WHAT ROLE FOR SOFT LAW IN BUILDING AND DEVELOPING THE CLIMATE CHANGE REGIME?

(İKLİM DEĞİŞİKLİĞİ REJİMİNİN İNŞASI VE GELİŞİMİNDE SOFT LAW'UN ROLÜ)

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ÖZET

Bu makale, merkezinde 1992 BM İklim Değişikliği Çerçeve Sözleşmesi ve Kyoto Protokolü bulunan iklim değişikliği rejiminin giderek karmaşık hale gelen normatif yapısını değerlendirmeyi amaçlamaktadır. Üç bölümden oluşan makalenin birinci bölümü, çalışmada yaygın olarak kullanılan üç temel kavrama açıklık getirmeyi hedeflemektedir. İkinci bölüm, genel olarak uluslararası çevre hukukunda, özel olarak da iklim değişikliği rejiminde soft law'un artan kullanım nedenlerini ele alırken, küresel iklim değişikliğine ilişkin uluslararası hukuku da değerlendirmektedir. Son bölümde, kısaca küresel iklim değişikliğine ilişkin düzenlemelerin normatif yapısını gözden geçirilirken; bu bağlamda raporlama, denetleme, ihlal ve esneklik mekanizmaları da incelenmektedir. Çalışma, devletlerin pazarlık gücü, düzenlenen konudaki bilimsel bulguların ulaştığı nokta ve konun taşıdığı politik önem olarak tanımlanabilecek faktörlerin farklılık gösterebilecek bileşimleri temelinde, iklim değişikliği rejiminin gelişiminde hem soft law'un hem de hard law'un devletler tarafından kullanılabileceğini savunmaktadır.

Anahtar kelimeler: Soft law, hard law, iklim değişikliği, çevre hukuku, uluslararası hukuk, uluslararası hukuki rejimler, Kyoto Protokolü

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ABSTRACT

This paper aims to portray the increasingly complex normative structure of international climate change regime, which consists of the 1992 UN Framework Convention on Climate Change, the 1997 Kyoto Protocol as well as other additional elements that playing a role, such as the practices of the Intergovernmental Panel on Climate Change and the Global Environmental Facility and procedures of these institutions. The paper is composed of three parts. The first part defines three key concepts, used extensively in this paper. Part two discusses factors promoting the increasing use of soft law in international environmental management in general and climate change regime in particular and overviews the international legal foundations on which the climate change regime is built. Part three briefly analysis of the norm structure of the CCR, including the reporting, review and non-compliance mechanisms as well as the flexibility mechanisms that this regime lays down. The paper concludes that both hard and soft law may have differential effects on both rule development and effective implementation of climate change rules depending mainly on three factors: 'political saliency', 'the perceived state of scientific knowledge' and 'the bargaining power of the states' that favour either hard or respectively soft law.

Keywords: *Soft law, hard law, climate change, environmental law, international law, international regime, Kyoto Protocol*

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Introduction

An increasing use of soft law in many areas of international law, in particular international environmental law can be observed. This development has unsurprisingly attracted the attention of scholars from a wide range of disciplines. The issues related to the functions of soft law, its relation and interaction with hard law, the

within the climate change regime (CCR), agreed as applicable to states, whether or not states consider them to be legally binding and/or enforceable. Special emphasis will be laying on the factors that promote the employment of soft law in the CCR. Besides, since the climate regime contains norms with different normative qualities, which interact with each other in various forms depending on political circumstances, economic interests and scientific knowledge, this paper, with the intention of portraying the normative structure of the international climate regime more accurately, also attempts to demonstrate how soft law is used in the CCR and assess its role in the rule development of this regime by using examples taken from the UN Framework Convention on Climate Change (FCCC) and the subsequent Kyoto Protocol (KP). In our view, an approach which focuses only on the legally binding rules would fail to convey the full picture of what states have agreed to adhere to in the climate context as well as of the factors that have been consequential and likely to remain influential on the future development of this regime. Such a broader approach will also provide a better understanding on the increasing use of soft law as well as its relative position vis-à-vis other flexibility mechanisms exist in international law.

The paper is composed of three parts. The first part defines three key concepts, used extensively in this paper. Part two discusses factors promoting the increasing use of soft law in international environmental management in general and climate change regime in particular and overviews the international legal foundations on which the climate change regime is built. Part three briefly analysis of the norm structure of the CCR, including the reporting, review and non-compliance mechanisms as well as the flexibility mechanisms that this regime lays down.

1. Three key concepts

This part clarifies the author's interpretation of three key concepts that the paper employs: "soft law", "hard law" and "international regime". Such clarification will not only provide a basic description of these three concepts for those who are less familiar with them, but also show the theoretical standpoints of the authors with regard to the interrelations between international law, politics and policy making.

Soft law

Gold discouragingly stated that "almost as many definitions of soft law can be found as there are writers about it".[2] Still, it is possible to categorise the diverse definitions of soft law in three broad groups:

(i) Some authors see the *form* of the international instrument as the most important criterion of 'softness'. Francioni, for example, describes international norms and instruments that fall outside Article 38 of the Statute of the International Court of Justice[3] as "soft law".[4] Similarly, Shelton uses the concept of soft law mainly to refer to any international instruments other than treaty, contain-

[2] Gold, Joseph, *Interpretation: The IMF and International Law*, Kluwer Law International: The Hague/London/Boston, 1996, p. 301

[3] Article 38(1) of the Statute of the "Permanent Court of International Justice", the international court of the "League of Nations" established in 1922 is, as it was, preserved in the 1946 Statute of the "International Court of Justice", which is the principal judicial organ of the United Nations. Article 38 reads as follows: "The Court shall apply: 1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States. 2. International custom, as evidence of a general practice accepted as law; 3. The general principles of law recognized by civilized nations; 4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto" (http://www.worldcourts.com/pcij/eng/documents/1920.12.16_statute.htm).

[4] Francioni, Francesco, "International 'Soft Law" in Lowe, A. Vaughan and Fitzmaurice, Malgosia (eds.), *Fifty Years of the International Court of Justice, Essays in Honour of Sir Robert Jennings*, Cambridge University Press: NY,

ing principles, norms, standards, or other statements of expected behaviour.[5] In this understanding, soft law instruments are legally non-binding, but they are still capable of creating certain legal effects. When soft law is understood as formally *non-binding*, it is contrasted with "hard law", i.e., 'treaty', which is legally binding.[6] Within this interpretation soft law instruments may take a number of different forms, including recommendations and resolutions of international organisations, declarations and 'final acts' of international conferences, like "the Rio Declaration on Environment and Development"; 'guidelines' that they explicitly state that compliance with the norm is voluntary, like "the OECD Guidelines"; resolutions of the UN General Assembly; or codes of conduct, guidelines and recommendations of international organisations, like "the United Nations Environment Programme" and "the Food and Agriculture Organization".

