Shallow Discussion on Non-binding Norms of International Environmental Law

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Abstract

The Non-binding norms take advice, guide, action plan and voluntary code as a representative, which plays an important role in international environmental cooperation; The identified key of binding of norms is the state will; "Soft law" is not appropriate appellation is non-binding norms.

Keywords

International environmental law; non-binding norms; binding; soft law.

1. Introduction

The international law is a law; there is no objection without doubt. Although the non-binding norms are not law, it plays an important role in the process of the international rule of law. Especially in the international environmental cooperation, the non-binding norms take advice, guide, action plan and voluntary code as a representative, which has become the indispensable backbone to achieve common interests. The vigorous development of the non-binding norms, the non-binding norms also make a concept popular - "soft law".

2. The Definition of Non-binding Norms

The international environmental law is sum of legally binding principles, rules and system that mainly adjust state in the field of international environment. As a branch of international law, international environmental laws also conform to the law of nature, namely: a set of code of human behavior in a society, which is mutually agreed by this society and should enforced by the external forces. The international environmental laws are new territory of international law at the same time, its emergence and development has injected new energy into international law, and also brought impact to the traditional international law theory.

I'm afraid that no branch can like international environmental law, which gives so broad stage to non-binding norms. In the face of the increasingly worsening global environmental crisis, under the background of the high-speed development of science and technology and the government public participation, in order to protect the common interests of mankind, need many types of international cooperation. The non-binding norms play irreplaceable role with their flexible and efficient properities, and constitute the regulatory system of international environmental problems with binding legal norms together.

In this paper, we discuss the non-binding norms, the non-binding norms itself does not have direct legal binding international norms. Precisely speaking, the non-binding norms is not an independent type, but it only are based on the existing of binding and distinguish the norms of international documents. The non-binding norms have a lot of "source", or "form", mainly including international declarations and decisions, guide and voluntary codes, international action plan and the draft treaty, etc. it's worth noting that what is derived from a form does not mean that all the types of files are not binding. Therefore, define the non-binding norms first have to define how to identify binding.

Since the birth of international environmental law, international organizations play a major role, including research, set the rules, and provide consultation and cooperation platform, etc. The legal status of international declarations and resolution are uncertain, whether a declaration or resolution has binding need in accordance with the approved specific situation and the attitude of the countries concerned to judge. At least in both cases, the international declarations and decisions can have binding: one is to gain unanimous approval or overwhelmingly passed in a approving way, the other is based on the decision made by the treaty.

The decision of binding of the United Nations general assembly resolution is quite representative. The article 10 and article 11 of Charter of the United Nations authorized assembly can advise on relevant matters to the member states or the Security Council, it is considered to be the rules of the legal status of the UN general assembly resolution. But these rules should not be understood to exclude certain resolution has the possibility of binding, and rules document should not be simply because it is the UN general assembly resolution and has the binding force. Whether a general assembly resolution has legally binding or not, it "must through the case analysis, must consider all aspects of the specific circumstances, including reflects the national opinions and other evidence of arguments". A UN general assembly resolution with binding, first of all, which is code of conduct should that takes the right (power) obligation as the main content. The international law is combination of legally binding rules, principles and system. In other words, the principle also is the content of international law, which can also have a binding. Whether a normative statement is summarized or not, whether has space in performance or explanation, it is not a reason to deny its binding. Considering the closely linked to the politics and the law, a files that mixed political declaration and promise, but contain code of conduct; it also can be considered to have binding.

It is more controversial for the discussion and the process of the UN general assembly resolution, the problem whether or not can give the resolution binding. The so-called "binding" ensures execution of external force. Sanctions, punishment and relief is part of the compelling force of international law, but not all, also is not basis that judge a norm has binding whether or not. Countries comply with the obligations of international law must be based on the unique attributes that international law is different from domestic law to evaluate. The international community is the societies take equal sovereign state as the main members, various countries depend on each other; constitute a combination of group for common interests together. State think "need" a set of norm "solve problems that other methods cannot solve in the exchanges and cooperation, enhance the common interests of the international community". This "need" rely on international law subject self-discipline and the power of the individual or collective implement and maintain it by the international public opinion. "Countries are bound by international law and international law makers. As a result, the basis of international law should be is that the state itself, which is the state will." Effectiveness basis is basis of binding, that is to say, the international law on the basis of national will and produce binding effects to the state. Thus it can be seen that the state will is foundation to produce binding force, is the important basis to discriminate binding.

