

CHAPTER 10: ENVISIONING THE FUTURE OF ARCTIC LAW

10.1

The Future of Hard/Soft Law Interactions and the Arctic

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Soft law is an important concept because of its normative value as well as its ability to fill in the gaps between existing hard law and provides a foundation for the development of international law within frontier regions such as the Arctic. Even with the scholarship, however, there is a lack of consensus on a definition for soft law. Some advocate a binary definition, but this approach obscures a subset of binding treaties with soft characteristics, including ambiguity, permissiveness, and redundancy relative to previous treaties.

While several studies have been conducted on the soft governance approach of the Arctic Council, nearly all of them have focused on non-binding instruments. When examining soft law, only a few scholars have considered binding, but soft instruments negotiated and concluded within the Arctic Council and other Arctic fora. By discounting soft treaties in their categorization of soft law, these scholars fail to account for the full range of implications that such governance has on the region. For the same reason, some scholars make the mistake of applauding the Arctic Council member states for having concluded three binding treaties—without consider whether these treaties are soft or hard. One needs to examine the full range of “soft” instruments, whether binding or non-binding, in order to understand the reasons and implications for such an approach to the region’s governance.

Soft law is the result of deliberate choices made to enable international cooperation. There is no hierarchy of value or importance with regard to different kinds of norms, rules, and instruments, with hard treaties at the top and soft law at the bottom. Instead, this is simply a situation of “different horses for different courses”. An Arctic regime complex of hard law supplemented extensively by soft law instruments can be credited for cooperation in a region with several mutually suspicious states, which may not trust each other enough to make many hard law commitments. At the same time, a shared commitment to cooperation in the Arctic partly explains the ability of these states to enter into some binding legal agreements—even if

most of them are soft treaties. Far from being a weaker and less effective alternative to hard law, soft law is an important normative solution that can exercise significant influence over actors and outcomes within the international system. Depending on the context – the degree of power that the relevant negotiating parties exercise, the issue that a particular instrument is meant to address, the degree of influence that the general public and other non-state actors have on decisions – soft law will often be a better alternative to hard law.

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

In questioning if soft law is increasing in the Arctic, one must also eventually ask the reverse: Is there a universal decline in hard treaties? If so, why? And, has the decline in hard treaties caused the rise in soft law instruments? Or has the ease with which soft law instruments are being negotiated caused the decline in hard treaties? What is the causal effect linking the decline of hard treaties and the rise of binding and non-binding soft law? It has been shown that soft law's expansion is coupled with hard law's decline due to an increasing number of states whose agendas are not aligned operating within consensus-based bodies. However, a deeper enquiry of the causal linkage between the soft and hard law needs to be further examined. Similar to the enquiry of the various degrees of softness in binding and non-binding legal instruments examined, one could also explore possible differences in the hardness of different hard treaties and their associated implications. Broadening the analysis would further help to situate soft law within the larger range of international law sources, and to elucidate its full impact in both international and domestic affairs.

International law is often criticized for lacking enforcement mechanisms. Although this criticism is usually overblown (think of the UN Security Council, international courts and tribunals, and national courts), it is true that international law may be more dependent on reciprocity, reputation, and other forms of “soft” enforcement than domestic law. For this reason, it is also possible that soft international law is not as much of a departure from hard international law as soft domestic law (recommendations, guidelines) might be from hard domestic law (statutes, contracts). Soft treaties might be just as effective as hard treaties, at least in some instances, precisely because neither kind of instrument relies on hard enforcement.

Last but not least, identifying the existence of soft treaties and analyzing their role and consequences also enables us to better understand the complex relationship between International Relations and International Law. States choose forms of instruments based upon careful considerations of objectives, obstacles, opportunities, and the relative benefits and drawbacks of the options available to them. Seen in this light, soft treaties are just one more tool available to diplomats.

For more on this, read...

Soltvedt I F, ‘Soft Law, Solid Implementation? The Influence of Precision, Monitoring and Stakeholder Involvement on Norwegian Implementation of Arctic Council Recommendations’ (2017) 8 Arctic Review on Law and Politics
73 <http://dx.doi.org/10.23865/arctic.v8.639>

