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Hard and Soft Law in the Paris Climate Agreement

Abstract

This paper examines the effectiveness of contractual, facilitative, and hybrid legal models in international climate agreements from the U.N. Framework Convention on Climate Change (1992) to the Paris Climate Agreement (2015). It begins with a review of the balance between hard and soft treaty law in international environmental treaties prior to the Paris Climate Agreement with an eye for how this translated into effectiveness in terms of compelling states to lower greenhouse gas emissions. It then investigates the structure and effectiveness of the Paris Climate Agreement, taking into account global political realities and limitations for international environmental law. The product of this investigation is an argument in favor of Paris's hybrid model utilizing both soft and hard treaty law in order to prioritize participation while maintaining an enforcement regime and state-level emissions-reduction obligations.

Keywords

International environmental law, Paris Climate Agreement, climate change, Kyoto Protocol, UNFCCC, treaty law, customary law

Disciplines

Environmental Policy | Environmental Sciences | Public Affairs, Public Policy and Public Administration

Comments

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International Law
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Hard and Soft Law in the Paris Climate Agreement

Introduction

As environmental science becomes increasingly explicit and exigent in its assessment of the threat of climate change, the international legal system has been challenged to adapt and confront state-level carbon emissions. This evolution towards a system of international institutions producing policy according to environmental developments has been described as ecosystemic or ecological reflexivity, and it is an essential principle in producing an international legal framework that can effectively combat the climate crisis.[1] Ecological reflexivity consists of *recognition* of environmental reality, *rethinking* the social relationship with the environment, and *responding* to environmental changes through policy and the law.[2] Any effective international climate framework must be built on these principles, and because of the international challenge posed by climate change, as many state actors must be involved as possible.

The drive to combat climate change within the international system has primarily taken the form of treaty law as a means to compel states to construct domestic environmental policy. This treaty regime has gradually developed into a hybrid legal system—including both hard and soft law—to walk the fine line between enforcement, increasing obligations to reduce emissions, and broadening international participation. A hybrid legal model attempts to solve a problem at the heart of treaty *effectiveness*, which, according to Bodansky, is defined by "the stringency of

[1] John S. Dryzek, "Institutions for the Anthropocene: Governance in a Changing Earth System," *British Journal of Political Science* 46, no. 4 (October 2016): 937–56, https://doi.org/10.1017/S0007123414000453.
[2] Jonathan Pickering, "Ecological reflexivity: characterising an elusive virtue for governance in the Anthropocene," *Environmental Politics* 28, no. 7 (2019): 1145–1166, https://doi.org/10.1080/09644016.2018.1487148.

its commitments, [...] the levels of participation, and compliance by states."[3] Effectiveness is challenged by the conflict between stringency and participation because as stringency increases, fewer states are willing to participate—and vice versa. There are two primary solutions to this conflict: a *contractual model* and a *facilitative model*, which approach the use of hard and soft law in opposing ways.[4]

History from the UNFCCC to Paris

International environmental law first addressed climate change in the United Nations Framework Convention on Climate Change (UNFCCC), which was negotiated in Rio de Janeiro, Brazil in 1992 and came into effect in 1994.[5] The UNFCCC was established following the negotiation of the Montreal Protocol in 1987, which was the first substantial international treaty on the environment, though it did not focus on climate change (instead, it focused on the depletion of the ozone layer).[6] The UNFCCC's main contribution to international environmental law was that it acted as a foundation from which to negotiate the Kyoto Protocol, following the 1995 Conference of the Parties (COP) of the UNFCCC in Berlin.[7] Rather than establishing binding (hard law) emissions standards and goals for states party, it sets an international objective: the "stabilization of greenhouse gas concentrations in the atmosphere at a level that

