Fewer Treaties, More Soft Law:
What Does it Mean for the Arctic and Climate Change?

Hema Nadarajah

Soft law has been observed to be increasing within the global system, particularly in regions and issue-areas where scientific and technological knowledge has been substantively integrated into decision-making and governance. The often-used assumption for the prevalence of such instruments has been the uncertainty of scientific knowledge. This paper takes this oversimplified analysis further by examining the contemporary changes to the international system such as the number and diversity of state and non-state actors as well as their relative influence through a close examination of the Arctic and climate change.

This paper makes three fundamental contributions. Firstly, it proposes that soft law instruments would be best categorized as binding or non-binding. Binding soft law instruments, called "soft treaties", fall within the twilight zone of binding, yet soft instruments that contain little to no new obligations for its Parties. Secondly, it empirically establishes that soft law instruments are becoming more pervasive than previously claimed in the literature. In order to identify reasons for its prevalence, this research examines a sample of instruments using mixed methodology encompassing legal textual analysis and a review of the international relations and international law literature. Thirdly, it examines the potential consequences of this contemporary global policy paradigm that is rooted in soft law and its variants. The following implications of soft law's prevalence were identified within the cases of the Arctic and climate change: (1) written international law is increasingly adaptable and follows a non-linear evolution; (2) complacency could stem from institutional design established by soft law; (3) path dependency to cooperate within discrete areas could emerge through the iterated negotiation of soft law instruments, despite diplomatic challenges faced elsewhere; and (4) more opportunities for states to forum shop may arise due to soft law's prevalence within each regime complex.

Introduction

"In 1992 … international legal rules, procedures and organizations are more visible and arguably more effective than at any time since 1945" (Burley, 1993: 205). These rules serve to cement the relationships of states. However, similar to the natural sciences, international law is still replete with uncertainties. These uncertainties arise from its genesis, whether it is binding, and more fundamentally, what exactly international law entails. In order to explore the uncertainty of international law and its role in international relations, clear terminology and classifications are key.

Hema Nadarajah is a PhD candidate in International Relations at the University of British Columbia.

Written international law can be differentiated in several ways, one of which is by using a spectrum ranging from 'soft law', in the form of resolutions and declarations, to 'hard law' in the form of treaties. Another approach categorizes written agreements in a binary form — non-binding and binding, the former being soft and the latter hard law. However, these two widely used definitions generate extremely broad categories that fail to capture the nuances of the more specific forms of instruments that we see in the international legal system today. The terminology and classification of soft law are overly simplified and possibly outdated. For example, the Paris Agreement as well as all three agreements negotiated under the auspices of the Arctic Council[1] are binding but soft, and as such, fall within a very specific part of the soft–hard spectrum. Such instruments classified here as "soft treaties", are binding documents that are "soft" in terms of their substantive expectations. The literature, while also claiming that soft law (both binding and non-binding) is increasing within the international system, has failed to empirically substantiate this observation.

Soft law has been observed to be increasing within the global system, particularly in regions and issue-areas where scientific and technological knowledge has been substantively integrated into decision-making and governance. The often-used assumption for the prevalence of such instruments has been the uncertainty of scientific knowledge. What are the implications of states having recourse to soft law, an instrument with weaker degrees of legalization, in certain regions or issue areas? Soft law is often assumed to be characteristic of areas where decisions are based on the best available and often uncertain scientific and technological knowledge. This paper takes this analysis further by examining the implications of such an increase through a close examination of the Arctic and climate change.

By re-conceptualizing soft law to encompass both its binding and non-binding variants this article aims to address the gaps in the literature on soft law and, also, to help bridge the international relations and international law gap. Such an analysis will not only help us gain a better understanding of the international system, as it exists today, and how it has changed, but also develop our understanding of the relationship between international relations and international law, the role of negotiation, the deliberate use of legal language, and the importance of the context within which each agreement was negotiated. More broadly, it could also inform decision-makers and relevant stakeholders of the relative costs and benefits of the various forms of international instruments.

This article first introduces the conceptual framework that it uses to identify soft law instruments. Drawing on the existing international relations and international law literature on soft law, it demonstrates that soft law is indeed far more pervasive in the Arctic and Climate Change than previously thought. Using this novel form of categorization and definition of soft law, it then argues that the global public policy paradigm is shifting towards one that is steeped in soft law, as opposed to one cemented in hard law. Before concluding this article, the implications of such a shift is examined within the cases of the Arctic and Climate Change.

Re-conceptualizing soft law

This article argues that soft law instruments would be best categorized as binding or non-binding. Binding soft law instruments, called "soft treaties" – fall within the twilight zone of binding, yet soft instruments that contain little to no new obligations for its Parties. Figure 1 below illustrates the broader definitional framework of soft law that this article uses. The spectrum indicates the degree to which a written international legal instrument is binding on its parties.

