Chapter 7
Analyzing Soft Law and Hard Law in Climate Change

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Abstract There is a great deal of variety in the international environmental agreements that have mushroomed in past decades. These legal arrangements can be placed on a continuum from hard law – *precise* and legally binding treaties that *oblige* a behavioural change with *delegated* enforcement bodies – to the softest of soft law, with its vague, aspirational goals and no delegation or institutional follow-up. The legalization continuum is a more insightful starting point for analyzing international agreements than 'bottom-up' vs. 'top-down' or 'pledge-and-review' vs. 'targets-and-timetables' that are often suggested by reports and policy papers. When applying the legalization lenses to the UN climate regime, two big trends emerge. There is a notable turn toward soft law in developed country commitments in climate mitigation. In the meantime, the UN regime is becoming harder by providing greater transparency of climate actions of all major economies.

7.1 Introduction

The recent climate meetings have witnessed no shortage of political drama and many of the central quarrels have included a strong legal perspective. The UN Climate Change Conference in Copenhagen, famously, concluded in a messy final plenary, "taking note" of the Copenhagen Accord, and was followed by months of blame game. In Cancún, a package of decisions was adopted by stretching the

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definition of "consensus" further than ever before in the climate regime. At the latest session of the Conference of the Parties (COP) in Durban the limelight of the final political struggle was the issue of legal form, this time for a mandate to negotiate an agreement beyond the year 2020. Since COP 13 in Bali in 2007 the UN climate regime has experienced legal-political turmoil; this reality calls for policy relevant analysis of the characteristics of different legal options, their limitations and possibilities.

The increasing reliance on global regulation through diverse types of legal arrangements, a phenomenon also referred to as the "legalization" of international affairs,[1] has been interpreted as a necessary corollary to globalization.[2] There is a great deal of variety in the international agreements that have mushroomed in past decades. Driven by the realist challenge to prove the ability of international law to exert influence on nation states, much of the research has focused on the international agreements in their legally binding treaty form with enforcement ('hard law') such as the World Trade Organization, as well as on economically powerful organizations such as the International Monetary Fund and the World Bank.[3] Since the early 1990s, however, increased attention has also been paid to the more amorphous, non-legally binding ('soft law') instruments. There is a growing body of research that studies private authority, networks, transnational standard-setting with non-state actors, and other profoundly soft modes of global governance.[4]

How should we approach soft law? As outlined above, when analyzing the current global response to climate change, we are confronted with several critical puzzles regarding international law in general. Even a cursory glance at the empirical world of global governance shows that there is considerable diversity in the legal characteristics of international agreements. How to analyze this diversity in a way that is both academically solid and relevant to the political debates in climate change? The aim of this chapter is to contribute to our understanding on this vital question.

There are broadly three main alternatives to study the legal characteristics of international agreements at the nexus of IR theory,[5] including rationalist, social

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[1] Kenneth Abbott et al., "The Concept of Legalization", 54 *International Organization* (2000), 401.

[2] Abram Chayes and Antonia H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (London: Harvard University Press, 1995); John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

[3] Xinuan Dai, *International Institutions and National Policies* (Cambridge: Cambridge University Press, 2007), at 7.

[4] See for example Braithwaite and Drahos, *Global Business Regulation*, supra, note 2; Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000), Steve Bernstein and Benjamin Cashore, "Can Non-State Global Governance be Legitimate? An Analytical Framework", 1 *Regulation & Governance* (2007), 347; Julia Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes", 2 *Regulation & Governance* (2008), 137.

[5] This grouping is by no means exhaustive list of perspectives that legal scholars use in studying international cooperation as a whole. Many other schools of thought and theoretical debates exist and are influenced by other disciplines such as anthropology, sociology, political philosophy and history.

constructivist, and critical formalist.[6] The orientation in this essay is influenced to a great extent by rationalist scholars and especially the special issue of *International Organisation* that provided a definition of "legalization" and kick-started the ensuing academic debate on that approach.[7] The legalization school argues that international agreements can be placed on a continuum from hard law – *precise* and legally binding treaties that *oblige* a behavioural change with *delegated* enforcement bodies – to the softest of soft law, with its vague, aspirational goals and no delegation or institutional follow-up.[8] From this point of view it is possible to further analyse the politics of institutional choice in the fragmented international legal order.

In the field of environmental politics, major multilateral agreements are commonly expressed in legally binding treaty form as "conventions" and "protocols" to those conventions.[9] For example the ozone regime,[10] biological diversity regime[11] and climate regime[12] include provisions for signature, ratification, accession, approval, and withdrawal recognized by international treaty law and customary law as a means of formalizing the consent of a state to be bound. These treaties have been complemented with soft law that exists *outside* their umbrella and soft law that exists *within* these regimes. In global climate governance, there has been a broader trend of States negotiating minilateral, non-legally binding agreements outside of the United Nations Framework Convention on Climate Change (UNFCCC). This trend gained momentum around 2005 and includes agreements that focus on the implementation of activities[13] as well as agreements that focus on political declarations

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[6] Several analysts such as Shaffer and Pollack would call these critics of soft law "legal positivists". However, some notable critical scholars such as Koskenniemi do not sit well with legal positivism, as he constantly emphasizes that his goal is not to promote positivist formalism, which could mask or neutralize political choices and conflicts. For this reason I adopt the term "critical formalism" to describe these viewpoints. See Gregory Shaffer and Mark Pollack, "Hard Law vs. Soft Law: Alternatives, Complements and Antagonists in International Governance", 94 *Minnesota Law Review* (2010), 706.

[7] See seminal articles by Abbott et al., "Concept of Legalization", supra, note 1; Kenneth Abbott and Duncan Snidal, "Hard and Soft Law in International Governance", 54 *International Organization* (2000), 421.

[8] Abbott et al., "The Concept of Legalization", supra, note 1.

[9] Jacob Werksman and Kirk Herbertson, "The Aftermath of Copenhagen: Does International Law have a Role to Play in a Global Response to Climate Change?", 25 *Maryland Journal of International Law* (2010), 109; Farhana Yamin and Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge: Cambridge University Press, 2004).

[10] The Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, in force 22 September 1988, 26 *International Legal Materials* (1986), 1529.

[11] The Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992), 818.

[12] The Framework Convention on Climate Change, Rio de Janeiro, 9 May 1992, in force 21 March 1993, 31 *International Legal Materials* (1992), 849.

[13] For example the Asia-Pacific Partnership on Clean Development and Climate (APP), see Harro Van Asselt, "From UN-ity to diversity? The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change", 1 *Carbon and Climate Law Review* (2007), 17; Sylvia Karlsson-Vinkhuyzen and Harro Van Asselt, "Introduction: Exploring and Explaining the Asia-Pacific Partnership on Clean Development and Climate", 9 *International Environmental Agreements* (2009), 195.

and guidance.[14] Second, soft law arrangements have emerged from within the UN climate regime, as the prospects for a legally binding protocol to include other parties than European countries have become more and more daunting for the 2012–2020 period in the climate regime. Also the mandate for the post-2020 agreement, preliminarily decided in the 2011 Durban meeting, may well yield an outcome that is considerably softer than the Kyoto Protocol architecture (see below). Furthermore, already the operationalization of the legally binding Kyoto Protocol relied considerably on the decisions of the Conference of Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP), which can be seen as a type of soft law.[15]

I will first provide an overview to the concepts of hard and soft law, and from there move on to present the main theoretical insights to these concepts. The focus is on the legalization approach and the critique it has faced during the last decade. Applying the legalization approach, I present some insights into major trends within the UNFCCC negotiations. Lastly, some conclusions are drawn.