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[3] Daniel Bodansky, "The Durban Platform: Issues and Options for a 2015 Agreement," *Center for Climate and Energy Solutions* (December 2012): 2, https://ssrn.com/abstract=2270336.
[4] Ibid.
[5] "What is the United Nations Framework Convention on Climate Change?" United Nations Climate Change, accessed April 25, 2021, https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change.
[6] "The Montreal Protocol on Substances That Deplete the Ozone Layer," U.S. Department of State, accessed April 25, 2021, https://www.state.gov/key-topics-office-of-environmental-quality-and-transboundary-issues/the-montreal-protocol-on-substances-that-deplete-the-ozone-layer/.
[7] Jonathan Pickering, Jeffrey S. McGhee, Sylvia I. Karlsson-Vinkhuyzen, and Joseph Wenta, "Global Climate Governance Between Hard and Soft Law: Can the Paris Agreement's 'Crème Brûlée' Approach Enhance Ecological Reflexivity?" *Journal of Environmental Law* 31, no. 1 (March 2019): 11, https://doi.org/10.1093/jel/eqy018.

would prevent dangerous anthropogenic interference with the climate system."[8] Additionally, it established the principle of "common but differentiated responsibilities and respective capabilities," which played an important role in the delegation of obligations in the Kyoto Protocol.[9] In short, the UNFCCC acted as a "heavily qualified, non-binding quasi-target" for reducing greenhouse gas emissions.[10]

Following the widespread adoption of the UNFCCC, the Kyoto Protocol in 1997 sought to establish the first effective emissions-reducing regime.[11] The Kyoto Protocol attempted to accomplish this primarily by employing hard law through a contractual model, meaning that it prioritized stringency and compliance at the cost of participation.[12] It put the burden on developed countries ("Annex I") to reduce emissions and set clear mandates of obligation on states party.[13] This approach failed to incentivize "non-Annex I" states to reduce their emissions, essentially letting some countries with high emissions off the hook, such as India and China.[14] Furthermore, the lack of accountability for high emissions developing (non-Annex I) countries dissuaded developed countries, such as the United States, from participating in the Kyoto Protocol, as they believed it would unfairly restrict their industry in competition with developing countries' industries.[15] As a result of the Kyoto Protocol's employment of the principle of "common but differentiated responsibilities," participation was low among both Annex I and

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[8] Ibid, 13; UN Framework Convention on Climate Change (adopted May 9, 1992, entered into force March 21, 1994) 1771 UNTS 107 (UNFCCC), Article 2, 9 https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.
[9] UNFCCC, 2.
[10] Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford: Oxford University Press, 2017), 104.
[11] Kayla Clark, "The Paris Agreement: Its Role in International Law and American Jurisprudence," *Notre Dame Journal of International & Comparative Law* 8, no. 2 (May 10, 2018): 109, https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1090&context=ndjicl.
[12] Bodansky, "The Durban Platform," 2.
[13] Clark, "The Paris Agreement," 110.
[14] Alexandre Durand, "Common Responsibility: The Failure of Kyoto," *Harvard International Review* 34, no. 1 (2012): 8–9, https://search.proquest.com/docview/1524709469/fulltext/D4A69A94C50E4160PQ/1?accountid=2694.
[15] Clark, "The Paris Agreement," 111.

non-Annex I states, lowering the effectiveness of the treaty's stringent obligations as few countries agreed to abide by them: according to Clark, "without China and India, and later the United States, the treaty only accounted for thirty percent of global emissions."[16] Only 83 states party ratified the Kyoto Protocol, in contrast to the 2015 Paris Climate Agreement's 197 states party.[17]

