kern Alexander, *The Role of Soft Law in the Legalization of International Banking Supervision: A Conceptual Approach* (ESRC Ctr. for Bus. Rsch., Univ. of Cambridge, Working Paper No. 168, 2000). I make a case for a more tailored curation and systematic analysis of soft law standards touching on economic questions such as trade, intellectual property, investment, sovereign debts and enforcement of economic treaties.

is a contemporary iteration of the substantial influence that seemingly benign taxonomies exert in I.E.L. The article is divided into two broad parts. Part I shows the overarching potency of taxonomies such as "soft law," and broadly explores the literature on soft laws in international law. Part II tailors the discussion towards "soft laws" in I.E.L. (soft international economic law), scrutinizing their legal origins, sources, methods of (re)invention, and the politics of rulemaking within the system.[2] The article concludes that soft laws can be pragmatic in many circumstances, but they should be understood and studied in their broader systemic ramifications in I.E.L.

[2] I.E.L. covers broad areas of law. This view is shared by other publicists of I.E.L., in the post-World War II era. *See* Detlev F. Vagts, *International Economic Law and the American Journal of International Law,* 100 Am. J. Int'l L. 769 (2006) (U.K.) (while recognizing the controversial nature of the scope of I.E.L. defines it as *"the international law regulating transborder transaction in goods, services, currency, investment and intellectual property"*); *See id.* at 769. On his part, Georg Schwarzenberger observed "the challenge of an expanding field" while writing about I.E.L. *See* Georg Schwarzenberger, *The Province and Standards of International Economic Law*, 2 Int'l L.Q. 402 (1948) (U.K.); *see also* John H. Jackson, *International Economic Law: Jurisprudence and Contours*, 93 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 98 (1999) (noting that:

> *I.E.L. can have an extra-ordinarily broad scope of application. Virtually every type of government regulation on economic activity is attracted by the subject including anti-trust, or competition policy, securities regulations, labour law, immigration law, insurance, bankruptcy, trade and goods, trade and services, capital flows, monetary policy, labour adjustment policies for unemployment and exchange rate effects.*

See id. at 99.

1. THE POTENCY OF TAXONOMIES AND "SOFT" INTERNATIONAL LAW

The taxonomy "soft law" refers to various instruments, such as agreements, guidelines,[3] declarations, standards, best practices, and draft articles[4] that are not "legally" binding.[5] For Snyder, soft laws are "rules of conduct which in principle have *no legally binding force*,

[3] *See* Noura Barakat, *The U.N. Guiding Principles: Beyond Soft Law*, 12 Hastings Bus. L.J. 591, 591 (2016).

[4] *See* Elena Baylis, *The International Law Commission's Soft Law Influence*, 13 FIU L. Rev. 1007, 1007 (2019) (a fascinating exploration of the role of the International Law Commission [hereinafter I.L.C.] in soft law formation and dissemination). *See also* Kristina Daugirdas, *The International Law Commission Reinvests Itself?*, 108 Am. J. Int'l L. Unbound 79, 79 (2014) (U.K.). Some examples of the soft law standards produced by the I.L.C. come in the form of guidelines, draft articles, and the reports of study groups. The institutional support of the U.N. is a factor to consider in the strategic position of the I.L.C. as a maker of soft laws in international law. Some of the soft laws produced by the I.L.C. in recent years include *Guide to Reservations to Treaties* (adopted by the I.L.C. at its Sixty-third Session) 2011. *See, e.g.*, Alain Pellet, *The ILC Guide to Practice on Reservations to Treaties: A General Presentation by the Special Rapporteur*, 24 Eur. J. Int'l L. 1061 (2013) (U.K.); Marko Milanovic & Linos-Alexander Sicilianos, *Reservation to Treaties: An Introduction*, 24 Eur. J. Int'l L. 1055 (2013) (U.K.); International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, U.N. Doc. A/56/10 (2001); James Crawford, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect*, 96 Am. J. Int'l L. 874 (2002); David Kaye, *International Law Commission: Draft Articles on State Responsibility*, 37 Int'l Legal Material 440 (1998); David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 Am. J. Int'l L. 857 (2002); *see also* International Law Commission, Draft Articles on the Responsibility of International Organizations, U.N. Doc. A/66/10 (2011); Daphna Shraga, *The ILC Draft Articles on Responsibility of International Organizations: The Interplay Between the Practice and the Rule*, 105 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 351 (2011); Noemi Gal-Or & Cedric Ryngaert, *From Theory to Practice: Exploring the Relevance of the Draft Articles on the Responsibility of International Organizations (DARIO) —The Responsibility of the WTO and the UN*, 13 German L.J. 511 (2012) (U.K.); International Law Commission, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with Commentaries, U.N. Doc. A/61/10 (2006). *See also* Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16); Caroline E. Foster, *The ILC Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities: Privatizing Risk?*, 14 Rev. Eur. Cmty & Int'l Env't L. 265 (2005) (U.K.); International Law Commission, Guiding Principles applicable to the unilateral declaration of States capable of creating legal obligations, U.N. Doc. A/61/10 (2006); Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018, 1; International Law Commission, Most Favoured Nation Clause: Final Report of the Study Group on the Most-Favoured-Nation Clause, U.N. Doc. A/CN.4/680 (2015); International Law Commission, Final Report of the Study Group on the Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, U.N. Doc. A/CN.4/L.702 (2006); International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, U.N. Doc. A/73/10 (2018); Dire Tladi, *Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?* EJIL Talk! (Aug. 30, 2018), https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice/; Malgosia Fitzmaurice, *Subsequent Agreement and Subsequent Practice: Some Reflections on the International Law Commission's Draft Conclusions*, 22 Int'l Cmty L. Rev. 14 (2020) (Neth.). So much of I.L.C.'s ongoing projects are exploring themes and topics that are both traditional and contemporary such as *jus cogens*, principles of international law, and customary law. Therefore, the I.L.C. is an active site of juris-genesis with a lot of the focus on soft laws beyond the commitment to the identification and codification of International Law.

[5] *See generally* Chris Inglese, *Soft Law?*, 20 Polish Y.B. Int'l L. 75 (1993) (Pol.); Amos O. Enabulele & Eric Okojie, *Myths and Realities in 'Self-Executing Treaties'*, 10 Mizan L. Rev. 1 (2016) (Eth.); Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171, 171 (2010) (exploring soft laws and some of the factors that necessitate their place in international law); Steven L. Schwarcz, *Soft Law as Governing Law*, 104 Minn. L. Rev. 2471, 2471 (2020).

but which *nevertheless may have practical effects*".[6] The discipline and institutions of law are arguably a haven of taxonomies.[7] These taxonomies are often the vehicles of legal imagination.[8] Some scholars have suggested that legal writing relies on taxonomic "scaffolding".[9] The law is therefore an agglomeration of terms, concepts, and notions. Thus, taxonomies such as "soft law" come in several forms—sometimes associated with existing terms, such as collocations, qualifiers, maxims, clauses, or phrases.[10] Still, they are odyssean at different times—overcoming systemic exertions and mapping new standards, power relations, and legal development pathways.[11] For example, when Bentham adopted the term "international law" instead of "law of nations", "*jus gentium*", and "*droit des gens*" as used by his predecessors such as Vitoria and Grotius, he altered the

[6] Francis Snyder, *Soft Law and Institutional Practice in the European Community* (Eur. Univ. Inst. L. Working Paper, Working Paper No 93/5, 1993).

[7] The word *haven* is used here as a place that offers favourable conditions and refuge as distinguished from Rudolf Von Jhering's "Heaven of Legal Concepts" which is like an exclusive realm. *See* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935) (exploring and critiquing Jhering's view of the world of legal concepts). *See also* Joachim Dietrich, *What is "Lawyering"? The Challenge of Taxonomy*, 65 Cambridge L.J. 549 (2006) (U.K.) (recognizing the role of taxonomy in law regarding classification, coherence, and order).

[8] For the role of taxonomy in jurisprudence and law see e.g., Tarunabh Khaitan & Sandy Steel, *Theorizing Areas of Law: A Taxonomy of Special Jurisprudence*, 28 Legal Theory 325 (2022) (U.K.); Emily Sherwin, *Legal Taxonomy*, 15 Legal Theory 25 (2009) (U.K.) [hereinafter Sherwin, *Legal Taxonomy*]; Emily Sherwin, *Legal Positivism and the Taxonomy of Private Law*, *in* Structure and Justification in Private Law: Essays for Peter Birks 103 (Charles E.F. Rickett & Ross Grantham eds., 2008); David Campbell, *Classification and the Crisis of the Common Law*, 26 J. L. & Soc'y 369 (1999) (U.K.); Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law*, *in* Structure and Justification in Private Law: Essays for Peter Birks 147 (Charles E.F. Rickett & Ross Grantham eds., 2008); Geoffrey Samuel, *English Private Law: Old and New Thinking in the Taxonomy Debate*, 24 Oxford J. Legal Stud. 335 (2004) (U.K.).

[9] *See* Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 Mercer L. Rev. 621 (2006).

[10] For instance, the taxonomy "fee simple" as a category of proprietary interest has strong implications for legal systems and property holding in the Common Law tradition. *See* William Blackstone, A Treatise on the Law of Descents in Fee-simple (Oxford, Clarendon Press 1759); Lee A. Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. Rev. 1457 (2016). It can make a difference regarding tenure and ownership in property transactions. The nightmare of any draftsman or conveyancer is often that a particularly dispositive taxonomy, such as "fee simple absolute", has been omitted in an instrument. *See* Katrina M. Wyman, *In Defense of the Fee Simple*, 93 Notre Dame L. Rev. 1 (2017); *see also* Thomas P. Gallanis, *The Future of Future Interests*, 60 Wash. & Lee L. Rev. 513 (2003) (showing some of the determinative impact of "fee simple" on future interests and alienability). The same is the case in legislative drafting, and treaty enforcement whereby the meaning of the law can turn on such an important taxonomy as "self-executing" or "non-self-executing"). *See* Carlos M. Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695 (1995) (exploring the treaty practice in the United States and the wobbly distinction between self-executing and non-self-executing treaties). *See also* Jordan J. Paust, *Self-Executing Treaties*, 82 Am. J. Int'l L. 760, 760 (1988); Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 303, 368 (1992) (Neth.); Murdoch Watney, *Bewyslas by Die Toelaatbaarheid Van Bekentenisse* [*Burden of Proof in Admissibility of Confessions*], 1995 J. S. Afr. L. 365, 367 (1995) (S. Afr.); Industria Panificadora, S.A. v. U.S., 763 F. Supp. 1154 (D.D.C. 1991); Medellín v. Texas, 552 U.S. 491 (2008); Foster & Elam v. Neilson, 27 U.S. 253 (1829).

[11] *See* Sherwin, *Legal Taxonomy*, *supra* note 8 (explored the different ways in which taxonomy plays a role in law—normatively, functionally, and in the formulation of moral or legal principles that justifies legal rules and decisions).

paths and nature.[12] He, by that token, equally authored a fresh dimension of international law jurisprudence. The same can also be said of the taxonomic category "transnational law"[13] because it has ramifications for sources of laws or law-making rules, plurality, hierarchy, the applicability of these rules to issues in the field, legal interpretation, and dispute resolution.[14] Taxonomies may also signify systems of law, justify hierarchies, and preempt how we approach those systems in terms of law reform, conflict of laws/Private International Law [hereinafter P.I.L.] rules, interpretation, harmonization possibilities, legal/norm diffusion, and perceptions of (im)possibilities of transplants.[15]

[12] *See* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 10 (Batoche Books, 2000) (1781); *see also* Mark W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 Am. J. Int'l L. 405 (1984) (examining Bentham's 'new term' "International Law"); Hidemi Suganami, *A Note on the Origin of the Word 'International'*, 4 Brit. J. Int'l L. 226 (1978) (U.K.); Philip Marshall Brown, *Jus Inter Gentes*, 35 Am. J. Int'l L. 513 (1941) (critiquing Bentham's framing of "international law" as restrictive); Gordon E. Sherman, *Jus Gentium and International Law*, 12 Am. J. Int'l L. 56 (1918); Stanislaw Wielgus, *The Genesis and History of "Ius Gentium" in the Ancient World and the Middle Ages,* Roczniki Filozoficzne / Annales de Philosophie / Annals Phil., 1999, at 335 (Pol.); Emerich de Vattel, Le droit des gens. Ou Principes de la loi naturelle, appliqués à la conduite & aux affaires des nations & des souverains [The Law of Nations. Or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns] (London, 1793), https://archive.org/details/bim_eighteenth-century_le-droit-des-gens-engl_vattel-emerich-de_1793/page/n1/mode/2; Jeremy Waldron, *Foreign Law and the Modern Ius Gentium,* 119 Harv. L. Rev. 129 (2005); Jacob Giltaij, *The Rediscovery of the Roman Jus Gentium and the Post 1945 International Order*, 35 Leiden J. Int'l L. 521 (2022) (Neth.); Martti Koskenniemi, *The Political Theology of Ius Gentium: The Expansion of Spain 1526–1559*, *in* To The Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870 117 (2021); Manuel Jiménez Fonseca, *Jus Gentium and the Transformation of Latin American Nature: One More Reading of Vitoria?*, *in* International Law and Empire: Historical Explorations 123 (Martti Koskenniemi et al. eds., 2017); Andreas Wagner, *Francisco de Vitoria and Alberico Gentili on the Legal Character of the Global Commonwealth*, 31 Oxford J. Legal Stud. 565 (2011) (U.K.); Victor M. Salas, *Francesco De Vitoria on the Ius Gentium and the American Indios*, 10 Ave Maria L. Rev. 331 (2012); Janne E. Nijman, *Grotius' 'Rule of Law' and the Human Sense of Justice: An Afterword to Martti Koskenniemi's Foreword*, 30 Eur. J. Int'l L. 1105 (2019) (U.K.).

[13] Philip C. Jessup, Transnational Law 2 (1956) ("[m]y choice of terminology will no doubt be equally unsatisfactory to others. Nevertheless, I shall use the term 'transnational law' to include all law which regulates actions or events that transcend natural frontiers. Both public and private international law are included as are other rule which do not wholly fit into such standard categories."); *see also* Craig Scott, "*Transnational Law" As Proto-Concept: Three Conceptions*, 10 German L.J. 859 (2009) (U.K.).

[14] *See* Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. Int'l Disp. Settlement 241 (2011) (U.K.) (noting that "the utility of taxonomies is that they make it possible to immediately grasp the essential traits of the classified object by simply knowing in which category and with which other objects it has been grouped"). *See also Id.* at 244.

[15] *See* Ugo Mattei, *The Legal Metaverse and Comparative Taxonomy: A Reappraisal*, 71 Am. J. Compar. L. 900 (2023); *see also* Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 Am. J. Compar. L. 5 (1997). Siems draws attention to the nature of taxonomies and makes an important methodological and philosophical argument about the place and value of taxonomies, that is, taxonomies of countries have both descriptive, analytical and normative functions. Yet taxonomies are never perfect representations of the complexities of the real world, and it is "*the task of subsequent researchers to critically scrutinize these conjectures and try to develop better ones*". *See* Mathias M. Siems, *Varieties of Legal Systems: Towards a New Global Taxonomy,* 12 J. Institutional Econ. 579 (2016) (U.K.). Taxonomies have their place in the law and its overarching function as an intermediator of human encounter(s) in societies. *See also*, Dominique Day, *Taxonomy and Restorative Justice: Can We Even See the Problem?*, 11 J. Race, Gender & Ethnicity 80, (2022) (highlighting how "taxonomy has been a powerful tool for maintaining supremacy, for delegitimizing struggle and resistance, and for narrowly defining injury and repair"); Toby S. Goldbach, *Why Legal Transplants?*, 15 Ann. Rev. L. & Soc. Sci. 583 (2019) (on taxonomies and typologies in legal transplant); Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 Maastricht J. Eur. & Compar. L. 111 (1997) (U.K.).

As older taxonomies become vestigial, new ones emerge to continue the critical role that taxonomies play in the evolution and development of laws.[16] Thus, taxonomies impact the law and its institutions, shaping how we perceive and organize social, economic, political, and legal systems.[17] Consequently, the evolution of any aspect of law or legal institution can be studied by looking at its constitutive taxonomies and the mutations of these in the legal system over time.[18] For instance, we can examine the taxonomic classification/qualification "most favoured nation" to understand the evolution of investment treaties in international law and its core structures, such as institutions of arbitration throughout the nineteenth or twentieth century.[19] To further the discussion, the idea of soft law raises a question—why is it essential to name a category of laws as "soft laws"?[20] What, if any, ramifications might such a naming portend for the discipline?[21] To begin, naming—such as calling a law "soft law"—is a linguistic function

[16] *See* Anna Di Robilant, *Genealogies of Soft Law*, 54 Am. J. Compar. L. 499, 499 (2006) (exploring some of the roots of "soft law" and arguing that the genealogies of soft law "operate as powerful ideological devices serving competing professional and political agendas."). *See also id.* at 554.

[17] *See, e.g.*, Joseph Lavitt, *Leaving Contemporary Legal Taxonomy*, 90 Denv. U. L. Rev. 213 (2012) (exploring the role of legal taxonomies in contemporary legal scholarship in America); Felix Krysa, *Taxonomy and Characterisation of Crypto Assets in Private International Law*, *in* Blockchain and Private International Law 157 (Andrea Bonomi et al. eds., 2023) (Neth.); Frederick H. C. Mazando, *The Taxonomy of Global Securities: Is the US Definition of Security Too Broad?*, 33 Nw. J. Int'l L. & Bus. 121 (2012) (highlighting the disparate global concept of "security" and how its broad definition has ramifications for legal obligations and possibilities of norm and practice harmonization).

[18] In the private law sphere, some scholars have argued that so much of the debate has been about taxonomies. *See* Duncan Sheehan & TT Arvind, *Private Law Theory and Taxonomy: Reframing the Debate,* 35 Legal Stud. 480 (2015) (U.K.).

[19] *See* Olivier Accominotti & Marc Flandreau, *Bilateral Treaties and The Most-Favoured-Nation Clause: The Myth of Trade Liberalization in the Nineteenth Century*, 60 World Pol. 147 (2008); Stanley K. Hornbeck, *The Most-Favoured-Nation Clause*, 3 Am. J. Int'l L. 395 (1909) (tracing how the clause emerged and gradually became the "coner-stone of all modern commercial treaties"); *see also* Julian Arato et al., *The Once and Future Law of Non-Discrimination: Revisiting Most-Favoured-Nation and National Treatment,* 112 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 61 (2018).

[20] McNair made an original contribution regarding the nature of treaties—distinguishing contractual treaties and constitutional treaties—with implications for the obligations they create. "Soft law" seems to have developed from that idea of different categories of treaties in international law. The dynamics of international law and the globalisation trends have since complicated McNair's thesis. That is, beyond his categories we now have different categories of frameworks which are now lumped together as soft laws. *See* Arnold D. McNair, *The Functions and Differing Legal Character of Treaties*, 11 Brit. Y.B. Int'l L. 100 (1930) (U.K.); *see also* Catherine Brölmann, *Typologies and the 'Essential Juridical Character' of Treaties, in* Conceptual and Contextual Perspectives on the Modern Law of Treaties 79 (Michael J. Bowman & Dino Kritsiotis eds., 2018).