7.2 Analyzing Soft and Hard Law

7.2.1 The Legalization Continuum

For the term hard law, which naturally was not referred to as 'hard' before the emergence of soft law, there are relatively widely accepted legal definitions, including on its sources (treaty and custom), and the implication of the general obligation imposed on states (*pacta sunt servanda*) to follow them. The well-established category of international customary law emerges from state practice and is in many cases not explicitly designed or formally codified. Therefore, it is excluded from further discussion in this essay.

The early discussions on soft law in the international sphere date back to the late 1970s. At that time the term was usually placed in quotation marks.[16] By the late

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[14] For example the Major Economies Forum/Meeting on Energy Security and Climate (MEF), several G8 and G20 meetings, and numerous regional forums, see Antto Vihma, "Friendly Neighbor or Trojan Horse? Assessing the Interaction of Soft Law Initiatives and the UN Climate Regime", 9 *International Environmental Agreements* (2009), 239.

[15] The Marrakesh Accords operationalized some of the key aspects of the Kyoto Protocol after long – lasting negotiations in 2001, related to, for example, reporting, verification and compliance. See Decisions 2-14/CP.7, The Marrakesh Accords, UN Doc. FCCC/CP/2001/13/Add.1, 21 January 2002.

For a recent discussion on the properties of COP decisions, see for example Antto Vihma, "A Climate of Consensus: The UNFCCC Faces Challenges of Effectiveness and Legitimacy", 75 *Finnish Institute of International Affairs Briefing Papers* (2011).

[16] For example Rene-Jean Dupuy, "Declaratory Law and Programmatory Law: From Revolutionary Custom to 'Soft Law'" in Robert Akkerman et al. *Declarations on Principles: A Quest for Universal Peace* (Leiden: Sijthoff, 1977), 247.

1980s and early 1990s, the concept had gained momentum,[17] and the analysis not only recognized and described an empirical phenomenon, but also reflected on its implications against the binary terms of legal formalism (legal/illegal; binding/non-binding), and to the great disappointment of formalist-oriented scholars, "in doing so ended up rejecting the binary code of law altogether".[18] Also in the contemporary literature the term soft law is on many occasions defined in binary terms, and usually in terms of what it is *not*. Soft laws are not legally binding by themselves, they are not in treaty form, and they do not belong to the category of customary law.[19]

The essential issue on which there is considerable disagreement is whether it is possible and/or useful to make this kind of binary divide between hard and soft law. In the formal view an international agreement is either international law or it is not; if a "soft norm meets the requirements of the doctrine of sources of international law, it is hard law".[20] Several analysts in a leading volume on soft law edited by Shelton subscribe to this viewpoint, in which soft law means "normative agreements that are not legally binding".[21] Another perspective is presented in the same volume by Chinkin, who frames soft and hard law in a hierarchy in a descending "hardness" of laws, including legal soft law (imprecise hard law); secondary or delegated soft law (which includes the "statements and practice that develop around a treaty to supplement or correct the text"); and non-legal soft law (resolutions, declarations, the output of intergovernmental conferences, etc.).[22]

The continuum approach to international legalization, of which Chinkin's categories are a variant, is supported by many rationalist scholars. For these analysts, the whole sanctity of "bindingness" in international law is a somewhat misleading hyperbole.[23] International legalization offers decision-makers many shades of grey

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[17] Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 38 *International and Comparative Law Quarterly* (1989), 850.

[18] Jan Klabbers, "Reflections on Soft International Law in a Privatized World", XVI *Finnish Yearbook of International Law* (2007), 313, at paragraph II.

[19] Dinah Shelton, "Introduction: Law, Non-law and the Problem of 'Soft Law'", in Shelton (ed.) *Commitment and Compliance*, supra, note 4.

[20] Jonathan L. Charney, "Commentary: Compliance with International Soft Law" in Shelton (ed.), *Commitment and Compliance*, supra, note 4, at 115.

[21] Shelton, "Introduction", supra, note 18; Wolfgang Reinicke and Jan Martin Witte, "Interdependence, Globalization, and Sovereignty: The Role of Non-binding International Legal Accords", in Shelton (ed.), *Commitment and Compliance,* supra, note 4.

[22] Chinkin also includes an unnamed category in her study, which encompasses the norms that are developed without the involvement of states. Some scholars would not include these in the term soft law, while others consider such private regulation as a central part of international soft law. The realm of "private" soft law – which in itself can range from very precise, elaborate and enforced rules to vague principles or codes of conduct – is not addressed here. See Christine Chinkin, "Normative Development in the International Legal System" in Shelton (ed), *Commitment and Compliance*, supra, note 4, at 27.

[23] See Charles Lipson, "Why are Some International Agreements Informal?", 45 *International Organization* (1991); Abbott et al., "The Concept of Legalization", supra, note 1; Abbott and Snidal, "Hard and Soft Law", supra, note 6; Kal Raustiala, "Form and Substance in International Agreements", 99 *American Journal of International Law* (2005); Shaffer and Pollack, "Hard Law vs. Soft Law", supra, note 5.

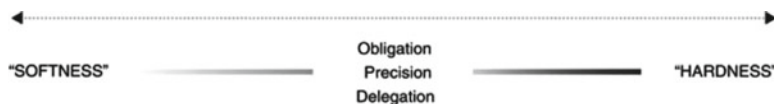

Fig. 7.1 The figure illustrates the continuum of international legalization, based on the criteria of precision, obligation, and delegation (Figure 7.1 is from Sylvia I. Karlsson-Vinkhuyzen and Antto Vihma, "Comparing the Effectiveness and Legitimacy of Global Hard and Soft Law: An Analytical Framework", 3 *Regulation & Governance* (2009), 400, at 402)

instead of a clear black and white distinction between binding and non-binding, and this is not to be seen normatively as a bad thing. A case in point is that traditional and formal hard law treaties may be so generally worded as to be devoid of legal content – the category referred to by Chinkin as "legal soft law".[24] Also many constructivists, as well as "realist" legal scholars, emphasize the "law-in-action" as opposed to "law-in-books", noting that domestic laws also vary considerably in their real-life bindingness, that binary distinctions are not useful,[25] and even accuse formalist scholars of being guilty of "elite ignorance" and "non-knowledge of the social".[26]

In their seminal article Abbott, Keohane, Moravcsik, Slaughter and Snidal elaborate on their factors of "hardness" for international law.[27] They pronounced three criteria: providing binding obligation, precise wording, and a degree of delegation. If international agreements are weakened along these dimensions, they enter the realm of soft law. *Obligation* means that the behaviour of actors under the treaty is subject to change and scrutiny under the general rules, procedures, and discourse of international law. *Precision* indicates that "rules unambiguously define the conduct they require, authorize, or proscribe", a particularly important feature of law at the global level, as laws and rules are usually created consensually by states and interpreted afterwards by those same states. *Delegation* gives a third party some level of authority to implement and interpret the rules and to resolve disputes.[28]

The critical formalist viewpoint regards international law as a clear, binary choice between something binding, which is law, and something non-binding, which is not law. In this view, the concept of soft law and its characteristics are not interesting,[29]

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[24] Chinkin, "Normative Development", supra, note 22.