Moving past the failure of the Kyoto Protocol, global leaders directed their attention to the annual COP meetings, established by the UNFCCC, as opportunities to pursue a more effective climate treaty. The 2009 COP meeting in Copenhagen (COP 15) produced the "Copenhagen Accord," which, while failing to produce a formal treaty with numerous states party, functioned as an understanding and basic agreement on emissions between China, India, and the U.S.[18] Copenhagen's "pledge and review" model, which for the first time compelled China and India to move beyond their status as non-Annex I countries under Kyoto and participate in emissions reduction, was strengthened the following year at COP 16 in Cancún.[19] Agreements at the COP in Copenhagen and Cancún, learning from the failure of the Kyoto Protocol, eliminated the Annex I/non-Annex I system, treating developing and developed countries the same in the spirit of increasing participation across the board.[20] Additionally, Copenhagen/Cancún ended the utilization of contractual models in international climate treaties, focusing instead on the potential of facilitative models, which are less stringent and prioritize compliance and participation.[21]

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[16] Ibid.
[17] Ibid, 112.
[18] Ibid, 113.
[19] Pickering, McGhee, Karlsson-Vinkhuyzen, and Wenta, "Global Climate Governance," 12.
[20] Clark, "The Paris Agreement," 113.
[21] Jeffrey McGhee and Jens Steffek, "The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law," *Journal of Environmental Law* 28, no. 1 (March 2016): 37–63, https://doi.org/10.1093/jel/eqw003.

In 2011, the Durban Mandate was negotiated, setting the framework for a new international climate treaty in the mold of the Kyoto Protocol, but with a facilitative model based on soft law.[22] Leading up to the Paris Climate Agreement, which the Durban Mandate preceded, many European, African, and island nations argued for a legally binding treaty, predicated on hard law, while some developing nations such as India countered by supporting a soft law approach.[23] This debate was limited by the political reality in the U.S., as any hard law-based treaty would have to clear a two-thirds vote in the Senate—which was essentially impossible, as Democrats were far short of a 67-vote majority.[24] As such, a soft law or hybrid approach was likely going into the 2015 Paris Climate Agreement negotiations.

The Paris Climate Agreement

The Paris Climate Agreement in its final form is the most effective piece of international environmental treaty law in history, with near-universal state participation, a clear objective for global emissions reductions, and a transparent reporting structure with nation-specific environmental goals.[25] Similar to the Kyoto Protocol's hard law, Annex I/non-Annex I approach, the Paris Climate Agreement has a hard law component in the form of its binding overall objective and its requirement for countries to transparently report their adherence to the treaty's emissions mandates.[26] The Paris Climate Agreement, however, broke from an entirely hard law-based philosophy as it has a substantial soft law component: emissions targets by country are

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[22] Peter Lawrence and Daryl Wong, "Soft law in the Paris Climate Agreement: Strength or weakness?" *Review of European, Comparative & International Environmental Law* 26, no. 3 (November 28, 2017): 278–9, https://doi.org/10.1111/reel.12210.
[23] Ibid, 279.
[24] Ibid.
[25] Paris Agreement to the United Nations Framework Convention on Climate Change (adopted December 12, 2015, entered into force November 4, 2016) (Paris Climate Agreement), https://unfccc.int/sites/default/files/english_paris_agreement.pdf.
[26] Pickering, McGhee, Karlsson-Vinkhuyzen, and Wenta, "Global Climate Governance," 12.

not enforced, and the language in the treaty governing both the global climate objective and individual countries' required contributions toward that objective is sufficiently vague to essentially leave it up to states party to uphold the treaty through their political will.[27]

Hard and Soft Law in Paris

Before the Paris Climate Agreement, international treaties and agreements had attempted to establish a collective target in terms of an increase in global temperature that staying below would prevent substantial long-term damage from climate change. The Kyoto Protocol could not institute such a standard, aiming instead at the aggregate temperature rise based on the contributions of individual states.[28] The later Doha Amendment to the Kyoto Protocol was more successful, establishing "an 18% reduction in greenhouse gas emissions below 1990 levels by 2020."[29] The consequences of the failures of international climate agreements before Paris are severe, particularly as a result of failing to establish a scientifically-based global temperature objective: before the Copenhagen Agreement, and with only the Kyoto Protocol, global temperatures may have risen 3.5–4.5℃ by 2100.[30] Furthermore, by the beginning of the Paris Climate Agreement negotiations in 2015, global temperatures were predicted to rise 2.6–3.1℃.[31]