The state will is the source of the binding of international law, as well as the basis that whether general assembly resolution has binding or not. If there is a resolution to accept as a law, it is thought that it must be abide by faith, and then the decision has binding. The United Nations General Assembly as the most widely published governmental opinion forum, discussion and pass process of resolution, which is a process to express the will of the state. For a resolution to contain the rights and obligations, clear acknowledgement in the process of negotiations on approval in a vote, it should think expressed a kind of "sure". Therefore, the "directly acknowledge, expound and establish principle, rule and system of international law, rule, or system" the declaration or resolution explicitly agreed to at least to "member states vote for" will be produce "binding". In 1986, the international court of justice also expressed a similar view in " Nicaragua and military against Nicaragua and military activities case" sentence: laws believe can deduce (though need carefully) from the party and the attitude that country on the UN General Assembly Resolution, the consent of the these resolution of can be understood as accepted rules that the resolution announced and a set of rules itself.

It is thought that there is no binding to the UN General Assembly resolution; the contained principle of resolution is legally binding after become treaty, resolution is only as "the guide" of successive treaty and has the "influence" and "law effect". It is true that content of the many UN General Assembly resolutions is in order to obtain further clarification and the treaty was concluded. But there are still many resolutions that declare international law principle has not been further develop to the treaty, however, the binding are recognized by the country and proved by subsequent practice, such as the "declaration of independence to colonial countries and peoples'' illuminates the principle of national self-determination in 1960.

The human environmental conference at Stockholm in 1972 is regarded as a sign of the birth of international environmental law; it and two environmental declarations that the environmental conference in Rio passed later - the 'Stockholm declaration of the human environment' and the 'Rio declaration on environment and development' - become a programmatic document of international environmental law. Two copies of the declaration contained in the column, such as respect state sovereignty and does not harm the environment abroad, international cooperation as well as the sustainable development principles has become a generally accepted principles of international environmental law. The problem is that the two declaration that confirmed, clarified, or created the above principles, which is based on facts and support of subsequent national practice and have binding, also only as part of developing the international practice of international law? There is no doubt that two copies of the declaration contain the rights, obligations and norms,. For the law, the two international conferences are organized and convened by the UN organizations, declaration get the recognition of the broad range of countries, and reflects the common agreement of country and society: The 113 of 132 member states go in for environmental conference in Stockholm, after a debate and negotiation, the declaration, which passed with "consensus", for political reasons not to attend the conference, the Soviet union and other countries also express support in the United Nations General Assembly after the declaration is passed; while 172 of 179 member states sent representatives to participate in Rio environmental and development conference, the "Rio declaration" is by the way of reaching a negotiated consensus and was subsequently unanimously approved by the UN General Assembly 47/190 resolution. After the declaration passed, they provides more evidence of legal conviction for countries practice: the treaty, the international resolution, the right to request and unilateral statement reiterated on the basis of the principle of declaration request or have the rights, and the International Court of Justice has quoted these principles as the basis of the relevant rights and obligations. It can be seen that the ''Stockholm declaration'' and the ''Rio declaration'' is a legally binding document.

In summary, international declarations and decisions are likely to have binding, but it's hard to say in general which kind of form or the name declaration and the resolution, of course, whether a declaration or resolution has binding or not needs to in accordance with discussion and passed situation to judge, and reflect the state will--whether there is a law conviction or not--as the main factors.

3. The Appellation of Non-binding Norms: Soft Law?

References are cited in the text just by square brackets [1]. (If square brackets are not available,

"Soft law" is a more "fashionable" concept in the present study of law. Some scholars have already built up a theoretical system of "soft law" and look forward to "rule of soft law". Concept is the starting point of thinking, which is basic element that people judge and reason. As a science pursued rigorous expression, research of law must be based on the concept basis that can stand serious scrutiny. As only appeared in the research of the concept and has not been used in practice, the introduction of the concept of "soft law" should be cautious.