[21] I have chosen the functional approach as a way of looking at the real effect of soft law in the international society—especially as it relates to I.E.L.: Because "*functionalist comparative law is factual; it focuses not on rules but on their effects...[it] combines factual approach with the theory that its objects must be understood in the light of their functional relation to society." See, e.g.*, Ralf Michaels, *The Functional Method of Comparative Law, in* The Oxford Handbook of Comparative Law 345, 347-48 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed. 2019) (U.K.); Martin Loughlin, *The Functionalist Style in Public Law*, 55 U. Toronto L.J. 361 (2005); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 Am. J. Compar. L. 671 (2002); Konrad Zweigert & Hein Kotz, An Introduction to Comparative Law 32-47 (Tony Weir trans., 3rd ed. 1998). Naming in law has the function in creating juridically cognizable rights. This in turn affects the politics of international law and the more significant formation of norms, pathways of norm dissemination, and ramifications for economic and distributive justice.

and an ontological instrument that introduces new entities into systems.[22] Sometimes, such taxonomies are essentially new metaphors.[23] In jurisprudence, naming carries significant importance and influences the five principal spheres.

First, naming confers legal corporeality to an object, rendering it (re)cognizable in juridical contexts. For example, the "right to be forgotten"—a relatively newly established right in the digital age—derives from pre-existing rights such as personal autonomy and privacy but has a broader legal scope through (re)naming, redefinition, and reclassification.[24] In like manner, the designation "alien" makes a difference regarding legal rights, obligations, and participation in the state.[25] Second, naming transforms existing entities. For instance, a tract of land or territory brand-named as "uninhabited", "for public use", or "non-self-governing" acquires a distinct legal character, influencing doctrines and practices such as adverse possession, self-governance, takings, and other aspects of rights of eminent domain.[26] These classifications implicate rights such as access, easements, alienability, sovereignty, and general economic exploration and exploitation.[27] Moreover, if the same land is renamed as a "graveyard", a place of worship, or a "common", it takes on a different historical,

[22] The naming not only creates a category but also establishes a relationship between what is named and the larger system of law and governance. This systems impact is therefore an important aspect of the deeper iterations of the role of taxonomies in law and society.

[23] As metaphors, taxonomies also carry their own challenges including what is not expressed. *See* László Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 Int'l & Compar. L.Q. 605 (2010) (U.K.).

[24] *See* General Data Protection Regulation (EU) 2016/679, art. 17, 2016 O.J. (L 119) 1 (imposes an obligation on the controller of data to erase the data without undue delay when for instance the owner of the data has withdrawn his consent). *See also* Uta Kohl, *The Right to Be Forgotten in Data Protection Law and Two Western Cultures of Privacy*, 72 Int'l & Compar. L.Q. 737 (2023) (U.K.) (highlighting how this right though also hinged on data protection law is also a manifestation of privacy law—a privacy in public). Jeffrey Rosen, *The Right to Be Forgotten*, 64 Stan. L. Rev. Online, 88 (2012).

[25] Although there have been efforts to bridge the gap in the human rights experience of "aliens" the problem persists. *See* U.N. High Commissioner for Human Rights, The Rights of Non-Citizens, U.N. Doc. E/CN.4/2006/40 (2006).

[26] On the idea of non-self-governing territories in international law see generally, Western Sahara, Advisory Opinion, 1975 I.C.J. Rep. 12; Makane Moïse Mbengue, *Non-Self-Governing Territories*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2013) (U.K.). By the provisions of Chapter XI of the Charter of the United Nations 1945, non-self-governing territories are "those territories whose people have not yet attained a full measure of self-government". *See also* G.A. Res. 66 (I), (Dec. 14, 1946). Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. Colo. L. Rev. 651 (2008) (exploring the element of public use in which is determinative of the extensions of the doctrine of eminent domain). Jesse Saginor & John McDonald, *Eminent Domain: A Review of the Issues*, 17 J. Real Est. Literature 1 (2000); Errol E. Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 Env't L. 1 (1980); Arthur Lenhoff, *Development of the Concept of Eminent Domain*, 42 Colum. L. Rev. 596 (1942) (tracing the history of the concept of eminent domain and its relationship to the "ends of public utility").

[27] *See, e.g.*, Mark A. Smith, *Sovereignty over Unoccupied Territories – The Western Sahara Decision*, 9 Case W. Rsrv. J Int'l L. 135 (1977); Joseph Blocher & Mitu Gulati, *Navassa: Property, Sovereignty, and the Law of the Territories*, 131 Yale L.J. 2390 (2022) (exploring how the language and distinction regarding territories as "belonging to" the U.S. makes such territories "property"–something owned by the U.S. but not part of the United States. On the other hand, were such a territory to be designated as part of the United States, it would have implicated sovereign duties towards these territories). Downes v. Bidwell, 182 U.S. 244, 287 (1901) (belonging to and not part of the United States).

ontological, or sentimental significance—for example, Westminster Abbey, Cambridge Common, Allington Memorial, or Lincoln Memorial.[28] Third, naming helps define the inherent attributes of a subject, object, or concept, shaping its relationship within the broader socio-legal framework.[29] This contributes to legal hermeneutics and architecture, and extends beyond mere identification. For example, qualifying the term "purchaser" with "*bona fide* purchaser" or development with "sustainable development" affects the legal interpretation, obligations, and benefits accorded to that person. This is also reflected in temporal and spatial considerations, as evidenced by due diligence requirements for land transactions. Failure to perform reasonable inquiries could result in stiff penalties. "Sustainability" can also be a significant factor when exploring the environmental impact of a development project. Naming a law as "soft law" also implicates the distinction that is assumed between that which is so-called and *hard law,* with consequences for "obligation, precision, and delegation".[30] Fourth, naming plays a critical role in articulating rights and allocating obligations. Denoting an object as "property" establishes legal ties with the right of ownership and the entity with this right.[31] When ownership is established, the temporal tick "*T*" further nuances this relationship, affecting its standing within the broader juridical framework, often codified in doctrines such as "*the chain of title*".[32] Finally, this legal framework can be understood as a set of relational dynamics denoted by "*S*". The interplay between "*S*" and "*T*" produces complex temporal and spatial repercussions for property "*X*".[33] In summary, naming is a critical jurisprudential tool, and its application sometimes requires exactitude, given its far-reaching implications on the interpretation and operation of law. In the larger administrative state, understanding a taxonomy can be dispositive regarding questions of compliance and non-compliance. These may also have significant cost implications, as assessing a project as non-compliant with the law,

[28] *See* Pleasant Grove City v. Summum, 555 U.S. 460 (2009); *see also* Timothy Zick, *Summum, the Vocality of Public Places, and the Public Forum*, 2010 BYU L. Rev. 2203, 2203 (2010).

[29] As Cohen and Hutchinson have argued "*law is not only a symbol and act of power; it is also a major component of the social context in which those symbols and acts of power acquire meaning, significance and effect". See* David Cohen & Allan C. Hutchinson, *Of Persons and Property: The Politics of Legal Taxonomy*, 13 Dalhousie L.J. 20 (1990) (Can.).

[30] Susan Block-Lieb, *Soft and Hard Strategies: The Role of Business in the Crafting of International Commercial Law*, 40 Mich. J. Int'l L. 433 (2019) (on "obligation, precision, and delegation").

[31] Naming someone as a beneficiary in a testament implicates a bundle of rights and responsibilities that the law will recognise.

[32] On the temporal aspects of law. *See generally,* Lawrence Berger, *An Analysis of the Doctrine That "First in Time Is First in Right"*, 64 Neb. L. Rev. 349 (1985); Dotan Oliar & James Y. Stern, *Right on Time: First Possession in Property and Intellectual Property*, 99 B.U.L. Rev. 395 (2019); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 Wash. U. L.Q. 667 (1986); Margaret Jane Radin, *Time, Possession, and Alienation*, 64 Wash. U.L.Q. 739 (1986) (exploring the temporal dimensions of law as it affects issues such as adverse possession and alienation).

[33] This complexity is seen in varying tenures, such as a thirty-year leasehold for party *A*, a six-month tenancy for party "*B*" and then to "*C*" for life in being, and residual rights for party "*D*".

institutional directives, best practices, or regulatory standards—such as a directive by the Department of Housing on the quality of building materials in a specific zone—could alter land values in that zone or impede certain types of development, with potential ramifications for social class and other competing identities in the area. Indeed, the complex network of relationships and definitions formed through this semiotic exercise underscores the reliance of legal systems on meticulous terminological articulation. This explains the gap in literature and the need for I.E.L. to become more reflective regarding its taxonomic repertories and their systemic ramifications.

Therefore, when examining legal taxonomies, it is essential to consider the implications of naming beyond mere identification. The act of naming can effectively establish notions that permeate the law and occasionally lead to systemic changes within the law and its underlying operational mechanisms—for example, designating a country as a "most favoured nation" in an investment treaty. As such, weighing the implications of naming when constructing legal taxonomies is of utmost importance to ensure that the resulting legal doctrines are precise, accurate, and effective in bringing about the anticipated outcomes. Over time, the accumulation of norms, particularly concerning specific practices and methods, can give rise to various legal branches. The emergence of *equitable interests* as part of the common law and the development of customary international law [hereinafter C.I.L.] are examples of this phenomenon. Soft laws, which may appear unenforceable at present, can gradually become part of C.I.L. or general principles recognised by states as enforceable, or affect the judicial interpretation of agreements and treaties in many ways.[34] This change may occur despite the canonical articulation of formal and informal sources of international law, as well as the deference shown to this canon by legal scholars. For example, the I.L.C.'s *Draft Article on the Responsibility of States for their Internationally Wrongful Acts* has since permeated legal discourse and judicial deliberations in international law.[35] Other examples can be found in many areas of the global economy—including those arising from the Organisation for Economic Co-operation and Development [hereinafter O.E.C.D.]'s Base Erosion and Profit

[34] *See* Michèle Olivier, *The Relevance of 'Soft Law' as a Source of International Human Rights*, 35 Compar. & Int'l L.J. S. Afr. 289 (2002) (S. Afr.) (suggesting that subsequent behaviour and practice of states can harden soft laws into formal sources of international law).

[35] *See* Federica Paddeu & Christian J. Tams, *The ILC Articles at 20: Introduction to the Symposium* (GCILS Working Paper Series, Working Paper No. 11, 2021); *see generally* Fernando Lusa Bordin, *Still Going Strong: Twenty Years of the Articles on State Responsibility "Paradoxical" Relationship Between Form and Authority,* E.J.I.L.: TALK! August 3, 2021; Caron, *supra* note 4; GabCikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 ¶¶ 47-53; Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. Rep. 62; *see also* International Law Commission, Model Rules on Arbitral Procedure (1958); International Law Commission, Draft Articles on Most-Favoured-Nation Clauses with Commentaries (1978).

Shifting [hereinafter B.E.P.S] initiative.[36]

In the civil law tradition, taxonomies often evolve or are associated with maxims, such as *uti possidetis juris* [as you possess under law], *jus in bellum* [justice in war], *ex aequo et bono* [according to what is equitable and sound], *jus ad bellum* [right to war], and *jus tertii* [a right of a third party].[37] These maxims have formed the springboard for many scholarly treatises on the role of law.[38] The maxims have formed the anchor of many foreign policy approaches in peace times and war situations.[39] They have also played a significant role in shaping communities and establishing the foundations of prevailing canons in domestic and transnational legal systems. In the common law tradition, equitable principles and remedies have since permeated the soil of common law following the unification of the respective courts in England. We see a lot of them in areas of law such as property, wills, and general conveyancing, as well as in the exercise of courts' discretionary powers. For example, today, the Roman law maxim of *uti possidetis juris* and its corollaries are indispensable in settling boundary disputes in international law.[40] This underscores the importance of precision and nuance in understanding legal structures and principles.

Thus, in many respects, the term "soft law" and its apparent qualification of law are vigorously debated in international law.[41] Currently, there is scarcely any aspect of international law that scholars do not perceive as having or requiring some species of

[36] *See* Frederik Heitmüller & Irma Mosquera, *Special Economic Zones Facing the Challenges of International Taxation: BEPS Action 5, EU Code of Conduct, and the Future*, 24 J. Int'l Econ. L. 473 (2021) (U.K.) (highlighting the impact of the soft law standards).

[37] *See* Ditlev Tamm, Roman Law and European Legal History 85 (1997); Malcolm N. Shawt, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 Brit. Y.B. Int'l L. 75 (1996) (U.K.). On *jus tertii* see generally, Brian A. Blum, *The Use of Jus Tertii Defenses by an Obligor on a Negotiable Instrument*, 84 Com. L.J. 131 (1979); Patrick S. Atiyah, *A Re-Examination of the Jus Tertii in Conversion*, 18 Mod. L. Rev. 97 (1955) (U.K.); John Frederick Hurlbut, *Jus Tertii as a Defense to Conversion Suits in Indiana—Toward a More Rational Approach*, 18 Val. U. L. Rev. 415 (1984); Charles D. Baker, *The Jus Tertii: A Restatement*, 16 U. Queensl. L.J. 46 (1990) (Austl.). On *jus ad bello* see Alexander Orakhelashvili, *Overlap and Convergence: The Interaction Between Jus ad Bellum and Jus in Bello*, 12 J. Conflict & Sec. L. 157 (2007) (U.K.); Christopher Greenwood, *The Relationship Between Jus ad Bellum and Jus in Bello*, 9 Rev. Int'l Stud. 221 (1983) (U.K.).

[38] For example, *Jus ad bellum*. *See* Stuart Casey-Maslen, Jus ad Bellum: The Law on Inter-State Use of Force (2020) (U.K.).

[39] For some exploration of the way the maxims jus in bello, and jus ad bello have been used in international law to justify and delineate the ways and means of use of force in international law, *see* Greenwood, *supra* note 37; Orakhelashvili, *supra* note 37.

[40] *See* Enver Hasani, *Uti Possidetis Juris: From Rome to Kosovo,* Fletcher F. World Affs., Summer-Fall 2003, at 85; *see also* Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 Am. J. Int'l L. 590 (1996); Arman Sarvarian, *"Uti Possidetis Iuris" in the Twenty-First Century: Consensual or Customary?*, 22 Int'l J. on Minority & Grp. Rts. 511 (2015) (Neth.); Monroe Leigh, *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali) 1986 ICJ Rep. 554*, 81 Am. J. Int'l L. 411 (1987); Tomáš Bartoš, *Uti Possidetis. Quo Vadis?*, 18 Austl. Y.B. Int'l L 37 (1997) (Austl.).

[41] *See* Tadeusz Gruchalla-Wesierski, *A Framework for Understanding "Soft Law"*, 30 McGill L.J. 37 (1984) (Can.); *see also* Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements,* 71 Am. J. Int'l L. 296 (1977); Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 Int'l & Compar. L.Q. 850 (1989) (U.K.); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am. J. Int'l L. 413 (1983). Other scholars have also been exploring why states prefer soft laws as a means of cooperation, *see* Laurence R. Helfer & Ingrid Wuerth, *Custom in the Age of Soft Law* (working paper).

"soft law" or another.[42] For example, one area where soft law is powerful is international environmental law and international taxation.[43] Soft laws are often justified in environmental and commercial arrangements, based on the need for governance regimes that are readily acceptable to multi-stakeholders.[44] Arguably, when other aspects of the public sphere, such as A.I. and its governance, are situated in the universe of things, one can say that we are in a new age of soft laws.

Pergantis argues that "soft law is the response to the need for accommodating law's dynamism when the traditional sources of international law are unable to do so".[45] In other words, the changing realities of international law and order require a responsive approach to law-making in international law. Still, the responsiveness is often missing or tardy, hence the resort to soft law mechanisms to meet the felt needs of the time. Other scholars have suggested that these soft laws are perceived to be more "politically feasible".[46] That is to say, the politics of international law often gets in the way of norm formation and crystallization. Indeed, C.I.L. itself strongly relies on the behaviour of sovereigns and the emergence of obligations deemed binding on all. Therefore, the commitment to soft law based on political feasibility is a significant ramification for international law, politics, and diplomacy.[47]

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[42] *See* Martino Reviglio, *The Shift to Soft Law at Europe Borders: Between Legal Efficiency and Legal Validity,* 23 Glob. Jurist 23 (2023) (Ger.); *see also* Seidl-Hohenveldern, *supra* note 1, at 194. Claire R. Kelly, *The Sociological Pull of Soft Law*, 106 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 327, 327 (2012). Felix Dasser, *"Soft Law" in International Commercial Arbitration*, 402 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 385 (2019) (Neth.). James Crawford, *Chance, Order, Change: The Course Of International Law*, 365 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 9, 27 (2013) (Neth.). Michael Bothe, *Legal and Non-Legal Norms — A Meaningful Distinction in International Relations?,* 11 Neth. Y.B. Int'l L. 65, 68 (1980) (Neth.). Gruchalla-Wesierski, *supra* note 41, at 44; Antonio Cassese, International Law 196 (2nd ed. 2005) (U.K.) (articulating "soft law" as a body of standards, commitments, joint statements or declarations of policy or intention); Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, *in* Handbook of International Relations 538, 540, 551 (Walter Carlsnaes et al. eds., 2002) (noting that soft law has to do with "instruments or rule that have some indicia of international law but lack explicit and agreed legal bindingness"). On human rights see, Tracing the Roles of Soft Law in Human Rights (Stéphanie Lagoutte et al. eds., 2016) (U.K.).

[43] *See* Dinah L. Shelton, *Comments on the Normative Challenge of Environmental "Soft Law"*, *in* The Transformation of International Environmental Law 61 (Yann Kerbrat & Sandrine Malijean-Dubois eds., 2011); *see also* Jürgen Friedrich, International Environmental "Soft Law" (2013) (on environmental soft law); Marcel M. T. A. Brus, *Soft Law in Public International Law: A Pragmatic or a Principled Choice? Comparing the Sustainable Development Goals and the Paris Agreement*, *in* Legal Validity and Soft Law 243 (Pauline Westerman et al. eds., 2018); Non-State Actors, Soft Law and Protective Regimes: From the Margins (Cecilia M. Bailliet ed., 2012) (U.K.). Allison Christians, *Hard Law, Soft Law, and International Taxation*, 25 Wis. Int'l L.J. 325 (2007).

[44] *See* Henry Deeb Gabriel, *The Use of Soft Law in the Creation of Legal Norms in International Commercial Law: How Successful Has It Been?*, 40 Mich. J. Int'l L. 413 (2019) (highlighting the reasons and advantages that are often used to justify soft laws—especially in international commerce—such as UNIDROIT principles).

[45] Vassilis Pergantis, *Soft Law, Diplomatic Assurances and the Instrumentalisation of Normativity: Wither a Liberal Promise?*, 56 Neth. Int'l L. Rev. 137, 142 (2009) (Neth.).

[46] Cary Coglianese, *Environmental Soft Law As a Governance Strategy*, 61 Jurimetrics 19 (2020).

[47] See *infra* Part II (on the Politics of Soft law (re)making in international law); *see also* Abraham Newman & Elliot Posner, *Structuring Transnational Interests: The Second-order Effects of Soft Law in the Politics of Global Finance*, 23 Rev. Int'l Pol. Econ. 768 (2016) (U.K.).

Beyond environmental law and general contracts, other aspects of international law have increasingly become arenas for the development of soft law. For example, about outer space and mining in celestial bodies, soft laws have also been suggested as essential to some meaningful governance of the field.[48] Other subjects of international law (tax, trade, internet regulation) are also witnessing the resort to soft law or at least an invitation by scholars that one form of soft law standard or another is adopted.[49] So, soft laws abound, including in areas such as international relations,[50] artificial intelligence and nanotechnology,[51] intellectual property, trade, general business transactions,[52] marine life, navigation and safety at sea,[53] private military and security companies,[54] international security,[55] indigenous peoples, and human rights.[56]

[48] *See* Jack M. Beard, *Soft Law's Failure on the Horizon: The International Code of Conduct for Outer Space Activities*, 38 U. Pa. J. Int'l L. 335, 337 (2017); *see also* Jennifer A. Urban, *Soft Law: The Key to Security in a Globalized Outer Space*, 43 Transp. L.J. 33 (2016).

[49] On the prolific amount of literature on soft laws and also highlighting the advantages and disadvantages of soft law, see Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 Minn. L. Rev. 706 (2010).

[50] *See* Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 Cornell L. Rev. 735, 735 (2014).