(ii) Some other scholars understand soft law as describing the "soft" provisions/clauses of legally binding instruments made by states and international organisations. Softness" in this description concerns the *content* of the legal obligation and not the form. Baxter for instance defines soft law as follows: "norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between states but do not create enforceable rights and duties may be described as soft law".[7] Hence, in this categorisation, soft law refers to treaty provisions/clauses with vague obligations or weak commands, which are formally binding but lack the required normative content to create *enforceable* rights and obligations.[8] The soft characteristics of such instruments may

[5] Shelton, Dinah, *Commitment and Compliance*, Oxford University Press: New York, 2003, p. 3. Nonetheless, Shelton recognises that treaties may have provisions with a hortatory character (*Ibid*. p. 10).

[6] According to Article 26 of the Vienna Convention on the Law of Treaties states that treaties, as a legal *form*, are *binding* upon the parties.

[7] Baxter, R. R., *International Law in "Her Infinite Variety"*, 29 International and Comparative Law Quarterly (1980), p. 549.

[8] However, much controversy remains regarding the precise nature and scope of

be evident from the employed (imprecise) language, or its flexible context, consequently lacking peremptory character, or the explicit indication that the nature and degree of adherence to the norm(s) is a matter of national discretion.

(iii) In parallel to the increasing role and importance of non-state actors in international policy and norm making, some scholars tend to define soft law as the norms that are created outside the inter-state/governmental realm. Kirton and Trebilcock, for instance, argue that soft law is essentially confined to those norms and regimes that rely on the participation and recourses of non-state actors in the construction, operation, and implementation. Accordingly, governmental authority is either completely absent or does not play a constitutive role in these soft law instruments. Furthermore, the participation in the creation, operation and continuation of these soft instruments are, in principle, voluntary.[9]

In this paper, soft law is used to refer both to soft provisions/clauses of international treaties and legally non-binding instruments. The reason for the preference of a 'broader' definition of soft law is, as will be discussed below, that softness in the climate change regime has two origins: It originates both from the *form* (non-binding instruments) and the *content* (soft provisions/clauses of treaties) of international instruments employed in that regime.

of soft law in international economic law, PhD dissertation at Kent Law School, Kent University, UK, 2007

Hard law

As it can be deduced from the above-given description of soft law that "hard law" in this paper is used with reference to legally binding *and* enforceable international agreements of a multilateral nature between state parties.[10]

International regime

Keohane, one of the earliest theorizers of international regimes, defines "international regimes", such as international monetary regime and trade regime, as institutions with sets of formal and informal rules created to facilitate cooperation among states.[11] Krasner also holds that international regimes have arisen from the convergence of interests that makes states willing to forego a degree of sovereignty. According to the writer, regimes are perma-

[10] Abbot and Snidal hold that norms (or legalised institutions) may have a particular set of characteristics, which are frequently defined along three dimensions: *obligation*, *precision*, and *delegation* (Abbott, Kenneth W. and Snidal, Duncan, *Hard and Soft Law in International Governance*, 54 International Organization [2000]) 3, p. 421). Elsewhere, it is said that hard law refers to legally binding obligations that are precise and delegate authority for interpreting and implementing the law while soft law lacks one or more of these three dimensions to a varied degree (Abbot, Kenneth W.; Keohane, Robert O.; Moravscik, Andrew; Slaughter, Anne-Marie, and Snidal, Duncan, *The Concept of Legalization*, 54 International Organization [2000] 3, p. 401). In this approach, *obligation* refers to a rule or commitment that is legally binding upon states or other actors while *precision* refers to rules that are clearly define the conduct they obligate, authorise, or prescribe. *Delegation* refers to the granted authority of third parties to implement, interpret, apply the rules and to resolve disputes (*Ibid.*). Hence, 'hardness' and 'softness', in this understanding, appears to be a question of degree and gradation rather than absolute categories.

[11] Keohane, Robert, O., "Hobbes's dilemma and institutional change in world politics" in Keohane, Robert, O., *Power and Governance in a Partially Globalized World*, Routledge: London and New York, 2002, p. 71. In a similar manner, Krasner defines regimes as "sets of implicit or explicit principles, norms, rules and decision-making procedures around which actor's expectations converge in a given area of international relations" (Krasner, Stephen, D., *Structural Causes and Regime Consequences: Regimes as Intervening Variables*

nent arrangements, which require a firm commitment to norms and rules by the actors involved.[12]

Yet, in parallel to the recent claims about the diminishing role of the nation-state and the growing influence of market forces in the globalisation process, the above given definitions of international regimes have been criticised of focusing on the state as the principal actor on the international arena and thereby neglecting the increasing role and importance of non-state actors within international regimes. According to most critics of the 'state-centric' regime theories, even though states remain the primary responsible for ratifying treaties, passing domestic regulations as well as adopting formal policy, the international arena, on which normative and policy activities occur, is now crowded with non-state actors. Scholars like Cutler, further argue that regime studies did not fulfil their initial promise to include non-state actors. Instead regime studies were gradually 'captured' by a neo-realist synthesis of realism, focussing excessively on states, state power and formal rule structuring.[13]

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[12] Krasner (1982) p. 186. For a detailed description of the more recent international regime theories, see Hasenclever, Andreas; Mayer, Peter; and Rittberger, Volker (eds.), *Theories of International Regimes*, Cambridge University Press: New York, 1997.

[13] Cutler, Claire, A., "Private international regimes and interfirm cooperation" in Hall, Rodney, Bruce and Biersteker, Thomas, J. (eds.), *The Emergence of Private Authority in Global Governance*, Cambridge University Press: Cambridge, 2002, p. 26. Koskenniemi, on the other hand, sees "regimes" as a step towards deformalisation and fragmentation of international law by re-descriptions of the world through novel languages, through which the law of international institutions, focused on formal competence, representation and accountability seems to be outdated. Still, according to Koskenniemi, "regime theory does not replace realism, but embrace it. The basic units remain power, interests and rational actors seeking to maximise both "(Koskenniemi, Martti, *Formalism, Fragmentation, Freedom*, paper presented in Frankfurt, 25.11.2005 at a conference titled "Kantian Themes in Today's International Law" available at http://www.valt.Helsinki.fi/blogs/eci/Frankfurt-Formalism-05h[1].pdf). See also Strange's early and prominent critique of regime analysis: Strange, Susan,

It is true that the participation of non-state entities in the relatively loose system of international climate change regime is *formally* limited to be observers in COP sessions without voting rights.[14] However, in view of the significant role of the non-state entities, in particular large multinational enterprises (MNEs) operating as political actors with significant policy influence, this paper understands the climate change 'regime' as including (i) the negotiation process in which non-state entities have formally and informally exercised considerable influence; (ii) the institutional practices, procedures and informal understandings that help define how the international climate process actually works together with more "traditional" elements of international regimes, in this case (iii) the 1992 *UN Framework Convention on Climate Change* (FCCC) and the supplementary 1997 *Kyoto Protocol* (KP) as well as (iv) the institutional framework established by the above-named legal instruments, in particular COP, the FCCC's governing body as well as institutions such as the *Intergovernmental Panel on Climate Change* (IPCC) and the *Global Environment Facility* (GEF).