The concept and traceability of "soft law"

The concept of "soft law" is fashionable but not new. This is a concept only appeared in the research and the theory – there are no international documents with the name of "soft law" or ego is defined as "soft law". At the latest in the middle of the 20th century, the concept of "soft law" has already appeared international law research abroad, but its use and today is a little different. "Soft law" was first used to

call international law (international law), the scholars that support the theory think, for the domestic laws, the binding international laws is very limited. This tone is few in present international law. Some scholars are used to describe the international habits "soft law" later, because they are not so clear and effective compared to the treaty. In addition, some scholars put some emerging branch of international law, such as international economic law, international human rights law and international environmental law, which is called the "soft law".

The users in the current academic circles have different definition for "soft law" concepts. Some scholars believe that "soft law" usually is international documents that are not legally binding, but can produce a certain legal effect, such as the resolution and declaration UN and other international conventions passed, standards and recommendations that international organization recommended, Some people think "international soft law" is established beyond the geographic scope of a country, it is norm that has not been fully legalized in the form and effect, the international environment "soft law" mainly are represented related environmental protection policy, suggestions resolution of the international organization, the declaration of principles related to the protection of the global environment and the action plan of environmental protection. And the "soft law" is a non "hard law", "soft law" in the international law is the law except the treaty and international habits. By way of comparison, the "soft law" theorists is generally from the angle of the binding to define the "soft" and "hard" and stressed these norms have certain practical effect. Extensionally, various views mostly make the international declarations, resolutions and action plans and recommendations included the category of "soft law".

The concept of harm of "soft law" use

The users of "soft law" often think make so-called, "the rapid development and the important role of "soft law" as reasons that counterattack different points of view. But the problem is that the theory of "soft law" is reasonable not only depends on its alleged those documents - the declaration, the resolution and plan of action, whether is reasonable or valuable or not, but more is the concept of "soft law" itself is reasonable.

The "soft law" confuses the nature of the law

"Soft law" is an extremely misleading concept. "Soft law" is not law, at least it is not proper law, and the majority of "soft law" concept users agreed it. Now that "soft law" is not law, why call it the "law"? The binding is the basic attribute of law, which is the important feature of the law that different from other social norms. Lack of this elements of the norm, no matter how similar it is, and it is not law, it is also should not be called law. The non-binding norms play a huge role in international environmental legal system, which has a quite important position, but it does not mean that must use a contradictory concept essentially called these norms. The concept of "soft law" itself is misleading, using it to confuse understanding of binding inevitably, so someone made this assertion: " the difference of legal norms and the economy, politics and other social norms, whose important point lies in a 'hard' and 'soft', but... international law itself has the property of soft law and even the essence". This is confusing: whether international laws are legal norms or not? Don't abide by international law is not need to bear legal responsibility?

Even the people who support "soft law", they also often hesitated on the question whether they are law or not. For example, the Pat Bonny and Professor Ellen Boyle professor and the co-authored ‘‘international law and the environment (second edition)’’, the "soft law" is described as "norm" expressed in written form, it not only includes the legal document, but also includes the non-legal documents", but in the revised third edition, the last half sentence is deleted. Professor James Crawford defines the"soft law" as "legal norms that not have binding", but admitted that binding is one of the factors of international law as the law.

To further explore the non-binding norms and the recognized difference of the traditional international law, we will find binding is not the core, or the binding is only the results and external performance. The fundamental difference among them is the state will, the basis of binding, the factors. Many times such as advice, guide, code of conduct are formulated by international organizations or organizations, experts

and scholars, and their discussion and pass also reflect a certain state will, and apparently does not contain "law conviction". In other words, the fundamental difference of these non-binding specifications and the universally accepted international law lies in the lack of authority, which is also not set by the particular subject in a particular program. Since these norms are not binding and lack the authority, so called "soft law" is called "soft norms", which may be exactly accurate.