[51] *See* Gary Marchant & Carlos Ignacio Gutierrez, *Soft Law 2.0: An Agile and Effective Governance Approach for Artificial Intelligence*, 24 Minn. J.L. Sci. & Tech. 375 (2023); *see also* Gary Marchant et al., *Governing Emerging Technologies Through Soft Law: Lessons from Artificial Intelligence*, 61 Jurimetrics 1 (2020); Carlos Ignacio Gutierrez et al., *Lessons for Artificial Intelligence from Historical Uses of Soft Law Governance*, 61 Jurimetrics 133 (2020); Kenneth W. Abbott et al., *Soft Law Oversight Mechanisms for Nanotechnology*, 52 Jurimetrics 279 (2012); Timothy F. Malloy, *Soft Law and Nanotechnology: A Functional Perspective*, 52 Jurimetrics 347 (2012).

[52] UNIDROIT Principles as soft law is one that comes to mind. *See* Lars Meyer, *Soft Law for Solid Contracts: A Comparative Analysis of the Value of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law to the Process of Contract Law Harmonization*, 34 Denv. J. Int'l L. Pol'y 119 (2006); *see also* Brooke Marshall, *The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law*, 66 Am. J. Compar. L. 175 (2018).

[53] *See* Unconventional Lawmaking in the Law of the Sea (Natalie Klein ed., 2022) (U.K.)*; see also* Birgit Feldtmann, *On-board Protection of Merchant Vessels from the Perspective of International Law*, 11 Erasmus L. Rev. 209 (2018) (Neth.).

[54] *See* International Committee of the Red Cross, The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (2009); *see also* James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. Conflict & Sec. L. 401 (2008) (U.K.); Joel C. Coito, *Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden*, 101 Calif. L. Rev. 173 (2013); David A. Wallace, *International Code of Conduct for Private Security Service Providers*, 50 Int'l Legal Materials 89 (2011).

[55] *See* Gregory C. Shaffer & Mark A. Pollack, *Hard Versus Soft Law in International Security*, 52 B.C. L. Rev. 1147 (2011).

[56] *See* Olivier, *supra* note 34 (highlighting how soft laws play crucial roles in advocacy and mobilization of the consent of states); *see also* Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples,* 58 Int'l & Compar. L. Q. 958 (2009) (U.K.).

In many respects, the scholarly debate about soft law in international law has followed three key pathways. First is the belief that soft law is an *effective way* of delivering on the mandate of international law and its institutions.[57] The set of scholars in this group argues for the pragmatic use of soft law because there is merit in getting things done as opposed to getting bogged down by the liberal limitations of international law.[58] Secondly, some scholars have *expressed reservations* about soft law, while others have given the taxonomy a *tepid endorsement*.[59] The reasons for this reticent approach to soft laws range from concerns about international institutions' functions and mission/mandate creep,[60] to worry about the "undesirability" of soft law.[61] The inability of international institutions to amend their charters and constitutive acts has led them to resort to soft law to remain relevant in the international sphere. At other times, soft laws have been suggested as a means of preventing some of the difficulties we see in cultivating the consent of states.[62] However, others have argued that soft laws sometimes overreach and extend international law beyond its intended boundaries—what is known as "mission creep." These extensions sometimes render them ineffectual and obfuscate their practical utility in international law.[63] Mission creep is a factor in the overarching complex machinery of international institutions such

[57] *See* Joost Pauwelyn et al., *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 Eur. J. Int'l L. 733 (2014) (U.K.). International organisations have continued to inspire the development of international law through soft standards. *See also*, Sean Hagan, *International Organizations and the Development of International Law,* 52 Geo. J. Int'l L. 863 (2021).

[58] *See* Marie von Engelhardt, *Opportunities and Challenges of a Soft Law track to Economic and Social Rights: The Case of the Voluntary Guidelines on the Right to Food*, 42 L. & Pol. Afr. Asia & Latin Am. 502 (2009) (Ger.), highlighting some of the deemed merits of soft law to include "attracting compliance," serving as gap fillers in the law or helping to "resolve ambiguities in the text of hard law instruments".

[59] *See* Jan Klabbers, *The Redundancy of Soft Law,* 65 Nordic J. Int'l L. 167 (1996) (Neth).

[60] *See* Bert-Jaap Koops, *The Concept of Function Creep*, 13 L. Innovation & Tech. 29 (2021) (Swed.) for a conceptual discussion of functional or mission creep. See also Jessica Einhorn, *The World Bank's Mission Creep*, Foreign Affairs 22 (Sept. - Oct. 2001), https://www.foreignaffairs.com/world/world-banks-mission-creep discussing the concept of mission creep with a focus on the World Bank.

[61] *See* Jan Klabbers, *The Undesirability of Soft Law*, 67 Nordic J. Int'l L. 381, 381 (1998) (Neth.); *see also* Jan Klabbers, *Reflections on Soft International Law in a Privatized World*, 16 Finnish Y.B. Int'l L. 313, 315 (2005) (U.K.). Further frustrations have also been expressed regarding the redundancy of soft law standards. *See* Klabbers, *supra* note 59, at 167; Ramses A. Wessel, *Normative Transformations in EU External Relations: The Phenomenon of 'Soft' International Agreements*, 44 W. Eur. Pol. 72 (2021) (U.K.) (raising questions as to how the resort to soft law may be enabling international organisations such as the E.U. to "step-outside" the E.U. legal framework); *see* Peter Slominski & Florian Trauner,*Reforming Me Softly - How Soft Law Has Changed EU Return Policy Since the Migration Crisis*, 44 W. Eur. Pol. 93 (2021) (U.K.), endorsing soft law as more sift and with limited sovereignty cost for international institutions such as the EU as seen in it migration policies in recent years.

[62] *See* Andrew T. Guzman, *Against Consent*, 52 Va. J. Int'l L. 747 (2012), exploring soft laws as part of the strategies for working around the "consent problem" in international law. One has to be aware of a broader debate in the discipline regarding the potential exaggeration of the consent problem and the intricate nature of the sources of international law beyond the Westphalian paradigm. *See also* Anthony A. D'Amato, *Consent, Estoppel, and Reasonableness: Three Challenges to Universal International Law*, 10 Va. J. Int'l L. 1 (1969), arguing that international law based only on the consent of states is an "extreme form of the positivist tradition in international law".

[63] *See* Gunther F. Handl et al., *A Hard Look at Soft Law*, 82 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 371 (1988).

as the United Nations [hereinafter U.N.] agencies and the Washington-based global institutions. Soft laws have also emerged due to the sluggish progression of international human rights law and the political maneuvering of states seeking to maximize the protections afforded by international law.

D'Aspremont considers the expansion of soft law as part of the politics of "deformalization" of sources of international law.[64] Goldman argues that "theoretically" soft law has remained a "conundrum".[65] There is also a sense in the field that the distinction between soft and hard international law is unnecessary: that is to say, what is essential is the role that soft laws play as part of the "methodologies of obtaining functional cooperation among states in reaching international goals".[66] Further scholarship, which has voiced a careful evaluation of soft laws and their ramifications in the international system, has suggested examining the intellectual history of soft law in international law. This is an essential way of situating soft law in the broader ontology of the evolution of international law first as an idea and second as part of the wider history of power and encounters between peoples and how the intellectual history of soft law is potentially revelatory of its potency to "endorse accepted political ideologies while obfuscating their distributive ramifications".[67]

The third approach is the approach of "*non-committal scholars*" who reckon with both the advantages and disadvantages of soft laws in the architecture of international law.[68] For example, there is a noted interest in the "network effect" possibilities that soft laws can generate in the international law system.[69]

[64] Jean d'Aspremont, *The Politics of Deformalization in International Law*, 3 Goettingen J. Int'l L. 503 (2011) (Ger.), critiquing deformalism. *See also* Jean d'Aspremont, Formalism and the Sources of International Law 29-30 (2011) (Austl.). Formalism, he argues, has its difficulties but "some elementary formal law-ascertainment in international law is a necessary condition to preserve the normative character of international law". *Id.* at 29-30. Jean D'Aspremont & Tanja Aalberts, *Which Future for the Scholarly Concept of Soft International Law? Editors' Introductory Remarks*, 25 Leiden J. Int'l L. 309 (2012) (U.K.), highlighting the "pitched" contest between scholars who are for and those against the idea of soft law.

[65] Matthias Goldmann, *We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law*, 25 Leiden J. Int'l L. 335 (2012) (U.K.) on the ramifications of soft law and how they usually work as the functional equivalence of binding treaties.

[66] Cynthia Crawford Lichtenstein, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 35 Int'l Law. 1433 (2001).

[67] Di Robilant, *supra* note 16.

[68] *See* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421 (2000) (U.K.), articulating such factors as less interference with sovereignty as part of the advantages inherent in the use of soft law in global governance.

[69] *See* Bryan H. Druzin, *Why Does Soft Law Have Any Power Anyway?*, 7 Asian J. Int'l L. 361 (2017) (U.K.).

Between these three foundations for exploring soft laws in international law, there are other theoretical justifications ranging from international relations theories to global governance and administrative law that have been applied in analyzing and articulating the place of soft laws in international law.[70] The fundamental flaw in soft law theory is its overextension, leading to the inclusion of inherently contradictory norms, and the near nonexistence of studies examining the distributive ramifications of soft laws within the international legal system. Thus, there are many analyses of soft law in the field, hinged on international relations theories of constructionism, functionalism,[71] realism, and normativism, highlighting the advantages and disadvantages of soft laws.[72] A significant aspect of this discourse is the acknowledgement that soft law standards constitute a part of international law.[73] Often overlooked is how the existing literature's concentration on state behaviour neglects the progressive evolution of international economic systems. These systems are guided by international law institutions that differ from traditional state constructs.

The International Relations [hereinafter I.R.] theory of international law holds allure for certain legal scholars. Nevertheless, caution is required, as this inclination towards international law could position it purely as another instrument in the toolbox of foreign relations. This reduces law to a tool for states to pursue power, wealth, and dominance. The difficulties in such approaches include the fact that conflict possibilities inherent in this approach to international law are self-evident. Approaches hinged on cooperative engagement and solidarity hold more hope for global peace, security, inclusive commerce, growth, and prosperity.[74] In other words, aligning I.R. with international law may lead to unilateral rather than multilateral efforts, the latter of which emphasises inclusivity, as opposed to the former, which is precariously open to abuse. Thus, the soft law puzzle has not been solved, and its systemic ramifications for

[70] Shaffer has also suggested that soft law is part of the realist approach to international law. *See* Shaffer & Pollack, *supra* note 49.

[71] *See* Blutman, *supra* note 23.

[72] *See* Galbraith & Zaring, *supra* note 50.

[73] *See* Anthony D'Amato, *A Few Steps Toward an Explanatory Theory of International Law*, Santa Clara J. Int'l L., Jan. 2010, at 1; *see also* Olufemi Elias & Chin Lim, *'General Principles of Law', 'Soft' Law and the Identification of International Law*, 28 Neth. Y.B. Int'l L. 3 (1997) (Neth.).

[74] *See* Ronald St. John MacDonald, *Solidarity in the Practice and Discourse of Public International Law*, 8 Pace Int'l L. Rev. 259 (1996); *see also* Chie Kojima & Kazimir Menzel, *Symposium on Solidarity As a Structural Principle of International Law, Max Planck Institute for Comparative Public Law and International Law, 29 October 2008*, 42 Verfassung und Recht in Übersee / L. & Pol. Afr. Asia & Latin Am. 585 (2009) (Ger.); *see also* Markus Tobias Kotzur & Kirsten Schmalenbach, *Solidarity Among Nations*, 52 Archiv des Völkerrechts 68 (2014) (Ger.) (on solidarity as an attempt to humanize international law); Jodie Boyd & Savitri Taylor, *Introduction. The Spirit of International Solidarity, the Right to Asylum, and the Response to Displacement*, 22 Hum. Rts. Rev. 383 (2021) (U.K.).

economic law and development remain under-explored.[75] In the next part, the article pivots to the discussion of this critical ramification of soft laws for I.E.L. [76]

[75] *See* Schwarcz, *supra* note 5 (looking at the increased recourse to soft law International financial and commercial transactions); *see also* Abraham L. Newman & Elliot Posner, Voluntary Disruptions: International Soft Law, Finance, and Power (2018) (U.K.)

> "*Voluntary Disruptions* argues that international soft law is deeply political, shaping the winners and losers of globalisation. Some observers focus on soft law's potential to solve problems and coordinate market participants. *Voluntary Disruptions* widens the discussion, shifting attention to the ways soft law provides new political resources to some groups while not to others and alters the sites of contestation and the actors who participate in them".

This work opens a very important discussion on the economic and distributive ramifications of soft law in international finance. I argue in my paper that the I.E.L. ramifications of soft law remain an open field yearning for deep scholarly cultivation.*See also* Roberta S. Karmel & Claire R. Kelly, *The Hardening of Soft Law in Securities Regulation*, 34 Brook. J. Int'l L. 884 (2009); Chris Brummer, *Why Soft Law Dominates International Finance—and not Trade*, 13 J. Int'l Econ. L. 623 (2010); For other debates on soft law, *see* Lorne Sossin & Chantelle van Wiltenburg, *The Puzzle of Soft Law*, 58 Osgoode Hall L.J. 623, 623 (2021) (Can.). The debate is ongoing as to the nature of soft law and its extensions. *See* Anthony D'Amato, *International Soft Law, Hard Law, and Coherence* (Nw. Pub. L., Research Paper No. 08-01, 2008); Weil, *supra* note 41. On the idea of formalism, *see* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949 (1988). For a rational choice and behavioural articulation of "why" soft law, see Tomer Broude & Yahli Shereshevsky, *Explaining the Practical Purchase of Soft Law*, *in* International Law as Behavior 98 (Harlan Grant Cohen & Timothy Meyer eds., 2021).

[76] See Vera Korzun, *Enforcing Soft Law in International Investment Arbitration*, 56 Vand. J. Transnat'l L. 1, 1 (2023) (on how investment treaties have incorporated soft laws thereby making them vastly applicable to arbitrations and investment disputes settlement).

2. 'SOFT' INTERNATIONAL ECONOMIC LAW

An archetypal textbook on I.E.L. looks at money, exchange rates, balance of payments, trade—especially now under the World Trade Organization [hereinafter: W.T.O.][77]—laws, regimes, and institutions of dispute resolutions, intellectual property, international investment treaties, and international institutions such as the World Bank [hereinafter: W.B.] and the International Monetary Fund [hereinafter I.M.F.] that provide the administrative backbone for I.E.L.[78] Taxation has also significantly evolved as an essential subject of I.E.L., although sovereign control and territorial questions associated with tax across transnational boundaries are often interlinked with conflict of laws.[79] Thus, sometimes, and depending on the region of the world, regional issues and institutions of economic law such as the European Union [hereinafter: E.U.],[80] African Union [hereinafter A.U.],[81] the Association of SouthEast Asian Nations [hereinafter A.S.E.A.N.], the Southern Common Market [hereinafter MER.CO.SUR.], Economic Community of West African States [hereinafter E.C.O.W.A.S.], Caribbean Community [hereinafter CARI.COM.] and North American Free Trade Zone under North American Free Trade Agreement [hereinafter N.A.F.T.A.] are also included to complicate the nature and extensions of I.E.L. There is equally the place of development/investment banks in the broader articulation of the aspirations of states whether as regional platforms or as lose association of states with common economic interests. Here we can generally include the African Development Bank [hereinafter A.D.B], Asian Development Bank [hereinafter A.D.B],[82] the European Investment Bank, Asian Infrastructure Investment

[77] The Oxford Handbook of International Trade Law (Daniel Bethlehem et al. eds., 1st ed. 2009).

[78] *See* Andreas F. Lowenfeld, International Economic Law (2nd ed. 2008). *See also*, John H. Jackson, *International Economic Law: Reflections on the "Boilerroom" of International Relations*, 10 Am. U. Int'l L. Rev. 595 (1995).

[79] *See* Sagi Peari & Nolan Sharkey, *Pairing International Taxation and Conflict of Laws: Common Challenges and Reciprocal Lessons*, 41 U. Queensl. L. J. 211 (2022) (Austl.) (on the intersection of conflicts of law with international taxation); *see also* Reuven S. Avi-Yonah, *International Tax Law as International Law*, 57 Tax L. Rev. 483 (2004). Julien Chaisse & Xueliang Ji, *'Soft Law' in International Law-Making — How Soft International Taxation Law Is Reshaping International Economic Governance*, 13 Asian J. WTO L. & Health Pol'y 463 (2018) (Taiwan) (exploring some of the espoused advantages of soft law including less contracting cost and lower sovereign cost).

[80] *See* Ernst B. Haas, The Uniting Of Europe: Political, Social, and Economic Forces, 1950-1957 (1st ed. 1958); *see also* Andreas Dür et al., *The Political Economy of the European Union*, 15 Rev. Int'l Org. 561 (2020); The EU and the Rule of Law in International Economic Relations (Andrea Biondi & Giorgia Sangiuolo eds. 2021); Jules Stuyck, Commercial and Economic Law in the European Union (3rd ed. 2022); Emilija Leinarte, Functional Responsibility of International Organisations: The European Union and International Economic Law (2021) (U.K.).

[81] *See* Frans Viljoen, Max Planck Encyclopedias of International Law: African Union (AU) (2011) (Ger.);*see also* James Thuo Gathii, *Agreement Establishing the African Continental Free Trade Area*, 58 Int'l Legal Materials 1028, 1028-38 (2019) [hereinafter Gathii, *Agreements*]; James Thuo Gathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. Int'l L. 571 (2009).

[82] The New Development Bank is established by Brazil, Russia, India, China and.South Africa countries, [hereinafter B.R.I.C.S.]. Article 1 of the N.D.B. Agreement provides that "the Bank shall mobilize resources for infrastructure and sustainable development projects in B.R.I.C.S. and other emerging economies and

Bank promoted by China,[83] the New Development Bank (promoted by B.R.I.C.S. countries), and the Comprehensive Progressive Agreement for Transpacific Partnership (2018).[84] At other times, specialized agencies of the U.N., such as the United Nations Conference on Trade and Development [hereinafter U.N.C.T.A.D.], United Nations Industrial Development Organization [hereinafter U.N.I.D.O.],[85] and the United Nations Economic and Social Council [hereinafter ECO.SO.C.][86] and its regional commissions are also included to give a panoramic view of the field.

There is, therefore, a lack of committed systematic studies on soft I.E.Ls. and their broader ramifications in the legal system. This assertion of the limited review of soft laws concerning their systemic influence is not unaware of the substantial literature on soft law as a subject in international law and policy more broadly. The shifting forms of soft law and their varied arenas of operation may have contributed to the limited interest in centralizing their study in international law. Still, although soft laws are everywhere, they remain a blind spot in I.E.L. literature. The studies of the critical roles of taxonomies in law demand an examination and centralization of "soft laws" in I.E.L. To that effect, I.E.L. springs from the traditional foundations of international law. In a sense, the economic interests of states, businesses, and other interests are significant fulcrums for the evolution of diplomatic structures and commercial relations among nations, peoples, and societies. The transnational nature of trade, ocean navigation, and services has also necessitated global value chains, which, in turn, produced various prescriptive aspects of I.E.L.

As with legal foundations everywhere, once these incipient groundworks are established, they could easily fossilize and become centrifugal bases for further juridical development and transmission of rules. The role of trading interests, corporations, and colonialism in the development of I.E.L. is continually interrogated in the field. Hence, the discourses on the sources and implications of soft law within the realm of I.E.L.

developing countries, complementing the existing efforts of multilateral and regional financial institutions for financial growth and development". *See* Agreement on the New Development Bank, UNTS vol. 53647, no. 3126, EIF 3 July 2015.

[83] Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. TRANSNAT'L L. 1255 (2021).