[25] David Trubek, Patrick Cotrell and Mark Nance, "soft Law, Hard Law, and EU Integration" in Joanne Scott and Gráinne de Búrca (eds), *New Governance and Constitutionalism in Europe and the US* (Oxford: Hart Publishing, 2006).

[26] Peter Goodrich, "Law-Induced Anxiety: Legalists, Anti-Lawyers and the Boredom of Legality", 9 *Social & Legal Studies* (2000), at 150.

[27] Abbott et al., "The Concept of Legalization", supra, note 1; Abbott and Snidal, "Hard and Soft Law", supra, note 7.

[28] Abbott et al., "The Concept of Legalization", supra, note 1, at 401.

[29] Jan Klabbers, "The Redundancy of Soft Law", 65 *Nordic Journal of International Law* (1996), 167.

and/or not desirable.[30] However, from an *ex ante* point of view of the actors, differences in legal characteristics offer the decision-makers room for manoeuvring, as different legal characteristics involve different costs and benefits. International agreements usually have both hard and soft elements[31] and do not constitute "sharp dichotomous choices" for decision-makers but rather "choices of various strategies, or combinations of strategies".[32] Hard and soft law may also act as mutually supportive or as competing strategies; law is not only a facilitator of social order, but also a tool advanced by actors looking to fulfil their aims.[33] This is especially the case in the sphere of global governance, with its fragmented nature, lack of clear hierarchy and lack of a final institutional arbiter (a supreme court). Also, soft law regimes may be "hardened", for example with links to other regimes, while hard law regimes may be "softened" with ambiguous paragraphs or decisions.

The exploration of the hard and soft law landscape results in a long continuum, "from hard law through varied forms of soft law, each with its individual mix of characteristics".[34] Hard law and soft law are useful concepts as end points of the continuum, but a systematic and policy-relevant evaluation of law needs to pay attention to the diversity along the continuum (Fig. 7.1). However, while negotiators draft legal arrangements of descending or ascending hardness, there is one strong element which is *not* amenable to flexibility: the decision on whether to conclude a ratifiable treaty or not. This is a profoundly binary decision.[35] If the intergovernmental negotiations result in a ratifiable treaty, it will go through procedures which are determined in the national constitutions.

In the climate regime, one of the main arguments for governance by COP decisions is that they do not, *an sich*, require ratification. However, in several countries, the content of an international instrument – rather than its name or formal status – determines the legal procedures through which it must be transposed into national legislation. This means that for many countries than the more substance is put into COP decisions, the more likely they are to require ratification in accordance with national constitutional requirements. In some key countries, however, the form and name of the agreement might make a remarkable difference. Globally the most crucial

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[30] See Jan Klabbers, "The Undesirability of Soft Law", 67 *Nordic Journal of International Law* (1998), 381. The normative argument is centred on the notion that increasing reliance on soft law represents a shift of power from legal institutions to "administrative power" in the EU context, namely to the European Commission.

[31] Richard Bilder, "Beyond Compliance: Helping Nations Cooperate", in Shelton (ed.), *Commitment and Compliance*, supra, note 4.

[32] John Kirton and Michael Trebilcock, "Introduction: Hard Choices and Soft Law in Sustainable Global Governance" in John Kirton and Michael Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Cornwall: Ashgate, 2004), 3.

[33] Shaffer and Pollack, "Hard Law vs. Soft Law", supra, note 5.

[34] Karlsson-Vinkhuyzen and Vihma, "Comparing the Legitimacy and Effectiveness", supra, note 34, at 401.

[35] I would like to thank Professor Timo Koivurova for emphasizing this point in our correspondence.

implication of the ratification requirement probably is the advice and consent procedure and the two thirds majority by which the US Senate has to consent to international agreements signed by the US executive branch. This has effectively prevented most environmental treaties from being implemented into US domestic legislation. A recent report sheds light to the status of ten pending environmental treaties – half signed by Democratic presidents and half signed by Republican presidents – which have been pending an *average* of 13 years, awaiting ratification.[36]

Focusing the analysis on the legal form only does not seem to provide answers to critical puzzles. Many practitioners and academics alike assume that a legally binding form would have a positive effect on compliance; however, available evidence does not univocally support this proposition.[37] From a rationalist point of view, states and other international actors utilize hard law to order their relations, because it helps to reduce transaction costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting. The hard law path, however, comes at a significant cost, as hard law restricts actors' behaviour and sovereignty.[38] The rationalist paradigm sees that the advantage of soft law is that it is less costly in terms of the sovereignty of states – a key theme in this literature is that soft law involves less negotiation costs, as states exercise more caution in drafting hard law due to greater consequences of a subsequent violation.[39] The other side of the coin is that soft law arguably represents a less credible commitment to the issue at hand than hard law. In the face of serious global risks such as climate change, many would argue that the virtue of credible commitments is worth significant costs, given the nature and limitations of the non-hierarchical and fragmented international legal order. One virtue could the formality of reciprocal expectations, that could, perhaps, build trust and thus enable greater ambition. Secondly, formalizing substantive and procedural rights and duties could in turn elevate the position of smaller actors, which in the case of climate change could also have implications on the ambition level. Many civil society groups such as environmental NGOs fear that soft law arrangements can be used cynically, to "take the heat off" political leaders, allowing symbolic but empty promises to substitute for real action.[40]

The constructivist paradigm has focused on "appropriate behaviour", which is intimately connected to the construction of the identities of states. Changes in state behaviour can thus occur through processes of socialization and the expansion of norms, ideas and principles. Constructivist-oriented legal scholars quite frequently

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[36] Mary Jane Angelo et al., *Reclaiming Global Environmental Leadership: Why the United States Should Ratify Ten Pending Environmental Treaties,* Center for Progressive Reform White Paper #1201 (2012), available at: http://www.progressivereform.org/articles/International_Environmental_Treaties_1201.pdf (last accessed on 23 February 2012).

[37] Helmut Breitmeier, Oran Young and Michael Zürn, *Analyzing International Environmental Regimes: from Case Study to Database* (Cambridge: MIT Press, 2006).

[38] Abbott and Snidal, "Hard and Soft Law", supra, note 6.

[39] Lipson, "Why are Some International Agreements Informal?", supra, note 23; Abbott and Snidal, "Hard and Soft Law", supra, note 7; Kirton and Trebilcock, "Introduction: Hard Choices and Soft Law", supra, note 32; Shaffer and Pollack, "Hard Law vs. Soft Law", supra, note 6.