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[14] Along with states and state groupings/political negotiating coalitions, such as "G-77" and the "African Group", as well as intergovernmental organisations such as the OECD and International Energy Agency, UN bodies and specialised agencies, the negotiation within the climate change regime involves a broad range of non-state participants called 'accredited observers' (According to Article 7, paragraph 6 of the FCCC, to be accredited as observers, organisations must be legally constituted entities with 'not for profit' status and competent in the related areas -http://unfccc.int/parties_and_observers/items/2704.php). Since climate change issue intersects with many other policy areas, in particular economy and sustainable development, and affecting many sectors, these non-state participants represent a broad range of competing and conflicting interests. Accredited observers to the negotiations include a spectrum of more than 750 organised interests such as business groups, NGOs, advocacy organisations, think tanks, indigenous populations, faith groups, municipal authorities, and universities (Yet, as Orr notes, barely half of the accredited organisations have actually attended the COP sessions between 1997-2001 -Orr, 2006, p. 149). These accredited organisations participate in the regime both in formal and informal ways.[14] When participating in the formal proceedings, accredited organisations may address (speak to) the COP and its subsidiary bodies in plenary meetings, by special invitation from the chair of these bodies, evidently without the right to vote (On the admission process, see

Presenting such a broad understanding of 'regime' the paper intends to illustrate the blurring distinction between law, politics and policy in the context of climate change. And more importantly, it intends to provide for a more accurate picture of social reality by not focusing exclusively on state authority. Only such a broader understanding of 'regime' explain more adequately for instance why the specific mechanisms, such as "the clean development mechanism" and "joint implementation" are there, why the FCCC contains market-based policies regarding technology transfer from developed to developing countries that may offer ecologically sustainable and socially equitable solutions for developing countries, or what role soft law plays in the formation of the main elements of the KP, which include mandatory but highly modest targets that are substantially weakened by broad and flexible mechanisms for implementation and weak enforcement.

2. Developing Environment Law and the Climate Change Regime: What Role for Soft Law?

It has become a truism to say that in the aftermath of the Second World War, the "interaction between states has become both more frequent and more penetrating".[15] As a result, the interdependency between states has also increased. In the words of Friedmann, international law has therefore been transformed from being the international law of "coexistence" governing essentially diplomatic inter-state relations, to the international law of "co-operation", expressed in the growing number of international organisations and the pursuit of common human interest.[16] The inclusion of new subject matters, such as the environment, international economy and human rights in international law constitutes one of the most noteworthy developments in the international domain. Associated with these developments, a new range of international legal commitments that either, lack the requisite normative content

[15] Van Hoof, G. J. H., *Rethinking the Sources of International Law*, Kluwer Law and Taxation Publishers: Deventer, 1983, p. 66

to create enforceable rights and obligations or do not fall into the "traditional" categories of "treaty", "custom" or "general principles of law", has gained unprecedented currency. During the same period, we have also witnessed the proliferation of new international legal rules that originate from entities other than states, particularly from international organisations and to a lesser extent from non-state entities.

The awareness of the interconnectedness between human interference and the deteriorating environment is hardly new. Already in the 1960s, there were international policy statements indicating serious global environmental problems the world faces and proposing the conditions necessary for sustainable development. All these efforts culminated in the UN Conference on the Human Environment held in Stockholm in 1972, which is generally seen as the starting point for the development of international environment law as a separate field of international law. Since then there has been a rapid proliferation of international legal instruments dealing with a broad variety of environmental issues even though this expansion has evolved as a multiple environmental regimes rather than a coherent system.

An overview of the international legal foundation of the climate change regime

The development of the climate change regime into international law started with an international scientific meeting held in 1979 (the First World Climate Conference), which resulted in the creation of the World Climate Programme (WCP), set up under the joint responsibility of the World Meteorological Organization (WMO), the UN Environment Programme (UNEP) and the International Council of Scientific Unions (ICSU).[17] In 1988, the UN General Assembly adopted resolution 43/53 on "Protection of global climate for present and future generations of mankind". In the same year, the WMO and the UNEP established the *Intergov-*

ernmental Panel on Climate Change (IPCC), which consists of government appointed experts, to provide the scientific guidance necessary to take further action.

In 1990, the UN General Assembly formally launched negotiations on a convention on climate change, which resulted in the *UN Framework Convention on Climate Change* (FCCC),[18] the core of the international climate change regime together with the subsequent *Kyoto Protocol* (KP).[19] The FCCC, being a treaty, is legally binding upon its state parties. However, as discussed below, the FCCC sets out the basic framework and the general commitments in respect of climate change issues. Its provisions do generally not specify the precise nature of the legal obligations that state parties are undertaking. On the other hand, the Kyoto Protocol, which is drafted on the FCCC, establishes a fairly distinct regime containing more precise legal obligations as well as non-compliance mechanisms and procedures.

The COP, the governing body of the FCCC, occupies the central place within the institutional core of the climate change regime. The COP, which is held approximately once a year and comprises all the countries that are parties to the FCCC, is responsible for reviewing the implementation of the Convention by assessing national communications and emissions inventories submitted by the parties.[20] Notably "rule development", which mainly takes the forms of adoption of amendments and protocols, creation of compliance mechanisms and interpretation of rules, is one of the

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[18] The Convention was opened for signature at the Rio de Janerio UN Conference on Environment and Development in June 1992 and entered into force on 21 March 1994. As of June 2007, it has been ratified by 191 parties.

[19] Negotiations for a protocol commenced in 1995 during the first conference of parties, which determined that the commitments of the Convention were not adequate. The Kyoto Protocol was adopted by the third conference of the parties in 1997 and opened for signature in 1998. The KP entered into force on 16 February 2005. As of 6 June 2007, a total of 174 countries and 1 regional economic integration organisation (the EEC) have deposited instruments of ratifications, accessions, approvals or acceptances, representing over 61.6% of

most critical tasks that the COP assumes in this regime. However, despite these seemingly broad powers involving 'law' and 'rule' creation, the legal status of the acts and decisions of COP cat at best be described as unclear. For instance, it is true that the Kyoto Protocol, which has brought additional legal obligations to the parties to the FCCC, is adopted by the third COP in 1997. Yet, it is hardly possible to consider that the power of the COP to adopt protocols or amendments amounts to a direct law making power for the reason that according to Article 15 and 17 of the FCCC, these protocols or amendments require ratification by state parties to become legally effective. Thus it would be more accurate to define the COP as a forum in which parties elaborate and adopt the protocol or amendment to the treaty, but do not alter the rights and obligations of the parties.[21] In a similar way, as the COP is authorised to make 'rules', as in the case of the operation of the system for trading with emissions of greenhouse gases embodied in Article 16 bis of the KP. Despite the explicit use of the word of 'rule', which suggests by nature the existence of legally binding measurements, such a rule making, as it is described in this article, does not entail a substantive obligation, but rather 'guiding principle' even though there could be found a certain normative content within it.[22] The same applies to Articles 6.2, 1.7 and 18 of the KP. In short, it can be argued that neither the FCCC nor the KP contains explicit provisions that entitle the COP to make binding decision upon state parties.[23]

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[21] For a detailed discussion on the 'indirect' law making power of the COP, see Brunee, J., *COPing with Consent: Law Making Under Environmental Agreements*, 15 Leiden Journal of International Law (2002).