[84] The Comprehensive and Progressive Agreement for Transpacific Partnership 2018 creates a free trade area between 11 countries in the Asia Pacific region including Australia, Brunei, Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. The United Kingdom has joined the group as of December 15, 2024. The gains of membership include national treatment and elimination/harmonization of custom duties and national treatment.

[85] *See* Franz Plasil-Wenger, *UNIDO: The United Nations Industrial Development Organization*, 5 J. WORLD TRADE 188 (1971) (Neth.).

[86] The Economic and Social Council of the U.N. has regional commissions in Europe, Africa, Latin America and the Caribbean, Asia and the Pacific Region, and Western Asia. *See* Volker Röben, *United Nations, Economic and Social Council (ECOSOC)*, *in* MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (Anne Peters & Rüdiger Wolfrum eds. 2018) (Ger.).

warrant deeper scholarly investigation. This is because the emergence of soft law within this domain intertwines with institutional frameworks, underscoring its significance despite its informal nature. Soft laws in I.E.L., distinct from broader soft law in international law, necessitate examination concerning their origins, re-making, and dissemination pathways. It is argued that their formalist underpinnings reinforce existing structures and engender path dependency, thereby impacting the distribution of benefits and burdens in I.E.L. While exploring the role of economically impactful soft laws in fostering development and inclusive growth, it is essential to acknowledge alternative perspectives on soft law in international law. Thus, the analysis presented here does not offer a rigid doctrine but instead aims to facilitate a nuanced examination of I.E.L.'s strategic relevance amid contemporary challenges in the international legal landscape. Equally, the article avoids the rigidities of disciplinary boundaries due to the policy and legal intersections on the subject of soft law, particularly in commerce and other related economic spheres.

The beginning of the twenty-first century has witnessed profound shifts in international law, driven by globalisation, pandemics, and the legacies of the Cold War, which have exacerbated global inequality and poverty. International law has expanded beyond traditional treaties to encompass a range of soft law instruments, including guidelines, best practices, and resolutions. Although lacking universal consensus, these mechanisms have a significant influence on businesses and government policies, particularly in emerging markets, shaping investment decisions and perceptions in the international financial market. In I.E.L., soft laws can impose significant obligations and consequences despite a unified theoretical framework. For instance, the implicit recognition of compliance expectations among stakeholders underscores the power dynamics inherent in financial stability standards and related best practices. Equally, organisations such as the Organization for Economic Co-operation and Development [hereinafter O.E.C.D.] expect their members to comply with their guidelines and prospective members to undertake to abide by the policies or model rules on many aspects of the global economy, such as taxation and human rights. Thus, the taxonomy of soft laws in I.E.L. holds substantial sway, defining private rights and influencing national destinies within the global economic legal system.

Moreover, the interplay between normative and taxonomic sources on the international stage yields distributive consequences that profoundly shape societal outcomes across various sectors. For example, in the area of taxation, the ability of multinational enterprises to shift profits across jurisdictions or avoid taxes in the place of business by taking advantage of regulatory arbitrage is a concern for scholars in the

field. Much of the effort to adjust these regulatory *lacunae* has been hinged on soft standards.[87] Soft laws in I.E.L. embody transformative potential while reinforcing formalist structures and privileging power dynamics among states and non-state actors. Mindful of these vast consequences of soft laws in I.E.L., one must ask whether the taxonomy "soft law" is an oxymoron. This article explores the legal origins and sources of I.E.L. in this Part. It notes the possibilities of embedding political preferences through soft law in I.E.L. This is critical because "soft laws" often reinforce existing hierarchies within I.E.L., hindering progress toward inclusive growth and global economic justice. By perpetuating specific formalist standards without considering equitable outcomes, soft laws hinder the transformations necessary for a more just and equitable I.E.L.

1) LEGAL ANCESTRIES AND SOURCES

In this Section, the article examines the issues of provenance and sources of I.E.L. and how they intersect with soft laws. Beyond the sources, it also highlights the methods and politics of rulemaking, regarding soft laws in I.E.L.

[87] *See* Hans Gribnau, *Soft Law and Taxation: EU and International Aspects*, 2 LEGISPRUDENCE 67 (2008) (U.K.) (exploring the use of soft laws for tax regulation). *See also* Guglielmo Ginevra, *The EU Anti-Tax Avoidance Directive and the Base Erosion and Profit Shifting (BEPS) Action Plan: Necessity and Adequacy of the Measures at EU Level*, 45 INTERTAX 120 (2017) (Neth.).

A. ARTICLE 38 OF THE STATUTE OF THE ICJ

The source of law is an imprescriptible factor in the recognition, legitimacy, and enforcement of regulations.[88] In international law, the traditional literature focuses on Article 38 of the Statute of the International Court of Justice [hereinafter I.C.J].[89] This traditional source of international law is especially so in public international law, which is primarily shaped by the activities and behaviours of states.[90] Thus, the scholarship about the sources of I.E.L. often defaults to the discussion of Article 38(1) of the Statute of the I.C.J., which provides that:

> [T]he Court, whose function is to decide by international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom as evidence of general practice accepted as law; (c) the general principles of law recognised by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.[91]

It is crucial to note that recent developments in international law have complicated the orthodox view of states as the primary makers of international law. Beyond states, other actors such as international institutions, business organisations,

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[88] François Rigaux, *Codification of Private International Law: Pros and Cons*, 60 La. L. Rev. 1321 (2000) (hinting at sources of law and their linkage with methods of study).

[89] For literature on the traditional discourse of the sources of international law see, Ian Brownlie, Principles of Public International Law 1 (4th ed. 1990); Joseph G. Starke, Introduction to International Law 32 (10th ed. 1989); David Kennedy, *The Sources of International Law*, 2 Am. U. Int'l L. Rev. 1 (1987); Humphrey Waldock, *General Course on Public International Law*, 106 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 1, 39-103 (1962) (Neth.); Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 Yale Stud. World Pub. Ord. 249 (1980); Michel Virally, *The Sources of International Law*, *in* Manual of Public International Law 116 (Max Sørensen ed. 1968); Taslim O. Elias, *THE MODERN LAW OF TREATIES* (1974); Malcolm N. Shaw, International Law 58-109 (9th ed. 2021); Hugh Thirlway, The Sources of International Law (2nd ed. 2019); Alain Pellet & Daniel Müller, *Article 38*, *in* The Statute of the International Court of Justice: A Commentary 819 (Andreas Zimmermann et al. eds., 3rd ed. 2019). For more on treaties as sources of International Law *see*, Anthony D'Amato, *Treaties As a Source of General Rules of International Law*, 3 Harv. Int'l L.J. 1 (1962).

[90] Kennedy has argued that *"Article 38 is addressed to I.C.J. justices and enumerates the various sources they are to examine in finding the law necessary to resolve a case. It has been taken as a convenient catalog of international legal sources generally, and as such, has been the starting point for most discussion in this area."* Kennedy, *supra* note 89, *at 2.*

[91] *See Article 38 (1)* of the Statute of the I.C.J. reproduces the provisions of Article 38(1) of the League of Nations, Statute of the Permanent Court of International Justice, 16 December 1920. This suggests the pre-World War II provenance of the Law governing sources of law in international Law. *See also* Valentina Vadi, Cultural Heritage in International Economic Law 90 (2023); Hazel Fox, International Economic Law and Developing States 1-23 (1992).

and "soft institutions" influence the evolution of I.E.L. For instance, in private international law which often has significant ramifications for commerce, the sources of law include many other factors, such as conflict of law rules, business practices, arbitration rules, and other non-state-based foundations for rule formation. This is because, in commerce and general transnational transactions, the sources of law may range from selected municipal laws in contractual arrangements to trade treaties, bilateral investment treaties, and rules of arbitration and dispute settlement adopted by the parties to the agreement. The doctrines and practices surrounding party autonomy in international business allow this state of affairs.

Nonetheless, by the extant provisions of Article 38(1) of the Statute of the I.C.J, the traditional sources of international law are, first, *treaties*—including conventions, agreements, protocols, and exchanges between states, and sometimes between states and international organisations such as the A.U., E.U., U.N., W.B. Group, and the I.M.F.[92] Second, *customs*.[93] Third *general principles*.[94] Fourth *judicial decisions*.[95] Fifth teachings of

[92] *See* Article 2 of the Vienna Convention on the Law of Treaties 1969, *"treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." See also* Vienna Convention on the Law of Treaties, U.N.T.S. vol. 1155, no. 18232, at 331, art. 2 (May 23, 1969).

[93] On customs as source of international law, see, Reexamining Customary International Law (Brian D. Lepard ed., 2017) (U.K.); *see also* Karol Wolfke, *Some Persistent Controversies Regarding Customary International Law*, 24 Neth. Y.B. Int'l L. 1 (1993) (Neth.); *see* Lazare Kopelmanas, *Custom As a Means of the Creation of International Law*, 18 Brit. Y.B. Int'l L. 127 (1937) (U.K.); *see* Josef L. Kunz, *The Nature of Customary International Law*, 47 Am. J. Int'l L. 662 (1953); *see* Anthony D'Amato, The Concept of Custom in International Law (1971) (U.K.); *see* Michael Akehurst, *Custom As a Source of International Law*, 47 Brit. Y.B. Int'l L. 1 (1975) (U.K.); *see* Custom's Future International Law in a Changing World (Curtis A. Bradley ed., 2016) (U.K.); *see* Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am. J. Int'l L. 757 (2001); *see* Michael Byers, *Custom, Power and the Power of Rules*, 17 Mich. J. Int'l L. 109 (1995); *see* Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, 15 Eur. J. Int'l L. 523 (2004) (U.K.); *see* David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 German Y.B. Int'l L. 198 (1996) (Ger.); *see* Bhupinder S. Chimni, *Customary International Law: A Third World Perspective*, 112 Am. J. Int'l L. 1 (2018); Peter Tomka, *Custom and the International Court of Justice*, 12 L. & Prac. Int'l Cts. & Tribunals 195 (2013) (Neth.).

[94] *See* Xuan Shao, *What We Talk About When We Talk About General Principles of Law*, 20 Chinese J. Int'l L. 219 (2021) (U.K.); *see also* Marcelo Vázquez-Bermúdez (Special Rapporteur), Second Report on General Principles of Law, Int'l Law Comm'n, U.N. Doc. A/CN.4/741 (2020); *see* Mahmoud Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 Mich. J. Int'l L. 768 (1990); *see* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals (1953); *see* Hersch Lauterpacht, Private Law Sources and Analogies of International Law (1927).

[95] Judicial decisions as sources of international law have become very relevant in our times. Yet the proliferation of international courts and tribunals besides the ICJ has led to some level of anxiety about the systemic significance of the decisions of these tribunals. Part of the anxieties include possibilities of "forum shopping", "norm fragmentation" and lack of certainty since there is no hierarchy of courts in international law. *See*, Thomas Buergenthal, *Lawmaking by the ICJ and Other International Courts*, 103 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 403 (2009); *see also* Mads Andenas & Johann R. Leiss, *The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute*, 77 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg J. Int'l L. 907 (2017) (Ger.).

the "*most highly qualified publicists*".[96] These are explored as they pertain to the discourse on the sources of I.E.L.

Treaties are multi-purpose instruments in international law.[97] They lend themselves to many interests, ranging from diplomatic relations to commercial arrangements.[98] Many theories have been co-opted to explain the motivation for treaties in international law. As public contracts, treaties can encompass a range of motivations, including development, political stability, and the maintenance of favoured nation treatment and friendly relations between contracting states. The Vienna Convention on the Law of Treaties (1969) is the governing regime for treaties as a source of international law. The law of treaties draws inspiration from such doctrines as *pacta sunt servanda*—agreements are meant to be obeyed.[99] Equally, treaties can codify existing norms or be innovative in articulating and enacting new norms of international law, depending on the emerging needs of the international system.[100] They are, therefore, important sources of I.E.L.s. Some of the significant examples of I.E.L. treaties are the U.N. Convention on the Limitation Period in the International Sale of Goods, New York

[96] D'Amato argues that "*the term "most highly qualified" selects from the class of scholars those whose writings have commended themselves through objective reporting and judgement to the international legal community.*" *See* Anthony D'Amato, *What Does It Mean to Be an Internationalist?*, 10 Mich. J. Int'l L. 102, 104 (1989); *see also* Sondre Torp Helmersen, *Finding 'the Most Highly Qualified Publicists': Lessons from the International Court of Justice*, 30 Eur. J. Int'l L. 509 (2019) (U.K.); *see also* Sandesh Sivakumaran, *The Influence of Teachings of Publicists on the Development of International Law*, 66 Int'l & Compar. L.Q. 1 (2017) (U.K.).

[97] Treaties can be used to identify, clarify and codify norms or customs. For example, the Vienna Convention on Diplomatic Relations recalls "*that peoples of all nations from ancient times have recognised the status of diplomatic agents.*" So, the convention is one sense seeks to put the practices arising from these "ancient times" into a treaty. *See* Vienna Convention on Diplomatic Relations 1961, UN *Treaty Series*, vol., 500, at 95, 1 of preamble; *see also* Vienna Convention on Consular Relations, 1963, U.N.T.S. 596, at 261 (Apr. 24, 1963). Treaties can also form the bases of international institutions. For instance, the U.N. Charter; *The Constitutive Act of the African Union*, 1963. They can simply serve as contractual foundations for relations between states and international organisations. *See* John B. Quigley, *Vienna Convention on Consular Relations: In Retrospect and into the Future*, 38 S. Ill. U. L.J. 1 (2013); *see also* Jan Wouters et al., *The Vienna Conventions on Diplomatic and Consular Relations*, *in* The Oxford Handbook of Modern Diplomacy 510 (Andrew Cooper et al. eds., 2013) (U.K.).

[98] For instance, the Treaty of Versailles is as much a foreign policy or diplomatic treaty as well as a treaty with strong ramifications for IEL. *See generally*, Barry Eichengreen, *Versailles: The Economic Legacy*, 95 Int'l Affs. 7 (2019); *see also* Nikolaus Wolf et al., *On the Economic Consequences of the Peace: Trade and Borders After Versailles*, 71 J. Econ. Hist. 915 (2011) (U.K.).

[99] *See Article 26 VCLT,* UN *Treaty Series, Vol. 1155*, at *331, May 23, 1969, in force 27 January 1980. See also* Jiang Zhifeng, *Pacta Sunt Servanda and Empire: A Critical Examination of the Evolution, Invocation, and Application of an International Law Axiom*, 43 Mich. J. Int'l L. 745 (2022)*; see* Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25);*see* I. I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 Am. J. Int'l L. 513 (1989); *see* Richard Hyland, *Pacta Sunt Servanda: A Meditation*, 34 Va. J. Int'l L. 405 (1994); *see* Christina Binder, *Stability and Change in Times of Fragmentation: The Limits of Pacta Sunt Servanda Revisited*, 25 Leiden J. Int'l L. 909 (2012) (U.K.); *see* Josef L. Kunz, *The Meaning and the Range of the Norm Pacta Sunt Servanda*, 39 Am. J. Int'l L. 180 (1945).

[100] For instance, there is an ongoing discussion on the establishment of a treaty to govern plastic pollution. This is a specific type of treaty to deal with the particularly troubling problem of pollution especially with non-biodegradable materials. *See generally*, *Historic Day in the campaign to beat plastic pollution: Nations commit to develop a legally binding agreement*, UN Environment (Mar. 02, 2022), https://www.unep.org/news-and-stories/press-release/historic-day-campaign-beat-plastic-pollution-nations-commit-develop (last visited May 12, 2025).

1974[101]; the U.N. Convention on Contracts for the International Sale of Goods, Vienna 1980[102]; the U.N. Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules);[103] the U.N. Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention) 10 June 1958;[104] the Agreement Establishing the World Trade Organization 1995;[105] The Trade-Related Aspects of Intellectual Property Rights (T.R.I.P.S.),[106]and the African Continental Free Trade Agreement. [107]

Others include the North American Free Trade Agreement (N.A.F.T.A.) and the Mercosur Treaty of Asunción, 1991; CARI.COM. Treaty of Chaguaramas, 1973; E.U. Treaty of Lisbon, 2007; E.U. Treaty Establishing the European Economic Community, 1957; E.U. Treaty Establishing the European Coal and Steel Community, 1951. There are also over 3,000 bilateral and multilateral investment treaties (between states and among themselves as well as between states and regional and international organisations, such as the E.U.), which constitute sources of I.E.L., especially concerning the parties to the treaties. There are also several bilateral and multilateral free trade agreements, which are sometimes executed for specific economic interests and country settings. For example, the Chinese government maintains over 100 Bilateral Investment Treaties and about sixteen Free Trade Agreements with several countries globally.[108] It is also the case that the constitutive instruments of international organisations often incorporate existing agreements, sometimes by general reference and at other times as direct annexures to the charter of these institutions. For instance, the (W.T.O. Agreement 1995

[101] *See* U.N., Convention on the limitation period in the international sale of goods. Concluded at New York on 14 June 1974, UNTS 1511, No. 26119, at 3, (Aug. 1, 1988).

[102] *See* United Nations Convention on contracts for the international sale of goods, UNTS 1489, No. 25567, at 3, Jan. 1, 1988.

[103] *See* United Nations Convention on the carriage of goods by sea, 1978 (with Final Act), UNTS 1695, No. 29215, at 3 (Nov. 1, 1992).

[104] *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNTS 330, No. 4739 vol. 330, at 3 (June 7, 1959).

[105] *See* Marrakesh Agreement establishing the World Trade Organization, UNTS 1867, No. 31874, p.1 (Apr. 15, 1994).

[106] *See* Alphonso B. Kassor, *The World Trade Organizations' Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement: The Compelling Challenges for Developing and Less Developed Member Countries-Implementation and Enforcement*, 9 Cybaris 107 (2018); *see also* Peter K. Yu, *TRIPS and Its Discontents*, 10 Marq. Intell. Prop. L. Rev. 369 (2006); *see* Ezinne M. Igbokwe & Andrea Tosato, *Access to Medicines and Pharmaceutical Patents: Fulfilling the Promise of TRIPS Article 31bis*, 91 Fordham L. Rev. 1791 (2023).

[107] *See* Gathii, *Agreement*, *supra* note 81; *see also* Rita M. Tsorme & Joseph Amoah, *African Continental Free Trade Agreement's Conditional Most Favoured Nation: A Necessary Compromise?*, 23 World Trade Rev. 93 (2024) (U.K.).

[108] *See* Protocol to Amend the ASEAN-China Framework Agreement on Comprehensive Economic Co-operation and Certain Agreements thereunder, Nov. 2015; China-Pakistan Free Trade Agreement, Nov. 2006; China-New Zealand, Free Trade Agreement, Apr. 7, 2008; China-Peru Free Trade Agreement, Apr. 28, 2009; China-Costa Rica Free Trade Agreement, 2010; China-Iceland Free Trade Agreement, Apr. 15, 2013; China-Switzerland Free Trade Agreement, July 6, 2013; China-Korea Free Trade Agreement, June 1, 2015; China-Australia Free Trade Agreement, June 17, 2015; Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, Jan. 15, 2020; *see* Michael Sampson, *The Evolution of China's Regional Trade Agreements: Power Dynamics and the Future of the Asia-Pacific*, 34 Pac. Rev. 259 (2021) (U.K.); *see* Min-Hua Chiang, *China–ASEAN Economic Relations After Establishment of Free Trade Area*, 32 Pac. Rev. 267 (2018) (U.K.); *see* Ka Zeng, China's Free Trade Agreement Diplomacy, 9 Chinese J. Int'l Pol. 277 (2016) (U.K.).

has several annexes that incorporate the existing trade agreements, such as General Agreements on Tariffs and Trade before the establishment of the W.T.O.[109] These also form the basis of economic law and cooperation among constituent states. At other times, sections or chapters of the establishment charters of international organisations, such as the U.N. bodies that pursue economic collaboration, thereby providing a platform for the emergence of economic law norms, obligations, and enforcement frameworks. The treaties can equally establish an economic community, thereby setting the foundation for further transnational economic laws and regimes.[110] Such economic communities forge common markets through the removal of trade barriers (including tariffs and non-tariff barriers), and they also provide regulatory frameworks for banking, payments systems, and other aspects of the economy. The E.U. is a prime example of this situation.