[40] See for example Vihma, "Friendly Neighbor or Trojan Horse?", supra, note 144, at 250.

take this kind of approach to international law, whether discussing "the active role of the regime in modifying preferences",[41] "internationalization processes" that work over time,[42] or "the compliance pull" of international law that is deemed legitimate.[43] From this perspective, the soft law approach might have advantages in promoting norm diffusion and learning, allow a wide spectrum for deliberation in governing,[44] and generate shared norms and a sense of common purpose and identity.[45] As constructivists analyze international law in terms of values and the formation of state identities, the world no longer needs to be thought of in terms of power and interest. This idealist perspective alone, I would argue, makes the analysis susceptible to classic criticisms which realist scholars of international relations originally levelled at international law.[46]

This chapter suggests a middle path between constructivist and rationalist paradigms.[47] I follow the argument that there is evidence that decision-making related to creating and complying with international law is influenced by drivers from both paradigms,[48] as the interest-based and normative strategies are deeply intertwined.[49] In the case of environmental regimes, utilitarian motives and normative motives are most often both at work, and simultaneously so.[50] Furthermore, both approaches can be improved on the ground "by carefully incorporating the arguments made by the other" in the analysis.[51] It is also worth re-emphasizing that the continuum approach resonates well with the view of the practitioners, namely the negotiators who craft multiple wordings ascending in various ways from "binding" to "non-binding" language. This *ex-ante* viewpoint of the multilateral negotiations is strikingly different from the binary distinction picture painted by some critical formalist scholars of academic literature.[52]

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[41] Chayes and Chayes, *The New Sovereignty,* supra, note 2.

[42] Harold Koh, "Why do Nations Obey International Law?", 106, *Yale Law Journal* (1997), 2599.

[43] Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990), 312.

[44] Trubek et al., "Soft Law, Hard Law, and EU Integration", supra, note 25, at 3.

[45] Shaffer and Pollack, "Hard Law vs. Soft Law", supra, note 6, at 3.

[46] See Martti Koskenniemi, "Turn to Ethics in International Law", available at: http://www.helsinki.fi/eci/Publications/Koskenniemi/Ethics.pdf (last accessed on 22 February 2012); also, see Martti Koskenniemi, "The Lady Doth Protest too Much: Kosovo, and the Turn to Ethics in International Law", 65 *The Modern Law Review* (2002), 159.

[47] Karlsson-Vinkhuyzen and Vihma, "Comparing the Effectiveness and Legitimacy", supra, note 34, at 405.

[48] See, for example, Oran Young, *The Institutional Dimensions of Environmental Change* (Cambridge: The MIT Press, 2002).

[49] Abbott and Snidal, "Hard and Soft Law", supra, note 7.

[50] Oran Young, Leslie King and Heike Schroeder, *Institutions and Environmental Change: Principle Findings, Applications, and Research Frontiers* (Cambridge: The MIT Press, 2008).

[51] Abbott and Snidal, "Hard and Soft Law", supra, note 6, at 422.

[52] The *ex-post* view is more at home in a situation where a judge faces the decision in a court on whether a given instrument is binding or not. However, this view should not be simplified to the extreme either, see Shaffer and Pollack, "Hard Law vs. Soft Law", supra, note 6, at 12.

7.2.2 Criticism of Legalization

The legalization continuum approach has sparked notable critical comments from two opposing camps – the formalist-oriented legal scholars who guard the sanctity of the binary character of law,[53] and several social constructivist legal scholars.[54]

The constructivist critique is aimed at the "narrow conception of law", rooted in "positivism," "formalism," and "Western tradition".[55] For many constructivists, law is a very broad concept, and in the end, law is "whatever people recognize and treat as law through their social practices".[56] According to this critique, focusing on legalization variables leads to diminished attention paid to important topics such as legitimacy, from which international law gets its "force" in a non-hierarchical system, and customary law, as well as the process of law. The constructivist scholars call for more focus on identities as generators of interest, and research which illuminates how identities are shaped through social interaction.[57]

Certainly, taking a profoundly sociological view on law, the legalization approach can also seem formal and alien to the developments on the ground, in the real world where law operates which is what most analysis is ultimately interested in. I also share the constructivist critics' view that legitimacy is a central concept, and furthermore, it is deeply intertwined with questions of effectiveness and compliance. In spite of this, I argue, the legalization approach highlights important aspects about the making and implementation of international law, and serves as a useful starting point for analysis.

The second branch of criticism stems from the directly opposing group to constructivist perspectives, namely scholars emphasizing critical formalism. There certainly is no love lost in Koskenniemi's assessment of constructivist research, which he sees as "returning to analyses of international politics in terms of its rights and wrongs, good and evil" and celebrating "moral enlightenment of a new world, a universal liberal *Gemeinschaft"*.[58]

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[53] Martti Koskenniemi, "International Law: Between Fragmentation and Constitutionalism", available at: http://www.helsinki.fi/eci/Publications/Koskenniemi/MCanberra-06c.pdf (last accessed on 22 February 2012). Most themes Koskenniemi touches upon in this key presentation feature in his collection of essays, Martti Koskenniemi, *The Politics of International Law* (Oxford: Hart Publishing, 2011). See also Klabbers, "The Undesirability of Soft Law", supra, note 30; Klabbers, "Reflections on Soft International Law", supra, note 18.

[54] Jutta Brunnée and Stephen Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law", 39 *Columbia Journal of Transnational Law* (2000), 19; Jutta Brunnée and Stephen Toope, "Interactional International Law", 3 *International Law Forum* (2001), 186; Marthe Finnemore and Stephen Toope, "Alternatives to "Legalization": Richer Views of Law and Politics", 55 *International Organization* (2001), 743.

[55] Finnemore and Toope, "Alternatives to 'Legalization'", supra, note 55.

[56] Brian Tamahana, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001).

[57] Brunnée and Toope, "Interactional International Law", supra, note 55.

[58] Koskenniemi, "Turn to Ethics", supra, note 47, at 22.

The formalist critique is usually aimed at 'soft law' in general, not only the legalization continuum approach. Although this critical viewpoint admits that soft law "may seem useful at first sight", as soon as it is to be applied it collapses into either hard law or no law at all. Soft law is like balancing a coin on its edge; it looks good for a moment, "but as soon as you start to spend it, it will fall heads or tails", so no continuum really exists.[59] The accusation by Klabbers is that soft law typically gets applied like hard law – especially in the EU context – with the difference being that it does not have to be accepted by "domestic democratic bodies" like formal treaties.[60] Again, in the EU context, this means a power shift towards the bureaucratic initiatives of the European Commission.[61] The backdrop is about power: once you give up formalism, a chaotic state prevails, who shouts loudest wins, and legal concepts and regimes cannot be systematically analyzed.[62]

It seems that some of the critical formalist views are laced with an overwhelming nostalgia for a more stable and simple point in time, when rules were clear, knowledge was uniform, and the road ahead was well laid out. The critique is concerned that international law is "no longer taken seriously" but is a policy option among others[63] (was it really ever anything else?), that soft law enables today's powerholders to escape "democratic scrutiny" (more than international affairs did before?), and compares "fragmented order" to the times when there was no international regulation whatsoever, for instance, for environmental problems.[64]

From a broader but equally critical perspective, soft law is claimed to represent fragmentation and managerialism, which leads to erosion of international law.[65] From this viewpoint Koskenniemi presents a masterful and critical reflection on the fragmentation of international law, leading to "imperial and solipsistic" subsystems, which threaten the universalism international law ought to highlight.[66] A fundamentally "managerial" approach has emerged as international law comes to us in separate boxes, and serves an instrumental purpose for particular values, interests and preferences, such as the "European project", "trade project" or "environmental project".[67] Koskenniemi acknowledges that the fragmentation goes further than the differentiated soft-hard characteristics of law, and emphasizes that each

[59] Klabbers, "The Undesirability of Soft Law", supra, note 30, at 382.

[60] Klabbers, "Reflections on Soft International Law", supra, note 18, paragraph IV.