[22] Article 16 bis of the KP reads as follow: "The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3 of this Protocol (...)".

[23] There are also some other additional legal instruments and institutions that play important roles in this regime. Two subsidiary bodies carry out preparatory work for the COP: the "Subsidiary Body for Scientific and Technological Advise" (SBSTA) and the "Subsidiary Body for Implementation" (SBI)

The role and use of soft law in environmental law making

As the ‘newer’ part of international law, the development of environmental law is essentially based on international treaties, such as the *Convention on Biological Diversity* and “non-binding” international instruments, such as *United Nations Conference on Environment and Development*”, which took place in Rio de Janeiro in 1992 rather than customary law and general principles of international law.[24]

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provide the means by which the COP monitors the progress made by parties. The *Global Environment Facility* (GEF), established in 1991, which organises the financial mechanism of the FCCC, related to developing countries fund projects and programs, and the “Intergovernmental Panel on Climate Change” are not formally part of the FCCC though provide services to it.

[24] As Malanczuk puts it, customary international law dealing with the environment is rudimentary. Only a few cases , such as the *Trail Smelter* arbitration between Canada and the US –initiated in 196 and concluded in 1941 (Trail-Smelter Arbitration, 2 Encyclopaedia of Public International Law, 1980, commented by Madders, K., J.) that is referred to the principle that no state may knowingly allow its territory to be used in a manner that would cause serious physical injury to the environment of another state, and the International Court of Justice’s famous *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, dated 1996, which confirmed that there is a general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment (35 International Legal Material, 1996, p. 821) offer some relatively modest protection for the environment (Malanczuk, Peter, *Akehurst’s Modern Introduction To International Law*, Routledge: UK, 1997, p. 245-246). Another case that establishes the limited role of customary law in protecting the environment is the *Corfu Channel* case, which reinforced the principle that every state has a duty not to knowingly allow its territory to be used for acts contrary to the rights of other states (*Corfu Channel* case–UK v. Albania, International Court of Justice 1949, Rep. 4). It is nonetheless important to note that even though the “some agreement better than no agreement” approach might at first sight appear realistic, this understanding, as Klabbers contends, can be deemed rather a simplistic assessment of international relations. The suggestion that ‘norms are better than chaos’ also reveals the apologetic tendency of the use of soft law, which gives “the politicians the possibility to be released from their responsibility to take necessary measures to achieve a given effect (Klabbers, Jan, *The Undesirability of Soft Law*, 67 Nordic Journal of International Law,

The environment is also one of the areas, where both types of soft law (i.e., “treaty” and “non-binding” soft law) are extensively used. A number of reasons and incentives to employ soft law solution in the domain of environment can be found. Firstly, even when states choose to use treaty form to regulate an area that has typically been seen to belong within the jurisdiction of sovereign states, they become often unenthusiastic to let their hands be tied in matters they consider essentially national. However, due to the transboundary nature of the environmental problems states are often obliged to address issue areas collectively even though they do not want to be subject to any constrains, which may arise from such ‘collective actions’. In order to bridge these apparently conflicting goals when states choose to create a legally binding form (i.e., treaty/convention), they mainly use two techniques: i) when signing a treaty, states retain discretion over the definition of the obligations they undertake, or to preserve an emergency exit when needed and to secure flexibility in implementation; ii) states simply avoid undertaking precise legal obligations. Or they use a combination of both methods.[25]

Secondly, soft law provisions/clauses in international treaties may be preferred by states as a way to facilitate bargaining problems. In a world of sovereign states with divergent interests, as often pointed out, it may be difficult to agree on legal rules. The divergence between states in terms of legal/cultural tradition, economic development level, ideology, and readiness for a specific legal commitment make in many cases soft law more attractive than hard commitment.[26]

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[25] Gruchalla-Wesierski, Tadeusz, *A Framework for Understanding “Soft Law”*, 30 McGill Law Journal (1984) p. 39

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Thirdly, states may adopt soft treaty provisions to open negotiations or to settle certain problems by subsequent agreement. Especially in the area of environmental law-making, states often use different forms of instruments in a combined manner: They first adopt a framework convention and a subsequent a more detailed protocol, as is the case in the climate change regime (First the FCCC and then the KP). As Chinkin points out, in such cases the framework convention establishes a structure for further co-operation between the state parties while protocols provide for greater specificity in complex regulation also permitting to response to changed scientific knowledge and political circumstances.[27]

Alternatively, state may opt to choose formally "non-binding" instruments in the form of declarations, agendas, programs, and platforms for action emanated from global summit conferences. There are diverse reasons for such choice. For instance, in certain new policy areas, states may be in a "learning" phase, during which they may not yet be prepared to bind themselves legally nonetheless are willing to adopt and test certain rules and principles, as in the example of "The Forest Declaration" adopted in at the 1992 Rio Conference on Environment and Development, entitled "A Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest".[28] Obviously, such areas require continual adjustment to respond to scientific knowledge and circumstances, a fact which makes it difficult to accommodate such flexibility within traditional forms of law-making. In such cases, "non-binding" instruments may be preferred as they provide flexibility and help 'road test' complex policy solutions to providing experience for negotiating firmer commitments.

[27] Chinkin, Christine, "Normative Development in the International Legal System" in Shelton, Dinah (ed.), *Commitment and Compliance*, Oxford University Press: New York, 2003, p. 27

[28] For the Rio documents in general, see *International Legal Material*, 31 (1992)

Or, the subject-matter of such instruments, such as social justice, financial support or technology transfer, may be deemed by especially powerful states as inherently 'soft', or "too intrusive for domestic jurisdiction, to be the subject of binding obligation".[29] In these situations, soft law instruments can act as a 'half-way' stage in the environmental law-making processes, bridging law with policy to which states wish to adhere but which they are reluctant to enshrine in binding, highly prescriptive forms.

Factors promoting the use of soft law in the climate change regime

Two groups of factors that boast the use of soft law in the climate change regime can be identified:

(i) Factors, common to other type of international law instruments in particular state sovereignty and sovereign equality. "State sovereignty" basically means that *sovereign* states are not subject to any higher authority. This concept also includes policy autonomy that refers to the ability of a national government to implement and sustain domestic and international economic policies of its own choosing. "Sovereign equality", on the other hand, refers to the necessity of each state's 'consent' with respect to the formation of customary international law and international treaties (and not the *actual* equality of law creating power of states). The very existence of the concept of soft law can to a certain extent be seen as a side-product of the incompatibility between the legal sovereignty of the nation-states and the minimum needs for an international legal order. The conciliatory role of soft law between sovereignty and order becomes more apparent when states make international treaties, which contain legal obligations and are binding upon state parties. Since treaty obligations involve what Abbot and Snidal call "sovereignty cost", which occurs when states are obliged to accept international authority over important domestic decision areas. In these cases states' ability to govern important domestic policy issues, such as industrial policy, is considerably reduced,

states attempt to overcome or at least to limit "sovereignty cost" by using either legally binding nonetheless enforceable or legally non-binding legal arrangements.[30] There is no doubt that both the FCCC and in particular KP have considerable impact on sovereignty which states are reluctant to concede, as evidenced by "protracted debates on the need for legally binding reductions targets, the legal personality of the COP, majority-voting decision-making and procedures for determining non-compliance".[31]

(ii) Factors that are unique to the area of environment and climate change. These include "scientific uncertainties", "far-reaching impacts of defining limits on greenhouse gases (GHS) emissions not only on many aspects of national and international economy, but also the entire modes of living", "geographical discrepancies between those who pollute and those subject to climate impacts", "variations among countries and regions in terms of level of economic development", "the structure of economy as well as demography", and finally "time lags between cause end effects".