Further examples can be seen in the Charter of the United Nations [hereinafter referred to as the U.N. Charter], which establishes the bodies and special agencies charged with the broad responsibility to promote *"higher standards of living, full employment, and conditions of economic and social progress and development."* [111] By Article 57 of the U.N. Charter 1945, various specialized agencies of the U.N. are incorporated by reference to be brought into relationship with the U.N. to pursue the broad agenda of the organisation—many of which are economically oriented or hinged on allied issues of the economy such as development and higher standard of living.[112] These specialized agencies are often the nurseries of I.E.L. normativity through soft law standards. They also produce rules for dispute settlement, such as those established by the United Nations Commission on International Trade Law [hereinafter U.N.C.I.TRA.L.] Arbitration Rules that go on to become standard setters in the field.[113] Such rules have profound ramifications for significant dispute settlement and processes of enforcement of economic treaty obligations such as investor-state arbitrations. [114]

[109] *See supra* note 105.

[110] For instance, the Treaty of Rome Establishing the European Community (Mar. 25 1957) establishes the European Economic Community. The Treaty of Rome 1957 has since undergone amendments culminating in the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. Economic Community of West African States (E.C.O.W.A.S.), Treaty of the Economic Community of West African States (May 28, 1975) establishes the Economic Community of West African States. *See also* Articles of Association for the Establishment of An Economic Community of West Africa, U.N.T.S. 288, No. 8623 (May 4, 1967).

[111] *See* U.N. Charter art. 55.

[112] *See id.* ch. IX-X.

[113] *See* G.A. Res. 76/108, Expedited Arbitration Rules of the United Nations Commission on International Trade Law (Dec. 9, 2021).

[114] *See* Esmé Shirlow, *Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31 ICSID Rev. - Foreign Inv. L.J. 622 (2016) (U.K).

Equally, these model rules of arbitration often have a substantive impact on municipal arbitration regimes. Sometimes, they inspire amendments in the local law, thereby changing the nature of the *lex arbitri* in that jurisdiction. At other times, they form the basis of institutionally designed legal development, such as restatements made by the legal institutes.[115] Often, these charter provisions invite economic cooperation among member states, which also leads to the establishment of subsidiary or affiliated institutions at the international, regional, or subregional levels. For example, Article 63 of the U.N. Charter recognises the specialized agencies of the U.N. as established in Article 57 of the U.N. Charter.[116]

Very interesting for the gamut of treaty-inspired expansion of the sources of I.E.L. is the establishment of regional development banks and other financial institutions to further obligations and aspirations first articulated in the founding charter of these international and regional institutions. Currently, we have the African Development Bank [hereinafter A.D.B.], the Asian Development Bank [hereinafter A.D.B.], the Inter-American Development Bank, and the European Central Bank [hereinafter E.C.B.] as exemplar institutions emerging from the *prior incipient* treaty grounds established in the founding charters of their respective regional parents.[117] These institutions are not only centres of norm formation for I.E.L. but also spaces for the transmission and assimilation of rules in I.E.L. In particular, they are spaces for easy consensus building on soft law standards on such issues as sovereign debt, letters of credit, risk exposure, management and bailout, prudential standards of financial markets, development policy formulation, and securities regulation and accountability.[118] It is safe to say that global

[115] Example is the United States Restatement of the Law of International Commercial and Investor-State Arbitration 2019. *See* George A. Bermann, *The UNCITRAL Model Law at the US State Level*, 39 Arb. Int'l 172 (2023).

[116] Indeed, the ECO.SO.C. is empowered to *"enter into agreement with any of the agencies referred to in article 57, defining the terms on which the agency concerned shall be brough into relationship with the United Nations."* U.N. Charter art. 63 (1).

[117] *See* Michael Ioannidis, *The European Central Bank*, *in* The EU Law of Economic and Monetary Union 352 (Fabian Amtenbrink et al. eds., 2020); *see also* René Smits, *The European Central Bank's Independence and Its Relations with Economic Policy Makers*, 31 Fordham Int'l L.J. 1614 (2007); *see* Paul Tucker, *How the European Central Bank and Other Independent Agencies Reveal a Gap in Constitutionalism: A Spectrum of Institutions for Commitment*, 22 German L.J. 999 (2021) (U.K); *see* Lucia Quaglia & Amy Verdun, *Weaponisation of Finance: The Role of European Central Banks and Financial Sanctions Against Russia*, 46 W. Eur. Pol. 872 (2023) (U.K.); *see* Philipp Hartmann & Frank Smets, *The European Central Bank's Monetary Policy during Its First 20 Years*, Brookings Papers on Econ. Activity, Fall 2018, at 1; *see* Arınç Onat Kılıç, *Secondary Objectives of the European Central Bank and Economic Growth: A Human Rights Perspective*, 35 Leiden J. Int'l L. 569 (2022) (U.K.); *see* Stefan Collignon, *Europe's Debt Crisis, Coordination Failure and International Effects* (Asian Dev. Bank Inst., ADBI Working Paper No. 370, 2012).

[118] *See* Agreement establishing the African Development Bank, U.N.T.S. 510 (Sept. 10, 1964); *see also* Susan Park, *The African Development Bank and the Accountability Policy Norm*, 29 Glob. Governance: Rev. Multilateralism & Int'l Orgs. 61 (2023); *see* Daniel Bradlow et al., *African Development Bank Independent Recourse Mechanism*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2023) (Germ.); *see* Stephen D. Krasner, *Power Structures and Regional Development Banks*, 35 Int'l Orgs. 303 (1981) (U.K.); *see* Roy Culpeper, *Regional Development Banks: Exploiting Their Specificity*, 15 Third World Q. 459 (1994); *see*

financial regulation cannot function effectively without the expertise, capacity, and supervision instruments that these institutions bring to the discipline.[119] Still, the treaty-based institutional and normative fermentation of the sources of I.E.L. will not be complete without some scholarly light cast on those organisations such as the W.B. and its associated institutions such as the International Finance Corporation, the International Bank for Reconstruction and Development, and the Multilateral Investment Guarantee Agency. Other comparably situated organisations include the I.M.F. as well as the O.E.C.D.; these bodies are not exclusively regional. They are not subsumed under global bodies, such as the U.N. However, they may establish relationships and sign memoranda of understanding with organisations such as the U.N. for specific purposes. The cooperative engagement of these bodies with regional and internationally affiliated institutions is a contributing factor in making I.E.L. frameworks and their governance.[120]

One such instance was the collaboration between the U.N. and World Bank-associated institutions in the design and implementation of the Highly Indebted Poor Countries initiative. Debt Relief Initiative in the 2000s. Through such collaborative activities and projects, these organisations develop soft law standards and create a taxonomy of instruments that often determine the trajectories and economic well-being of many communities globally. These organisations are platforms of turgid global economic domination and contestation. They have their internal logic, which shapes their policy preferences and determines what is deemed worthy of financing within the broader context. They have been the *fons et origo* [source and origin] of global economic liberalization and deregulation, which has ramifications for law and political economy. In particular, they impact economic sovereignty and its associated elements, such as ownership of natural resources, taxation possibilities, quality of life index, and general human well-being.

In summary, a comprehensive taxonomy of treaties in I.E.L. requires a whole book, considering the ever-expanding scope of the field and the proliferation of agreements in the post-1945 era. An examination of the genealogy of treaties reveals a deeper instrumentalisation of treaties for economic purposes. For instance, the Berlin

Eisuke Suzuki, *Regional Development Banks*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2011) (Ger.); *see* Judith Clifton et al., *Regional Development Banks in the World Economy*, *in* Regional Development Banks in the World Economy 1 (Judith Clifton et al. eds., 2021) (U.K); *see* Ruth Ben-Artzi, Regional Development Banks in Comparison: Banking Strategies Versus Development Goals (2016).

[119] *See* Rinke Bax, Andreas Witte, *The Taxonomy of ECB Instruments available for Banking Supervision* 6 E.C.B. Economic Bulletin (2019); *see also* David Quinn, *The Law and Norms of the European Central Bank as Sovereign Lender of Last Resort: Crystallising Endogenous Authority*, 17 Eur. Const. L. Rev. 78 (2021) (Neth.); *see* René Smits, *The European Central Bank: Institutional Aspects*, 45 Int'l & Compar. L.Q. 319 (1997) (U.K.).

[120] *See* Hagan, *supra* note 57, at 863.

West Africa Treaty of 1895 was to facilitate *free trade* in Africa.[121] The Treaty of Versailles 1919 had significant economic relations commitments for the parties, especially Germany. Many other treaties, including those signed amongst colonial powers and Indigenous communities, have financial consequences, as they often involve free trade, the acquisition of territory, access to minerals, ransom payments, taxation, and other economically significant issues, such as wages, labour, and ownership of private property. Indeed, Caesar's head is on the coin, and the coin of I.E.L. has treaties as its baseline.

It, therefore, suffices to state that regional and national issues may affect particular treaties and their interpretation when disputes arise between the parties. Thus, treaties could also be significant sources of *conflict of laws* principles and rules, especially when interpreting commercial and general contractual obligations arising from them. Hence, principles of interpretation such as *first-in-time rule* and *temporality* are essential facets in treaties' deeply embedded and nuanced role as sources of I.E.L. Equally, grasping the ways soft laws map into these treaties, especially those ratified in the post-1945 era, has ramifications for economic justice and the general distributive consequences of formal structures of international law. For instance, the International Centre for the Settlement of Investment Disputes [hereinafter I.C.S.I.D.] and its ramifications for investor-state arbitration are factors to consider when elucidating the implications of arbitration rules before the I.C.S.I.D. in international investment disputes.[122]The procedural provisions of I.C.S.I.D. and other simultaneously situated rules, such as the U.N.C.I.TRA.L. Arbitration Rules can be dispositive regarding the outcome of investment disputes, with significant consequences for the losing party's economy.

Custom is an aggregation of accepted behaviour within a legal system. Within the international community, custom has been justified based on historical legitimacy, natural law, and a general sense of duty between states themselves and states and other participants in the international system, such as tribal groups and indigenous peoples.[123] Often, customary law arises from and derives legitimacy from these behaviours, which are recognised as binding. Shaw argues that custom is *"an authentic expression of the needs*

[121] *See* Matthew Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, 3 London Rev. Int'l L. 31 (2015) (U.K.); *see also* Ewout Frankema et al., *An Economic Rationale for the West African Scramble? The Commercial Transition and the Commodity Price Boom of 1835–1885*, 78 J. Econ. Hist. 231 (2018) (U.K.).

[122] *See* Yarik Kryvoi, International Centre for Settlement of Investment Disputes (ICSID) (2020); *see also* Stephen T. Lynch, *The International Centre for the Settlement of Investment Disputes: Selected Case Studies*, 7 Md. J. Int'l L. 306 (1982).

[123] B. S. Chimni has argued that custom in many ways maps on to capitalism and power relations especially of European states. *See* Chimni, *supra* note 93.

and values of the community at any given time".[124] Customary international law theory essentially adopts the view that law develops from people's behaviour, which is consistent and habituated over time. The dynamism of custom as a source of international law also means that the threshold of time, quality, and quantum of behaviour required for the emergence of a C.I.L. norm is often indeterminate. It aligns with Carl von Savigny's view that a deep methodical study of custom will yield the true law.[125] Therefore, customs as sources of law have significant ramifications for relations among nations, and they remain dynamic. Hence, there is an active debate about custom as an aspect of the various sources of international law.

In a recent International Law Commission study, customary international law is regarded as *"unwritten law deriving from practice accepted as law".*[126] Thus, a custom's existence is contingent upon states' practice and behaviour. The behaviour must be deemed obligatory, not merely a courtesy extended by one state to another. Thus, for a custom to be binding, it must fulfil the two elements that determine the existence of customary law—the existence of *"a general practice"* and the *"acceptance of this practice as law."* This signifies that the practice in question must be observed by states as a matter of legal obligation—arising from coherence between *state practice* and *opinio juris sive neccessitatis* [an opinion of law or necessity].[127] These broad categories of international law may remain what they are—broad categories devoid of significant ramifications for I.E.L. Indeed, the enormously shaped scope of I.E.L. makes it challenging to situate customs in I.E.L. Yet, a careful look at the evolution of international law reveals how customs such as the right of ownership of property derived from personal labour were used to justify the evolution of international law.

In many cases, customs have been resorted to answer recondite questions of international law, including the prohibition of piracy.[128] Custom, therefore, is not a place but a vibrant resource for the adjustment and development of international law in line with the felt necessities of the time, informed by history. Thus, reconciling I.E.L. with customs is a particularly fertile space for legal scholarship in I.E.L. For Lawrence Boisson de Chazournes, although one of the cornerstones of I.E.L. is founded on custom, very few

[124] *See* Shaw, *supra* note 89, at 61; *see also* Fidler, *supra* note 93; *see* Rein Müllerson, *On the Nature and Scope of Customary International Law*, 2 Austrian Rev. Int'l & Eur. L. 341 (1997) (Neth.); *see* Byers, *supra* note 93; *see* Kammerhofer, *supra* note 93; *see* Tomka, *supra* note 93; *see* Antony A. D'Amato, *The Concept of Special Custom in International Law*, 63 Am. J. Int'l L. 211 (1963).

[125] *See* Frederick C. Beiser, *Savigny and the Historical School of Law, in* The German Historicist Tradition 214 (2011) (U.K.).

[126] *See* I.L.C., Draft conclusions on identification of customary international law, with commentaries, U.N. Doc. (A/73/10) (2018).

[127] *See* Continental Shelf (*Libya v. Malta*) 1985 Rep. 13, ¶ 27 (June 3).

[128] *See* Lawrence Azubuike, *International Law Regime Against Piracy*, 15 Ann. Surv. Int'l & Compar. L. 43 (2009).

principles of customary law can be founded on custom, and a few principles of customary law can be found in I.E.L.[129] One of the important aspects of customary IEL is the right of sovereignty over national resources.[130]Another strand of customary sources of I.E.L. has been the gradual attenuation of the absolute immunity of sovereigns before foreign courts. Before this era, sovereigns were immune from proceedings in foreign courts based on the doctrine of *"par in parem non habet imperium"*.[131] It is a doctrine of equality of sovereigns, and no state can take hold of another sovereign, as that would mean putting an equal sovereign on trial before another sovereign.[132] This forms the basis of state immunity. Yet the evolution of commerce and the increased participation of states in the marketplace through activities such as commercial procurement, sovereign debt bond issues, bilateral investment treaties, accession to multilateral frameworks, and other market behaviours has led to the evolution of the custom regarding the jurisdictional immunity of states.

The law states that a state's immunity in I.E.L. is qualified immunity. This qualified immunity entails that states cannot claim immunity from actions or claims arising from transactions in which they act in the marketplace. Therefore, there are two limbs to the qualification. On one hand, conflicts arising from issues or actions construed as *acta jure imperii* (executive acts of the sovereign) are immune from actions. In contrast, disputes arising from business or commercial transactions are construed as acts of a juridical nature and fall outside the realm of sovereign jurisdictional immunity. States such as the United States and the United Kingdom have codified these customs.[133] Also, the United Nations has followed this trend in the evolution of customs by adopting the *United Nations Convention on the Jurisdictional Immunities of States and their Property in 2004*.[134] This Convention is not yet in force, as it has not yet reached the required thirty ratifications under its *Article 30*.[135] Furthermore, the jurisprudence on this custom of

[129] *See* Laurence Boisson de Chazournes, *International Economic Law and the Quest for Universality*, 32 Leiden J. In'tl L. 401(2019) (U.K.).

[130] *See* G.A. Res. 1803 (XVII), (Dec. 14, 1962).

[131] Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220 (1952) (U.K.).

[132] *See* Yoram Dinstein, *Par in Parem Non Habet Imperium*, 1 Isr. L. Rev. 407 (1966) (U.K.).

[133] *See United States Foreign Sovereign Immunities Act (FSIA)*, 28 U.S.C. §§ 1602-1611 (1976); Rosalyn Higgins, *Recent Developments in the Law of Sovereign Immunity in the United Kingdom*, 71 Am. J. Int'l L. 423 (1977) (U.K.); The *United Kingdom State Immunity Act* 1978, c. 33 (U.K.); Georges R. Delaume, *The State Immunity Act of the United Kingdom*, 73 Am. J. Int'l L. 185 (1979).

[134] David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194 (2005) (on restrictive immunity under which governments are not immune from actions arising from their commercial transactions. This Convention is not yet in force since).

[135] According to U.N. Convention on Jurisdictional Immunities of States and Their Property, art. 30 (Dec. 2, 2004) *The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. For each State ratifying, accepting, approving or acceding to the present Convention after the deposit of the thirtieth instrument*

attenuated sovereign immunity can be found in such cases as *Trendtex Trading Corporation v. Central Bank of Nigeria*[136] and *Jam v. International Finance Corporation*.[137] Similarly, the concept of collective ownership of global commons and collective ownership of property has been justified by international law, grounded in principles of natural law and customary international law. This common ownership has been reflected in areas of international law that have significant ramifications for I.E.L., such as the law of the sea, exploitation of common resources in the area, and the management and exploitation of fish and marine organisms in those areas outside the jurisdiction of the littoral states. It is, therefore, imperative that I.E.L. scholars pay attention to these newer yet critical frontiers of I.E.L. and relations as we seek humane and inclusive approaches in the latter part of the twenty-first century.

Regarding *general principles*, Article 38(1)(c) of the Statute of the I.C.J. also contemplates the existence of general principles of law acceptable to states as a source of international law.[138] These principles also demonstrate that every legal system has several principles upon which courts can rely to settle disputes, especially in situations where neither a clear customary norm nor an existing treaty exists on the subject matter at issue. Yet, there is no taxonomy of international law detailing all the principles now acceptable by states or the major legal traditions that are part of international law. In this circumstance, scholarship in the field has explored the nature, sources, and application of general principles from two major standpoints. First is the set of scholars and publicists who submit that general principles of international law are derivable from natural law principles, including principles of justice and equity. Yet, a second set of thinking in the discipline construes general principles of international law from the standpoint of treaty and customary international law. In other words, general principles of international law are derived from customary international law and treaties, treaties and customs are the primary sources of international law.

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of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

[136] Trendtex Trading Corp. v. Central Bank of Nigeria [1977] 1QB 529 (sovereign immunity should not extend to commercial transactions); *see also Trendtex Trading Corporation v. Central Bank of Nigeria*, 64 Int'l L. Reps. 111 (1983) (U.K.); Robin C. A. White, *State Immunity and International Law in English Courts*, 26 Int'l & Compar. L.Q. 674 (1977) (U.K.).

[137] *Jam and Others v. International Finance Corporation*, 188 Int'l L. Reps. 672 (2020) (U.K.); *see also Jam v. International Corporation* 481 F. Supp. 3dI (D.D.C. 2020); Chimène I. Keitner & Scott Dodson, *Jam v. International Finance Corp.*, 113 Am. J. Int'l L. 805 (2019) (U.K.); Marco Simons & MacKennan Graziano, *Jam v International Finance Corporation: The US Supreme Court Decision and Its Aftermath*, 5 Bus. & Hum. Rts. J. 282 (2020) (U.K.).