[61] Klabbers, "The Undesirability of Soft Law", supra, note 30.

[62] Klabbers, "Reflections on Soft International Law", supra, note 18. See for example paragraph II, "Any definition, or even any broader concept of soft law, has so far proved highly elusive", and "if everything is law, nothing is".

[63] Klabbers, "Reflections on Soft International Law", supra, note 18, at paragraph V.

[64] Klabbers, "Reflections on Soft International Law", supra, note 18, at paragraph II; Koskenniemi, "International law", supra, note 51.

[65] Koskenniemi, "International Law", supra, note 51; see also Martti Koskenniemi, "The Politics of International Law – 20 years later" in Koskenniemi, *The Politics of International Law*, supra, note 54.

[66] Koskenniemi, "International Law", supra, note 54.

[67] Koskenniemi, "International Law", supra, note 54, paragraph 8.

subsystem of international law has a different objective, different ethos and a different "structural bias", no matter what its legal characteristics are.[68] However, from the point of view of his critique, it is evident that soft law is a way to spread these specialized projects and their differentiation further, with a quintessentially managerial approach to law.[69] International lawyers are taught to speak of "regimes" instead of institutions and of "regulation" instead of rule, to change the language of government to "governance", responsibility to "compliance" and lawfulness to "legitimacy". Ultimately, international law becomes drained of law.[70]

From a practice-oriented perspective this critique is problematic. First, as Koskenniemi naturally acknowledges, the empirical reality is that specialized regimes are commonplace in contemporary international law, but he argues that this is not "natural and inevitable" as many others would suggest.[71] It is certainly true that the sub-areas of international law do not automatically arise from the "nature of things", and that most real-world events and cases relate to, for example, environmental law, trade law and human rights law simultaneously. However, it is still hard to escape the increasing inevitability of such specialization and division of labour, even though its origins are a social construct and have to do with "powerful interests".[72] While agreeing with many of the problems raised by Koskenniemi, his criticism is on a higher level of abstraction than this essay, suggesting that international law should return to the "culture of formalism" and "constitutional mindset",[73] universality in a Kantian sense, law as a language for the critique of power. His view is openly normative, the world as it ought to be, and, in contrast to this edited volume, he also highlights that he is ultimately not interested in architectural questions.[74] This critique thus offers few applicable tools for analyzing the architectural issues in the contemporary international legal landscape in empirical terms.

Finally, both the constructivist critique and the perspectives that emphasize formalism are connected to the broad theme of legitimacy. Constructivists caution that in the legalization approach effectiveness overrides legitimacy and, in a way, so does the broader version of formalist critique. Kantian deontological reasoning cited by Koskenniemi requires the decision-maker to focus on the morality of actions themselves, without "making principles subordinate to the end", without deriving justification from the consequences, as values and purposes

[68] Koskenniemi, "International Law" supra, note 54; see also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

[69] Koskenniemi is fiercely critical of the "deformalisation" of international law. See for example Koskenniemi, "International Law", supra, note 54, paragraphs 17 and 21.

[70] Koskenniemi, "International Law", supra, note 54, paragraphs 20 and 21.

[71] Koskenniemi, "International Law", supra, note 54, paragraph 9.

[72] Koskenniemi, "International Law", supra, note 54, paragraph 9.

[73] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

[74] Koskenniemi, "International Law", supra, note 54, paragraphs 20 and 25.

represent *hubris* and *Schwärmerei*.[75] The opposing rationalist camp follows the "consequentialist" or "welfarist" paradigm that acknowledges the priority of good over process.[76] In this rationalist view, justice is seen firstly as a matter of outcome; a political and legal decision can produce injustice, however fair the procedure is. It is in this instrumental way that specialized regimes and projects – with their faults and biases – currently are justified as legitimate.[77] In the traditional view, legitimacy is crucial in achieving state compliance and thus effectiveness. But equally importantly, effectiveness is a component of legitimacy, as the lack of acceptable performance undermines the legitimacy of the norm in the long term. This argument has been widely noted in sociology, but has not been internalized by many analysts of international regimes.[78]

7.2.3 Hard Law-Soft Law Dynamics

The dynamic of legal characteristics operates over time. For example, an initially soft agreement may earn high enough legitimacy to be turned into hard law.[79] At the level of practical politics within the field of global environmental governance, the soft-hard law dynamics are at play in the process of operationalizing softer framework conventions into harder legal instruments and decisions through multilateral negotiations. This approach has been adopted, for example, with the ozone regime, the biodiversity regime, and the climate regime.[80]

Framework conventions in international environmental law are formal, ratifiable and legally binding treaties. However, framework conventions typically do not contain clear, detailed, or specific rules that could be implemented in domestic legislation in a straightforward manner. In contrast with the generality of framework conventions, the protocols or other legal instruments developed within their regime, as well as decisions adopted by the decision-making bodies established by the regime, typically provide rules and mechanisms that are very specific.[81]

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[75] Koskenniemi, "International Law", supra, note 54; Immanuel Kant, *The Critique of Pure Reason* (1781), available at: http://ebooks.adelaide.edu.au/k/kant/immanuel/k16p/part1.2.html (last accessed on 22 February 2012).

[76] See discussion in Jekwu Ikeme, "Equity, Environmental Justice and Sustainability: Incomplete Approaches in Climate Change Politics", 13 *Global Environmental Change* (2003), 195.

[77] See Frtitz W. Scharpf, *Governing in Europe: Effective and Democratic?* (New York: Oxford University Press, 1999); Robyn Eckersley, "Ambushed: The Kyoto Protocol, the Bush Administration's Climate Policy and the Erosion of Legitimacy", 44 *International Politics* (2007), 308.

[78] See also Eckersley, "Ambushed: The Kyoto Protocol", supra, note 78.

[79] Shelton, "Introduction", supra, note 19.

[80] See supra, notes 10, 11 and 12.

[81] See for example Yamin and Depledge, *The International Climate Change Regime*, supra, note 9.

As is well illustrated by the legalization approach, international agreements are very varied rather than a dichotomy of two categories with different forms. Consequently, the term soft law can also be used to refer to soft provisions in "hard law" instruments. Abbott and Snidal elaborate on how states can limit their legal obligation through "hortatory language, exceptions, reservations and the like".[82] In practice, the soft provisions mean vague and flexible formulations in treaty texts, such as mandating a party to take "such actions as it deems necessary"[83] or to act in a certain manner "as appropriate".[84] These types of provisions are also referred to as "escape clauses",[85] or more to the point, "non-decisions",[86] or "elements of non-commitment in commitment".[87] Soft provisions in treaties exist parallel to hard ones, but their vagueness leaves it up to states to decide how to implement the provision. In spite of their vagueness, the principle of *pacta sunt servanda* applies and a treaty remains "binding" on paper, even if the chances of actual effective implementation of the provision in question are reduced by the generality of the obligation.