Scientific uncertainty has always been a challenge of international environmental policy and law making, but it has particularly been a major issue when negotiated the FCCC and KP. Considering multifaceted impacts of the actions taken in the field of environment from economy to human cost, international law-makers are essentially obliged to rely on scientists to identify, assess and manage environmental risks and uncertainties.[32] This is why the IPCC stressed in its report that what constitutes dangerous interference must be determined through a socio-political process taking into

[30] Abbot and Snidal (2000) p. 436-441

[31] Yamin, Farhana and Depledge, Joanna, *The International Climate Change Regime*, Cambridge University Press: UK, 2004, Introduction

[32] In the negotiations for a climate change convention, the report of Intergovernmental Panel on Climate Change, which consists of government-appointed scientists, was instrumental to the opening of the agreement negotiation. As it is common knowledge, the conclusions of the Panel have been criticized by many of being "negotiated science" rather than pure scientific findings (Weiss, Edith, Brown (ed.), *Environmental change and international*

account issues such as sustainable development, equity, risk and uncertainties.[33] This is why the COP exists in the first place. On the other hand, scientific uncertainty cannot be used as an excuse not to react especially in cases where the harm may be serious and irreversible. Indeed, although it is still an evolving principle (i.e., it is considered by states not legally binding yet), the "precautionary principle" set out in Article 3.3 of the FCCC, requires that states should not advance scientific uncertainty as a reason not to take action and wait for 'conclusive proof' to prevent environmental damage or disasters.[34] What is more is that climate change is a field, where there will always be some uncertainty and constant advances in our scientific understanding. In other words, international law-makers are obliged to create law under conditions of uncertainty and decide what degree of scientific certainty should be looked for before taking some sort of actions. Hence, one way of limiting the risks is to take precautionary approach and formulate a law with sufficient flexibility so that parties can adapt to changes in scientific understanding, and it is here soft law comes into the picture.

The wide-ranging and differentiated technological and economical consequences across countries, sectors and enterprises of the climate issue and particularly the design an implementation of the Kyoto mechanisms and its binding emissions requirements is another important and intersecting cause for the use of soft law in the climate change regime. Despite the fact that the KP was adopted unanimously by COP-3 meeting in 1997, the immediate post-Kyoto period, which was marked by economic recession in OECD countries and financial crises across South Asia and Argentina, made it clear that neither the "Rio partnership" of 1992 between developed and developing countries nor the "post-Cold War optimism" among developed countries was enduring and self-

[33] IPCC 2001, *Climate Change Synthesis Report* "Question 1", edited by Watson, R. and the Core Writing Team, Cambridge University Press: Cambridge, 2001

[34] Sands, Philippe, *Principles of International Environmental Law*, Cambridge

assured. Also, related to these developments, it can be argued that contrary to the hegemonic discourse on the globalised world economy within which, it is argued that the globalised footloose capital has become autonomous from national economies, and correspondingly, the notion of international competitiveness has become meaningless, neither the state nor inter-national competitiveness has withered away, but the rules of interstate competitive game has changed from control of territory to a quest for world market shares.[35] To put it differently, in the process of globalization, states are forced to act more and more like a market player that shapes its policies to promote, control, and maximise returns from market forces in an international setting.[36] Otherwise, it would be difficult to explain the rationality behind the US refuse to sign the Kyoto Protocol. Thus, it can be said that the re-problematisation of competitiveness within the context of neo-liberal rationality of government continues to make it difficult to adopt 'harder' norms and commitments and foster the need for soft law as a 'second best' solution.

It is interesting to note that some writers consider *soft* law rules and *flexible* rules as two different phenomena. Carlson, for instance, contends that flexibility and softness are not synonymous or analogous concepts. The writer argues that flexible rules that permit temporary and limited deviations from important norms may contribute to respect for those norms, by permitting gradual compliance with the norms. By doing so, the perceived harmful impact of the norms may be limited. Moreover, within clearly defined boundaries, flexible rules that cause non-uniform obligation can contribute to the application of the terms more fairly. In contrast, according to Carlson, soft law creates national freedom without possessing most of the virtues flexible norms have. The ambiguity and weakness that soft law often displays foster derogation from

[35] McGrew, Anthony, *The globalization debate: Putting the advanced capitalist state in its place*, 12 Global Society (1998) 3

[36] Cerny, Philip, G., *The changing architecture of politics*, Sage: London, 1990.

and disrespect for the goals that soft law norms seek to achieve.[37] However, even accepted soft law and flexible rules as two distinctive categories, such a distinction could be feasible only case by case basis and not as a general categorisation.

As mentioned earlier, soft law is often welcomed on the ground of providing flexibility. As may be expected however, soft law is not the only way of creating flexibility or compromise, to respond to scientific uncertainty or conflicting interests. There are other devices that enable states to respond to the demand for flexibility. One way of creating flexibility especially in the context of the changing scientific knowledge is to include appendices or lists attached to the agreement that can be easily updated. The agreement may also provide for regular technical assessments when parties to an agreement meet on a regular basis to respond to new scientific findings, as is the case with COP meetings. Moreover, 'joint implementation', 'clean development mechanism' and 'emissions trading' are the three special flexibility mechanisms designed in the KP.[38] The doctrine of "margin of appreciation" on the other hand, is a different device that provides flexibility. It is based on the idea that each country has the right to decide how to apply international treaties obligations to make them suitable for each State's own circumstances and societal constrains and expectations especially in areas of security, environment, human rights, and allocation and management of national resources.[39]

[37] Carlson, Jonathan, *Hunger, Agricultural Trade Liberalization, and Soft International Law: Addressing the Legal Dimension of a Political Problem*, 70 Iowa Law Review (1984-1985) p. 1270

[38] On the various means used in international legislative process to provide flexibility other than soft law, see Szasz, Paul, C., "International norm-making" in Weiss, Edith, Brown (ed.), *Environmental change and international law: new challenges and dimensions*, UN University Press: Tokyo, 1992.