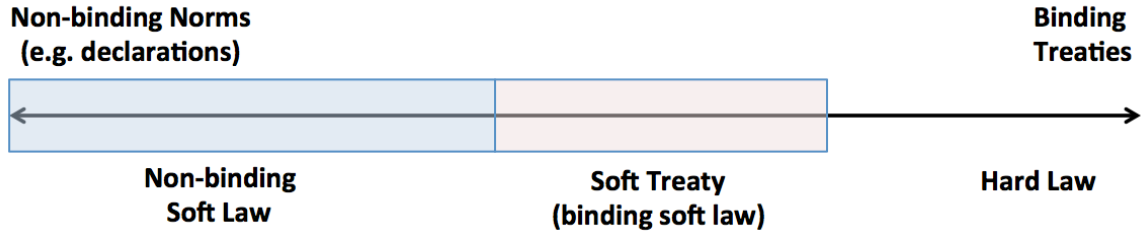

Figure 1: Spectrum of written international law with the shaded segments representing soft law

Non-binding soft law

Non-binding soft law is defined, in this article, to be simply any legal instrument that is non-binding. In contrast to existing definitions of written international law, particularly those that find soft law to lie somewhere along a spectrum, non-binding soft law here is not defined to be less permissive in its language or more redundant or ambiguous than its binding counterpart (Abbott & Snidal, 2000).

Defining non-binding soft law to encompass a lower degree of precision, as Abbott and Snidal do, implies that such instruments contain vague provisions relative to binding instruments. In reality, this is not the case. There are a number of non-binding soft law instruments that are highly precise and impart a relatively greater degree of obligation on the negotiating states. The 2007 United Nations Declaration on the Rights of Indigenous Peoples and the 1992 Rio Declaration are but two examples of non-binding soft law instruments that contain precise provisions.

Such a definition may also lead one to assume that non-binding soft law instruments are benign and "residual", possibly causing states to be lenient in their negotiation (Posner & Gersen, 2008: 45). Such an assumption would be incorrect. The negotiations leading to the 2019 non-binding ministerial declaration by Arctic Council member states are a case in point. The United States was opposed to the inclusion of any reference to climate change, and the other seven countries refused to concede. This first-ever failure to adopt an Arctic Council ministerial declaration demonstrates that the language and content of some soft law instruments are hard-fought, and that states do consider them important.

Shelton's widely cited definition of soft law will be used in this article for the category of non-binding soft law (Shelton, 2008). Shelton defines soft law as non-legally binding instruments that may take the forms of "normative texts not adopted in treaty form that are addressed to the international community as a whole or to the entire membership of the adopting institution or organization" such as the ASEAN Joint Statement on Climate Change to the UNFCCC Conference of the Parties or as recommendations, resolutions, and other writings meant to "supervise state compliance with treaty obligations"(ASEAN Joint Statement, 2019; Shelton, 2009: 72).

Soft treaty

While the term soft law has conventionally been used solely for non-binding political instruments, the literature recognizing binding instruments as encompassing soft elements is growing (Abbott & Snidal, 2000; Canuel, 2015; Olsson, 2013). To this, we might add "soft treaties". Given the diversity in these instruments, one could usefully see international law as agreements along a

continuum measured by a degree of "softness" or "hardness" at either end of the spectrum. If placed along such a continuum, such instruments would fall somewhere between two ends that are either purely legal or purely political, with soft treaties falling between non-binding soft law and binding hard treaties.

This article defines "soft treaty" as a binding instrument containing some combination of permissive language, ambiguity, and redundancy that leaves it devoid of mandatory, clear, and new obligations. Identifying this new category called the "soft treaty" might then enable the expansion of the analysis of soft law and its effects, including (perhaps) challenging the assumption that soft law instruments are necessarily benign and egalitarian. These three elements make up a preliminary list of attributes of an international legal instrument that could indicate "softness" in terms of its degree of legalization.

Although a single accepted definition of "binding" is lacking, the literature generally characterizes a binding instrument as one whose provisions the parties accept as such. Bodansky explains that in some instances "final clauses addressing issues such as how states express their consent to be bound (for example, through ratification or accession) and the requirements for entry into force – provisions that would not make sense in an instrument not intended to be legal in character" help to distinguish binding from non-binding instruments (Bodansky, 2015: 157).

In the case of the Arctic Council, two out of three Agreements negotiated under its auspices explicitly identify which of their sections are binding on their parties and which are not (Agreement on Enhancing International Scientific Cooperation: Art. 14; Agreement on the Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic: Art. 20). As for the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean, it explicitly states: "The depositary shall inform all signatories and all Parties of the deposit of all instruments of ratification, acceptance, approval or accession and perform such other functions as are provided for in the 1969 Vienna Convention on the Law of Treaties". Likewise, Article 20 of the Paris Agreement states that the Agreement "shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations that are Parties to the Convention", with the "Convention" being the 1992 UN Framework Convention on Climate Change.