The Paris Climate Agreement set the goal of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."[32] Additionally, this language is

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[27] Ibid.
[28] Joanna Depledge, "Tracing the Origins of the Kyoto Protocol: an Article-by-Article Textual History," *UNFCCC*, November 25, 2000, https://unfccc.int/documents/1880.
[29] Pickering, McGhee, Karlsson-Vinkhuyzen, and Wenta, "Global Climate Governance," 22.
[30] Joeri Rogelj, et al. "Paris Agreement climate proposals need a boost to keep warming well below 2 °C," *Nature* 534 (2016): 631–639, https://www.nature.com/articles/nature18307.pdf.
[31] Ibid; Pickering, McGhee, Karlsson-Vinkhuyzen, and Wenta, "Global Climate Governance," 17.
[32] Paris Agreement, Article 2(1a).

binding, as it is in the hard law portion of the agreement, meaning that all states party must be in line with the overall objective of the treaty to some extent. This language is unique in international climate law in that it is somewhat based on scientifically determined emissions reduction goals; however, because of the political reality of mandating emissions reductions, it falls slightly short of the threshold touted by most scientists.

Treaty hard law acts at a similar level to federal law in most countries, according to the Vienna Convention on Treaties;[33] this includes the U.S., even though it is not a state party to the Vienna Convention, because the U.S. Supreme Court has ruled that international law should be treated as binding on domestic affairs.[34] The binding nature of the global temperature rise goal has manifested in state-level and localized judiciaries, where environmental interests now have legal-grounding for litigation hoping to reduce emissions: "the [Paris] Agreement's mitigation framework, including the Nationally Determined Contributions (NDCs), mid- and long-term goals and the temperature targets, provides a policy and factual benchmark against which courts are evaluating government or private sector actions."[35] As such, the Paris Climate Agreement has been cited in state-level and localized litigation in countries including New Zealand, Ireland, South Africa, Australia, Poland, the Netherlands, Colombia, Switzerland, and the U.S., with many of these cases holding states to account for their adherence to their Paris obligations (or lack thereof).[36]

The other portion of the treaty that is binding is the requirement for all states party to establish "nationally determined contribution" (NDCs) defining mandated reductions in

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[33] Vienna Convention on the Law of Treaties (adopted May 23, 1969, entered into force January 27, 1980) 1155 UNTS 331 (Vienna Convention), https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf.
[34] Clark, "The Paris Agreement," 125.
[35] David Hunter, Wenhui Ji, and Jenna Ruddock, "The Paris Agreement and Global Climate Litigation after the Trump Withdrawal," *Maryland Journal of International Law* 34, no. 1 (2019): 225–6, https://digitalcommons.law.umaryland.edu/mjil/vol34/iss1/9.
[36] Ibid, 229–240.

emissions by country.[37] The binding nature of the NDCs manifests in each country establishing their own emissions goal and communicating their progress in achieving their goal; however, states party are not bound to "meet the requirements of the NDC" that they set for themselves.[38] Additionally, because states control their own goals, they also control the ambition of their goals, and there is the potential (which has very much been realized) for dramatic disparities in how closely states adhere to their NDCs in practice.[39] This possible disparity reveals another problem with NDCs: the system maintains to a limited extent the problem of differentiation in the Kyoto Protocol by preserving the principle of common but differentiated responsibilities.[40] However, this problem is much less exigent than it was during the Kyoto Protocol negotiations, as the binding portion of the NDCs heightens the obligations for developing countries towards an equal responsibility with developed countries. The political issue has also slightly lessened since 1997, with India and China more willing to shoulder their responsibility in global greenhouse gas emissions reductions.