3. The climate change regime: an arena for the interaction between hard law and soft law

As mentioned in the beginning of this paper, being as international treaty, the FCCC and the subsequent KP are legally binding upon the parties. However, as stressed earlier, this does not mean that the all provisions that these two legally binding instruments contain are hard in the meaning that they allow third-party adjudication or are enforceable. This part of the paper aims to demonstrate the interactions between hard law and soft law by examining the substantive rules which are mostly related to the differentiated mitigation commitments. This part also explains the non-compliance mechanisms and procedures that display such interactions between norms with different normative quality. The reason for selecting these examples is that both mitigation commitments and non-compliance mechanisms lay in the hart of the climate change regime.

Objective and principles

Article 2 sets out the objective of the FCCC implicating both an "ultimate GHG concentration level (that "would prevent dangerous anthropogenic interference with the climate system") and the time path of achieving that concentration ("within a time frame sufficient to allow ecosystems to adapt naturally to climate change"). However, Article 2 does not aim to establish concrete commitments for its parties but a declarative goal involving the basic values and scientific orientation of the regime. In a similar way, Article 3 of the FCCC, which together with the Preamble of the FCCC, sets out principles of the Convention, provides general guidance on implementation of the commitments and not concrete commitments.[40] These principles are "common but differentiated responsibilities" (Article 3.1),[41] the "precautionary principle" (Article 3.3),[42] and "sustainable development" (Article 3.4).[43] It can be said that both Articles 2 and 3 should be seen as a general guidance for the parties that also display the policy rationale for collective action. Yet, it does not imply that these articles are legally altogether irrelevant. For example, Article 3 limits the scope and legal implications of the FCCC while the Preamble contains some concepts that many consider as the emerging new principles of international environmental law, like "common concern of human kind", which implies that all states have a legal interest in the issue, including legal responsibility to prevent damage to it.[44]

[40] Article 3 reads as follows: "In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, inter alia, by the following (...)"

ought to be differentiated because of the different level of economic development. As stated in the Article: "the developed country Parties should take the lead in combating climate change and the adverse effects thereof".

[42] Article 3.3 further states that precautionary policies and measures" should be "cost-effective" so as to ensure global benefits at the lowest possible cost and "different socio-economic contexts" should be taken into account. Obviously, such a wording, however might be deemed necessary for the flexibility, gives states parties the possibility to interpret what measures are "cost-effective" in their special socio-economic contexts.

[43] Although it is now widely used, it is still uncertain the normative content and use of the concept of "sustainable development". Yet, no matter what, the wording of this paragraph makes sustainable development "a right to *promote*" Besides, Article 3.4 provides again that "Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes" (highlighted by the authors).

[44] A similar formulation can be found in the Preamble of the Convention on Biological Diversity. Of course, it is open to debate whether such a concept may provide a legal basis for a state acting as a member of "international

Substantive rules

Article 4.1 of the FCCC sets out the mitigation commitments[45] applicable to all parties regardless their stage of development in general terms without specifying which groups of states should undertake them.[46] Furthermore, Article 4.1 of the FCCC and the corresponding Article 10 of the KP state that there is no common standards that are being laid down, leaving each party to determine its own level of implementation, taking into account its own specific goals and circumstances. Moreover, Article 4.7 states that the level of the implementation of mitigation commitments of developing countries' depends on "the effective implementation by developed country parties of their commitments under the Convention related to financial resources and transfer of technology". It is therefore possible to interpret the legal implication of this wording as developing countries are not expected to fulfil their mitigation commitments unless developed countries first fulfil their financial and technological transfer commitments for developing countries. Such a conclusion becomes even more plausible considering that the same paragraph also states that economic and social development and poverty reduction are the first and overriding priorities of developing countries.[47] It is even so when considered the wording

[45] The word 'mitigation' refers to human intervention to reduce emissions of greenhouse gases from sources or to enhance their removal by sinks (Yamin and Depledge, 2004, p. 76).

[46] Article 4.1 of the FCCC reads as follow: "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances (...) And the Article 10 of the Kyoto Protocol reads as follows: "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments in Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention (...)". Thus, as it can easily be deduced from this wording, the KP strengthens the differentiated structure and conditionalities of the FCCC.

of Article 10 of the KP, which states that the Kyoto Protocol "does not create any new commitment for Parties not included in Annex 1".[48]

Article 4.1 of the FCCC presents another example of the use of hard and soft law together. Paragraph (b) of this article requires all parties to formulate national programmes containing measures to mitigate climate change by addressing all GHG emissions and removals by sinks and also adequate adaptation to climate change. Despite the fact that this article does not contain a requirement regarding the achievement of *specific* levels of emissions limitations/reductions or mandates the pursuit of a *particular* mitigation policy of a country, it nonetheless demands for the establishment of national institutions that are charged with the roles to identify, implement and assess measures to mitigate and adapt to climate change. This applies even to the corresponding Article 10 (b) of the KP, which gives rather a more specific guidance as to how to formulate national programmes addressing mitigation and adaptation. The flexibility contained in this wording reflects the national context of the dependency to determine and implement which policy instruments are to be used to maximise mitigation opportunities. As the high level of detail in the "Guidelines for Second National Communications for non-Annex 1 Parties" adopted by COP-8 demonstrates, although this is only 'guidelines' and not phrased in mandatory terms and therefore legally non-binding, the existing commitments are being advanced largely due to the increasingly higher level of details these guidance contain.

A common feature in most environmental treaties is that the choice of policies and institutional arrangements to oversee the implementation and enforcement of such policies is left for each party to decide due to different national circumstances and sovereignty concerns given that states wants to minimise external constraints on policy choices, especially in areas such as energy, industry, agriculture and transport. Neither the FCCC nor the KP ex-

[48] "Annex 1 Parties" consist of developed countries and the so-called EIT countries -countries that are undergoing the process of transition to a market

empts from this 'national prescriptiveness' approach. For instance, Article 4.2 (a) of the FCCC displays a combination of both mandatory and permissive elements regarding policies and measurements issues. It *obliges* all Annex 1 countries to adopt national policies and take corresponding measures on the mitigation of climate change by limiting their anthropogenic emissions of greenhouse gases and protecting and enhancing their greenhouse gas sinks and reservoirs. On the other hand, this Article does not say to what degree parties are obliged to constrain their emissions. The wording "limiting" that is used in the Article does not imply an obligation to "reduce" emissions, or lies down a legally binding target. On the other hand, even though Article 2 of the KP states that Annex 1 countries may choose their own policies "in accordance with national circumstances", this Article nonetheless makes it clear that the purpose of such policies are to be achieved their quantified targets.

In a similar way, a mixture of the "margin of appreciation", "soft law" and the "choice of policies" techniques are used together in Article 4.1 (f) of the FCCC, which require state parties to employ "appropriate methods", for instance 'impact assessments', (or "given full consideration", as required in Article 10 (g) of the KP) when states adopt their social, economic, and environmental policies that are "formulated and determined nationally". These wordings make it clear that it is up to parties to determine the scope and application of this commitment at the national level "to the extent feasible".