To identify soft treaties, we need to read international instruments carefully, for instance, maintaining an awareness of the important difference between "should" and "shall". We also need to pay close attention to context, including whether the parties are already bound to the same commitments through other, pre-existing treaties. Last but not least, we need to apply the customary international rules on treaty interpretation, as codified in the 1969 Vienna Convention on the Law of Treaties (Vienna Convention on the Law of Treaties, 1969). International relations scholars, in particular, would benefit from paying more attention to these long-accepted rules, which are designed to reduce the scope for misunderstanding and disagreement over the meaning and legal consequences of words.

Hard law

While this article is focused on soft law, there lies a need for hard law to be defined clearly in order to better situate soft law and soft treaties along the spectrum of written legal instruments. The reverse of the elements that this article uses to describe soft treaties – permissive language,

ambiguity, and redundancy – could constitute a new list of the attributes, not just of hard treaties, but of hard law generally. These attributes could be expressed as: mandatory language, clarity, and novelty.

Hard law broadly encompasses written international legal instruments, that may take the form of treaties, agreements, conventions, as well as customary international laws. This article solely focuses on written legal instruments in its enquiry of soft law. The examination of any hard law instruments serves as a point of reference when analysing non-binding soft law and soft treaty instruments.

Prevalence of soft law

This article empirically establishes that soft law instruments are becoming more pervasive than previously claimed in the literature. In order to identify reasons for its prevalence, this research examines a sample of instruments using mixed methodology encompassing legal textual analysis, review of the international relations and international law literature, and interviews with academics and practitioners. Argued elsewhere (Nadarajah, 2020), research shows that aside from shifting domestic politics, growing geopolitical tensions between the East and the West have contributed to a weaker degree of legalization.

Arctic

Aside from global treaties such as the United Nations Convention on the Law of the Sea (UNCLOS), the Arctic is governed at a regional scale by the high-level intergovernmental Arctic Council, the five coastal Arctic states (Arctic Five)[2], and the Barents-Euro Arctic Council (BEAC) (China's Arctic Policy 2018; Arctic Council 2018; UK Arctic Strategy 2013; Escudé, 2014; Hirose, 2018).

Having initiated the negotiation of three soft treaties and adopted numerous other non-binding soft law instruments, the Arctic Council has established itself as an institution for soft governance in the region.[3] The Arctic Council itself was created on the foundation of a non-binding soft law instrument – the Ottawa Declaration (Ottawa Declaration 1996).[4] This form of governance has since come to characterize the Arctic Council member states' approach to governance in the region (Smieszek, 2019: 36). It can be observed that, when the Arctic states wish to conclude a hard treaty, such as the Central Arctic Ocean Fisheries Agreement, they do it outside the Arctic Council.

Although the soft law approach facilitates norm formation, in this case, the structure and form of the Arctic Council may have been just as important. The Arctic Council includes Russia and five NATO states. A soft law approach has long enabled it to shape decisions, rather than trying to make decisions in circumstances where this might not be possible given the often-tense relationship between NATO and Russia (Hasanat, 2012). While the Arctic was categorized as a region within which tension is low, power dynamics outside of the region are spilling over into the Arctic as countries increasingly recognise the region as a key geopolitical theatre (Lanteigne, 2019). These dynamics among regional actors are compounded by China's increasing presence in the region. However, the soft nature of these instruments, coupled with the inclusion of a wide variety of regional and non-regional state and non-state actors, may strengthen social cohesion and thus facilitates cooperation – in a region where conflict has been predicted on numerous occasions (Escudé, 2014). The shift from governing purely with non-binding soft law instruments to a combination of binding and non-binding instruments perhaps indicates a move "from a policy-

shaping toward a policy-making body" lending legitimacy to the Arctic Council and, by extension, to the Arctic Council member states' role as stewards of the region (Smieszek, 2019: 41).

While several studies have been conducted on the soft law governance approach of the Arctic Council, nearly all of them have focused on non-binding instruments (Escudé, 2014; Hasanat, 2012). When examining soft law, only a few scholars have considered binding, but soft instruments negotiated and concluded within the Arctic Council and other Arctic fora. By discounting soft treaties in their categorization of soft law, these scholars fail to account for the full range of implications that such governance has on the region. It is necessary to go beyond a simplified dichotomy of written international law as binding versus non-binding to further distinguish between soft and hard treaties. For the same reason, some scholars make the mistake of applauding the Arctic Council member states for having concluded three binding treaties without considering whether those treaties are soft or hard. One needs to examine the full range of "soft" instruments, whether binding or non-binding, in order to understand the reasons and implications for such an approach to the region's governance.