Soft law can bring parties to the negotiation table – under a framework convention – and involve parties in a process that leads to harder international obligations in the future.[88] From this dynamic viewpoint, the soft provisions within a regime are left open for future negotiations. Regime critics have also raised this issue in order to point out the respective lack of formalism in contemporary treaties. To agree on a framework convention is, in practice, also to agree to continuous negotiations, contextual deal striking, and bargaining of experts; and as laws do not spell out the conditions of their application in their entity, the management of a regime will have to take place by open-ended standards.[89]

Constructivist-oriented scholars tend to view the framework convention approach positively, claiming that it may catalyze the dialogic process of norm-building.[90] Rationalists do not take a stand on whether this is the case, but conclude that the framework convention approach is fruitful at least in cases of technical uncertainty, where states can facilitate information generation and common understanding via

[82] Kenneth Abbott and Duncan Snidal, "Pathways to Cooperation", in Eyal Benvenisti and Moshe Hirsch (eds), *The Impact of International Law on International Cooperation: Theoretical Perspectives* (Cambridge: Cambridge University Press, 2004), at 50.

[83] Article 5, North Atlantic Treaty Organization, Washington, 4 April 1949, in force 24 August 1949, 34 *United Nations Treaty Series,* 243.

[84] Article 4.5, UNFCCC, supra, note 12.

[85] Lavanya Rajamani, "From Berlin to Bali and Beyond: Killing Kyoto Softly?", 57 *International and Comparative Law Quarterly* (2008), 909.

[86] Joyeeta Gupta, *The Climate Change Convention and Developing Countries: From Conflict to Consensus?* (Dordrecht: Kluwer Academic Publishers, 1997), 249.

[87] Michael Glennon, *Constitutional Diplomacy* (Princeton: Princeton University Press, 1990).

[88] Jutta Brunnée and Stephen Toope, "Environmental Security and Freshwater Resources: Ecosystem Regime Building", 91 *The American Journal of International Law* (1997).

[89] Koskenniemi, "International Law", supra, note 54, paragraph 15 and paragraph 25.

[90] Trubek et al., "soft Law, Hard Law, and EU Integration", supra, note 25; Braithwaite & Drahos, *Global Business Regulation*; Brunnée and Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010).

clarified costs and benefits.[91] The ozone regime – the Vienna Convention and its Montreal Protocol – has served as a positive example for scholars from both paradigms, both for norm internalization and monitoring, as well as cooperative research, transparency and information exchange.

The main legal-political challenge is agreeing on whether normative principles and rules are overlapping or not – does a Conference of the Parties decision or a protocol "change" or "operationalize" the framework convention? This is the delicate balancing act that the negotiations within a framework convention call for. As noted already in the 1980s by Krasner, changes in rules and decision-making procedures are "changes *within* the regime, provided the principles and norms are unaltered, whereas changes in principles and norms are changes *of* the regime".[92] There is a dynamic approach built into the regimes as the substantive obligations can change along the way, based on the progress of the negotiations as well as input from external processes, such as increased scientific insights into the problem that needs to be addressed, or, at least ideally, changes in the respective responsibilities and capabilities of states to address the problem. Sometimes the uncertainties related to the operationalization are also used cynically to slow down the negotiations. There are cases in which parties assume positions that are contradictory to the basic understanding of a system of negotiating a protocol and decisions on the basis of a framework convention.[93]

International law is also influenced by horizontal interaction between hard law and soft law.[94] The commonplace viewpoint of the literature is that hard and soft law act as complements, that hard law can generate secondary or delegated soft law,[95] or that hard law linkages can indirectly harden soft law.[96] The complementary assumption has also been claimed to be biased, as Shaffer and Pollack conclude that "the scholarship has failed to address how, when and why hard law and soft law operate as antagonists".[97] Their viewpoint is not completely original, however, as some earlier literature already suggests that emerging principles of soft law can soften existing

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[91] Abbott and Snidal, "Hard and Soft Law", supra, note 7; Shaffer and Pollack, "Hard Law vs. Soft Law", supra, note 6.

[92] Stephen Krasner, *International Regimes* (Ithaca, NY: Cornell University Press, 1983), at 3.

[93] See Antto Vihma, "India and the Global Climate Governance: Between Principles and Pragmatism", 20 *Journal of Environment & Development* (2011), 69.

[94] The vertical interaction between levels of governance is also a case in point. The vertical dynamics include international soft law, which can "harden" at lower levels of governance; for example, when a principle from a soft international declaration is elaborated into a more binding instrument nationally or regionally. See, for example, Jeremy Wates, "The Aarhus Convention: A Driving Force for Environmental Democracy", 2 *The Journal for European & Environmental Planning Law* (2005).

[95] Chinkin, "Normative Development in the International Legal System", supra, note 17.

[96] Sylvia Karlsson, Multilayered Governance: Pesticides in the South – Environmental Concerns in a *Globalised World* (Linköping: Linköping University, 2000).

[97] Shaffer and Pollack, "Hard Law vs. Soft Law", supra, note 6, at 2.

hard law by undermining its legitimacy.[98] Although not framed in soft law-hard law terminology, the environmental regime theory is also well informed of the possible antagonist relationship between different international legal arrangements.[99]

In the world of climate governance it seems reasonable to assume that the multitude of climate governance arrangements is not simply a somewhat uncoordinated group of peacefully co-existing institutional processes – instead, these elements might be used to create overlaps and to interact with intentional synergetic or disruptive consequences.[100] The latter is the case if the institutional overlaps result from deliberative efforts of interested parties to pursue their own objectives by creating competitive arenas, and/or opening up opportunities for strategic behaviour for those who have less interest in the problem.[101] Based on these premises, the multitude of processes in global climate governance calls for analysis of the positions of relevant actors and mechanisms through which the influence could occur, perhaps in the footsteps of the insightful analysis by Shaffer and Pollack. Such work on the interaction between soft and hard law is, however, beyond the scope of this essay.[102]

7.2.4 Legalization Insights to the Climate Regime

The legalization approach emphasizes the benefits and costs of different legal characteristics and thus a rationalist perspective. But clearly law also engages normative considerations. It requires commitment to a background set of legal norms – the "engagement in established legal processes and discourse"[103] or "the practice of legality"[104] – and provides opportunities for parties to epitomize normative values. Normative processes and interests enable laws to be effective, and also constrain the success of law. The key message of Abbott and Snidal is that the form and content of international laws are parts of the same package, the muscle of international law, into which the legalization continuum – with its variables of obligation, precision and delegation – offers an insightful analytical approach. Several other approaches are suggested to categorize between different types of law in the policy literature,

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[98] Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 38 *International and Comparative Law Quarterly* (1989), 850.

[99] See for example Frank Biermann et al., "The Fragmentation of Global Governance Architectures: A Framework for Analysis", 9 *Global Environmental Politics* (2009), 14; Sebastian Oberthür and Thomas Gehring (eds), *Institutional Interaction in Global Environmental Governance* (Cambridge: The MIT Press, 2006); Young, *The Institutional Dimensions*, supra, note 49.

[100] Biermann et al., "The Fragmentation of Global Governance Architectures", supra, note 100.

[101] Young, *The Institutional Dimensions*, supra, note 49, at 112–113.

[102] See, for instance, the chapter by Camilla Bausch and Michael Mehling in this volume.

[103] Abbott and Snidal, "Hard and Soft Law", supra, note 7, at 425.