Flexibility mechanisms

To adopt the legally binding collective and differentiated quantified emission limitation and reduction commitments for Annex B countries (i.e., developed countries) is the most important feature of the KP. The KP provides three mechanisms, namely (i) Joint Implementation (Article 6), (ii) the Clean Development Mechanism (Article 12), and (iii) Emission Trading (Article 17), to achieve the Article 3.1 mitigation commitments in view of the difficulties

ures. The "Joint Implementation" mechanism allows Annex B Parties to trade among themselves emission reduction units; the "Clean Development Mechanism" aims to assist non-Annex 1 Parties (i.e., developing countries) in contributing to the realisation of the objectives of the climate change regime by way of projects in which developed countries that are subject to emission caps under the Kyoto Protocol can invest to reduce emissions in developing countries, and offset some of their own emissions against the savings from these projects; and the "Emission Trading" mechanism allows developed countries to buy and sell emission credits to fulfil their commitments under the KP. In other words, if one country reduces its emissions by more than its Kyoto target requires, it can sell its surplus emissions reductions (carbon abatement) to another country, which in turn, can exceed its emissions target by this amount. This mechanism is based on the idea that the atmosphere is a global common, and it does not matter where the emissions reduction occur. The downside of these mechanisms has been the moral and environmental risks that these mechanisms might exacerbate the existing emissions inequalities by providing a cheap way for Annex B Parties to 'buy' themselves out of their legal obligations.[49]

Non-compliance

The effective implementation is a common concern for all multilateral regimes. The discrepancy between the commitments and compliance has been seen one of the central problems in especially multilateral environmental agreements, which generally lack of established 'internal' specialised bodies and procedures to deal with non-compliance cases. Of course, it is always possible to use the 'traditional dispute settlement mechanisms, in particular the

[49] This concern has been addressed in the Marrakesh Accords, which provide that "use of the mechanisms shall be supplemental to domestic actions and domestic action shall thus constitute a significant element of the effort by each Annex 1 Party in meeting its Article 3.1 commitments". However, the preference of the word 'significance' over more precise wording with quantitative

International Court of Justice and international arbitration to correct non-compliance.[50] However, mainly because of the special nature of environmental commitments, these traditional mechanisms have generally been considered unpractical.[51] In the Kyoto Protocol context, the Marrakesh Accords have established an 'internal' compliance system with a mixture of hard and soft elements.[52] The institutions, procedures and consequences designed for the Kyoto compliance system will not be analysed here in detail. Instead, the paper confines itself to highlighting the hard and soft elements embodied within the compliance procedure as well as sanctions or enforcement consequences applied in cases of breaches of obligations. There can be found three types of obligation under the climate change regime: (i) procedural obligations, which refer to reporting (in particular those relating to 'national communications' and 'national inventories'), or undertaking an environmental impact assessment; (ii) institutional obligations, which refer to obligations implemented through the regime's institutions, such as the COP's obligation to review the adequacy of commitments –verification of information provided; and most importantly, (iii) substantive obligations, which basically refer to the mitigation commitments.

Non-compliance procedures under the FCCC display a nature of non-judicial and non-confrontational and have a 'soft' character. For instance, the outcomes of the Multilateral Consultative Committee (MCC) established upon the requirement of Article 13 of the FCCC for the resolution of question regarding the implementation of the FCCC can only be 'conclusions' and 'recommendations' for the Parties "to consider". A similar 'soft' preference can be observed regarding the compliance assessment by the COP designed in Article 7.2 (e). This Article requires the COP to 'assess' (the use of a harder wording, such as 'monitor', was not preferred) the 'implementation' (the use of a harder wording, such as 'compliance', was not preferred) of the Convention by the Parties (...). Besides, the compliance of the Parties has in practice been to date scrutinised by the COP insufficiently, limited to only providing 'general consideration'. At any rate, according to Article 7.2, the COP can only make 'recommendation', which is not binding upon the parties.

On the other hand, non-compliance procedures and mechanisms under the Kyoto Protocol display a combination of hard and soft elements. Considering the legally binding nature of the commitments under the KP, such a harder and quasi-judicial modification does of course not come as a surprise.[53]

The principal institution involved in the identification of non-compliance by Annex-1 parties that the KP sets out is the "Compli-

[50] Indeed, Article 14.2 (a) and (b) of the FCCC and Article 18 of the KP contain provisions allowing recourse to both judicial settlement and arbitration.

[51] Yamin, and Depledge note that no state party to a multilateral environmental agreement has to date used traditional dispute settlement procedures (2004, p. 378). Considering the fact that breach of multilateral environmental commitments concerns not a single state but the all state parties, for the reason that such agreements address a 'global concern' and therefore should be addressed in a multilateral context rather than through bilateral disputes mechanisms. Also, such traditional mechanisms are designed to award remedies after a breach occurs. However, in case of environmental commitments, such legal remedies may be proven environmentally defective. Lastly, traditional mechanisms are designed to enforce compliance in adversarial/conferential rather than in a cooperative/managerial manner.

[53] For the same reason, the Kyoto Protocol includes more elaborated reporting and reviewing provisions. The existence of detailed, accurate and working reporting and reviewing procedures is not only essential for supplying information on the GHS emissions of parties and their sources, the actions being taken to combat climate change and their effectiveness as well as securing the transparency needed to reassure parties that burden of implementation is being shared as agreed, but also is the basis for assessing compliance with the legal obligations (The reporting obligation for the Annex 1 Parties under the KP is embodied in Article 7.1. Detailed guidelines for reporting supplementary information required by Article 7.1 were agreed as a part of the Marrakesh Accords and an additional COP-8 decision ""Decision 22/CP.7"). By the same token, the review process embodied in Article 8.1 holds particular significance under the KP given that the review reports provide the basis for the decision-making process under the compliance regime, and that compliance with reporting obligations constitutes an eligibility criterion for participating in the

ance Committee".[54] The "Enforcement Branch" (EB), which functions under the Compliance Committee, has the responsibility to determine whether each Annex 1 party is in compliance with quantified emission limitation or reduction commitments, reporting commitments and eligibility to participate in the flexibility mechanisms under the KP. The EB has the power to apply both soft and hard sanctions. The relatively 'soft' sanctions that the EB may exercise are (i) to issue a declaration regarding the existence of non-compliance aiming to shame non-compliance party, (ii) to require developing a compliance action plan, and (iii) to require submitting progress report. On the other hand, if the EB finds that an Annex 1 party does not meet one or more of the eligibility requirements of the flexibility requirements lied down in Article 6, 12 and 17 of the KP, it *shall* suspend the eligibility of the party. It may mean that all uses of the flexibility mechanisms are prevented. Similarly, if the EB determines that the emissions of a party has exceeded the amount assigned to it in Article 3.1 of the KP, the EB *shall* deduce from the party's assigned amount for the second commitment period. Appeal against an EB decision to the COP/MOB is also envisaged. However, in order to hinder a political interference, even if the COP/MOP decides with a three-fourths majority of parties present and voting to override the decision of the EB, the COP/MOP has only the power to refer the decision back to the EB for reconsideration.