Climate change

The Paris Agreement, the latest in the globalized post-Kyoto effort, is the closest instrument that resembles a treaty. Although the larger and powerful states such as the US and China had argued for a non-binding instrument, the Paris Agreement's binding nature can be attributed to strong advocacy by The Alliance of Small Island States (AOSIS) which held a strong position on the need for a legally binding instrument, thus proving the ability of smaller states to influence international law-making (Lawrence & Wong, 2017). The Paris Agreement is one of many examples of soft treaties that were reached as a compromise between entities of varying degrees of power within the international system. Such a compromise can also be observed between states and non-state actors.

The broadly cited assumption of soft law crystallizing to hard law does not hold within the climate crisis sphere. The degree of legalization, for example, has weakened and thus devolved from a hard treaty, the Kyoto Protocol, to a soft treaty, the Paris Agreement (Popovski, 2015). Moreover, the path to the soft-but-binding obligations in the Paris Agreement was not linear. It instead went from hard provisions in the Kyoto Protocol, to non-binding political concessions in the Copenhagen Accord, to soft obligations in the binding Paris Agreement (Bodansky et al, 2017: 22). It may be that the optimum design for an international instrument to reduce emissions is in fact a soft treaty – one that has taken the climate change regime decades to reach through a meandering path of trial and error. However, it remains to be seen if the combination of a hard and soft hybridized instrument is effective, at least within the climate regime.

Some of the softness in binding treaties within the climate change regime is the result of provisions pertaining to adaptation. As Hall and Persson observed, "Adaptation has low precision and low obligation" and that a number of adaptation initiatives are not "constraining on states". In analysing the Paris Agreement, Bodansky draws a similar conclusion: "Most of the provisions on adaptation and means of implementation are expressed, not as legal obligations, but rather as recommendations, expectations or understandings" (Hall & Persson, 2018: 554). The absence of precise obligations pertaining to adaptation could simply be due to challenges arising from three issues. The first is empirically accounting for adaptation. The second, the lack of clarity as to what adaptation entails (Hall & Persson, 2018: 555). And the third, the wide gap of power and global

inequality, since the impact of a changing climate is greater in developing countries and so is the cost of adaptation efforts (Khan, 2013: 9).

Soft law's prevalence: Implications for the Arctic and climate change

What does soft law's prevalence mean for governance in the Arctic and on climate change? This section examines the potential implications of this contemporary global policy paradigm that is rooted in soft law and its variants. In doing so, it offers a renewed perspective on our understanding of how the behaviour of states, and perhaps more broadly, the international system is influenced by this prevalence.

The following implications of soft law's prevalence were identified: (1) written international law is increasingly adaptable and follows a non-linear evolution; (2) complacency could stem from institutional design established by soft law; (3) path dependency to cooperate within discrete areas could emerge through the iterated negotiation of soft law instruments, despite diplomatic challenges faced elsewhere; and (4) more opportunities for states to forum shop may arise due to soft law's prevalence within each regime complex.

Non-linear evolution of written international law

Aspects of The World Charter for Nature, a non-binding soft law instrument, such as the "EIA process and participatory rights", have been argued to become customary international law, entering the hard law end of the spectrum (Atapattu, 2012: 212) With the exception of these oft-stated observations that non-binding soft law often leads to the development of hard law, the literature does little to examine these evolutions of written international law. Those that do, often examine the path that a legal regime may take as a whole, such as Harrop and Pritchard (2011) in their examination of the Convention on Biological Diversity which they observed to have, over time, devolved from a soft treaty to even softer forms of governance in the form of non-obligatory global targets.

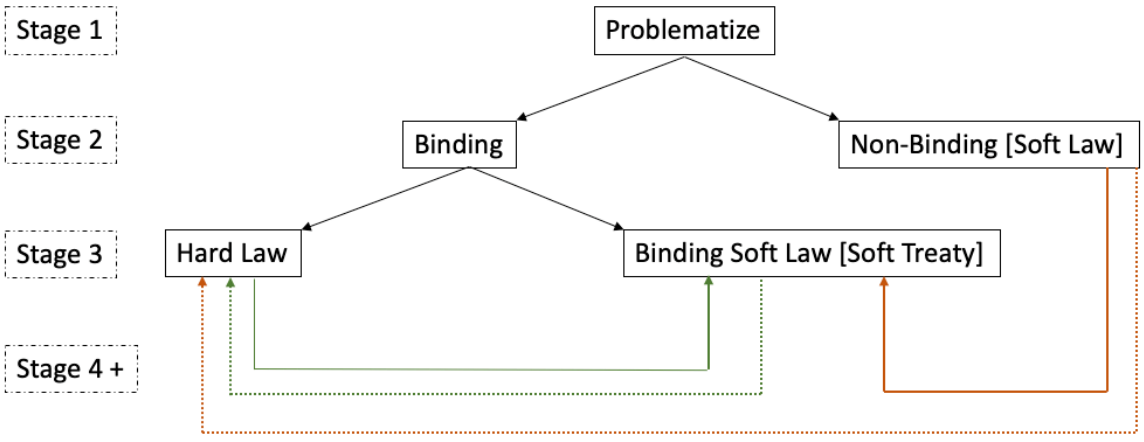

Figure 1: A simplified version of the various stages in the decision-making process of written international legal instruments