[138] *See generally* Frances T. Freeman Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations - A Study*, 10 UCLA L. Rev. 1041 (1963); Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 Am. J. Int'l L. 279 (1963) (U.K.); Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, 117 Collected Courses Hague Acad. Online / Recueil des cours de l'Académie de La Haye en ligne 201 (1966); Mavrommatis Palestine Concessions Case (Greece v. U.K.) 1924 P.C.I.J. (Series B.) No. 3 (Aug. 30) (on jurisdiction to hear as a matter of general principles of law common to all jurisdictions).

Notwithstanding the scholarly aptitude concerning the source of *general principles* of international law, there is a near consensus that general principles are part of international law.[139] Thus, these principles have since become relevant sources of international law, including standards of justice, equity, and public policy.[140] In one sense, general principles of international law are significant gap fillers in international law. They are articulated to settle disputes either by courts, arbitration tribunals, or quasi-judicial bodies such as diplomatic committees and administrative panels of international institutions; they clarify norms and assist in dispute resolution on matters that are either based on economic disputes or have strong resonance with them. In a recent study, the I.L.C. articulated a two-part method so as to identify general principles of international law. The first limb of the approach is an ascertainment of the existence of a principle common to the world's principal legal systems. When such a principle is identified, it requires coherence with the second aspect, which is that the principle so identified "has been transposed into the international legal system".[141] This two-part move for the identification of the existence of a general principle of international law means that publicists have to be open to comparative studies of law from different jurisdictions and subject areas as a means of correctly identifying and applying general principles of law which have been transposed or in the process of transposition into international law. Thus, a deliberate study of comparative law is a necessary engagement for scholars of international law.[142]

Many times, the I.C.J. and other juridical bodies have applied general principles such as res judicata, *estoppel*, *restitutio in integrum*, *reparations,* and *ex aequo et bono* in the settlement of disputes—in international law generally and in I.E.L. Often, the ramifications of these disputes for I.E.L. and the well-being of states—especially emerging markets—are illustrated through the range of resources, whether as arbitration awards or otherwise required to meet their judgment debt obligations or arbitral awards arising from these disputes. One case exploring the principle of reparation and restitution in international law is the case of the *Chorzow Factory (Germany v. Poland),*[143] where the Permanent Court of International Justice [hereinafter P.C.I.J.][144]noted that "it is a principle of international law that the reparation of a wrong

[139] *See* Rudolf B. Schlesinger, *Research on the General Principles of Law Recognized by Civilized Nations*, 51 Am. J. Int'l L. 734 (1957); *see also* Friedmann, *supra* note 138.
[140] *See* Shaw, *supra* note 89, at 82-85.
[141] Marcelo Vazquez-Bermudez, Second Report on General Principles of Law, I.L.C., A/CN.4/741 (April 2020).
[142] *See genrally* Bassiouni, *supra* note 94, on the pragmatic value of general principles in international law; *see also* Cheng, *supra* note 94; Shao, *supra* note 94; Lauterpacht, *supra* note 94.
[143] Factory at Chorzow (*Germ. v. Pol.*), 1927 P.C.I.J. (ser. A) No. 9 (July 26), at 27-28.
[144] The Permanent Court of International Justice is the predecessor of the current I.C.J.. Yet, the P.C.I.J. and its establishment was a watershed in international law and some of the principles and practices which have

may consist of an indemnity that corresponds to the damage which the nationals of the injured state have suffered as a result of the act which is contrary to international law".[145] Equally, since the *Chorzow Factory Case*, more courts and tribunals have integrated compensation and reparations into their corpus juris.[146] In the *Gabčíkovo-Nagymaros Project* case,[147] the I.C.J. explored the extent of applicability of general principles of international law in which the "existing structures" can fulfil the obligations assumed by the parties to a treaty.[148] Particularly on the existence of a general "principle of approximate application" as canvassed by Slovakia, the I.C.J. refused to address the point as to whether such a principle exists in international law. Nonetheless, the Court surmised that even if such a principle exists, it could only be considered within the walls of the treaty.[149] Although these examples are not exhaustive, they illustrate the prevailing outlook in the discipline and how *general principles* of international law have evolved to continue determining the incremental expansion of international law—especially its economic aspects.

Still, the discourse on general principles of law acceptable to civilized states as a source of international law will not be complete without an appropriate reflection about the place of equity, albeit a secondary source of principles of general international law. In a sense, equitable principles emerge at the confluence between civil and common law traditions. These two traditions have equally influenced many legal systems globally for reasons ranging from historical shifts, such as the fusion of common law and the Court of Chancery in England, to European colonial exploits in later centuries. There is, therefore, evident hybridity of systems of law globally, with Roman-Dutch in South Africa and

become common in all aspects of international law trace their provenance to the P.C.I.J. *See*, James D. Fry, *The Permanent Court of International Justice in Global History,* 33 Duke J. Comp & Int'l L. 151 (2023); William D. Coplin & J. Martin Rochester, *The Permanent Court of International Justice, the International Court of Justice, the League of Nations, and the United Nations: A Comparative Empirical Survey*, 66 Am. Pol. Sci. Rev. 529 (1972); Leland M. Goodrich, *The Nature of the Advisory Opinions of the Permanent Court of International Justice*, 32 Am. J. Int'l L. 728 (1938); Manley O. Hudson, *The Permanent Court of International Justice*, 35 Harv. L. Rev. 245 (1922); Edwin M. Borchard, *The Permanent Court of International Justice*, 218 N. Am. Rev. 1 (1923); John Bassett Moore, *The Organization of the Permanent Court of International Justice*, 22 Colum. L. Rev. 497 (1922).

[145] The Factory at Chorzów (Merits) (*Ger. v. Pol.*), Judgment, 1928 P.C.I.J. (ser. A) No.17, ¶(47) (Sept. 13); *see also* Felix E. Torres, *Revisiting the Chorzów Factory Standard of Reparation – Its Relevance in Contemporary International Law and Practice*, 90 Nordic J. Int'l L. 190 (2021) (Neth.); Ronald E.M. Goodman & Yuri Parkhomenko, *Does the Chorzów Factory Standard Apply in Investment Arbitration? A Contextual Reappraisal*, 32 ICSID Rev. - Foreign Inv. L.J. 304, 322 (2017) (U.K.).

[146] *See* Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83 Mod. L. Rev. 1246 (2020) (U.K.); *see also* Andrés Jana, *Reparation in Investment Treaty Arbitration*, 110 Proc. Ann. Meeting (Am. Soc'y Int'l L.) 288 (2016).

[147] Gabčíkovo-Nagymaros Project (Hung./ Slovak.), Judgment, 1997 I.C.J. 7 (Sept. 25).

[148] *Id.* ¶ 134.

[149] *Id.* ¶(76). *See also* Mari Nakamichi, *The International Court of Justice Decision Regarding the Gabcikovo-Nagymaros Project*, 9 Fordham Env't L. Rev. 337 (1998); Stephen Stec & Gabriel E. Eckstein, *Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning the Gabčíkovo-Nagymaros Project*, 8 Y.B. Int'l Env't L. 41 (1997) (U.K.).

Indonesia, civil law in Latin America, Eastern Europe, Japan, Cameroon, and Algeria. Thus, equitable principles, often expressed in maxims, are perverse and readily apparent in the face of international law. By extension, these equitable principles have also permeated international law. Therefore, equitable principles are not expressly mentioned in Article 38(1) of the Statute of the International Court of Justice (hereinafter, the I.C.J. or P.C.I.J.), before it international courts and tribunals often apply equitable principles in settling disputes. Usually, this is done to assist a good-faith interpretation of treaties.

In the case of the *Diversion of Water from the Meuse, Netherlands v. Belgium*,[150] Manley Hudson, in his separate opinion, had argued that although the Court has not been expressly authorised by its statute to apply equity as distinguished from law.

> *Article 38 of the Statute expressly directs the application of 'general principles of law recognized by civilized nations' and in more than one nation, principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it 'to decide a case ex aequo et bono' if the parties agree thereto.*[151]

By these assertions, such maxims as "he who seeks equity must do equity" should be treated as general principles of international law. Many aspects of I.E.L.—especially dispute resolution—have incorporated these equitable tenets, and they are frequently employed. Equally, although the principle of *ex aequo et bono* articulated under Article 38(2) of the Statute of the I.C.J. has not been the fulcrum of contentions before the I.C.J., it has also recurred frequently in arbitrations and other juridical platforms where parties have expressly agreed to the principle. So, it is worth noting that the express agreement of parties to the application of the principle of *ex aequo et bono* is a dispositive factor for its application in dispute settlement.[152]

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[150] Diversion of Water from Meuse (Neth. v. Belg.), Judgment, 1937 P.C.I.J. (ser. A/B) No. 70, at 321 (June 28).

[151] *Id.* ¶¶ 12, 14 of the Separate Opinion of Manley O. Hudson.

[152] *See generally* Hersch Lauterpacht, The Function of Law in the International Community 379 (Oxford Univ. Press 1933) (U.K.) (regarding the place of equitable principles in international law and that of ex aequo et bono); *see also* Louis F. E. Goldie, *Equity and the International Management of Transboundary Resources*, 25 Nat. Res. J. 665 (1985); Francesco Francioni, *Equity in International Law, in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2020) (Ger.); Markus Kotzur, *Ex Aequo et Bono*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2009) (Ger.); Leon Trakman, *Ex Aequo et Bono: Demystifying an Ancient Concept*, 8 Chi. J. Int'l L. 621 (2008); S. K. Chattopadhyay, *Equity in International Law: Its Growth and Development*, 5 Ga. J. Int'l & Compar. L. 381 (1975); North Sea Continental Shelf (Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20); U.N. Vienna Convention on the Law of Treaties, art. 31 (1), May 22, 1969, 1155 U.N.T.S. 331. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object

Furthermore, *judicial decisions and teachings of the most highly qualified publicists* form part of the recognised sources of law in international law. Thus, in many law cases, we often ask similar questions: What is the jurisprudence on this subject? What have the courts said on the matter? The value of these questions lies in the fact that judicial deliberations are akin to seeking to understand what the expressed will of the parties to a contract or treaty may mean in the face of a dispute. This is law in action, and courts are indispensable in shaping the contours and general dimensions of actions anchored in the law. In other words, despite the differences across jurisdictions and legal traditions, judicial bodies are legitimate sources of law. At a minimum, courts clarify the law and confer legitimacy on emerging norms and policy interventions. Judicial imprimatur has a way of justifying or prohibiting other stakeholders within the international system.

In recent years, the proliferation of international law tribunals has added to the allure and complexity of studying the decisions of courts as sources of I.E.L. Many tribunals deal with economic questions. For example, the W.T.O. Appellate Body is a quasi-judicial tribunal charged with jurisdiction to hear and determine trade disputes within the framework of the W.T.O. There is also the I.C.S.I.D. This expansion and proliferation are factors in the general question of fragmentation and have since been studied by the I.L.C.[153] The lack of a hierarchy of courts within the international system makes it even more fragmentary, but no less intriguing for curious international legal scholars. The study of these courts can be approached from three perspectives: general jurisdictional decisions, advisory opinions, and other foundations such as *res judicata.* General decisions of the I.C.J. on a subject matter help to establish international law and its developmental trajectory. For instance, in maritime and land boundary disputes, the I.C.J. was very busy formulating international law on the subject even before the enactment of the United Nations Convention on the Law of the Sea. Even with those complex marine boundary questions, the Court has managed to distill pragmatic principles and approaches toward their dispute settlements and ensure that the exploitation of economic resources is neither hindered nor allowed to lead to a breach of international peace and security.[154] Equitable principles and the general doctrines of equidistant boundary delimitation have often been adopted to settle disputes between

and purpose." Larry A. DiMatteo, *Soft Law and the Principle of Fair and Equitable Decision Making in International Contract Arbitration*, 1 Chinese J. Compar. L. 221 (2013) (U.K).

[153] *See* The Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Rep. of the Study Group of the Int'l Law Comm'n, 58th Sess. (18 July 2006); *see also* U.N. GAOR, 57th Sess., Supplement No.10, ¶¶ 492-94, U.N. Doc. A/57/10 (2002).

[154] *See generally* Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116 (Dec. 18); North Sea Continental Shelf, Judgment, 1969 I.C.J. 3 (Feb. 20); Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. 1045 (Dec. 13); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Judgement, 2002 I.C.J. 303 (Oct. 10).*

the parties. Today, it is safe to argue that the guiding jurisprudence on land and maritime boundary disputes and the interpretation of treaties associated with them has significantly crystallised due to the decisions of the I.C.J. Increasingly, the work of the International Tribunal for the Law of the Sea also contributes to the development of international law in this area.[155]

Another way the I.C.J., as a Court, participates in creating international law and, therefore, serves as a source of international law is through the advisory opinion approach. This is particularly true in the non-contentious jurisdiction of the I.C.J. Here, the I.C.J. accommodates the peculiar position of international organisations such as the U.N. and its specialized agencies, who, not being states, cannot appear on their own before the Court but may do so in advisory opinion matters where particular questions are referred to the I.C.J. for clarification.[156] As with other sources of international law, Article 38(1) of the Statute of the I.C.J. equally recognises the teachings of the most highly qualified publicists as a source of law.[157] This is not surprising, considering the historical position of publicists, including institutes of law—especially in the civil law tradition, regarding the exposition and advancement of law. Thus, the history of international law bears testimony to the contributions of legal scholars to the development and expansion of international law. Some of these legal scholars were so influential in the field that scholars established awards in their honor. Yet the intriguing aspect of the provision "most highly qualified publicists" is that no standard or criteria are set out regarding how a publicist comes to become a "most highly qualified publicist".[158] This leaves the provision open to various interpretations. In that regard, some scholars have come to view it from the perspective that the teaching of the most highly qualified publicist may be considered within the broad divisions of state-empowered institutions, such as the I.L.C., which the U.N. authorized to study and assist in the progressive development of international law.

[155] *See* Helmut Tuerk, *The Contribution of the International Tribunal for the Law of the Sea to International Law*, 26 Penn State Int'l L. Rev. 289 (2007). *See, e.g.*, the "Monte Confurco" (Sey. v. Fr.), Prompt Release, Case No. 6, Judgment of Dec. 18, 2000, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_6/published/C6-J-18_dec_20.pdf (claims of breach of France's exclusive economic zone and bonds on the ship was resolved by the tribunal relying on general treaty interpretation and application of UNCLOS).

[156] *See generally* Buergenthal, *supra* note 95; H. C. Gutteridge, *The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice*, 38 Transactions Grotius Soc'y 125 (1952) (U.K.).

[157] *See* Helmersen, *supra* note 96.

[158] Sivakumaran, *supra* note 96.

B. BEYOND ARTICLE 38—THE OTHER SOURCES

It is now considered in the discipline that Article 38(1) of the Statute of the I.C.J. is not exhaustive on the sources of international law.[159] Hence, despite the well-developed scholarship on the subject, the debate about the sources of international law has not been laid to rest.[160]In the same vein, soft law as a juridically essential set of standards, guides, guidelines, non-binding legal agreements, and policy prescriptions is ubiquitous and emerges from formal and informal sources.[161] In I.E.L., soft laws' readily noted sources and origins include international institutions such as the U.N. and its specialized agencies, the World Bank Group, the International Monetary Fund, and other global financial and governance institutions. At other times, they can emerge from sectional, ad hoc, and associated groups such as the G7, the Organization of Economic Cooperation and Development , the Basel Committee on Banking Supervision, the World Trade Organization, and other platforms with significant footprints in the making of I.E.L.[162] These platforms are, therefore, the primary sources of soft laws in I.E.L. Thus, from trade to mining, financial regulation, and corporate accountability for human rights violations to insurance and economic stability, a cadre of soft laws governs one aspect of I.E.L. or another. This has three ramifications for I.E.L. First, they map into the existing structures of I.E.L. in ways that are not transformative. Second, there is a commitment to certain normative positions. Third, it creates a closed system of norm creation. Regarding the mapping of existing structure within I.E.L., soft laws are typically an incremental extension of the approaches, laws, and institutions of I.E.L.

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[159] *See* Aldo Zammit Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 Eur. J. Int'l L. 649 (2013) (U.K.) (highlighting the literature on sources of international law and the significance of *article 38(1)* of the statute of the ICJ although it has been criticized as belong underinclusive).

[160] There is currently an ongoing work by the ILC on other sources of International Law—especially "non-legally binding agreements." *See* Mathias Forteau, Non-Legally Binding International Agreements (Les Accords Internationaux Juridiquement Non-Contraignants), U.N. Doc. A/77/10. *See also* Fritz Münch, *Non-binding Agreements*, 29 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg J. Int'l L. 1 (1969) (Ger.); Schachter, *supra* note 41 (perhaps Schachter's title was too early because what we have seen since 1977 is not a sunset on non-binding international agreement, but its proliferation and recent years and this proliferation has been signification on subjects of commerce and environmental justice). Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 Int'l & Compar. L.Q. 901 (1999) (U.K.); *Non-Legally Binding Agreements in International Law*, Committee of Legal Advisers on Public International Law - Council Of Europe, https://www.coe.int/en/web/cahdi/non-legally-binding-agreements-in-international-law. (last visited May 12, 2025); Harsh Mahaseth & Karthik Subramaniam, *Binding or Non-Binding: Analysing the Nature of the Asean Agreements*, Int'l & Compar. L. Rev., June 2021, at 100 (U.K.); Wessel, *supra* note 61; Andreas Zimmermann & Nora Jauer, *Legal Shades of Grey? Indirect Legal Effects of 'Memoranda of Understanding'*, 59 Archiv des Völkerrechts 278 (2021) (Ger.).

[161] *See* Eibe Riedel, *Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?*, 2 Eur. J. Int'l L. 58 (1991) (U.K.) (highlighting the complication of the sources of international law to include declarations, resolutions and other quasi juridical acts of international organisations such as the UN).

[162] *See* Karmel & Kelly, *supra* note 75.

They hinge on institutions such as the I.M.F., the World Bank, or other international financial institutions for their extensions. Sometimes, they penetrate through the boards of these institutions to emerge. Yet, the more significant majority of communities and countries on the receiving end of these policies often have limited access to the spaces where these approaches are brewed and sanctified for onward application. For instance, the report of the U.N.C.T.A.D. consolidated Principles on Promoting Responsible Sovereign Lending and Borrowing notes the emergence of the principles; thus,

> [A]n expert group was established to contribute to the process of drafting these principles. The group comprises world-renowned experts in law and economics, private investors, N.G.O.s, and senior representatives from the I.M.F., the World Bank, and the Paris Club who participate as observers in this group. After several formal meetings and exchanges of ideas, these principles emerged. U.N.C.T.A.D. is now reaching out to get national and regional feedback on the design and possible and voluntary implementation process from U.N. Member States through consultative regional meetings.[163]

These world-renowned authority groups often comprise experts living and working in the global governance centres of Washington, New York, Geneva, London, and Paris. Equally, they also privilege private institutions and law firms in these centres whose perspective on the implications of critical economic law sometimes differ radically from those of farmers in Salt Lake City, Punjab, or Sokoto. Consequently, there is a high possibility of a diametrical disconnection between these commitments and the needs of the small farmer or business enterprise living on these peripheries. Equally, there is sometimes a disparity between the recommendations and the problems they seek to settle. It is also worth considering how subaltern experts are incorporated into these arrangements, which ultimately lead to the adoption of principles and standards that are subsequently codified into soft laws in the field. Secondly, the commitment to certain normative foundations is also evident in the framing, taxonomies, and conceptual arrangements. For instance, they give verve to market-driven ideals and market structures, such as commitment to deregulation.