[104] Brunnée and Toope, "Legitimacy and Legality", supra, note 91.

such as "top-down vs. bottom-up" and "pledge-and-review vs. targets-and-timetables".[105] These approaches, however, run a notable risk of being misleading. First, in the policy discourse of the UN climate regime, "pledge-and-review" is usually used to imply a very soft architecture.[106] However, reviewing policies, pledges, targets or obligations is actually an ambitious task for international law. The UN climate regime itself illustrates that many countries are extremely sensitive about allowing such measures to be taken.[107] Second, "top-down" architecture, on the other hand, risks sounding idealistic and lacking credibility in the community of practitioners. It suggests that the international community would be able to agree on the needed aggregate amount of emissions reductions and then divide the pie to different parties via negotiations. This picture is far from the reality of policy making, where countries' emissions targets are adopted "bottom-up", agreed upon by the domestic constituencies, and then communicated to the international arenas. The role of international negotiations considering ambition is not irrelevant but more subtle than "top-down" – it is to provide a framework of reference for the domestic politics of emissions reductions. Examples of this include the collective sense of the level of effort in Kyoto negotiations, and the 2° target and 450/550 pm targets discussed and debated in various international fora in recent years.

So what type of insights can the legalization approach give to the contemporary developments in the climate regime? The decision on legal form was one of the main political struggles in Durban COP-17. The conference resulted in Parties launching a process titled "The Durban Platform on Enhanced Action" to negotiate "a Protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all".[108] The negotiations are scheduled to adopt a decision in 2015 and implement it from 2020 onwards. The compromise language "agreed outcome with legal force" cobbled together by US and Brazilian negotiators to solve a political stand-off between the EU and India does not reflexively signal a ratifiable instrument.[109] However, it makes a ratifiable treaty the most likely and widely expected form of the outcome for the post-2020 period.[110]

As suggested by the legalization continuum, the ratifiable versus non-ratifiable form should not be the only criterion when evaluating the legal dimension of the UN

[105] For a very recent example see Daniel Bodansky, "A Tale of Two Architectures: The Once and Future UN Climate Regime", available at http://ssrn.com/abstract=1773865 (last accessed on 22 February 2012).

[106] See for example "Greenpeace Guide to Kyoto, Bali, APEC, the G8 and Major Emitters Meeting", Greenpeace Briefing, available at: http://www.greenpeace.org/usa/Global/usa/report/2007/11/greenpeace-guide-to-kyoto-bal.pdf (last accessed on 22 February 2012).

[107] These difficulties are featured, for example, in Vihma, "India and the Global Climate Governance", supra, note 94.

[108] Decision 1/17.CP, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UNFCCC, UN Doc. FCCC/CP/2011/9/Add.1, 15 March 2012, available at: http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf (last accessed on 22 February 2012).

[109] Rajamani, "Deconstructing Durban", *Indian Express*, 15 December 2011.

[110] Rajamani, "Deconstructing Durban", *Indian Express*, 15 December 2011.

climate regime. Building on the analysis of Rajamani, there are at least two broader tendencies that are traceable at least from Bali COP-13 onwards, namely i) softer *obligation* and less *delegation* on developed country commitments and ii) harder *obligation, delegation* and *precision* on major developing country reporting and transparency. These tendencies are determining the parameters of the 2012–2020 climate regime and may well be a strong influence from 2020 onwards as well. Moreover, even if the legal form becomes "hard" as in a ratifiable treaty for the post-2020, the character of the commitments for developed countries is likely to be softer than under KP and their form more self-selected.

First, the move towards a soft law approach in the post-2012 era for developed countries not parties to the second commitment period of the Kyoto Protocol is quite evident if we use the Kyoto Protocol itself as a yardstick. There is no facilitative or punitive compliance mechanism on the Convention track of the Bali Action Plan. The mitigation by developed countries will be subject to International Assessment and Review (IAR) procedures,[111] but the scope of the "assessment" is unclear, namely whether the assessment concern the adequacy of data, adequacy of targets, or adequacy of performance.[112] In comparison with the Kyoto Protocol's architecture,[113] the Convention track is softer than the KP in all aspects of the legalization continuum.

The evolution towards soft law has also taken place *within* the Convention track since the Bali meeting in 2007, as pointed out by Rajamani.[114] The Cancún and Durban decisions use the language of "targets" instead of "commitments" like the Bali Action Plan,[115] and similarly they "promote comparability" instead of "ensuring comparability".[116] Furthermore, the Cancún and Durban outcomes essentially re-emphasize the pledges countries submitted under the Copenhagen Accord, but do this in a non-legal manner, by "taking note" of these pledges, collected in an information document.[117] The main point is not that the pledges are nationally determined and then submitted to the international sphere – many would say that also

[111] Decision 1/CP.17, supra, note 109.

[112] Rajamani, "Deconstructing Durban", *Indian Express*, 15 December 2011.

[113] Articles 5, 7 and 8, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997, in force 16 February 2005, 37 *International Legal Materials* (1998), 22.

[114] Rajamani, "From Berlin to Bali and Beyond", supra, note 86; Rajamani, "The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves", 60 *International and Comparative Law Quarterly* (2011), 499.

[115] Decision 1/CP.16, The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UNFCCC, UN Doc. FCCC/CP/2010/7/Add.1, 15 March 2011, paragraphs 36–38; Decision 1/CP.13, The Bali Action Plan, UNFCCC, UN Doc. FCCC/CP/2007/6/Add.1, 14 March 2007, paragraph 1 (b) (i).

[116] Decision 1/CP.16, supra, note 116, paragraph 44; decision 1/CP.13, supra, note 116, paragraph 1 (b) (i).

[117] Information documents have no legal status in the process, but are commonly used for example as a way to distribute the list of participants.

the Kyoto commitments were in essence nationally determined and in that way "bottom-up" as noted above – but that these pledges have different conditions, base years and caveats.[118] They are thus lacking common accounting and comparability metrics.

Second, the mitigation actions of developing countries are internationalized through increased reporting requirements and a process of International Consultation and Analysis (ICA). Although ICA is to be conducted "in a manner that is non-intrusive, non-punitive and respectful of national sovereignty",[119] it is a significant development on the Convention track, and has been subject to notable political controversy, both in the UNFCCC negotiations as well as in the national sphere of major developing countries, for example in the Indian Parliament.[120] Since the launch of the UN climate regime the developing countries have faced virtually no transparency requirements with any degree of international delegation: the National Communications have not been regular, they have not been designed in accordance with international guidelines, and they have been allowed to use ancient data. Comparing this long time *status quo* to the biennial reporting with 4 years old data and an ICA procedure, all envisioned in the Cancún and Durban decisions, shows a significant step forward in the hardness of the 2012–2020 climate regime.

While agreeing to the main conclusions of Rajamani, it seems that in some parts of her analysis, the formal and political meanings of "developing countries" overlap slightly. Formally, as is well known, there is very little differentiation among the developing countries (non-Annex I countries) in the climate regime. From this perspective it is plausible to conclude growing parallelism among developed and developing countries. Politically, however, the pressure for parallelism in reporting and legal form has not been on "developing countries" but on certain major economies, China ahead of others. Secondly, Rajamani takes a firm stand that in Bali the (major) developing countries agreed only to measure, report and verify internationally supported actions. However, most developed countries had an interpretation of the Bali Action Plan that the transparency requirements covered also unsupported domestic actions.[121] At least the paragraph in question has been open to different interpretations and quite a lot of political controversy, as witnessed already in the Bali final plenary, where India inserted a carefully placed comma to the text and South Africa clarified their interpretation of the text to overcome objections from the US.[122]

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[118] See, for example, submissions from the US, available at: http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/unitedstatescphaccord_app.1.pdf (last accessed on 22 February 2012).