NDCs, because of their reliance on state initiative to be effective in the aggregate, have the potential to fall short of the overall goals of the Paris Climate Agreement. In fact, the "emissions gap" between current predictions for global temperature rise under Paris and necessary global temperature rise in order to avoid the worst consequences of climate change is currently startlingly high, with NDCs set to reduce emissions by only one-third of the requisite amount.[41]

Finally, the review provisions of the Paris Climate Agreement are also binding, acting as the primary enforcement and accountability mechanism. Article 13 of the Paris Climate

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[37] Paris Agreement, Article 4(2).
[38] Lawrence and Wong, "Soft Law in the Paris Climate Agreement," 280.
[39] Pickering, McGhee, Karlsson-Vinkhuyzen, and Wenta, "Global Climate Governance," 14.
[40] Lawrence and Wong, "Soft Law in the Paris Climate Agreement," 280.
[41] Hunter, Ji, and Ruddock, "The Paris Agreement and Global Climate Litigation," 227.

Agreement institutes an "enhanced transparency framework," built on mutual respect between states parties, regardless of state NDCs.[42] Article 14 sets a five-year timeframe for the COP to convene, review states party adherence to their NDCs, and put state contributions in a global context, in what the treaty calls a "global stocktake."[43] Article 15 consists of the primary compliance-inducing mechanism: provisions for a committee to investigate and confront states party failing to meet their NDCs, functioning "in a manner that is transparent, non-adversarial and non-punitive."[44] In short, the enforcement provisions for the Paris Climate Agreement are fairly weak, relying on reputation costs and 'naming and shaming,' facilitated by a transparency system that reveals and induces states to confront states that are not meeting their NDCs, to ensure compliance.[45]

Effectiveness

Though the Paris Climate Agreement's enforcement mechanisms may seem ineffective, the treaty threads a difficult needle between soft law encouraging participation and hard law emphasizing compliance. The substance of the treaty regarding emissions reductions is couched in soft law, making it less effective than if states party had mandated contribution, as they did under the Kyoto Protocol. That being said, the Paris Climate Agreement attracted significantly more signatories than Kyoto because of the less stringent requirements.[46] Because Paris also included binding provisions regarding NDC procedure and transparency as an enforcement mechanism, in the words of Pickering, McGhee, Karlsson-Vinkhuyzen, and Wenta, "a mix of hard and soft provisions could boost participation without undermining other aspects of response

[42] Paris Agreement, Article 13.
[43] Ibid, Article 14.
[44] Ibid, Article 15.
[45] Lawrence and Wong, "Soft Law in the Paris Climate Agreement," 284.
[46] Pickering, McGhee, Karlsson-Vinkhuyzen, and Wenta, "Global Climate Governance," 15.

or rethinking."[47] This was accomplished without forfeiting the participation of the U.S., as the limited nature of the binding provisions of Paris did not require Senate approval.

Another potential advantage of Paris's hybrid approach is its ability to induce states party to strengthen the treaty by implementing accompanying domestic climate legislation. This has already happened in many countries, which have codified measures to meet their NDC in domestic law. This has further enabled environmentalists to hold states to account for adhering to their NDCs through domestic legal systems.[48] Additionally, although current NDCs do not meet the global temperature rise objectives established in Paris, there is a provision in the treaty that ensures that states party cannot reduce their NDCs and can only increase them; pared with a non-binding obligation to gradually increase contributions, this ensures that there will be a gradual increase in contributions over time, eventually meeting the overall goals of Paris.[49]

Furthermore, 'naming and shaming' as an enforcement mechanism can be genuinely effective, greatly influencing state behavior. Unlike prior international climate treaties, the Paris Climate Agreement has a transparent system of reporting adherence to NDCs and state progress in reducing emissions. This transparency greatly increases the cost of non-compliance, even in failing to comply with the soft law portions of Paris: "the transparency and accountability mechanism of the Paris Agreement could achieve the same result as binding obligations in that it is more likely that 'poor performance will be detected and criticized', thus raising the 'reputational costs of failing to achieve one's NDC'."[50]

An example of the effect of naming and shaming is President Trump's decision to withdraw the U.S. from the Paris Climate Agreement in June 2017. Upon announcing U.S.