Through the examination of the two case studies, this article reveals the non-linear evolution of written international law. Illustrated in Figure 2 above, the evolution of international law highlights the need for a dynamic approach to studying the interface of international relations and

international law. Stage 1 indicates the initial phase of the negotiation process, whereby states problematize an issue that requires a solution in the form of an international legal instrument. Whether that instrument takes the form of a binding or non-binding form is decided in Stage 2. If the former variant is chosen, the negotiation process dictates whether a hard or soft treaty is adopted. Stage 4 onwards indicates the evolution of instruments whether from non-binding soft law to soft treaty or hard law; soft treaty to hard law; or even hard law to soft treaty.

Another example of a Stage 4 process is the Montreal Protocol, a hard treaty. The Protocol is an instrument that has been amenable to changes over time, primarily because it is a protocol nested within a framework convention. This feature of flexibility in framework conventions is in contrast to the literature on the topic which argues that soft law is a preferable alternative given its flexibility. The Kigali Amendment to the Protocol was adopted in 2016 and entered into force three years later. The Amendment aims to cut back on HFCs by 80% by 2047 and may avoid up to 0.5°C increase in global temperatures.

What triggers the change from one form of written international law to another? By looking to the field of evolutionary biology, one could borrow the theoretical concept of punctuated equilibrium[5] to explain the evolution of written international law. Stephen Krasner had previously used the concept to explain institutional changes (Krasner, 1984). Krasner argues that during periods of crisis, institutions undergo rapid changes after which they are followed by "consolidation and stasis" (Krasner, 1984: 240). Binding instruments could represent these periods of rapid changes which are then followed by soft law instruments characterizing periods of stasis. Hard treaties in particular could be indicative on large scale departures from the past. These changes could be triggered by political shocks such as wars, pandemics (much like the current COVID-19), major communication leaps (such as the digitization of diplomacy and social media advocacy) and, technological disruptors.

Complacency

The Arctic Council and the UNFCCC are the principal institutions through which cooperation in the Arctic and climate change takes place. Both institutions use consensus decision-making whereby every state has to agree or at least acquiesce before any decision can be made. It would be easy to assume that consensus decision-making equalizes the power of different states within an institution, but this is not the case. After studying consensus decision-making within the GATT/WTO, Richard Steinberg concluded that the process – despite upholding the principle of sovereign equality and delivering rules that are accepted as legitimate by all the participants – nevertheless favours powerful states (Steinberg, 2002: 342). A plausible explanation for this continued role for power was advanced by Paul Reuter, writing half-a-century ago:

> Consensus may perhaps oblige the strongest to make certain sacrifices, but it sacrifices the viewpoint of another minority: the one which is not strong enough to make the consensus process fail; ... in spite of the apparent unanimity which it represents, it constitutes an instrument of coalition against those who are isolated.[6]

As Michael Byers argues "although each state in a consensus decision-making system could act as a spoiler, this fact provides an incentive for states to signal to any potential spoiler that the costs imposed for blocking consensus would be higher than any possible gains" (Byers, 2019: 8). Consensus decision-making can thus conceal and perhaps even facilitate the application of power.

In contrast, the decision-making based on voting is different. While "still open to applications of power, the very act of calling a vote legitimizes opposition by a single or small number of states" (Byers, 2019).

That being said, the prevalence of soft law examined in this article is likely to be a result of a consensus decision-making which many of the respective forums and IOs within each issue-area, or region engages in. Such a decision-making system reduces the costs and the need for tough negotiations (Byers, 2019). Because hard law "involves clear, mandatory, substantively new commitments", the stakes are higher (Byers, 2019). As outlined in the section above, soft law can crystallize into harder forms, both written and customary law. However, this only happens gradually, and "only if states demonstrate through consistent practice that they are following the norms and consider them binding" (Akehurst, 1975; Byers, 1999; Byers, 2019, 9; D'Amato, 1979).