The creation of the Washington Consensus has a folk aspect, with limited participation, yet it has become an integral part of I.E.L., influencing economic and social impact investments. Equally, the Washington Consensus has ramifications for distributing opportunities and wealth in ways that have made indelible marks on the

[163] *See* United Nations Conference on Trade and Development, Principles on Promoting Responsible Sovereign Lending and Borrowing, (Jan. 10, 2012), [hereinafter U.N.C.T.A.D.].

developmental outlook of states, especially in Latin America and Africa. The third point is that there is also a seemingly closed system of norm creation in the field, facilitated by the increased reliance on soft law standards. Arguably, reforms are difficult to achieve from a closed system for rulemaking in I.E.L. This is so because there is scarcely any significant opportunity for the cross-fertilization of ideas necessary to adjust the jural lenses of the institutions and centres of norm-making in I.E.L. Take, for example, the Basel Committee on Banking Supervision's Basel Standards. Each time a failure occurs in the system, a minor adjustment is made to add a new layer of prudential indicators to the set of indicators for measuring risks and other financial stability questions in the field. Thus, we have Basel I, Basel II, Basel III, and so on. The potential inertia and limited imagination that can arise from this commitment to weaving a little more iteration into the instruments is self-evident.

Furthermore, non-binding agreements are archetypal examples of soft law. There are many of them these days that one cannot effectively keep track of, some of them, and where they are in the broader schema of I.E.L. evolution. Non-binding agreements with profound ramifications for economic law and human well-being include the Paris Climate Accords 2016, the Rio Declaration 1995, and the Stockholm Declaration 1972.[164] Closely aligned with non-binding agreements are also a raft of policy prescriptions and model rules that govern many aspects of I.E.L. Many policy prescriptions in I.E.L. originate from model rules. In a sense, just like the discipline of economics, which has since evolved into a taxonomy of models and more modeling depending on the subject matter, I.E.L. has become a foundation of models. Examples include model arbitration clauses, model arbitration rules, model contractual clauses, model choice of law clauses, model most-favoured-nation clauses, model national treatment clauses, model dispute settlement mechanisms, and model judgment enforcement rules and agreements. Beyond these rules and models are also model bilateral investment treaties, model build-operate-transfer contracts, and model trade agreements. In sovereign debts, we have model common action clauses (C.A.C.). Beyond serving as guides, these models often become the operational tools of foreign missions, chambers of commerce, and other relevant organisations, institutions, and bodies involved in norm formation in I.E.L.

[164] *See* Philippe Gautier, *Non-Binding Agreements*, *in* Max Planck Encyclopedias of International Law (Anne Peters & Rüdiger Wolfrum eds., 2022) (Ger.).

C. PERSISTENCE OF ESTABLISHED SOURCES OF NORMS

However, there is no doubt that these foundations persist because they already have leverage in the field and, therefore, can ensure the path dependence that privileges these leverages and maintains the structures of I.E.L. There is scarcely any path to reform in the global economy that can emerge from such walls of embedded liberalism. If anything, it is a continued march towards the co-optation and domination of other potential pathways to sustainable development and shared growth. Imagining a new path to sustainable development means reimagining these closed rules and soft law generation systems in I.E.L. Soft laws heavily rely on soft powers. Hence, they are scarcely dependable sources of reforms in I.E.L. For instance, many states opt out of soft law standards even when they are full members of the organisations that produce them. Whereas reservations are normal in treaties, wholesale avoidance by opting out is a significant factor to consider in the case of soft laws.[165]

The evolution of I.E.L. has often followed the steps of power relations. The power relations underpinning I.E.L. are evident in the structures arising from the histories of conquest, colonialism, and other forms of domination. Indeed, economic sanctions and other exclusionary measures have played a significant role in the opportunities and possibilities for development of states and communities around the world. In many situations, the impoverishment of populations around the world and the allocation of the undue burdens of I.E.L. have rested on these paths, which were charted by imperial orders. This also explains the central role of multinational corporations, mercantile associations, and guilds in shaping international law. In the post-World War II era, the Bretton Woods institutions have significantly influenced I.E.L.s and standards, for example, through the Washington Consensus. [166]

These standards and laws engender path dependency because these institutions are omnipresent in the development programmes and policies of states. For example, sovereign borrowing has become a primary source of development finance, a creed in international law. Despite the uncertainties and mixed correlations between the level of borrowing and the level of development, sovereign borrowing continues to grow. Some countries operate as if they are satellite stations of the World Bank and the I.M.F. Yet,

[165] *See* Memorandum on the Organization for Economic Co-operation and Development (OECD) Global Tax Deal (Global Tax Deal), 2025 Daily Comp. Pres. Doc. 150 (Jan. 28, 2025) (urging the Secretary of the Treasury and the Permanent Representative of the United States to the OECD to notify the OECD that "any commitments made by the prior administration on behalf of the United States with respect to the Global Tax Deal have no force or effect within the United States absent an act of Congress adopting relevant provisions of the global tax deal").

[166] *See* John Williamson, The Washington Consensus as Policy Prescription for Development (Jan. 13, 2004) (unpublished manuscript) (Peterson Institute for International Economics).

these institutions often do not change their constitutive instruments to create equal participatory opportunities. They are also not creating new hard laws; instead, they establish soft regulations and standards tailored to meet the new dynamics of the global economy, while retaining the levers of opportunity and control where they are. This takes us to the methods of (re)making soft laws in international law, including working groups, study groups, committees, and commissions.

2) METHODS, POLITICS, AND DIFFUSION

Law-making methods—either through legislative processes, judicial deliberations, or quasi-judicial administrative processes—often have ramifications for the politics and values embedded in the laws and their mode of transmission within the legal system. Soft laws also do not escape these primary considerations regarding methods of making, politics of (re)making, and the diffusion or general norm dispersal within the system. This article interrogates these ramifications in the following section.

A. METHODS OF (RE)MAKING SOFT LAW

The above factors draw us into the methods of (re)making soft I.E.L. The existing commitments and pathways in the field require that soft laws be (re)produced through mechanisms that do not disrupt these pathways. Soft laws in I.E.L emerge through four significant iterations, which, from the outset, do not commit to the goal of producing a treaty obligation to govern the subject matter in focus. These four observable iterations are (1) expert bodies such as the International Law Commission and (2) other bodies empaneled by plenary organs such as the Board of Governors of the World Bank; (3) soft consultations, symposia, and workshops (4) declarations, directives, and policy statements issued by Central Bank Governors of the G7 countries. Expert bodies, such as the I.L.C., have since gained global acceptance as juridical or quasi-juridical bodies capable of studying and setting out rules, pronouncements, or agendas for legal development in different aspects of international law. These rules or pronouncements are not self-executing, but they often gain salience, sometimes due to the quality of the work of these experts or the reliance of more formal institutions, such as the I.C.J., on the work of these expert bodies for dispute settlement. Soft consultation is often an entry point towards producing soft law in I.E.L. Sometimes, it is also depicted as a preliminary consultation, a call for opinions and thoughts.

The ideas generated from these preliminary foundations are then articulated into working papers, white papers, and other instruments that will form the groundwork of further consultation through conferences, symposia, and workshops on the subject of interest. The topic of interest can range from extractive industry policies to market deregulation. An early or preliminary consultation has two powerful effects on the crystallization process of soft laws. First, they sow seeds of ideas about subjects and topics of interest to institutions of global governance through the soft law-making process. If, for instance, the I.M.F. invites papers or opinions on modalities for facilitating market liberalization or business facilitation, it is readily perceptible that a keen observer will immediately recognise that these are subjects of interest to these institutions. This may affect scholarly commitment to research and work on topics that are of manifest interest to the institutions of global governance.

This can also be the case with the W.T.O. and any other institution with significant economic governance capacity. The second limb is to signal to the relevant public what is indispensable to the institutions. This signaling is also a way of driving conversations in both policy and epistemic spaces, thereby taking the initiative in the field rather than allowing for the organic development of the potentially multiple sets of ideas and normative frameworks possible within the plural foundations of the global economy. Thus, the seed sown in epistemic spaces and the signals given to the relevant public, such as government institutions, prime these institutions and spaces for the next level of engagement. In a sense, consultation tests the waters and prepares the soil for the effective implementation of laws on a particular subject. It also sets the tone for the subsequent activities, including workshops, symposia, and technical reviews. These workshops, symposia, and technical committees form more vital concentric spaces of norm cultivation and elucidation. They create an opportunity to enlarge the consultation space, articulate views, exchange opinions, debate issues, and produce a summary of the papers presented. These workshops can create far-reaching ripples in policy-making, whether as executive summaries or full-length reports. At times, the outcomes of these workshops are the final building blocks for policy declarations.

Another pathway in forming soft I.E.L. rules and norms is that of expert bodies such as the I.L.C.[167] Thus, there are occasions whereby the outcomes of these workshops are inconclusive and are, therefore, further referred to working groups, expert bodies, or technical committees to harmonize or review to produce a working document for the international institution in question. Sometimes, they may be referred to the heads of relevant units, such as the head of legal, the director of risk asset management, and the

[167] *See* Baylis, *supra* note 4.

authority responsible for financial stability, among others, to review and approve for the governing board's approval. Once this is approved accordingly, it becomes effective and may even produce more profound systemic shifts than hard laws of international economic governance. Even then, they are pliable in the hands of these powerful institutions, and they can be adjusted depending on the policy agenda of the successive heads of these systemically crucial economic governance institutions. A combination of these efforts, along with the contributions of working groups and expert bodies, also facilitates the development of these soft laws. Experts with global visibility often constitute these working groups. The difficulty is that those with the usual ability are usually experts in the global North and institutions where legacy public media can capture their activities, thus placing them at the forefront of norm articulation and soft law-making. Little wonder then, that these expert committees are often overcrowded with experts from European and North American backgrounds. These working groups submit reports at the end of their deliberations and work, which are then used to produce final records and documents that govern the subject matter or, at a minimum, serve as evidence of emerging soft law standards.

Another vital pathway of norm-making in soft I.E.L. is that of municipal institutions with the capacity to shape economic trajectories. In many cases, the emergence of or creation of soft laws does not follow all these detailed processes of normativization; they may simply be the articulated opinions of the plenary executive offices, such as the heads of federal reserve banks or central banks of the G7 countries. This is extended to incorporate G20 countries or countries under the O.E.C.D. in more generous situations. Suffice it to say that the pathways for making many soft law standards in I.E.L. do not usually extend to issues such as poverty, inequality, and distributive consequences of law. [168] The goal is to get businesses and other allied interests to thrive. Factors such as efficiency and incentives may influence norm formation, as driven by these entities. Still, these are limited in their overall impact on the developmental needs of many emerging markets. This section dovetails into the next, which explores the politics of norm-making and diffusion within the discipline.

B. THE POLITICS OF SOFT LAW MAKING

The emergence of international law norms is often considered dependent on the practices of states, which are regarded as the primary makers of international law. These

[168] It is worthy to recognise the effort made on general accountability of businesses for their violation of human rights. *See generally* Christiana Ochoa, *The 2008 Ruggie Report: A Framework for Business and Human Rights*, ASIL Insights (June 18, 2008),https://www.asil.org/insights/volume/12/issue/12/2008-ruggie-report-framework-business-and-human-rights.

plenary powers of rule-making granted to states as sovereigns have increasingly been mitigated, particularly in I.E.L. Thus, this has been reflected in the adjustment of sovereign prerogatives in regulatory control and the enforcement of obligations. Today, International Organizations [hereinafter I.Os.] have become quasi-sovereigns, influencing the making of international law. While this has been praised in some spaces as critical to the flexibilities needed for global governance, what is unmistakable is that the flexibilities have ramifications for all, including those living in emerging markets. Even before the significant disruption in the field by I.Os., international law had a dose of democratic deficit. International law facilitated the superimposition of the privileged customs and general principles of the "civilized" as the law of all humanity. In this Section, the article examines the democratic deficit from the perspective of uneven power relations, juridical commitments, ambiguities, and ambivalence in the field. Soft law rules are potential tools of obligation avoidance and perhaps soft power diplomacy. This has implications for the question: who gains from the expanding reliance on soft law standards in I.E.L?

One way of looking at the problem of democratic deficit is that participation is crucial to making I.E.L., whether soft or hard. Yet, I.E.L. relies so much on power relations that are historically entrenched and exclusive. G20 economies or other powerful states usually set the standards, which then become the template for any further evolution of the soft law. A review of the adjustments in the international economic system since the end of the Cold War, and the soft laws playing significant role in many spheres of the global economy such as taxation, environment and human rights shows the influence of robust economies and states such as those of the E.U., the O.E.C.D./G20. These powerful states and economies are also shapers of soft normativity through their state practices and substantial footprints in international institutions, such as the World Bank and the I.M.F. Even before then, the efforts of developing states, especially in Africa, Latin America, and South Asia to push for inclusive reforms have yielded minimal results, which is partly explained by their limited representation in influential institutions such as the O.E.C.D./G20 Base Erosion and Profit Shifting Project [hereinafter B.E.P.S.]. Arguably, the New International Economic Order, championed by developing states in the 1960s, failed because much of the economic interest was hinged on geopolitics and reforming the frameworks that existed before World War II, including readjusting economic access and opportunities for all. The goals entailed readjusting these political paradigms.[169] The profoundly entrenched I.E.L. and political power relations require

[169] *See generally* Victor McFarland, *The New International Economic Order, Interdependence, and globalisation*, 6 Human.: Int'l J. Hum. Rts. Humanitarianism & Dev. 217 (2015); *see also* Nils Gilman, *The New International Economic Order: A Reintroduction*, 6 Human. J. 1 (2015).

tailored reforms.[170] Although soft laws can inspire some reforms, it is argued that the democratic deficit stemming from the political power anchorages of I.E.L. is more acute when considering soft laws, because they often recline on global governance institutions such as the World Bank with carefully defined mandates, perspectives, and systems of participation in norm generation and soft law development.

Participation may be explored from two angles: procedural and substantive involvement. Regarding procedural participation, it is worth recognizing that the substantive issues to be deliberated or considered are often preempted by the terms of reference and available list of experts who can serve as consultants to these international institutions. Procedurally, meaningful participation in making soft law and its platforms requires access to information and epistemic spaces where the original ideas are conceived and debated.

Therefore, equal participation opportunity for all regions of the world requires education and access to relevant information as a first step. Similarly, there is limited gender representation in the platforms that produce these soft laws. Furthermore, there is the high cost of legal training and the development of expertise and competence to effectively engage at the reified levels of I.E.L., where these debates and discussions are held. For many developing countries, the post-1991 policies of defunding public education and other social policy alterations arising from the structural adjustment policies of the era have meant that there is even less expertise for them to engage effectively and in the best interest of their people at these levels. In many cases, they rely on outsourcing such representations to foreign law firms and experts in London, Geneva, Paris, and Washington for meaningful participation. Yet, such participations have their respective limitations, considering the nature of the politics of I.E.L. Often, this also gives rise to participation fatigue, and developing states have to accept whatever conditions make sense, regardless of the distributive impact this may have in their states. So, despite the air of deliberativeness and consensus-building highlighted in the activities of international institutions, a significant democratic deficit still exists in the system regarding how these soft law standards are generated and disseminated in the field.

In another sense, the politics of soft law-making can also be considered through the lens of judicial commitments and obligations arising from law. The law creates duties, rights, privileges, and responsibilities, and sometimes serves as the foundation

[170] *See* G.A. Res. 3201 (VI), Declaration on the Establishment of a New International Economic Order, at 3 (May 1, 1974); *see also* G.A. Res. 3202 (VI), Programme of Action on the Establishment of a New International Economic Order, at 5 (May 1, 1974).

for the juridification of many quasi-relations within the corpus juris.[171] Therefore, when a law is prefixed with the word "soft", it does not mean that the law in question is weak or ineffective, as we would say in phrases like "soft lettuce" or "soft tomato". The prefix is only a taxonomic exercise that in no way diminishes the potential capacity and ramifications of such a soft law within the corpus juris and the system of law in question. In I.E.L., soft law retains the capacity to create juridical commitments and jurally-recognised relationships—although in different ways than would have been the case with *hard* law. Hence, we see the relevance of soft law on numerous occasions, in various issues that impact the global economy.

There are *four* crucial pathways through which the legal landscape of I.E.L. is increasingly sculpted by soft law and its juridical extensions. First, soft law standards serve as instruments for ratings and, in some cases, as evidence of measurable standards within an economy. This is also evident in the design of other general measures, such as indicators of prudential banking policies. They could also be accepted as international best practices that govern the activities of institutions. Second, soft laws, once they are produced, also serve as instrumentalities of dominating epistemic spaces and consequently excluding what may be deemed *unorthodox*. This is because institutions of global economic governance often have the leverage to preempt developments in the field by publishing guidelines and approaches. This can be seen in the disposition of the O.E.C.D. policy and the Bretton Woods Institutions. For instance, the O.E.C.D./G.20 B.E.P.S. is shaping a significant part of the developments in the area of international taxation. The priorities of B.E.P.S. are to combat tax avoidance by multinational corporations. The fifteen-point Action Plan of the O.E.C.D. serves as a framework for achieving the organisation's objectives in international taxation. Indeed, B.E.P.S. tools and guidelines are being championed and advocated across jurisdictions, including in Non-Member States as standards for meaningful regulation and general governance of international tax.[172] The O.E.C.D. also has an OECD tax treaty.[173] When these guidelines and models are produced, they create a sense of completeness in the imagination and enunciation of what should be done regarding the subject matter. This makes other

[171] Wesley Hohfeld is acknowledged as having espoused the idea of jural relations in American Law. This has since become part of the general jurisprudence of understanding how the law operates especially as it relates to rights, duties, immunities, powers, and privileges within our institutions and social systems. It is broadly a functional articulation of how things work in an adversarial system. For more general understanding of the idea of jural relations, *see generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); *see also* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Luca Fiorito & Massimiliano Vatiero, *Beyond Legal Relations: Wesley Newcomb Hohfeld's Influence on American Institutionalism*, 45 J. ECON. ISSUES 199 (2011).

[172] *See* Sissie Fung, *The Questionable Legitimacy of the OECD/G20 BEPS Project*, 2017 ERASMUS L. REV. 76.

[173] *See* John F. Avery Jones, *Understanding the OECD Model Tax Convention: The Lesson of History*, 10 FLA. TAX REV. 1 (2009).

efforts at reimagining the policy and legal foundations space redundant. The downside of this situation is that approaches from indigenous and subaltern spaces are continually marginalized and peripheralized. It eliminates or, at best, generally circumvents broader participation and curation of consensus, especially as between the big and smaller economies or developed and developing economies, in the formation, adoption, and dissemination of rules in I.E.L.

This leads us to the third point, which is eliminating the need for deeper democratic treaty commitments. As principal international lawmakers, states rely on treaty-making to articulate international law. The importance of this is the need to allow for democratic and broad participation of states. Broad participation helps articulate different concerns and viewpoints on the subject matter. In the post-independence period, the consensus-building that arises from this broad participation has seen smaller states and formerly colonized peoples increasingly seeking to reform the I.E.L. foundations, many of which were built in colonial times. For instance, the U.N. Declaration on the Sovereignty over natural resources.[174] Another way of eliminating broad democratic participation is through juridification. Here, current ideas are assimilated into the normative fabric of international law—often [175] through the plenary organs of international institutions. Thus, once these principles and political positions are accepted, they sediment and percolate into the deeper foundations of the systems of norm-making in international law.

Furthermore, there is also the idea of conditionalities for accessing the programmess and development activities of international institutions. In this regard, when soft laws are formulated and adopted, they are depicted as non-binding and, therefore, merely serve as guidelines, policy directions, and evidence of evolving standards in the field. For instance, the U.N. Guidelines on Corporate Accountability is a non-binding instrument for evaluating businesses' human rights commitments.[176] These guidelines may seem non-binding, but they establish minimal standards for assessing the activities of corporations. Another example is the Basel Standards for banking

[174] *See* G.A. Res. 1803 (XVII), Permanent sovereignty over natural resources, (Dec. 14, 1962); *see also* Stephen M. Schwebel, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 Am. Bar Ass'n J. 463 (1963); Sangwani P. Ng'ambi, *Permanent Sovereignty Over Natural Resources and the Sanctity of Contracts, From the Angle of Lucrum Cessans*, 12 Loy. U. Chi. Int'l L. Rev. 153 (2015); Ricardo Pereira & Orla Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law*, Melb. J. Int'l L., Mar. 2014, at 1 (Austl.).