[119] Decision 1/CP.16, supra, note 116, paragraph 63.

[120] For example Lokh Sabha of the Indian Parliament, 21 December 2009 (transcript on file with author).

[121] Decision 1/CP.13, supra, note 116, Article 1 b (ii).

[122] Bali COP-13, final plenary, 15 December 2007.

7.3 Discussion and Conclusions

Crafting legal arrangements is a central tool in global governance, whether we look into the issue areas of trade, security, human rights, or the environment. The types of norms that have been generated during the past decades have very different legal characteristics. The aim of this essay is not to have the final word on the strengths and weaknesses of hard and soft law, but to suggest a way for further analysis that would be academically rigorous as well as politically relevant.

The law that is designed as an instrument of global governance can be placed on a continuum from ideal hard law – precise and legally binding treaties with delegated enforcement bodies – to the softest of soft law, with its vague, aspirational goals and little or no institutionalized follow-up. The legalization continuum, I argue, is a more insightful starting point for analyzing international agreements than "bottom-up" vs. "top-down" or "pledge-and-review" vs. "targets-and-timetables" that are often suggested by reports and policy papers.

To date, little work has been done on combining constructivist and rationalist paradigms in the analysis of hard and soft law,[123] although there seems to be considerable value in incorporating arguments from both paradigms into the research framework. I argue that we should remain agnostic as to which theoretical camp most accurately captures the true nature of hard and soft law and their relevant qualities, and approach the question on a contextual basis. In sum, different legal characteristics have advantages and drawbacks in different contexts, whether framed in rationalist or constructivist terms. The qualities of global hard and soft law are largely based on specific, political and functional questions, such as the North–south politics, the domestic/foreign policy interface, and the institutional interaction. It seems that the issues of legal character, effectiveness and legitimacy cannot and should not be solved in an abstract or general way. This echoes the views of Young, King and Schroeder, who summarized the literature on environmental regimes and recommended a "diagnostic approach" to designing specific institutions rather than "a search for design principles or generalizations" applicable to the full range of international environmental agreements.[124] The debate should be firmly grounded in the context of a particular policy domain, its incentives, discourses and operational capacities. An almost inescapable context for the effectiveness and legitimacy of global environmental governance is, however, the North–south politics, which have received relatively scant attention in some more theoretical analyses of global law and its implications.

The UN climate negotiations can be framed as efforts to operationalize the soft law of the framework convention into decisions or legal instruments, with a greater degree of obligation, precision, and delegation. From this legalization perspective there indeed seems to be a notable drive towards soft law within the climate

[123] Trubek et al., "Soft Law, Hard Law, and EU Integration", supra, note 25.

[124] Young et al., "Institutions and Environmental Change", supra, note 51, at 3.

change regime. This is not only due to the form of the agreement that is relying on COP-decisions that "take note" of parties' actions and not a ratifiable protocol, but to the broader tendency towards less obligation, precision and delegation for developed country parties in mitigation. However, there is another broad tendency, which is scaling up the transparency requirements of (major) developing countries. For the first time a delegated and precise reporting system is being agreed upon, and although the first report is framed in voluntary terms, this is not a minor development. The legal form of the post-2020 agreement is likely to continue to draw the big headlines, but in the meantime, the UN regime is becoming "harder" by providing greater transparency of climate actions of all major economies. The caveat is that while mitigation commitments and transparency are central issues in the climate negotiations, they do not paint a complete picture of the regime. Alongside them there are many other interesting developments, including Parties' commitments in long-term financing and the evolution of technology, adaptation and REDD+ mechanisms. There are signs of a process of stronger institutionalization and hence delegation in these areas, with new decision making bodies with a mandate from the COP and limited membership. Simultaneously, the common design standards are lacking in market mechanisms and, above all, the commitments that generate demand for credits. There remains a need to look closer into these specific issue areas, as well as the regime functions as a whole.

In the context of growing parallelism, I would be tempted to argue that a trade-off between hard law characteristics and effectiveness of the regime may well be present. The political context of parallelism and the drive towards "hard law" outcomes will make states hyper-cautious about what they commit to, potentially leading to decreased ambition, and possibly, an absence of a major player such as the US or China or Russia. This is especially the case where the legal form of the obligation is concerned, but may well surface also with more innocent attempts to delegate authority away from parties to the international sphere.

One suggestion to unravel the complex dynamic of effectiveness and legitimacy is to focus on enhanced decision-making in the UNFCCC.[125] The legal vacuum of unadopted Rules of Procedure and pushing the limits of "consensus" do not seem like sustainable strategies.[126] The idea of voting has recently been floated by several scholars.[127] This is often justified by highlighting the problems of a consensus-based decision-making structure: "*Moving the climate change agenda forward multilaterally among 195 parties to the UNFCCC is proving to be a serious challenge [...] The turn today toward a multipolar world indicates that approaches based on consensus*

[125] Antto Vihma and Kati Kulovesi, "Strengthening the Global Climate Change Negotiations", *Nordic Council of Ministers Working Paper* (forthcoming, 2012).

[126] Vihma, "Climate of Consensus", supra, note 15.

[127] "One of the core findings of our research program is that the current consensus principle as it is being implemented in the climate negotiation, but also in many other international environmental negotiations, is obsolete." Professor Frank Biermann, interview with Deutsche Welle 27 March 2012, available at: http://www.dw.de/dw/article/0,,15840057,00.html (last accessed on 25 May 2012).

are unlikely to produce results".[128] While procedural reforms do not offer "low hanging fruits" in the short term, strengthening the basis of decision-making for the future of global climate governance would be a productive exercise that could, in time, contribute to a positive cycle of increased legitimacy and effectiveness.

In general, the constructivist point of view does not see hard law, or credible compliance and enforcement systems, as key motivators for states in international regimes, as measuring the utilitarian value of compliance and non-compliance is not the central issue. For rationalists, regimes as "information providers" have been a centrepiece for research,[129] as compliance mechanisms in a broader sense begin with observability. More empirical research is needed on which functions can be effectively covered with soft law and which would require a hard law approach. These insights would, in turn, feed back into the more theoretical debates between rationalists, constructivists and the critical formalist scholars.

In Koskenniemi's view, the practice-oriented approach and emphasis on the contextual – as argued for in this essay – can turn international law into an apologist deference to power. In his work, "apology" has at least two distinct meanings, namely referring to international law as being descriptive of what states do, and international law as reflecting the wishes or values of its subjects (which might not be "good").[130] From the viewpoint of this essay, which is more open to rationalist argumentation than Koskenniemi's deconstruction, only the first is a concern. It is, in essence, the classic realist challenge. Future research would duly benefit from answering the call by examining international agreements with a legalization approach, from a broad and practice-oriented perspective.

[128] Rafael Leal-Arcas, "Top-Down versus Bottom-Up Approaches for Climate Change Negotiations: An Analysis", 6 *IUP Journal of Governance and Public Policy 6* (2011).

[129] Many scholars have discussed these issues, see for example Xinuan Dai, *International Institutions and National Policies* (Cambridge: Cambridge University Press, 2007).

[130] Notably, the classic critique presented by Koskenniemi is not only about international law being apologetic, but about being caught between the destructive dynamics of apology and utopia. See Koskenniemi, *From Apology to Utopia*, supra, note 69.