But such a prevalence arising from consensus could have its drawbacks. If states conclude soft law instruments, simply as a means to overcome the constraints of a consensus based decision-making mechanism, or to be seen as doing something (even if the bare minimum), there could be drawbacks of soft law's prevalence. Kirton and Trebilcock surmised the problems of (non-binding) soft law:

> It may lack the legitimacy and strong surveillance and enforcement mechanism offered by hard law. With a broader array of stakeholders, soft law may promote compromise, or even compromised, standards, less stringent than those delivered by governments acting with their full authority all alone. And soft law can lead to uncertainty, as competing sets of voluntary standards struggle for dominance, and as actors remain unclear about the costs of compliance, or its absence, and about when governments might intervene to impose a potentially different, mandatory regime (Kirton & Trebilcock, 2004: 6).

While one could argue that soft treaties may help to address these challenges posed by non-binding soft law, the very ambiguity, permissiveness, and redundancies of soft treaties may add to the challenges similarly posed by ambiguous non-binding soft law instruments. The ambiguity of the Paris Agreement, or the redundancy of the Arctic Council Scientific Cooperation Agreement give Parties a great deal of independence to skirt around their obligations and perhaps fall short of reaching the desired goal of the said treaty.

Path-dependency

The ongoing activities of all the Arctic Council working groups, many of which result in soft law instruments, provide an excellent example of path dependency for future cooperation. Non-security issues in the region have generally been managed among the Arctic states on a cooperative basis since the end of the Cold War, even during and after Russia's annexation of Crimea, with a number of non-binding soft law and soft treaty instruments having been successfully negotiated. These activities never stop, because the Arctic Council is always working on the next deliverable in the forms of reports, assessments, and other soft law instruments. Diplomats and experts are therefore on a perpetual hamster wheel of international interaction. There are over a hundred cooperative projects and initiatives continuously being worked on at the Arctic Council at any given time (Arctic Council, 2020). This raises a more general question: Does a path dependency[7] to cooperate arise as a result of soft law's prevalence?

Soft instruments could provide a degree of resilience to regional cooperation among distrusting states, in circumstances where hard treaties and formal international organizations are not possible (and might suffer full breakdowns if they were). Therefore, it is not just about flexibility and sub-optimal outcomes, but rather about creating interdependence, building and strengthening trust, cushioning cooperation against exogenous shocks. Non-binding soft law and soft treaties that encompass redundant, permissive, and/or ambiguous provisions could also be a way of filling gaps, encompassing new developments, gathering non-state parties (and non-state actors) into the normative envelope of a harder treaty.

There is perhaps a path dependency to cooperation, as is the case with the Arctic and climate change, because of this prevalence of soft law instruments. The continued negotiations within each of these regimes have yielded instruments of varying degrees of legalization, cementing cooperation on a diversity of issues. This is despite the shifts at the systemic level due to an increase in the number of states and non-state actors involved in negotiations and the advancement of science and technology. If states have an interest in and/or momentum toward increased cooperation, soft law enables them to pursue that regardless of political impediments to hard law.

Forum shopping

While there has been a growing volume of research on treaty conflict and forum shopping, little work has been done on the choices between, and the tensions arising, from the availability and interaction of hard and soft instruments, particularly in the context of the latter's prevalence. With the increase in the number of soft law instruments, including those setting out obligations that are redundant, i.e. already binding on states as a result of pre-existing hard law, states are able to strategically "use soft-law provisions [to] undermine existing hard law or creat[e] hard-law provisions to trump existing soft law" (Shaffer & Pollack, 2010). Shaffer and Pollack are among the few scholars who have written on this topic. They argue that the incentive for states to forum shop between soft and hard law depends on the ongoing "distributive conflict among states" (Shaffer & Pollack, 2010: 739). When this conflict is low, there may be a higher tendency for states to employ hard and soft law in a complementary manner; when conflict is high (and regime complexity is high) the reverse may more likely be observed (Shaffer & Pollack, 2011: 1167).

Both cases examined in this article are governed by a combination of hard and soft law instruments, the provisions of which may overlap or even contradict each other. What are the consequences that could potentially arise from this co-existence of hard treaties and soft law instruments, both binding and non-binding? Does it give parties to the former influence vis-à-vis the latter, or at least vis-à-vis matters addressed by the latter? China is a party to UNCLOS and only an observer at the Arctic Council, under the umbrella of which the Arctic Scientific Cooperation Agreement was adopted. An instance where a hard treaty can provide greater influence could possibly be foreseen with regards to China's presence in the Arctic.

While only an observer to the Arctic Council, the principal organization within which much of the regional non-binding soft law and soft treaties are negotiated by member states, China is nonetheless a party to the Central Arctic Ocean Fisheries Agreement, the UN Convention on the Law of the Sea, a permanent member of the UN Security Council (which is the only body within the UN that can "adopt binding coercive measures" in order to maintain international security), and a member of the UNFCCC. Timo Koivurova, for this reason, argues that "under the framework of international law, China is one of the Arctic's main actors" (Koivurova, 2018). While

for now, legal instruments concluded within the auspices of the Arctic Council are complementary to existing international law, it remains to be seen if conflict may arise on issues pertaining to China particularly due to deteriorating relations between it and the United States due to disputes on trade and the COVID-19 pandemic.