[175] On the general idea of juridification, see generally John Gardner, *The Twilight of Legality* (Oxford Legal Stud., Research Paper No. 4/2018) (on juridification as the "proliferation of legal norms or legally recognised norms") (U.K.).

[176] U.N., Guiding Principles on Business and Human Rights, (Jan. 1, 2012), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

regulations.[177] Although the Basel Committee on Banking Supervision primarily produces them, they are presented as best practices and required as minimum standards for central banking. These are offered as global prudential standards expressed as non-binding, but they have a significant juridical impact on the worldwide economy. They influence the perception of financial rating and stability in economies. To be listed as non-compliant based on the "non-binding" Basel Standards would naturally produce nightmares for any Central Bank Chief. Hence, enforcement is achieved by peer perception or reputation. Although reputation is essential in business and the global economy, it is often the case that in the real quest for economic advantage, states are very pragmatic.[178] These templates of standards are frequently adjusted by adding new layers of compliance indicators to respond to critiques and changing economic topography. Thus, we have seen Basel I, Basel II, Basel III, and Basel IV all providing global (prudential) financial standards.

Additionally, international law adheres to two fundamental principles—equality of states and the notion that no one can bind themselves over; they cannot be bound in law. This sovereign equality is also reflected in international law-making, primarily through international institutions, except in those exceptional circumstances where votes are weighted and membership and deliberative capacities depend on each sovereign's allotted weight. This approach is found in plenary organs, such as the Security Council of the U.N. and the Board of Governors of financial institutions, including the I.M.F. and the World Bank Group. The allotment of weight is often expressed in the constitutive document of the organisation, such as the U.N. Charter on the Security Council and the Constitution of the I.M.F. and the World Bank Group.[179] These plenary organs have a profound influence on the development of policy prescriptions and guidelines, which in turn affect global economic standards.

Consider, for instance, the creation of the Washington Consensus, which evolved into a standard of wise economic policy and minimum requirements for market policy liberalization and financial reform. Although these were policy guides recommended as non-binding, they had a positive impact on many economies because they reflected compelling public opinion, affecting the activities of economies, especially in developing

[177] *See generally* Emily Jones & Alexandra O. Zeitz, 2017. "The Limits of Globalizing Basel Banking Standards," Journal of Financial Regulation, Oxford University Press, vol. 3(1), pages 89-124 (U.K.); Emily Jones & Alexandra O. Zeitz, *The Limits of Globalizing Basel Banking Standards*, 3 J. Fin. Regul. 89 (2017).

[178] *See* George W. Downs & Michael A. Jones, *Reputation, Compliance, and International Law*, 31 J. Legal Stud. 95 (2002); *see also* Colin B. Picker, *Reputational Fallacies in International Law: A Comparative Review of United States and Canadian Trade Actions*, 30 Brook. J. Int'l L. 68 (2004), available at SSRN: https://ssrn.com/abstract=970087.

[179] *See* William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 Fordham Int'l L.J. 910 (1990) (arguing that the current weighted voting system in these institutions is essential for the efficient operation of the institutions).

economies. Equally, they provided the minimum standards for participating in the development policy programmes of the Washington-based institutions. Today, there is scarcely any subject of international economic importance where the prevailing institutions of I.E.L. have no standard template articulated as guidelines, but are implemented almost as compulsory requirements for accessing the services and participating in the institutions' programmes. These, therefore, constrict the field of operations of states and minimize the need for thorough democratic deliberation. The non-binding nature of these codes, as produced by these global governance institutions with significant democratic deficits, does not diminish their capacities to reconfigure the landscape of I.E.L. in ways that have far-reaching consequences for communities, especially in developing economies.

For instance, the I.M.F. and the World Bank Group have developed "Standards and Codes" in twelve policy areas.[180] These standards and codes are not binding on states. Still, they are established as "benchmarks of good practices", and they define standards and regulations to mean "sets of provisions relating to the institutional environment—the 'rules of the game'—within which economic and financial policies are devised and implemented." Countries with well-regulated and transparent institutions tend to demonstrate better economic performance and greater financial stability. It is thus in the countries' interest to adopt and implement internationally recognised standards and codes[181]A cursory review of the quoted excerpt shows two critical points—the representation of these standards and codes as internationally recognised benchmarks, "the rules of the game", and the embedded threat that "it is in the countries' interest" to adopt and implement these standards and codes.

[180] For instance, there are policy benchmarks and standards on such subjects as: Association of Insurance Supervisors, Insurance Core Principles (2019); International Organization of Securities Commissions, Objectives and Principles of Securities Regulation (May 2017) https://www.iosco.org/library/pubdocs/pdf/ioscopd561.pdf; International Association of Deposit Insurers, Core Principles of Effective Deposit Insurance Systems (Nov. 2014), https://www.iadi.org/uploads/cprevised2014nov.pdf; WBG, Committee on Payments and Market Infrastructures & Technical Committee of International Organization of Securities Commissions, Principles of Financial Market Structures; World Bank, Principles for Effective Creditor/Debtor Regimes (2016); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law, Sales No. E.05.V.10 (2004); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law, Part Three: Treatment of Enterprise Groups in Insolvency, Sales No. E.12.V.16 (2012); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law, Part four: Directors' obligations in the period approaching insolvency (including in enterprise groups) (2020); U.N. Commission on International Trade Law (U.N.C.I.T.R.A.L.), Legislative Guide on Insolvency Law for Micro- and Small Enterprises, Sales No. E.22.V.18 (2022); G.A. Res. 59/40, (Dec. 2, 2004), https://docs.un.org/en/A/RES/59/40; OECD, G20/OECD Principles of Corporate Governance (2023); IAASB, International Standards on Auditing; Financial Action Task Force, Revised Recommendations on Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT) (Nov. 2023).

[181] IMF, *Fact Sheet: Standards and Codes: The Role of the IMF*, (Mar. 1, 2021).

No state can hope to do business with the I.M.F. and the World Bank unless it is ready to abide by these standards and codes. What is often ignored is the provenance and process of curation behind these standards and codes. Usually, the processes of articulating these standards and codes are exclusively controlled by these institutions, with debate regarding the potential externalities of these standards and codes, especially in emerging economies. It, therefore, goes without saying that the superimposition of these standards shrinks the needed space for thorough-going deliberations that would take into consideration the real concerns and interests of countries whose economic trajectories are often affected by these standards and codes developed in small policy spaces and dispersed accordingly without the input of the subaltern. Equally, it minimizes the need for a treaty or charter, as engaging in the laborious work of treaty-making and consensus-building is difficult; thus, if an institution can convene a policy dialogue or constitute a committee to produce a draft set of codes and standards based on carefully enacted terms of reference.

More to the issue of democratic deficit and the politics of rule formation in international economic soft law is the persistence of ambiguities and ambivalence. This is connected to the fact that a significant factor in international law is the absence of a general and globally recognised legislature. Thus, private and public entities participate in making rules for I.E.L. engagements. Consequently, although international law arises from treaties, customs, practices, and general principles that states recognise, I.E.L. depends a lot on private commercial activities of businesses and customs of trade such as *Lex Mercatoria*.[182] In the current era, there is an amalgam of international institutions constituted by states and sometimes a combination of states and other supranational entities such as the E.U. as a Member of the World Trade Organization.

In many cases involving financial and other economic regulations and standards, there is an overwhelming ambiguity regarding the provenance of these laws. Equally, a general ambivalence toward economic justice also persists. The ambiguity and ambivalence in these regulations towards questions of justice make it easy for the institutions to omit issues related to these questions. For example, there is a commitment to trade facilitation as a means of encouraging trade among states. This includes ensuring that barriers—both tariff and non-tariff barriers to trade are obviated. This aligns with the broader model of assisting businesses and investments globally.

[182] The provenance and general evolution of Mercatoria is a subject of intense scholarly deliberations. *See generally* Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State,* 14 Ind. J. Glob. Legal Stud. 447 (2007); *see also* Ralf Michaels, *Legal Medievalism in Lex Mercatoria Scholarship*, 90 Tex. L. Rev. 259 (2012); Emily Kadens, *The Myth of the Customary Law Merchant*, 90 Tex. L. Rev. 1153 (2012); Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant'*, 21 Am. U. Int'l L. Rev. 685 (2006).

C. NORM DIFFUSION AND APPLICATION

Legal norms, rules, or standards can be juridically formative in many ways. However, if they germinate and remain in the same place, they will likely not be very systemically important. For instance, the idea of juridical equality of all human persons was not always a given. It had emerged from several norm-making traditions, including ethical, religious, and indigenous. Its movement has helped its evolution, and as it moves, there is a continued interrogation of its extensions and what it may yet accomplish. This can also be seen in the principle of judicial equality among states, which is a fundamental canon of international law today. It is essential to recognise that when laws or rules evolve and change, they can trigger other activities within a legal system. Together, these activities can lead to legal reform or expand existing frameworks within the systems. Norms are, therefore, nuggets of change, certainty, and stability within a legal system. However, how these laws move from their spaces of germination to other places of juridical importance or function is quite an exciting preoccupation of legal scholars in comparative and international law.[183]

One of the ways of legal movement has been legal transplants, which studies how laws and legal frameworks move from one place to another.[184] Sometimes, what is transplanted is a piece of legislation. At other times, it could be a constitution or practice. Yet, many times, as in colonial periods, entire legal systems or aspects of legal systems are transferred from one jurisdiction or legal tradition to another. This can be seen in the transplant of civil codes into places such as Japan and Louisiana. We can also observe the transplantation of common law into the former colonial territories of the United Kingdom of Great Britain and Northern Ireland, including the United States, Canada, Australia, Nigeria, Ghana, and Sierra Leone. These transplanted foundations have also since developed and evolved in their own ways to meet the functional needs of their different communities. It is remarkable how these evolutions are often not visible to the ordinary observer of the legal system. Still, they are ever-present in courts, classrooms, legislative institutions, and other juridically relevant epistemic spaces in the state. Soft laws in international law travel almost the same way—through courts, classrooms, and legislative institutions. However, since there is no obvious case of colonial structures of legal transplant, soft laws in I.E.L., in particular, proceed through specific, though seemingly irregular, pathways. Many of these pathways track the

[183] For a general review of the canon on legal movement, see generally John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 Ga. J. Int'l & Compar. L. 637 (2013); *see also* Margit Cohn, *Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom*, 58 Am. J. Compar. L. 583 (2010).

[184] *See* Alan Watson, Legal Transplants: An Approach to Comparative Law (1974).

frameworks of international institutions and their specialized agencies. My analysis of the movement and general dispersal of soft law norms in I.E.L. is explored through three pathways: through the organs and capillaries of international institutions, including courts and tribunals; through N.G.Os. and other associated organisations; through the media; and other instruments of public opinion curation.

It is often the case that, as primary generators of international economic soft law standards, international organisations such as the I.M.F. rely primarily on their organs and associated institutions as the capillaries for the dissemination and application of these standards once they are established. Thus, when, for instance, a financial stability standard or framework is developed and published by the I.M.F., it is widely disseminated to this group as governance standards, which they must comply with in the subject matter. One such standard is the Debt Sustainability Analysis framework of the I.M.F. While it is produced under the auspices of the I.M.F. and the World Bank, it cannot be considered a binding agreement. Still, it has an implicit recognition and a mediatory role in debt policies involving the I.M.F., its associated institutions, and even private organisations. Thus, although such a standard has been developed by a small group of experts and policy persons, it is given full institutional support. Because these institutions have significant footprints in I.E.L. and governance, they inspire associated organisations, such as regional development banks and the World Bank Group, to incorporate them in their meetings and briefings with their respective staff and organs.

Sometimes, this is done as a way of keeping up with economic policy trends, at other times as a hint of what adjustments are being made in the field, and at different times as non-committal standards that associates, affiliates, and other relevant institutions working with them should be aware of. The significance of peer pressure in the field is intense because many of these organisations and associated agencies collaborate in conceiving policies and adopting relevant pathways through which they are implemented. Beyond the dissemination of these policies through the established organs and associated agencies of international financial and global economic governance institutions, a relationship has also evolved between many of these institutions and non-governmental or not-for-profit organisations. Non-profit organisations working on I.M.F. and World Bank-associated projects are typically expected to demonstrate a thorough understanding of these guidelines and tailor their project proposals and implementations accordingly. Otherwise, these projects may not be approved or fail evaluations if they have been previously approved.

Non-governmental organisations also play critical roles in the dispersal of soft I.E.L.s. Increasingly, rulemaking institutions are compelled to rely upon N.G.Os. for two

crucial reasons—expertise and network. Outsourcing work to N.G.Os. with specific knowledge in areas of interest to international financial regulatory organisations has become a regular aspect of global development and economic policy. This is also critical in the more significant implications of overextending their limited staff. Thus, they tap into N.G.Os. with local networks and provide them with guidelines, standards, and soft laws that serve as the minimum rules of engagement. Therefore, these N.G.Os. must abide by the policy prescriptions of the institutions before they can be incorporated into the activities of these international institutions. For instance, World Bank-assisted projects must adhere to the rules established by the institution. This is not necessarily a bad thing because it can encourage transparency, accountability, and the quality of work done. They may also check for human rights abuses and ensure that resources are not misallocated or misapplied during the project execution process. However, it is also important to remember that difficulties may arise even with the best-intentioned soft law standards.

The limited deliberations and consultations that go into creating the law standards also affect the quality of these standards, as they may not have effectively anticipated many of the possible scenarios that could arise from these standards. For instance, there have been cases of clean water policies that hinge on privatizing water resources to encourage investment in water and sanitation. In some situations, these privatization policies have gone awry, thereby making drinking water and sanitation less affordable to the general community. In other cases, land titling projects have led to exclusionary approaches and complex outcomes, as the underpinning foundation is that individual ownership is the preferred title deed, and the consequent possibilities of credit leveraging arise from this title. There have been cases where such land titling projects disempowered women because such projects privileged the male gender, or the social and cultural milieu meant that women have to be represented by men in public affairs, hence the need for a woman or households to appoint a family head—usually a man—who will then go on to file information and have the land allotted in his name on behalf of the family. It is often the case that these titles become issues of conflict due to devolution, or the man may transfer interest without the appropriate consultation of the women, who should be equal interest holders in the property. The more significant economic and distributive (in)justice effect of this policy disposition is better imagined, especially in those communities where the seasonal allotment of portions of land for subsistence farming is still a significant source of income and livelihood. Although these "mistitling" or "improper allocations" may not have been intended or based on any hard law, the soft law policies do bring them about, and they can have as much transformative

effect as *hard* laws, which undergo more deliberations and consultations before being enacted.

Regional organisations and the media provide another vital pathway for the dissemination of soft law in I.E.L. In the era of high media coverage and speedy electronic access to information, soft laws are easily spread worldwide. In this regard, a simple tweet from the Twitter (*X*) handle of any globally significant regulator, such as the Federal Reserve Bank (F.E.D.) or the Bank for International Settlements (B.I.S.), regarding such factors as interest rates and stability indicators or market volatility, will immediately travel widely. In the E.U, the requi.rement that member states model their laws to meet E.U. standards on issues such as trade, market stability, environmental protection, and financial governance means that the E.U. has become a vital channel for soft law hardening. This has been seen in such efforts as Germany adopting a new supply chain due diligence law in 2021.[185] Equally, in 2017, France adopted the Corporate Duty of Vigilance Law.[186] These were in response to the E.U. requirement that states replicate the E.U. standard or enact equivalent laws to meet the E.U. compliance standards.[187]

Another significant way the E.U. impacts the emergence, dissemination, and hardening of soft laws is by requiring all companies operating in the zone to comply with the standards—for instance, the E.U. 's International Financial Reporting Standards 2002.[188] Sometimes, through carefully tailored and placed interviews and editorials, these organisations can also disseminate these policy prescriptions. This has a way of inspiring debates on important policy questions and also serving as a primary reference document on the subject matter. Such reference documents can reinforce the top-down policy frameworks in international financial regulation. Other ways of doing this are through carefully placed op-eds in legacy media.

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[185] *See generally* Kellie R. Tomin, *Germany Takes Action on Corporate Due Diligence in Supply Chains: What the United States Can Learn from International Supply Chain Regulations*, 18 Loy. U. Chi. Int'l L. Rev. 189 (2022) (highlighting how the nature of the commitments made in the law regarding the human rights aspects of business activities such as the use of slave labour); *see also* European Commission, Just and Sustainable Economy: Commission Lays Down Rules for Companies to Respect Human Rights and Environment in Global Value Chains (Feb. 23, 2022) (noting that the due diligence rule will apply to companies operating within the EU within a certain threshold of financial turnover and number of employees).

[186] Loi n° 2017-399 du 27 mars 2017, Loi de Vigilance, [Law No. 2017-399 of March 27, 2017, *Corporate Duty Vigilance Code*] (Fr.); *see generally* Elsa Savourey & Stéphane Brabant, *The French Law on the Duty of Vigilance: Theoretical and Practical Challenges Since Its Adoption*, 6 Bus. & Hum. Rts. J. 141 (2021) (Fr.).

[187] Regulation (EC) 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards, pmbl. ¶ 6, O.J. (L 243) notes that *"On June 13, 2000, the [EU] Commission published its communication on 'EU Financial Reporting Strategy: The Way Forward' in which it proposed that all publicly traded community companies prepare their consolidated financial statements in accordance with one single set of accounting standards, namely International Accounting Standards (IAS) at least by 2005."*; *see also* European Union, Regulation (EC) No. 1606/2002 of the European Parliament and the Council of 19 July 2002 on the Application of International Accounting Standards, 2002 O.J. (L 243) 1.

[188] *See* Alexander Schaub, *The Use of International Accounting Standards in the European Union*, 25 Nw. J. Int'l L. & Bus. 609 (2005).

CONCLUSION

Arguably, I.E.L. now has a "new" sovereign: "soft laws". Soft law in I.E.L. is undoubtedly an exciting taxonomy, considering the range of interests and issues now dependent on soft laws in the field.[189] The resonance in the name is rather remarkable, considering how far-reaching soft laws can be in shaping economic policies and the distributive effects of economic law. In many respects, soft laws reflect the consolidated foundations of I.E.L., many of which are traceable to colonial times and the early days of independence, when political decolonization was prioritised. Despite the promises of the U.N. through the Economic and Social Council, the needed post-independence global economic reforms are deferred. Instead, the international institutions with significant footprints in the system have maintained the current situation. When contests and cries arise, such as the riots in Seattle regarding the W.T.O., they weave small embroideries on the status quo. Tracking these consolidated foundations of I.E.L. helps to decentre the need for reform, which is sorely needed in the field. Recent efforts by the O.E.C.D. through the issuance of guidelines, have also not quietened the murmurs regarding reforms. Thus, a significant theoretical gap remains regarding the systemic implications of soft laws in I.E.L.

Soft laws, by providing minuscule and sometimes incremental remedies, hamper the possibilities for progress in ways that can unlock I.E.L. for the good of all. The limitations of soft laws in the I.E.L. sphere are also evident in the fact that they are easily exploited as tools of policy ambivalence and avoidance of obligations, especially in the hands of powerful states and institutions of global economic governance. When considered in light of the known difficulties in international law, such as unilateral use of economic sanctions, institutional inertia, and managing conflict of law rules across jurisdictions, the difficulty inherent in the taxonomy "soft law" becomes self-evident. It is, therefore, imperative for scholars and policymakers to recognise the nature of soft laws and thus be more deliberate when deciding to follow the path of soft laws rather than undertake the hard work of treaty-making.

[189] *See generally* Schwarcz, *supra* note 5; Newman & Posner, *supra* note 75.

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