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[47] Ibid.
[48] Hunter, Ji, and Ruddock, "The Paris Agreement and Global Climate Litigation."
[49] Lawrence and Wong, "Soft Law in the Paris Climate Agreement," 280.
[50] Ibid, 284.

withdrawal, President Trump immediately drew international criticism, particularly from U.S. allies at the forefront of fighting climate change, such as French President Emmanuel Macron and Canadian Prime Minister Justin Trudeau.[51] Diplomatic repercussions were severe, with France, Canada, and Mexico threatening to impose a carbon tax on the U.S., a broader global push to impose sanctions on the U.S., and diplomatic ostracization at the G20.[52] The consequences extended to the domestic sphere, as President Trump drew criticism from business and industry leaders, as well as Democratic politicians.[53] Furthermore, the decision to withdraw prompted many state and local leaders, some in the private sector, Native American tribes, and universities to declare their intention to continue upholding the Paris Climate Agreement despite U.S. withdrawal.[54] In summation, non-compliance with—and withdrawal from—the Paris Climate Agreement carries real political and diplomatic consequences that, according to Clark, "may range from naming and shaming pressure to loss of diplomatic goodwill, or even to economic sanctions that could provoke a trade war."[55]

Finally, another component of enforcement in the Paris Climate Agreement is its implications in terms of international customary law. Because of the near-universal participation in the treaty, the complied-with portions of it act not just as treaty law but also as customary law on any state that has not consistently objected to it. The Paris Climate Agreement acts in addition to the customary law principle of "do no harm," which was established in the 1941 *Trail Smelter Arbitration* between the U.S. and Canada.[56] The do no harm principle mandates that states retain sovereignty over their territory, but cannot right use their territory in such a way that harms other

[51] Clark, "The Paris Agreement," 127.
[52] Ibid, 128.
[53] Ibid.
[54] Ibid, 129.
[55] Ibid.
[56] Hunter, Ji, and Ruddock, "The Paris Agreement and Global Climate Litigation," 240.

states' environments.[57] The Paris Agreement as customary law acts in conjunction with the do no harm principle, applying it to climate change specifically.

The power of the Paris Climate Agreement as customary law is clarified when applied to the example of U.S. withdrawal under President Trump. Despite the withdrawal from Paris, the history of U.S. participation does not constitute consistent objection, meaning that Paris applies to the U.S. as customary law whether or not the U.S. signed or ratified the treaty itself.[58] This is all the more true as the U.S. was involved in the case that established the do no harm principle, accusing Canada of violating U.S. sovereignty by damaging their environment. Additionally, the U.S. recognizes customary law as essentially binding, with the Supreme Court once holding that "international law is part of our law"—including customary international law.[59]

Conclusion

The Paris Climate Agreement is an effective international environmental treaty because it prioritized participation, established a global standard for greenhouse gas emissions reductions, and instituted accountability systems that serve as effective enforcement. While the soft law in the Paris Climate Agreement lacks stringent obligations for states party, it creates a procedure for obligations to increase over time and, by increasing participation, fuels and produces the political momentum required to compel countries to implement climate change-combatting policies. Furthermore, by producing parallel customary international law, Paris forces universal participation and accountability, regardless of ratification or signatory status. Above all other criteria, participation is the most important, as the monumental issue of climate change cuts across national, cultural, and geographic boundaries, and all states must be on board in order to

[57] Ibid.
[58] Ibid, 242.
[59] Clark, "The Paris Agreement," 125.

reduce greenhouse gas emissions to a sufficient level to prevent the worst consequences of climate change.

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