Conclusion

Soft law's increasing use in the international system and the gaps in the current literature examining its prevalence and implications, call for a re-examination and further theorizing of this now ubiquitous feature of the international system. Broadening the definition of soft law to include both binding and non-binding forms has not only verified that soft law is indeed increasing but also that it is far more pervasive than previously assumed to be. The literature's past exclusion of soft but binding instruments resulted in a narrow examination of soft law's influence within the international system. This article aims to deepen our understanding of the implications of states choosing to increasingly negotiate soft law instruments and by extension narrow the gap between the fields of international relations and international law, which are, despite their general lack of engagement with each other, inextricably intertwined.

Growing numbers of state and non-state actors can make it more difficult to negotiate hard treaties. Rapid political, technological, and environmental change can make it impractical to use hard treaties that are, to some degree, frozen in time. Soft treaties and other forms of soft law are more flexible and adaptable. They also allow for greater and more diverse participation. And they might avoid some of the obstacles that can prevent the adoption of hard law, such as growing tension between Western states and Russia, while leaving open and even facilitating the possibility that their commitments might later become part of hard treaties or customary international law (Abbott et al, 2000).

International law is often criticized for lacking enforcement mechanisms (Goldsmith & Posner, 2005). Although this criticism is usually overblown (think of the UN Security Council, international courts and tribunals, and national courts), it is true that international law may be more dependent on reciprocity, reputation, and other forms of "soft" enforcement than domestic law (Albright, 1995; Franck, 1998). For this reason, it is also possible that soft international law is not as much of a departure from hard international law as soft domestic law (recommendations, guidelines) might be from hard domestic law (statutes, contracts). Soft treaties might be just as effective as hard treaties, at least in some instances, precisely because neither kind of instrument relies on hard enforcement. And at times, soft law instruments can be used to test the political will for parties to take cooperation to the level of an international treaty.

Notes

1. The Arctic Council is made up of eight member states include the following: Canada, Denmark, Iceland, Finland Norway, Russia, Sweden, and United States, and permanent participants who represent the six indigenous organizations in the region. As of 2017, there are 13 non-Arctic states and 13 intergovernmental organizations that have been approved observer status within the AC. Observer states include China (which has since called itself a "near-Arctic state"), Germany, Poland, South Korea, Singapore, Switzerland, and the UK

(which also calls itself "the Arctic's nearest neighbor"); China's Arctic Policy 2018; Arctic Council 2018; UK Arctic Strategy 2013.

2. Arctic Five refers to the five Arctic Ocean littoral states: Canada, Denmark, Norway, Russia, and United States. In 2008, these five states agreed to utilize the existing international law as outlined in UNCLOS on matters pertaining to the Arctic and decided against the need for a "new legal framework".
3. See, Nadarajah 2020 for an extended discussion on soft law's prevalence within the Arctic and the role that the Arctic Council plays in catalyzing these soft treaties.
4. The Declaration on the Establishment of the Arctic Council (also known as the Ottawa Declaration) established The Arctic Council in 1996 under the Canadian chairmanship (Ottawa Declaration 1996).
5. N.B. "Punctuated equilibrium" in the field of evolutionary biology is used to explain the rate of speciation. Species are thought to mostly be in a stable equilibrium which is punctuated by short bursts of rapid evolution which is in contrast to the Darwinian theory that evolution of species is a gradual process. For an extended discussion on the topic, see, Eldredge and Gould 1972.
6. Reuter 1967, Michael Byers' translation.
7. Path dependency defined by Dryzek (2014, 941) is "Path dependency means that early decisions constrain later ones, as the costs of changing course become high, actors develop material stakes in stable institutions, and institutions arrange feedback that reinforces their own necessity".

References

Abbott, K., & Snidal, D. (2000). Hard and soft law in international governance. *International Organization, 54*(3), 421-456.

Abbott, K. O., Keohane, R., Moravcsik, A., Slaughter, A., & Snidal, D. (2000). The concept of legalization. *International Organization, 54*(3), 401-419.

Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic. 15 May 2013. Available at <https://oaarchive.arctic-council.org/handle/11374/529>. Accessed 6 February 2019.

Agreement on Enhancing International Arctic Scientific Cooperation, multilateral agreement, signed May 11, 2017. https://oaarchive.arctic-council.org/handle/11374/1916

Albright, M. K. (1995). Enforcing international law. *Proceedings of the Annual Meeting (American Society of International Law), 89*, 574-580.

Akehurst, M. (2000). Custom as a source of international law. (1st ed., pp. 251-303) Routledge.

