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# FAJARDO DEL CASTILLO, Teresa, *El soft law en el derecho internacional y europeo: Su capacidad para dar respuesta a los desafíos normativos actuales* (Tirant lo blanch, Valencia, 2024)

The concept of soft law plays a key role in contemporary international law. Many international disputes involve provisions, agreements, or even simple statements that fall outside the traditional boundaries of international law. In the *Pulp Mills* case, for example, the International Court of Justice (ICJ) relied on guidelines and recommendations from international technical bodies.[1] Similarly, in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the Court used non-binding resolutions of the United Nations General Assembly.[2] Despite the Court's initial reluctance, the influence of soft law in international law has significantly grown over time. Moreover, the challenges of reaching a consensus in a diverse and unequal international community, along with the need to complement complex international obligations with technical and dynamic decisions, underscore the promising future of soft law as an institution.

In this context, Dr. Teresa Fajardo's has recently published "*El Soft law en el Derecho Internacional y Europeo: su capacidad para dar respuesta a los desafíos normativos actuales*", edited by Tirant lo Blanch. In this new book, Dr. Fajardo addresses the main debates and theoretical gaps in this subject. As the author puts it, her work has two main objectives.[3] On the one hand, she aims to analyze soft law by reviewing the leading scholarly contributions and exploring their practical applications  an objective she rigorously accomplishes. On the other hand, and I will go back to it later on, the author wants to generate scholarly debate on the topic.

Regarding the achievement of the first objective, I would like to highlight three key elements. First, the comprehensive literature review already makes this book a valuable resource. Fajardo brings together the perspectives of the most prominent contemporary scholars. Any jurist seeking to understand the leading academic works on soft law can easily navigate the literature through the second chapter. However, Fajardo goes beyond mere synthesis. She also undertakes the important task of categorizing these various perspectives. Specifically, she distinguishes between scholars who support a dichotomous approach (law versus non-law) and those who advocate for a continuum of norms with varying degrees of normative intensity.[4] Ultimately, she provides a theoretical framework that clarifies the practical interaction between soft law and other international norms.

Second, the author provides a balanced analysis of the concept, framing it not as an "all or nothing" instrument, but as a trade-off that brings both benefits and disadvantages.

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1 *Case concerning Pulp Mills on the river Uruguay (Argentina v. Uruguay)*, ICJ Reports (2010), at Par. 196

2 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports (1986), at Par. 188

3 T. Fajardo del Castillo, Teresa, *El soft law en el derecho internacional y europeo: Su capacidad para dar respuesta a los desafíos normativos actuales* (Tirant lo blanch, València, 2024) at 32.

4 *Ibid*., at 42

In this regard, her characterization of soft law as a symptom of the normative crises within international and regional legal systems is particularly noteworthy.[5] Fajardo argues that these crises are not accidental but driven by those advocating for a softer, principles-based legal framework.[6] Similarly, she warns how soft law can also be used by private actors to avoid public vigilance.[7] Nevertheless, she also acknowledges that in this context of normative crisis, soft law can serve as a pre-legislative phase, functioning as a consensus-building mechanism.

Third, from the very beginning, the author draws theses that run through the book. In the end, Fajardo summarizes these theses in 14 insightful conclusions. Of course, the formal requisites of this review do not allow an in-depth analysis of all such findings. However, there is one worth mentioning. Both International Law and European Union Law have equally incorporated soft rules. However, Fajardo explains how this institution's content, meaning, and legal consequences diverge between both legal systems.[8] Not many authors have Fajardo's capacity to synthesize these differences in a single book. As such, this work is poised to become a key reference in Spanish scholarship.

Regarding Fajardo's objective to stimulate scholarly debate on soft law, I would like to expand on one of her theses. Specifically, in discussing the role of soft law emerging from international treaties and organizations, the author argues that it does not legally bind the parties. I do not dispute this position. However, in such cases, soft law serves another critical function: it creates an obligation of diligence. As Judge Lauterpacht notices in his separate opinion on the *South West Africa* case:

> "a State is bound to give [to certain recommendations] due consideration in good faith. If, having regard to its own ultimate responsibility for the good government of the territory, it decides to disregard it, it is bound to explain the reasons for its decision".[9]

Judge Lauterpacht's perspective has gained acceptance in more recent jurisprudence and literature. For instance, in *Whaling in Antarctica*, Japan correctly argued that cooperation with an organization does not require compliance with its non-binding decisions.[10] However, the ICJ nuanced this stance, holding that the duty to cooperate obliges states to give due regard to such recommendations.[11] As Justice Charlesworth asserts in his Separate Opinion, soft law does not directly bind states, but parties must "consider these resolutions in good faith"[12] and "show genuine willingness to reconsider its position in light of those views."[13]

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5 *Ibid*., at 299
6 *Ibid*., at 21
7 *Ibid*., at 119
8 *Ibid*., at 15
9 *Advisory Opinion concerning the Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa Case: Separate Opinion of Judge Lautherpatch*, ICJ Reports (1955), at Par 119
10 *Case concerning Whaling in the Antarctic* (Australia v. Japan)*: Counter-memorial of Japan*, *Volume I*, ICJ Reports (2012), at Par 8.64
11 *Case concerning Whaling in the Antarctic* (Australia v. Japan), ICJ Reports (2014), at Par 83
12 Case concerning Whaling in the Antarctic (Australia v. Japan), Separate Opinion of Judge ad hoc Charlesworth (2014), ICJ Reports (2014), at Par. 13
13 *Ibid.*, at Par. 15

In this sense, it is evident that the obligation to give due regard can not be an obligation of result. It is rather a duty of conduct and, more specifically, an obligation of *due diligence*. Thus, as the ILTOS puts it, the standard or regard will be variable and change on a case-by-case basis.[14]

Moreover, I uphold that this obligation not only applies to the soft law emerging from an International Organization. Indeed, the paragraph above assumes that the parties must give due regard to resolutions with which they may disagree. *A fortiori*, the same standard should apply to those non-binding provisions of a treaty that the parties have negotiated, accepted, and ratified. The principle of good faith would strengthen this approach.

To conclude, Teresa Fajardo offers us a book that must be on the list of readings of any jurist interested in soft law. Her extensive literature review, the theoretical framework that the author develops, and the necessary debates that will emerge from it convert this book into one of the most significant publications of the year. I can wait to discuss with her whether the adoption of soft law in an international treaty or by an international organization establishes an obligation of *due diligence*.

Didac Amat
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[14] *Advisory opinion on the Responsibilities and obligations of States with respect to activities in the Area* (2011) N° 17. International Tribunal of the Law of the Sea, at Par. 117