Yet, since the KP states that any procedures and mechanisms regarding non-compliance that entails binding consequences shall be adopted by means of an amendment to the KP (i.e., ratification requirement), there is still uncertainty surrounding the legal status

[54] It is interesting to note that the voting rule for the Compliance Committee incorporates the concept of a double majority to provide a safeguard for the Annex 1 Parties (i.e., developed countries). Accordingly, any two Annex 1 Party members could block a decision from being taken, a power, which may be

of the "Decision 24/CP.7" that set out the KP's enforcement mechanisms.[55]

Conclusion

Climate change has many common features with other environmental concerns. It is global in nature (in this case, "atmosphere knows no boundaries") and consequently demand for collective actions of sovereign states and stakeholders. Besides, regulations must be dynamic and responsive to changing environmental conditions and in the state of knowledge on the best measures and methods to deal with the matter. However, climate change also indicates a complex new area of international co-operation, mainly for two reasons: First, the actions which are suggested to be necessary when addressing climate change require policy consideration related to the integration of the environment, economic development, energy, transport, consumer behaviour, life style, and environmental and social justice as well as inter-generational equity, hence it is highly politicised. Second, even though the human interference has been pointed out as being one of the major factors influencing the climate, there are still important uncertainties over the timing, rate and impacts of climate change, which require an unprecedented scientific approach, risk assessment and uncertainty analysis, and related to this, the assessment of the cost effectiveness of the actions that the climate change regime puts forward. All these factors identified in this paper urge the use of a variety of legal norms: some legally non-binding nonetheless detailed and capable of embodying precise standards, some legally binding nonetheless of a general nature, and others, legally binding and specific.

In the climate change regime soft law performs a triple function. First, soft provisions of the FCCC and the KP create the necessary flexibility and (national) discretion to adapt to the diverse

[55] For a more detailed discussion surrounding the uncertainty of the legal status of the "Decision 24/CP.7", see Ulfstein, Geir and Werksman, Jacob, "The Kyoto Compliance System: Towards Hard Enforcement" in Stokke, O., S.; Hovi, J.; and Ulfstein, G., *Implementing the Climate Change Regime: International*

and diverging interests of states, MNCs, NGOs and it can hence act as a bridge between state sovereignty and the minimum needs for and international legal order as well as law with policy. Second, soft law is considered as a safeguard in a new and complex area such as climate change allowing 'road test' policies. And related to this, third, soft law also makes it possible to handle the specific characteristic of the climate change where the flexibility of soft provisions enables the continuous inclusion of new scientific findings or changed political priorities. Soft law instruments provide the detailed rules and technical standards required for implementation of the FCCC and the KP.

It is sometimes argued that soft law is trivial while hard law is essential. This argument includes the idea that increasing hardness should be the ultimate goal to ensure the implementation and enforcement of the norms in question. There is in many cases a continuum from 'soft' to 'hard' law. In other words, soft law may undergo a hardening process, in which soft law norms may transform into binding (and enforceable) norms. However, hard law and soft law categories do often not indicate two diametrically opposite and frozen polarities. Besides, it should be recalled that the non-binding character may sometimes be the very *reason d'être* of a soft law instrument. Otherwise, there would, in many cases, be no international agreement at all. Hence, a move towards hard law is neither always possible nor desirable.

Besides, soft law provisions may be substantially more ambitious than hard law. It can be observed that because of the various soft law standards and non-binding decisions taken within the institutional framework, such as those of the COP, the climate change regime has significantly strengthened. As a result of the needed flexibility, built into the institutional system of the regime, where hard law and soft law create an increasingly complex network of rules of climate change mitigation and adaptation, the legal force of the FCCC and KP standards create a more convincing legal framework. The increasingly detailed technical standards and guidelines, which are non-binding in essence, give hard content to the overly-

due to the increasing details such soft law instruments contain, the room for discretion left the parties over the matters is increasingly limited. This potential of soft law to influence the strength of binding norms and institutions by putting pressure on parties is demonstrated in the FCCC reporting guidelines for national communication, which have been revised by the COP three times, each time specifying in more detail the information that parties must include in their reports with the aim of improving the comprehensiveness, accuracy, transparency and comparability of the data provided.[56]

What has been discussed above is also partly about rule development within the climate change regime. It can be argued that despite the fact that the COP has no power to take legally binding decisions over the parties, it has nonetheless become the most dynamic organ of the whole climate change regime as regard to rule development as the regime must be shaped by continuous interaction of member states to provide guidance on, and ensure consistency in the implementation of the FCCC and KP. This has been done through defining the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions as well as approving appropriate and effective procedures and mechanisms to determine and to address of non-compliance with the provisions of the KP. Moreover, COP is also authorised to adopt measures with a certain normative content that relate to the implementation of the parties' substantive obligations unless they are strictly legislative. For example, Article 17 of the KP enables the COP to adopt rules relating the operation of the system for trading in emissions of greenhouse gases. Furthermore, the climate change regime assigns a general supervisory role to the COP entailing the negotiation and elaboration of detailed rules, standards and practices, which intends to give effect to the more general provisions of the FCCC.

This paper explained the factors that have favoured soft law in the climate change regime. However, it should be noted that soft law has also some disadvantages. Thus while the flexibility and

fluidness of soft law in overall terms have helped the progressive development of international climate change regime not least by responding to the inherent uncertainty, soft law can also generate uncertainty due to the conceivable weaker engagement to live up to these soft commitments. Moreover, soft law may simply provide states with an opportunity to be seen to be doing something while avoiding any obligation to comply.

Yet, all things considered, as Chinkin suggests, hard and soft law should be seen as part of a continuum of international legal mechanisms. Both may contribute to the development of international law, to the creation of stability and expectation in international relations and both facilitate international co-operation.[57]

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ÇEVRENİN KORUNMASINA İLİŞKİN HUKUK SORUMLULUK KURALLARININ YARGITAY KARARLARI KAPSAMINDA İNCELENMESİ

(AN ANALYSIS OF CIVIL LIABILITY REGARDING ENVIRONME PROTECTION IN THE FRAME OF TURKISH CASE LAW)

Dr. Süheyla Suzan

ÖZET

Çevre sorunlarının çözümüne yönelik hukuki soruml temi; çevreyi kirleten veya bozan faaliyetlerden zarar göre rin uğradıkları zararın tazminini, eski hale getirilmesini, bu liyetlerin zarar verici etkilerinin önlenmesini öngörmekt çerçevede geleneksel sorumluluk kurallarına ilave olara doğal kaynakların korumasına ilişkin yeni sorumluluk ve y lük kurallarının getirildiğini görmekteyiz. Bu kapsamda mızda, çevrede oluşan zararın giderilmesini öngören çev rumluluk kavramı ile zarara sebep olanların yükümlülü alınmıştır. Bu konuda ulusal mevzuat incelenmiş ve Ya çevre ile ilgili kararları tartışılmıştır. Ayrıca Avrupa B Çevresel Sorumluluk Direktifi üzerinde durularak iç huk yansıtılması durumunda hangi sorunlarla karşılaşılabilece lanmıştır.

Anahtar Kelimeler: Çevre, çevresel sorumluluk, zarar, kirlilik, kirleten, komşuluk hukuku, ürün zararı, AB sorumluluk direktifi.