Some "soft law" theorists think that the norms are divided into "law" and "the non-law" two categories, which is not accurate on the basis of the concept", " (in the context of legal) there is a "grey area" between law with strict sense and the non-law with strict sense, especially international law. But in fact, in the presence of opposite ends, and under the case one side has gradually changed to another side, the " intermediate zone" is difficult to classify on both ends, the way that people treated is not consistent. In the case from black gradually change to the white; people generally don't distinguish between black and white, and the middle part is call for "grey area". And between legal and illegal, or from the generally illegal evolve to "grey area" crime, And people tend to perfect legal system and establish standard to reduce or even eliminate the qualitative uncertainty, rather than to use a new name, such as "soft law" or "crimes" - to summarize these "gray behavior". The author thinks that, in the face of the norms with mandatory differences, under these conditions, the qualitative to norm adopts the way to introduce new concept, it is a kind of escaping attitude. Especially when this qualitative will bring derived consequences and the connotation of the new concept itself is also not clear; the introduction of new concept is very irresponsible.

Other people believe "soft law is law", the law is defined as “rely on public compulsory or self-discipline mechanism to ensure implementation of the standard system", and they deny that "soft law" is law, it like deny "the white horse is a horse". However, the problem of "soft law" is not the problem of "white horse is horse or not horse", but is "whales are fish or not the fish". Rigorous concept is the basis of the research of law, not because of "convenience", and the document which is not consistent with the connotation of the law called a "law", even for such a preconceived appellation, and modifies the connotation of "law", make "law" adapt to this kind of non-rigorous appellation. As to think the "soft law is made by the UN, the world trade organization (WTO) and the European Union and supranational community, the industry association and sub-national community", "soft law has binding... but not national force, in violation of soft law, it will be suffered the community disciplinary sanctions and even fire, these point of view are not worth refuting for international law scholars.

The "soft law" provides an excuse to escape obligation

For a non-binding norm, whether to comply or not, the country have a more large selection room, the consequences for violation are generally confined to the moral or within the scope of public opinion. The "Soft law" theorists focus on the actual effect or influence of non-binding norm, but often ignore the disadvantages of randomness and uncertainty that cause by "soft law" without legal binding. A document is described as the "soft law", it will make non-clear law sense become more blurred, in fact, and it let parties’ freedom of choice become larger, effect is more unpredictable. At the same time, the non-binding norms are huge, but it is not always the first choice in international environmental cooperation, and if we establish a legal document choose non-binding file, both parties and the public often won't be satisfied. Moreover, environmental protection action sometimes loss short-term interests and affects competitiveness, various countries can expect other nations to take action to return to the same starting line. Some international environmental problems need to consistent action and solve it. In such cases, if the corresponding arrangement is not binding, then the countries will be more in watching and shuffle without real progress. For example, in response to climate change, except the arrangement of the non-binding to achieve emission reduction results in large scope, it is almost impossible.

In addition, when using the concept of "soft law", the binding files are always inevitably included in the category of "soft law", which make them legally binding is ignored or even negative. Because on the one hand, the introduction of the concept of "soft law", which is in response to the existing difficulties in binding boundary. This evasive practice, which will inevitably lead to delayed in carefully to identify the legal status of a file or a norms, on the other hand, the so-called binding is not clear, the binding may

have binding or may not have binding, if there are non-binding norms, it will not exist the so-called " intermediate zone", there is also no need to use the concept of "soft law". These norms that may have or may not have the binding shall be classified as "soft law", it has denied that binding of part of the legal norms. A lot of soft law theorists put the Stockholm Environmental declaration and the Rio declaration on environment and development and other legal documents in the same position with "21st century agenda", I'm afraid that is welcomed by some irresponsible countries.

4. Conclusion

The rapid development of international norms, and they play an important role in the field of international environment field, which arouse the enthusiasm for academic research. In order to more easily call these norms, the concept of "soft law" was introduced. However, the rationality and the value of the so-called "soft law" actually as the object of "soft law" -- declaration, resolution, and some norms in non-binding international files-- possessive, and the concept of "soft law" have no direct relation. To introduce the concept with contradiction and misleading to study a booming field, which is not conducive to the development of the research, it will also hinder the revitalization of this field.

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