Atapattu, S. (2012). International environmental law and soft law: A new direction or a contradiction? (pp. 200-226) Cambridge University Press.

Bodansky, D. (2015). Legally binding versus non- legally binding instruments. In *Towards a Workable and Effective Climate Regime.* 155-165.

Bodansky, D., Brunnée, J., & Rajamani, L. (2017). *International climate change law* (First ed.). Oxford, United Kingdom: Oxford University Press.

Burley, A. S. (1993). International law and international relations theory: A dual agenda. *The American Journal of International Law, 87*(2), 205-239.

Byers, M. (2019). Cold, dark, and dangerous: International cooperation in the arctic and space. *Polar Record, 55*(1), 32-47.

Canuel, E. T. (2015). The four arctic law pillars: A legal framework. *Georgetown Journal of International Law, 46*(3), 735.

Chinkin, C. M. (1989). The challenge of soft law: Development and change in international law. *International and Comparative Law Quarterly, 38*(4), 850-866.

D'Amato, A. A. (1971). *The concept of custom in international law*. Ithaca, N.Y: Cornell University Press.

Dryzek, J. S. (2016). Institutions for the anthropocene: Governance in a changing earth system. *British Journal of Political Science, 46*(4), 937-956.

Escudé, C. (2016). The Strength of Flexibility: The Arctic Council in the Arctic Norm-Setting Process. *Arctic Yearbook*.

Franck, T. M., & Oxford Scholarship Online Law. (1998). *Fairness in international law and institutions* (Reprint ed.). New York: Oxford University Press, Incorporated.

Hall, N., & Persson, Å. (2018). Global climate adaptation governance: Why is it not legally binding? *European Journal of International Relations, 24*(3), 540-566.

Harrop, S. R., & Pritchard, D. J. (2011). A hard instrument goes soft: The implications of the convention on biological diversity's current trajectory. *Global Environmental Change, 21*(2), 474-480.

Hasanat, M.D. (2012). Soft-law Cooperation in International Law: The Arctic Council's Efforts to Address Climate Change. Lapland University Press.

Hirose, Y., & Keio University, J. (2018). International Cooperation in the Arctic Region: The Search and Rescue and the Barents Cooperation. *Eurasian Journal of Social Sciences, 6*(4), 37-55.

Khan, M. R. (2014;2013;). *Toward a binding climate change adaptation regime: A proposed framework*. London: Routledge Ltd.

Krasner, S. D. (2009). Approaches to the state: Alternative conceptions and historical dynamics. (pp. 80-102) Routledge.

Kirton, J. J., Trebilcock, M. J., & Taylor & Francis eBooks A-Z. (2016;2017;2004;). *Hard choices, soft law: Voluntary standards in global trade, environment, and social governance*. London, [England];New York, New York;: Routledge.

Koivurova, T. (2018). China & the Arctic: Why the Focus on International Law Matters? *Arctic Centre Papers*.

Lanteigne, M. (2019). The Changing Shape of Arctic Security. *NATO Review. Available at* https://www.nato.int/docu/review/articles/2019/06/28/the-changing-shape-of-arctic-security/index.html.

Lawrence, P., & Wong, D. (2017). Soft law in the paris climate agreement: Strength or weakness? *Review of European, Comparative & International Environmental Law, 26*(3), 276-286.

Nadarajah, H. (2020). Prevalence of Soft law in the Arctic. *Polar Law Vol. 12.*

Olsson, I.A. (2011). Four Competing Approaches to International Soft Law. *Scandinavian Studies Review.* 58. 177 – 196.

Ottawa Declaration. 1996. Declaration on the establishment of the Arctic Council. September 19. Available at <https://oaarchive.arctic-council.org/bitstream/handle/11374/85/00_ottawa_decl_1996_signed%20%284%29.pdf?sequence=1&isAllowed=y>.

Popovski, V. (2019). 'Hard' and 'soft' law on climate change: Comparing the 1997 Kyoto Protocol with the 2015 Paris Agreement. (1st ed., pp. 19-41) Routledge.

Posner, E., & Gersen, J. (2008). Soft Law. *University of Chicago Public Law & Legal Theory* Working Paper No. 213.

Shaffer, G. C., & Pollack, M. A. (2010). Hard v. soft law: Alternatives, complements, and antagonists in international governance. *Minnesota Law Review, 94*(3), 706.

Shelton, D. (2008). Soft Law. In *Routledge Handbook of International Law*, edited by David Armstrong, 68–80. London: Routledge.

Smieszek, M. (2019). The Arctic Council in Transition. In *Leadership for the North*. Douglas C. Nord. Springer Polar Sciences

Steinberg, R. H. (2002). In the shadow of law or power? consensus-based bargaining and outcomes in the GATT/WTO. *International Organization, 56*(2), 339-374.

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).